Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
MEMORANDUM
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO:	Nyasha Smith, Secretary of the Council
FROM:	Charles Allen, Chairperson, Committee on the Judiciary and Public Safety CA
RE:	Closing Hearing Record
DATE:	January 5, 2021

Dear Ms. Smith,

Please find attached copies of the Hearing Notice, Agenda and Witness List, and testimony for the Committee on the Judiciary and Public Safety's October 15, 2020, public hearing on B23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", and B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020".

The following witnesses testified at the hearing or submitted written testimony to the Committee:

i. Public Witnesses

1. Monica Hopkins-Maxwell, Executive Director, American Civil Liberties Union of the District of Columbia
2. Ruth Lindberg, Manager, Health Impact Project, The Pew Charitable Trusts
3. Premal Dharia, Public Witness
4. Thomas Susman, President, D.C. Open Government Coalition
5. Mana Azarmi, Policy Counsel, Center for Democracy and Technology
6. Grayson Clary, Stanton National Security Fellow, Reporters Committee for Freedom of the Press
7. Jonathan Blanks, Visiting Fellow in Criminal Justice, Foundation for Research on Equal Opportunity
8. Akhi Johnson, Deputy Director, Reshaping Prosecution Program, Vera Institute of Justice
9. Yvette Alexander, Public Policy Chair, Metropolitan Washington D.C. Chapter, Coalition of 100 Black Women
10. James Berry, Chair, MPD Citizens Advisory Council
11. Robert Pittman, Chair, 1D Citizens Advisory Council
12. Brenda Lee Richardson, Public Witness
13. Georgine Wallace, Community Facilitator, PSA 103/105
14. Gregg Pemberton, Chair, D.C. Police Union

15. Patrick Burke, Executive Director, D.C. Police Foundation
16. Anthony Lorenzo Green, Commissioner, ANC 7C04
17. Mara Verheyden-Hilliard, Executive Director, Partnership for Civil Justice Fund
18. Nick Robinson, Legal Advisor, U.S. Program, International Center for Not-for-Profit Law
19. Patrice Sulton, Director, D.C. Justice Lab
20. Beverly Smith, Volunteer, D.C. Justice Lab
21. Virginia Spatz, Volunteer, D.C. Justice Lab
22. Diontre Davis, Volunteer, D.C. Justice Lab
23. Sabrin Qadi, Volunteer, D.C. Justice Lab
24. Jordan Crunkleton, Volunteer, D.C. Justice Lab
25. Emily Friedman, Volunteer, D.C. Justice Lab
26. Katrina Jackson, Student Director, D.C. Justice Lab
27. Alexis Mayer, Student Director, D.C. Justice Lab
28. Victoria McCullough, Volunteer, D.C. Justice Lab
29. Brandon Spreckels, Volunteer, D.C. Justice Lab
30. Iris Benson-Sulzer, Volunteer, D.C. Justice Lab
31. Marlene Aiyejinmi, Volunteer, D.C. Justice Lab
32. Salim Adofo, Commissioner, ANC 8C07
33. Cynthia Lee, Edward F. Howrey Professor of Law, The George Washington University Law School
34. Jestelle Hanrahan, Public Witness
35. Rachel Gale, Public Witness
36. Jonathan Carter, Public Witness
37. Steve Boughton, Public Witness
38. Lane Kauder, Public Witness
39. Josephine Ross, Professor of Law, Howard University School of Law
40. Kaylah Alexander, Public Witness
41. Leah Wilson, Member, Students Taking Action Against National Discrimination
42. Qubilah Huddleston, Education Policy Analyst, D.C. Fiscal Policy Institute
43. Makia Green, Organizer, D.C. Working Families Party
44. Dawn Dalton, Deputy Director, D.C. Coalition Against Domestic Violence
45. April Goggans, Core Organizer, Black Lives Matter D.C.

46. Elisabeth Olds, SAVRAA Independent Expert Consultant
47. Gavin Nelson, Public Witness
48. Samantha Davis, Founder/Executive Director, The Black Swan Academy
49. Eduardo Ferrer, Policy Director, Juvenile Justice Initiative, Georgetown Law
50. Dr. Ranit Mishori, Senior Medical Advisor, Physicians for Human Rights
51. Michael Payne, Interim Advocacy Director, Physicians for Human Rights
52. Lauren Spokane, Board Member, Jews United for Justice
53. Sarah Novick, D.C. Senior Organizer, Jews United for Justice
54. Logan Bayroff, Member, Jews United for Justice
55. Alana Eichner, Member, Jews United for Justice
56. Rebecca Ennen, Member, Jews United for Justice
57. Hannah Weilbacher, Member, Jews United for Justice
58. Marques Banks, Equal Justice Works Fellow, Washington Lawyers' Committee for Civil Rights and Urban Affairs
59. Rebecca Burney, Attorney & Youth Advocacy Coordinator, Rights4Girls
60. Samuel Bonar, Co-Director, Delicious Democracy
61. Brianna McGowan, Chief Technology Officer, Delicious Democracy
62. Harlan Yu, Executive Director, Upturn
63. Rebecca Shaeffer, Legal Director, Fair Trials
64. Gavin Laughland, Member, SURJ DC
65. Ntebo Mokuena, Public Witness
66. Peter Krupa, Public Witness
67. Mary Beth Tinker, Public Witness
68. Benjamin Merrick, Public Witness
69. Dornethia Taylor, Core Organizer, Black Lives Matter D.C.
70. Kate Taylor Mighty, Public Witness
71. Imara Crooms, Public Witness
72. Alison Boland-Reeves, Public Witness
73. Laura Petersen, Public Witness
74. Katherine Crowder, Public Witness
75. Harper Jean Tobin, Public Witness
76. Katlyn Cotton, Public Witness
77. Sean Young, Public Witness

78. Gautham Venugopalan, Public Witness
79. Eric Lewitus, Public Witness
80. Kenithia Alston, Public Witness
81. Wade McMullen, Public Witness
82. Rob Hart, Public Witness
83. Chuck Wexler, Executive Director, Police Executive Research Forum
84. Patricia Stamper, Public Witness
85. DeVaughn Jones, Chair of the Legal Redress Committee, NAACP D.C. Branch
86. Sarah Gertler, Public Witness
87. Bill Mefford, Executive Director, The Festival Center
88. Seth Stoughton, Associate Professor of Law, University of South Carolina
89. Christopher Bangs, Public Witness
90. Runal Das, Public Witness
91. Lisa Pahel, Public Witness
92. Nell Geiser, Public Witness
93. Stuart Karaffa, Public Witness
94. Michael Swistara, Public Witness
95. Debbie Steiner, Public Witness
96. Franklin Roberts, Public Witness
97. Jonah Furman, Public Witness
98. Tamika Spellman, Policy and Advocacy Director, HIPS
99. Sarah Buettner-Connelly, Public Witness
100. Dr. Serina Floyd, Medical Director, Planned Parenthood of Metropolitan Washington, DC
101. Vick Baker, Public Witness
102. Thomas Boland-Reeves, Public Witness
103. Shameka Stanford, Chief Operating Officer, STND4YOU
104. Holly Rogers, Public Witness
105. Linda Gomaa, Public Witness
106. Eamon McGoldrick, Public Witness
107. Bart Sheard, Public Witness
108. Laura Van Dyke, Public Witness
109. Ben Lee, Public Witness

110. David Herman, Public Witness
111. Laura Jaghlit, Public Witness
112. Connor Czora, Public Witness
113. Eric Peterson, Public Witness
114. Ryan Carroll, Public Witness
115. Kaela Bamberger, Public Witness
116. Deidre Nelms, Public Witness
117. Robert Cline, Public Witness
118. Alexandra Seymour, Public Witness
119. Madeleine Stirling, Public Witness
120. Marli Kasdan, Public Witness
121. Shivani Desai, Public Witness
122. Sarah Bever, Public Witness
123. Ryan Anderson, Public Witness
124. Jayme Epstein, Public Witness
125. Elizabeth Sawyer, Public Witness
126. Sarah Greenbaum, Public Witness
127. Katherine Myer, Volunteer, Moms Demand Action
128. Jean Badalamenti, Member, All Souls Church Unitarian
129. Greg Afinogenov, Public Witness
130. Joshua Lawson, Public Witness
131. Ana Bailey, Public Witness
132. Tamara Vatnick, Public Witness
133. Laura Killalea, Public Witness
134. George Tobias, Public Witness
135. Yael Nagar, Member, Jews United For Justice
136. Ben Davis, Public Witness
137. Yafet Girmay, Vice Chair of International Affairs, National Black United Front
138. Robert Keithan, Minister for Social Justice, All Souls Church Unitarian
139. Niq Clark, Public Witness
140. Geraldine Galdamez, Public Witness
141. Salim Adofo, National Secretary, National Black United Front
142. Olivia Valdez, Public Witness

143. Kristin Eliason, Director of Legal & Strategic Advocacy, Network for Victim Recovery of DC
144. Rebecca Rossi, Public Witness
145. Lauren Sarkesian, Senior Policy Counsel, New America's Open Technology Institute
146. Kris Garrity, Public Witness
147. Betty Diggs, Public Witness

ii. Government Witnesses

1. Dr. Roger A. Mitchell, Jr., Interim Deputy Mayor for Public Safety and Justice
2. Chief Peter Newsham, Metropolitan Police Department
3. Michael Tobin, Executive Director, Office of Police Complaints
4. Niquelle Allen, Director, Office of Open Government, Board of Ethics and Government Accountability
5. Richard Schmechel, Executive Director, Criminal Code Reform Commission
6. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia
7. Elana Suttenberg, Special Counsel to the U.S. Attorney for Legislative Affairs, United States Attorney's Office for the District of Columbia

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B23-0723, THE "RIOTING MODERNIZATION AMENDMENT ACT OF 2020"

B23-0771, THE "INTERNATIONALLY BANNED CHEMICAL WEAPON PROHIBITION AMENDMENT ACT OF 2020"

AND

B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"

Thursday, October 15, 2020, 9:00 a.m. – 6:00 p.m.
Virtual Hearing via Zoom
To Watch Live:
https://dccouncil.us/council-videos/
http://video.oct.dc.gov/DCC/jw.html
https://www.facebook.com/CMcharlesallen/

On Thursday, October 15, 2020, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing to consider Bill 23-0723, the "Rioting Modernization Amendment Act of 2020", Bill 23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", and Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020". The hearing will be conducted virtually via Zoom from 9:00 a.m. to 6:00 p.m. Pre-registered public witnesses will testify from 9:00 a.m. to 3:00 p.m., and government witnesses will testify from 3:00 p.m. to 6:00 p.m.

The stated purpose of B23-0723, the "Rioting Modernization Amendment Act of 2020", is to amend An Act relating to crime and criminal procedure in the District of Columbia to provide definitions for certain terms related to the offense of rioting, to clarify the conduct that constitutes rioting, to revise the penalties for convictions, and to establish a right to a jury trial for prosecutions.

The stated purpose of B23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", is to amend the First Amendment Rights and Police Standards Act of 2003 to prohibit the use of chemical irritants at First Amendment assemblies.

The stated purpose of B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020", is to provide for comprehensive policing and justice reform for District residents and visitors, and for other purposes. Specifically, the bill:

- Prohibits the use of neck restraints by law enforcement and special police officers;
- Requires the Mayor to publicly release the names and body-worn camera recordings of any officer who committed an officer-involved death or serious use of force, unless the subject or their next of kin objects to its release;
- Amends the statutes of various District boards related to policing, including by:
    - Expanding the membership of the Police Complaints Board – the governing body for the Office of Police Complaints ("OCP") – and allowing OCP's Executive Director to investigate evidence of abuse or misuse of police powers, even if it was not specifically alleged by the complainant;
    - Expanding the Use of Force Review Board's voting members to include OPC's Executive Director, three civilian members appointed by the Mayor, and two members appointed by the Council; and
    - Reconstituting the Police Officers Standards and Training Board ("POST Board"), the District board that establishes minimum application and appointment criteria for Metropolitan Police Department ("MPD") officers and reviews MPD's initial training and continuing education programs;
- Requires that police officers, for searches where an officer's justification for the search is based only on the person's consent, explain that the person is being asked to consent and that they can refuse the search;
- Expands MPD's continuing education requirements to include new topics such as racism and white supremacy, limiting the use of force, and employing de-escalation tactics;
- Requires the uniforms and helmets of MPD officers policing First Amendment assemblies to identify the officers as local law enforcement;
- Repeals two outdated criminal offenses: (1) the District's law criminalizing mask wearing for certain purposes and (2) the offense of failure to arrest when any crime is committed in an officer's presence;
- Codifies the situations in which deadly force can be used and elaborates on the standard for judges and juries to use when reviewing cases that involve claims of excessive force;
- Extends the right to jury trials to certain offenses where the victim is a law enforcement officer;
- Proposes a number of reforms to MPD's disciplinary procedures, including:
    - Specifying that discipline is no longer negotiable during collective bargaining;
    - Extending the time during which MPD must bring a corrective or adverse action for misconduct in cases involving serious use of force or indicating potential criminal conduct by a sworn member or civilian employee;
    - Allowing the Chief of Police to increase the penalty recommended by the Police Trial Board to be imposed on an officer for misconduct; and

    - Prohibiting MPD from hiring as sworn members anyone who committed serious misconduct, was terminated from another law enforcement agency, or resigned from a law enforcement agency to avoid potential disciplinary action;
- Restricts the ability of District law enforcement agencies to acquire or request certain military equipment;
- Restricts MPD's use of riot gear in response to First Amendment assemblies to situations in which there is an immediate risk of significant bodily injury to officers, and prohibits the use of chemical irritants or less-lethal projectiles to disperse a First Amendment assembly;
- Establishes a Police Reform Commission;
- Amends the WMATA Compact to require that WMATA (1) prohibit the use of quotas to evaluate, reward, or discipline officers, and (2) establish a Police Complaints Board; and
- Enfranchises all eligible District residents incarcerated for felony convictions.

The Committee invites the public to provide oral and/or written testimony. Public witnesses seeking to provide oral testimony at the Committee's hearing must thoroughly review the following instructions:

- Anyone wishing to provide oral testimony must email the Committee at judiciary@dccouncil.us with their name, telephone number, organizational affiliation, and title (if any), by the **close of business on Wednesday, October 7**.
- The Committee will approve witnesses' registrations based on the total time allotted for public testimony. The Committee will also determine the order of witnesses' testimony.
- **Witnesses who are approved by the Committee to testify will be emailed Zoom registration instructions for the hearing, which they must complete in order to be placed on the final witness list and access their unique Zoom link**.
- Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals (and any subsequent representatives of the same organizations) will be allowed a maximum of three minutes.
- Witnesses are not permitted to yield their time to, or substitute their testimony for, the testimony of another individual or organization.
- If possible, witnesses should submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.
- Witnesses who anticipate needing language interpretation are requested to inform the Committee as soon as possible, but no later than five business days before the hearing. The Committee will make every effort to fulfill timely requests; however, requests received fewer than five business days before the hearing may not be fulfilled.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be emailed to the Committee at judiciary@dccouncil.us **no later than the close of business on Friday, October 23.**

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

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Thursday, October 15, 2020, 9:00 a.m. – 6:00 p.m.
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https://dccouncil.us/council-videos/
http://video.oct.dc.gov/DCC/jw.html

AGENDA AND WITNESS LIST

I. CALL TO ORDER

II. OPENING REMARKS

III. WITNESS TESTIMONY

i. Public Witnesses

Panel 1

1. John Ayala, Mid-Atlantic Operations Director, D.C. Chapter, Alliance of Guardian Angels

2. Monica Hopkins-Maxwell, Executive Director, American Civil Liberties Union of the District of Columbia
3. Ruth Lindberg, Manager, Health Impact Project, The Pew Charitable Trusts
4. Premal Dharia, Public Witness
5. Thomas Susman, President, D.C. Open Government Coalition
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8. Jonathan Blanks, Visiting Fellow in Criminal Justice, Foundation for Research on Equal Opportunity
9. Akhi Johnson, Deputy Director, Reshaping Prosecution Program, Vera Institute of Justice
10. Richard Gilbert, Chair, Legislative Committee, District of Columbia Association of Criminal Defense Lawyers

Panel 2

11. Yvette Alexander, Public Policy Chair, Metropolitan Washington D.C. Chapter, Coalition of 100 Black Women
12. James Berry, Chair, MPD Citizens Advisory Council
13. Robert Pittman, Chair, 1D Citizens Advisory Council
14. Brenda Lee Richardson, Public Witness
15. Georgine Wallace, Community Facilitator, PSA 103/105
16. Debbie Smith-Steiner, Public Witness
17. Gregg Pemberton, Chair, D.C. Police Union
18. Patrick Burke, Executive Director, D.C. Police Foundation

Panel 3

19. Anthony Lorenzo Green, Commissioner, ANC 7C04
20. Salim Adofo, Commissioner, ANC 8C07
21. Bobbi Strang, President, Gay and Lesbian Activists Alliance
22. Mara Verheyden-Hilliard, Executive Director, Partnership for Civil Justice Fund
23. Nick Robinson, Legal Advisor, U.S. Program, International Center for Not-for-Profit Law

Panel 4

24. Patrice Sulton, Director, D.C. Justice Lab
25. Beverly Smith, Volunteer, D.C. Justice Lab
26. Virginia Spatz, Volunteer, D.C. Justice Lab
27. Diontre Davis, Volunteer, D.C. Justice Lab
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Panel 5

37. Cynthia Lee, Edward F. Howrey Professor of Law, The George Washington University Law School
38. Jestelle Hanrahan, Public Witness
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44. Kaylah Alexander, Public Witness
45. Leah Wilson, Member, Students Taking Action Against National Discrimination

Panel 6

46. Kymone Freeman, Co-Founder, We Act Radio
47. Qubilah Huddleston, Education Policy Analyst, D.C. Fiscal Policy Institute
48. Makia Green, Organizer, D.C. Working Families Party
49. Franklyn Malone, CEO/Founder, The 100 Fathers, Inc./Co-Chair, D.C. Fatherhood Coalition
50. April Goggans, Core Organizer, Black Lives Matter D.C.
51. Dawn Dalton, Deputy Director, D.C. Coalition Against Domestic Violence

52. Elisabeth Olds, SAVRAA Independent Expert Consultant

Panel 7

53. Naomi Adaniya, Public Witness
54. Claudia Barragan, Public Witness
55. Larry Lewis, Public Witness
56. Tam Haye, Public Witness
57. Gavin Nelson, Public Witness
58. Samantha Davis, Founder/Executive Director, The Black Swan Academy
59. Eduardo Ferrer, Policy Director, Juvenile Justice Initiative, Georgetown Law
60. Yafet Girmay, Vice Chair of International Affairs, Washington DC Chapter, National Black United Front
61. Michael Payne, Interim Advocacy Director, Physicians for Human Rights
62. Dr. Ranit Mishori, Senior Medical Advisor, Physicians for Human Rights

Panel 8

63. Lauren Spokane, Board Member, Jews United for Justice
64. Hannah Garelick, Community Organizer, Jews United for Justice
65. Rebecca AbuRakia-Einhorn, Member, Jews United for Justice
66. Logan Bayroff, Member, Jews United for Justice
67. Alana Eichner, Member, Jews United for Justice
68. Rebecca Ennen, Member, Jews United for Justice
69. Hannah Weilbacher, Member, Jews United for Justice

Panel 9

70. Rick Ammirato, Executive Director, D.C. BID Council
71. Joe Sternlieb, CEO/President, Georgetown Business Improvement District
72. Bill Mefford, Executive Director, The Festival Center
73. Alexander Pope, III, President/CEO, The Pope Companies
74. Megan Macaraeg, Interim Executive Director, Many Languages One Voice
75. Marques Banks, Equal Justice Works Fellow, Washington Lawyers' Committee for Civil Rights and Urban Affairs
76. Rebecca Burney, Attorney & Youth Advocacy Coordinator, Rights4Girls

77. Harlan Yu, Executive Director, Upturn
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Panel 10

81. Ntebo Mokuena, Public Witness
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Panel 11

92. Harper Jean Tobin, Public Witness
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97. Eric Lewitus, Public Witness
98. Kenithia Alston, Public Witness
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100. Joseph Van Wye, Public Witness
101. Rob Hart, Public Witness

ii. Government Witnesses

1. Dr. Roger A. Mitchell, Jr., Interim Deputy Mayor for Public Safety and Justice
2. Chief Peter Newsham, Metropolitan Police Department

3. Michael Tobin, Executive Director, Office of Police Complaints
4. Niquelle Allen, Director, Office of Open Government, Board of Ethics and Government Accountability
5. Richard Schmechel, Executive Director, Criminal Code Reform Commission
6. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for D.C.
7. Elana Suttenberg, Special Counsel to the U.S. Attorney for Legislative Affairs, United States Attorney's Office for the District of Columbia

IV. ADJOURNMENT

Statement on behalf of the
American Civil Liberties Union of the District of Columbia
before the
DC Council Committee on the Judiciary and Public Safety
Hearing on
Bill 23-882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020,"
by
Monica Hopkins, Executive Director
October 15, 2020

My name is Monica Hopkins and I am the Executive Director of the American Civil Liberties Union of the District of Columbia (ACLU-DC). I present the following testimony on behalf of our 13,500 members and residents of the District. The ACLU-DC is committed to working to dismantle systemic racism, improve police accountability, safeguard fundamental liberties, and advocate for sensible, evidence-based solutions to public safety and criminal justice policies.

Introduced by the Council on July 31, 2020, the stated purpose of Bill 23-882 is to provide for comprehensive policing and justice reform for District residents and visitors. The Council also passed a version of this legislation this June.[1] We already know that police reforms on their own are not the solution, but this is an important step and the council has an opportunity here to be visionary and transform what both policing and public safety look like in the District. Our recommendations are informed by what we have heard from our clients, community members, and from best practices in other jurisdictions, but the recommendations in our testimony are not an exhaustive list. More than anything we urge the Council to really listen to and incorporate the input and solutions offered by those who are most directly impacted by policing in the District.

The ACLU-DC has identified three key areas of necessary reform under which we have organized our recommendations for amendments to Bill 23-882.

I. Placing limitations on existing police powers, practices, and policies that regularly violate the rights of civilians interacting with police.

II. Strengthening of transparency, oversight, and accountability measures to ensure proper implementation of police reforms and meaningful consequences for officers when they do violate civilians' rights.

III. Decentering policing and criminalization in favor of a public safety system that invests significant resources into the community and focuses on non-police responses to enforcing laws.

[1] B23-0825 - Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020. Available at https://lims.dccouncil.us/Legislation/B23-0825.

I. Enact Necessary Limitations on Police Powers and Practices

Bill 23-882 includes several provisions that place important limitations on current police practices. However, there remain many harmful practices that are not addressed by the current draft of the legislation. We outline some of the most harmful law enforcement practices that must be banned or severely limited below.

1. Stop and Frisk/Terry stops

Analysis of the most recent stop-and-frisk data released by the Metropolitan Police Department (MPD) revealed that Black people make up 72 percent of those stopped in the District despite, making up 46 percent of the D.C. population.[2] Of the people under 18 who were stopped, Black youths made up 89 percent and were stopped at 10 times the rate of their white peers. The analysis further showed that only 0.8 percent of all stops, and only 2 percent of non-traffic stops, led to the seizure of any weapon, including guns. MPD's stop practices are highly ineffective, ultimately amount to racial profiling, and potentially violate the constitutional rights of Black people in the District on a daily basis. We urge the council to adopt policies that not only reduce over-policing of the District's Black and Brown residents, but also increase accountability for officers who abuse their powers.

One step the Council could take is to prohibit MPD officers from making stops based on certain common pretextual grounds. This includes things like presence in a "high crime neighborhood," nervousness around police officers, "furtive gestures or movements" or running, a bulge in a person's clothing, and time of day.

Additionally, the Council could increase the discipline for officers who make unlawful stops. One avenue for achieving this would be empowering the Office of Police Complaints (OPC) to collect data from federal and Superior Court each time evidence is suppressed or an officer's testimony is rejected as not credible. The Council may even consider requiring the Superior Court clerk to transmit this information directly to OPC. OPC could then use this information to create a list, similar to the Lewis List but public, that would basically track officer credibility. The Council could go a step further by requiring that MPD consider this list in making promotional decisions involving officers.

2. Ban the use of no-knock warrants

No-knock warrants issued by judges allow police to enter homes without announcing themselves, typically in an effort to obtain evidence that could be otherwise be quickly destroyed or disposed of. These searches are an exception to the usual Fourth Amendment rule barring unreasonable

[2] The report analyzed MPD data collected between July 22, 2019 and December 31, 2019, yielding data on over 62,000 stops, which amounts to approximately one stop every four minutes during the five-month period.
American Civil Liberties Union of the District of Columbia. "Racial disparities in stops by the D.C. metropolitan police department: Review of five months of data." June 16, 2020. Available at https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf.

searches and seizures. The history of no-knock warrants in the District dates back to the racist anti-crime policies of the Nixon administration, when the District did not have home rule.[3] Since then, the use of no-knock warrants has increased nationally,[4] as they have been a staple of the failed war on drugs, which turned communities into war zones.

Every year, police execute about 20,000 no-knock searches across the U.S.[5,6] From 2010 through 2016, at least 94 people (81 civilians and 13 law enforcement officers) died in no-knock raids; many others were seriously injured.[7,8] While police departments have defended such procedures based on the need to prevent destruction of evidence and concern about officer safety, in reality, the execution of such warrants poses significant dangers to the lives of innocent civilians and police alike. Time after time, these raids lead to property damage, gruesome injuries, trauma, and most alarming, tragic and completely preventable deaths, as evidenced by the recent murder of Breonna Taylor at the hands of police in Louisville, Kentucky.

The no-knock warrant exception is a part of the District's criminal code[9] and the practice is permitted by case law. Several jurisdictions, including Louisville, KY, Memphis, TN, and the Virginia state senate, have recently passed Breonna's Laws and other legislation banning the practice.[10,11] The Council should look to those pieces of legislation and follow suit.

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[3] Balko, R. "Senator Ervin, "No-knock" warrants, and the fight to stop cops from smashing into homes the way burglars do." American Civil Liberties Union, July 10, 2013. Available at https://www.aclu.org/blog/national-security/senator-ervin-no-knock-warrants-and-fight-stop-cops-smashing-homes-way.

[4] Data shows that municipal police and sheriffs' departments used no-knock or quick-knock warrants about 1,500 times in the early 1980s, but that number rose to about 40,000 times per year by 2000. Norwood, C. "The war on drugs gave rise to 'no-knock' warrants. Breonna Taylor's death could end them." PBS NewsHour, June 12, 2020. Available at https://www.pbs.org/newshour/politics/the-war-on-drugs-gave-rise-to-no-knock-warrants-breonna-taylors-death-could-end-them.

[5] Biron, C.L. "'Your home is your castle' - unless police mount a 'no-knock' raid." Reuters, June 18, 2020. Available at https://www.reuters.com/article/us-usa-race-noknock-trfn/your-home-is-your-castle-unless-police-mount-a-no-knock-raid-idUSKBN23P39D.

[6] A 2010 estimate placed this number between 60,000 - 70,000 no-knock or quick-knock raids were conducted by local police annually. Balko, supra note at 3.

[7] Sack, K. "Door-busting drug raids leave a trail of blood." The New York Times, March 18, 2020. Available at https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html?smid=pl-share&mtrref=en.wikipedia.org&assetType=REGIWALL.

[8] Because there are no federal laws that require law enforcement agencies to report data on no-knock incidents, national and city-wide data are not widely collected and reported. Therefore, it is difficult to know exactly the frequency of no-knock warrants, the circumstances under which they occur, and the results of their execution.

[9] No knock warrants are mentioned in the D.C. Code. See D.C. Code s. 23-524(a), references 3109 of Title 18, which courts have interpreted to permit no knock entries where knocking would be futile, where there is a risk of destruction of evidence, or a risk of harm to the officer. See *United States v. Patrick*, 959 F.2d 991, 999 (D.C. Cir. 1992), abrogated on other grounds by United States v. Webb, 255 F.3d 890, 894 (D.C. Cir. 2001)

[10] Gupta, H.A., & Hauser, C. "New Breonna Taylor law will ban no-knock warrants in Louisville, Ky." The New York Times, June 13, 2020. Available at https://www.nytimes.com/2020/06/12/us/breonna-taylor-law-passed.html.

[11] Louisville Metro Council. "Ordinance No. 069 – Breonna's Law." Louisvilleky.gov. Passed June 11, 2020. Available at https://louisvilleky.gov/sites/default/files/metro_council/ord_069_2020.pdf.

3. Ban the use of jump-outs

For years, D.C. residents, advocacy and activist groups, and the ACLU-DC have been raising the alarm over the practice of jump-outs by MPD officers in predominantly Black and Brown neighborhoods.[12] MPD and Police Chief Peter Newsham deny that MPD uses these paramilitary tactics, but countless reports from community members demonstrate otherwise. Most recently, the National Police Foundation's (NPF) report on MPD's Narcotics and Special Investigations Division (NSID) confirmed that MPD not only engages in jump-outs, but that the Department itself plans jumpouts.[13] Another remnant of the disastrous War on Drugs era, jump-outs are an abusive and dangerous practice that should be banned altogether. Jump-outs sow fear and distrust of the police and escalate the possibility of violent outcomes; making it more dangerous for police and communities that they seek to serve.

4. Ban the use of additional restraint tactics beyond neck restraints

Though Bill 23-882 does ban the use of neck restraints and imposes penalties for officers who violate this provision or fail to intervene when other officers employ this deadly tactic,[14] the bill does not ban other dangerous restraint tactics that police use. The Council should expand this provision to ban additional tactics that could be used by officers to similarly cause asphyxiation, or lead to serious injury or death in other ways, such as placing knees into people's backs,[15] placing a person in the prone position for long periods of time, or even placing a baton in someone's mouth.[16]

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[12] Sadanandan, S. "Living under the cloud of stop-and-frisk." The Washington Post, August 23, 2013. Available at https://www.washingtonpost.com/opinions/living-under-the-cloud-of-stop-and-frisk/2013/08/23/a83c7914-0b52-11e3-8974-f97ab3b3c677_story.html.

[13] National Police Foundation. "Metropolitan police department narcotics and specialized investigations division – A limited assessment of data and compliance from August 1, 2019 - January 31, 2020." September 23, 2020. Available at https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/National%20Police%20Foundation%20MPD%20NSID%20Report%20September%202020%20Final.pdf.

[14] B23-0882 – Comprehensive Policing and Justice Reform Amendment Act of 2020. See Subtitle A, Section 4 on p. 4: *"(a) It shall be unlawful for: "(1) Any law enforcement officer or special police officer ("officer") to apply a neck restraint; and (2) Any officer who applies a neck restraint and any officer who is able to observe another officer's application of a neck restraint to fail to: "(A) Immediately render, or cause to be rendered, first aid on the person on whom the neck restraint was applied; or "(B) Immediately request emergency medical services for the person on whom the neck restraint was applied. "(b) Any officer who violates the provisions of subsection (a) of this section shall be fined no more than the amount set forth in section 101 of the Criminal Fine Proportionality Amendment Act of 2012, effective June 11, 2013 (D.C. Law 19-317; D.C. Official Code § 22-3571.01), or incarcerated for no more than 10 years, or both."*

[15] Wagner, P. "Alonzo Smith's in-custody death ruled a homicide." Fox 5 Washington DC, December 15, 2015. Available at https://www.fox5dc.com/news/alonzo-smiths-in-custody-death-ruled-a-homicide.

[16] The Joliet (IL) Police Department is currently facing a wrongful death lawsuit for the death of Eric Lurry, a 37-year-old Black man who died after Joliet police violently "searched" his body in the back of a squad car during a drug arrest in January. Later leaked footage from the incident showed officers shoving a baton in Lurry's mouth and pinching his nose shut for one minute and 38 seconds. See Iannelli, J. "In a small Illinois city, a black man died after officers shoved a baton in his mouth. Black officers say they've suffered at the hands of the department, too." The Appeal, September 25, 2020. Available at https://theappeal.org/joliet-police-lawsuits/.

5. Strengthen use of force provisions to include use of non-deadly force

The "use of force" provision[17] in the second emergency and temporary act that the Council passed removes language that was in the original emergency legislation proposed by Councilmember Allen on limitations for non-deadly use of force. We believe that such limitations are important to include in legislation and urge the Council to reinstate them. Incidents involving MPD officers' use of force has increased significantly in the past several years, with force used disproportionately against black people (with the most frequent officer-subject pairing being white officers using force against Black subjects)[18]. There is an alarming pattern and practice of use of force, both deadly and non-deadly, that needs to be addressed. Additionally, we are concerned that the change in the definition of "deadly force" from "any force that is likely or intended to *create a substantial risk of* serious bodily injury or death" in the original proposed emergency legislation to "any force that is likely or intended to *cause* serious bodily injury or death" in the permanent legislation before the Council may have the effect of weakening this provision by having it apply to fewer circumstances. This may not be the intent of the Council and we ask that it be reviewed to assess its impact and if it does in fact weaken the law, that the Council return to the original definition.

6. Ban the use of military weapons and harmful surveillance tools

The military-industrial complex has been brought to the door steps of U.S. households through federal funding and military weapons transfers[19]—empowering police to terrorize civilians, particularly Black, Brown, and immigrant communities. The militarization of policing, with heavy artillery and surveillance technologies, encourages officers to adopt a "warrior" mentality and think of the people they are supposed to serve as enemies and continues the deterioration of trust in law enforcement.

The ACLU-DC supports Bill 23-882's provisions restricting District's law enforcement agencies from acquiring and using military weaponry as listed in the legislation, including requiring agencies to publish notices of requests or acquisition of any property from the federal government within 14 days of the request or acquisition and to return any such equipment that they've already acquired within 180 days of the enactment of the law.[20] However, we recommend that the Council require periodic audits by an independent agency outside of law enforcement (such as the D.C. Auditor) to ensure compliance, and that the Council enact penalties for failure of law enforcement agencies to

[17] Supra note at 14. See Subtitle N. Use of Force Reforms, Section 19, p. 21.

[18] OPC's Report analyzing 2019 data of use of force by the MPD indicated that reported use of force incidents increased by 84% between 2015 and 2019. The report also found that Black community members made up 91% of the total subjects MPD reported using force on in 2019, while white community members made up 6% of the total subjects in 2019. See Police Complaints Board. "Report on use of force by the Washington, D.C. Metropolitan Police Department 2019. D.C. Office of Police Complaints. Released October 14, 2020. Available at https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/UOF%20Report%202019_FINAL.pdf.

[19] Kostro, S.S., & Riba, G. "Equipping law enforcement agencies with military and tactical equipment." Center for Strategic and International Studies, September 3, 2014. Available at https://www.csis.org/analysis/equipping-law-enforcement-agencies-military-and-tactical-equipment.

[20] Supra note at 14. See Subtitle O. Restrictions on the Purchase and Use of Military Weaponry, p. 23.

comply. Without such conditions, this provision is largely unenforceable. Additionally, we recommend that the restriction be expanded to ban District law enforcement from acquiring or purchasing such weapons from private companies in addition to the federal government.[21] Finally, the provision should also ban District law enforcement agencies from entering into non-disclosure agreements with federal agencies or private companies that prevent public transparency or oversight of their acquisition of these harmful tools.

We also support the Bill's provision prohibiting the use of chemical weapons and rubber bullets at first amendment rallies but urge the Council to expand this restriction beyond first amendment rallies.[22] Police should not be using these harmful weapons on District residents at any time. We understand the Council is also considering another bill, the "Internationally Banned Chemical Weapon Prohibition Amendment of 2020," (Bill 23-771), which amends the First Amendment Rights and Police Standards Act of 2004 to prohibit the use of chemical irritants at first amendment assemblies by MPD and includes a provision that the Mayor shall request all federal law enforcement officials also refrain from using chemical irritants at first amendment assemblies in the District.[23] We support this bill and suggest that it be folded into the police reform legislation.

Besides tactical and chemical weapons, police also use a number of surveillance tools that harm communities. The unchecked use of surveillance technologies by government agencies and law enforcement threatens everyone in our communities. We hope the Council addresses this issue in the permanent legislation by including a provision that bans the use of facial recognition technologies. These technologies are particularly threatening to people who are already overpoliced and face significant discrimination: Black and Brown residents, immigrant communities, sex workers, and Muslim communities, among others.[24]

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[21] The military-industrial complex thrives from the militarization of policing, as it has created a huge market for defense contractors and private companies to profiteer from state violence enacted on predominantly Black and Brown communities. The atrociousness of this toxic relationship is most clearly observed in moments of civil unrest. People exercising their First Amendment right to assemble by taking to the streets to demand justice for yet another civilian slain by an officer are typically met with military-grade weapons and other tools touted by weapons manufacturers as "less lethal." See Rahall, K. "The green to blue pipeline: Defense contractors and the police industrial complex." Seattle University School of Law Digital Commons, January 1, 2015. Available at https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1726&context=faculty. See also Feigenbaum, A. "The profitable marriage of military and police tech." Al Jazeera America, September 5, 2014. Available at http://america.aljazeera.com/opinions/2014/9/police-militarizationswattechnology.html.

[22] Supra note 14. See Subtitle P. Limitations on the Use of Internationally Banned Chemical Weapons, Riot Gear, and Less-Lethal Projectiles, p. 23.

[23] B23-0771 - Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020. Available at https://lims.dccouncil.us/downloads/LIMS/45092/Introduction/B23-0771-Introduction.pdf.

[24] Besides being an invasive tool with potential to violate people's First Amendment Rights to privacy, facial recognition technology is notoriously error-prone, and has led to many false arrests. See the case of Robert Julian-Borchak Williams, a Farmington Hills, MI man who was arrested on a false warrant on accord of a facial recognition misidentification. Hill, K. "Wrongfully accused by an algorithm." The New York Times, June 24, 2020. Available at https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.
Studies show that facial recognition is the most inaccurate when attempting to identify people of color. See Harwell, D. "Federal study confirms racial bias of many facial-recognition systems, casts doubt on their expanding use." The Washington Post, December 19, 2019. Available at https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.

II. Strengthen transparency, oversight, and accountability measures

The ACLU-DC has testified many times[25] about the significant obstacles to enforcement and proper implementation of laws and policies that the D.C. Council has enacted to address racial profiling, over-policing, excessive use of force, and other violations of civilians' civil rights and civil liberties at the hands of law enforcement in the District. Many reforms have fallen short of resulting in meaningful changes in police practices due to poor oversight, lack of public access to information, and few meaningful consequences for officers when they do violate civilians' rights.

The recently released National Police Foundation report on MPD's practices is yet another reminder of the Department's complete indifference to analysis of its own tactics, efficacy, and procedures.[26] The fact that MPD's data reporting and conflicting General Orders delayed and made difficult the NPF's report emphasizes that we cannot rely on general orders and internal policies when MPD routinely flouts its own policies.[27] We therefore recommend the following amendments to Bill 23-882 to strengthen accountability measures.

1. <u>Improve access to Body-Worn Camera Program and strengthen access to public records</u>
   We support the provision of Bill 23-882 that requires public release of body-worn camera footage and names of officers following incidents of officer-involved death or the serious use of force following consent of victims or surviving next of kin. However, as the July 31st release of body-worn camera footage by MPD revealed, the full intent of the Council in passing this legislation was not achieved.[28] This was also apparent in the release of footage following the killing of Deon Kay by Officer Alexander Alvarez. In complying with the letter, but not the spirit of the law, MPD released only the body-worn camera footage of the officers most directly implicated in the actual killing of the victims, but not those of other officers on the scene. To provide the public with the clearest picture of what took place, which is one key purpose of this provision, the law should require public release of body-worn camera footage of all officers on the scene during the incident.

   Additionally, the ACLU-DC has several recommendations for strengthening the oversight and transparency role of body-worn cameras in this legislation. Last October, we testified about necessary changes to the District's policies and practices regarding the body-worn camera

[25] Most recently in our FY21 Budget Testimony.
[26] Supra note at 11.
[27] A recurring issue with MPD has been lack of consistent data for analyses. The National Police Foundation had to narrow the period of analysis for its report due to limitations in the data available and provided by MPD. Data from prior periods were not available in formats that were consistent with the most recent data, therefore the Foundation was unable use a longer period of time to understand activities and complaints involving NSID-assigned personnel. Consequently, the analysis is limited in its ability to describe NSID activity, their outcomes, and how the unit has changed over time. Id note at 23.
[28] On July 31, 2020, Mayor Bowser authorized MPD to release body-worn camera footage in the officer-involved deaths of Marqueese Alston, Jeffrey Price, and D'Quan Young, in response to the temporary Comprehensive Police Reform and Justice legislation passed in by the Council in July. Footage from these incidents and others that have been released since are available at https://mpdc.dc.gov/page/community-briefing-videos-officer-involved-deaths-and-serious-use-force.

program.[29] We are pleased that some of our recommendations were incorporated into Bill 23-882, but we urge the Council to consider amending the legislation to address the following concerns:

- There are situations that are of significant public interest but do not necessarily involve an officer shooting or serious use of force for which there should be a presumption of release of BWC footage. Currently, release of BWC footage after such situations is left to the discretion of the Mayor, but this discretion is often not exercised or exercised inconsistently even when there is a clear public interest in the footage. Body-worn camera footage for incidents of significant public interest can be released to the public with appropriate privacy redactions to protect civilians in the videos and would go a long way in demonstrating a sincere commitment to transparency. The D.C. Council should appoint an independent arbiter (other than the Mayor or Police Chief) to determine when BWC footage is of "significant public interest."
- In its report on the Body-Worn Camera Program Amendment Act of 2015, the Judiciary Committee noted that when "anyone could witness an incident with the naked eye," the resulting "recordings should be public in their unredacted form unless otherwise required by law."[30] MPD consistently refuses to release body-worn camera footage of events occurring on the public streets using the excuse that it is protecting privacy. MPD also sometimes releases these videos, but they are heavily redacted and the excuse of redacting images of people on public streets from the footage slows response times and increases costs. The question of when privacy redactions are necessary should also be reexamined and defined clearly in legislation.
- Body cameras cannot advance accountability when —despite video-recorded evidence of police wrongdoing—officers can continue to abuse their power with little consequence.[31] There are currently no clear meaningful disciplinary consequences for failure to comply with the law. [32] Bill 23-882 should include meaningful penalties that go beyond referrals to

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[29] See "ACLU-DC statement at public oversight roundtable on "five years of the metropolitan police department's body-worn camera program: Reflections and next steps." October 12, 2019. Available at https://www.acludc.org/en/legislation/aclu-dc-statement-public-oversight-roundtable-five-years-metropolitan-police-departments.

[30] D.C. Council Comm. on the Judiciary, Report on Bill 21-0351, at 16 (2015) available at http://lims.dccouncil.us/Download/34469/B21-0351-CommitteeReport1.pdf

[31] MPD General Orders on body-worn camera use require that "members, including primary, secondary, and assisting members, shall start their BWC recordings as soon as a call is initiated via radio or communication from OUC on their mobile data computer (MDC), or at the beginning of any self-initiated police action." Page 7 of MPD General Order, Body Worn Camera Program, available at https://go.mpdconline.com/GO/GO_302_13.pdf)

[32] The Office of Police Complaints does not currently have statutory authority to impose discipline on MPD officers. However, when an allegation of misconduct is sustained by a complaint examiner or upheld by a final review panel, MPD is statutorily required to impose discipline. "MPD defines education-based development as "an alternative to discipline." MPD is using education-based development instead of discipline at an increasing rate: it was used in only two of 85 cases requiring discipline between FY09 and FY16, but in 11 of 14 cases in FY17, and four of the 10 FY18 cases for which discipline had been imposed by the end of the fiscal year. There were still 10 FY18 cases that were sustained by a complaint examiner for which discipline had not yet been imposed by the end of the fiscal year." Page 24 https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/AR18_Final.pdf

additional trainings for officers who repeatedly fail to activate their body-worn cameras ahead of an interaction or who repeatedly turn their cameras off in the middle of a police incident.[33]

- Additionally, the Council intended D.C. agencies to waive fees when furnishing the information would primarily benefit the general public,[34] and yet, leaving fee waivers at the discretion of the agency has allowed MPD to adopt what we believe to be a standard practice of denying fee waiver requests to anyone except media members and individuals depicted in the recording, an approach that denies the public access to critical information. The Council should update D.C.'s Freedom of Information Act to address this, and the Council should also investigate why MPD's redaction fees are so high.

2. Strengthen and move the disciplinary process completely outside MPD and expand the role of the Office of Police Complaints

   The ACLU-DC supports the provisions in Bill 23-882 that give the Office of Police Complaints (OPC) the discretion to open investigations into police misconduct that are not complainant-driven and which expand the Police Complaints Board to nine members and remove law enforcement seat from the board.[35] We also support the provision of Bill 23-882 which removes disciplinary procedures from the negotiating table in collective bargaining.[36] However, in recognizing that union contracts alone do not shield officers from being held accountable, we have serious concerns about all disciplinary decisions resting within the Department, not only because superiors are not likely to discipline members of their team who break rules, but also because it nearly guarantees arbitrary action. This change does not go far enough in ensuring true accountability because ultimately, it still leaves police to police themselves, which decades of experience has indicated simply does not work.

   The bill should therefore be amended to completely move the disciplinary process out of MPD. We propose that the role of the OPC be significantly expanded to give it the authority not only to investigate complaints into police misconduct, as it currently does, but to actually impose and enforce discipline when there has been a determination of wrongdoing. We also recommend that the authority of the OPC be expanded to allow the agency to receive and investigate anonymous complaints. This would address the concerns raised by community members before the Council that fear of retaliation by MPD officers keeps them from filing complaints.

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[33] In 20% of the cases it investigated in FY18, at least one office failed to properly use their BWC, by: (1) turning it on late, (2) turning off early, (3) not turning it on at all, or (4) obstructing the camera. And in 19% of the cases it investigated, at least one officer failed to notify the subjects that they were being recorded. Page 14, https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/AR18_Final.pdf

[34] D.C. Code § 2-532(b) provides that "Documents may be furnished without charge or at a reduced charge where a public body determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public."

[35] Supra note at 14. See Subtitle C. Office of Police Complaints Reforms, p. 10.

[36] Id. See Subtitle L. Police Accountability and Collective Bargaining Agreements, Section 116, p. 20.

We support the Council's decision to expand OPC's authority but the bill contains an sizable loophole that must be closed. Currently, OPC can only investigate misconduct expressly raised by complainants. That means, if someone complains about an act of excessive force but doesn't mention that the officer performed an illegal search as well, OPC is powerless to act on the search—even if an investigator sees it happen through body-worn camera footage. Subtitle C of the bill attempts to address this problem by allowing OPC to act if it discovers "evidence of abuse or misuse of police powers that was not alleged by the complainant in the complaint." But the bill proceeds to limit this provision, stating in proposed subsection (g-1)(2) that this power "shall include circumstances in which the subject police officer failed to" intervene in or report misconduct. This language could easily be interpreted to mean that Subtitle C *only* applies in the circumstances listed. So construed, the bill would only vest OPC with the power to conduct sua sponte investigations if it uncovers evidence of an officer failing to intervene in or report on misconduct; the Office would remain unable to take independent action when its staff catches officers using improper force, making unlawful arrests, or otherwise infringing on core rights that the complainant didn't mention in the complaint. We doubt the Council intended such an odd result. To ensure the scope of OPC's new powers is clear, the Council should remove proposed subsection (g-1)(2) from Subtitle C of the bill.

When officers repeatedly violate the law and policies of MPD in ways that violate civilians' rights, there are repeated calls for additional training which are insufficient to hold officers truly accountable. There also must be a reexamination of the consequences for repeat violations.

In addition to expanding the role of OPC, we recommend that the put in place other mechanisms that strengthen and allow greater accountability in disciplinary procedures. The Council could follow the example of jurisdictions like New York[37] and Oregon[38] by including provisions that expand retention, public access, and use of police disciplinary records, and make disciplinary decisions more enforceable.[39] Lack of access to police disciplinary history makes it nearly impossible to use prior records of misconduct to hold officers accountable.[40]

3. <u>Expand and make enforceable limitations on consent searches:</u>

   The ACLU-DC supports the intention of Subtitle F of Bill 23-882 to strengthen procedural justice in cases where a police officer's search of a person or their vehicle, home, or property is based only

[37] On June 12, New York passed legislation repealing section 50-a of New York civil rights law, which prevented disciplinary and personnel records of police, fire, and corrections departments from being made public. Now disciplinary records are subject to FOIA requests. The New York Senate. "Senate Bill S8496." Signed by Governor Andrew Cuomo on June 12, 2020. Available at https://www.nysenate.gov/legislation/bills/2019/s8496. See New York Consolidated Laws, Civil Rights. Available at http://www.supnik.com/ny51.htm.

[38] Oregon House Bill 4207 directs the Department of Public Safety Standards and Training to establish a statewide public online database of suspensions and revocations of certifications of police officers. See Oregon State Legislature. "House Bill 4207." Oregon Legislative Information System. Available at https://olis.oregonlegislature.gov/liz/2020S1/Measures/Overview/HB4207.

[39] Oregon Senate Bill 1604 attempts to make it easier for Oregon police agencies to discipline officers without having discipline overturned or reduced through binding arbitration. See Oregon State Legislature. "House Bill 1604." Oregon Legislative Information System. Available at https://olis.oregonlegislature.gov/liz/2020S1/Measures/Overview/SB1604.

[40] Id at 35. Bill 4207 also requires a law enforcement agency to review an officer's personnel file from the previous agency for which they worked before that officer can be hired.

on the person's consent to the search (e.g., there is no warrant and no other exception to the warrant requirement applies). Also known as a "consent" search, this requires officers to explain to the individual whom (or whose property) they hope to search that the person is being asked to consent and that they can refuse the search, and to obtain "affirmative consent." We also support the presumption that a search is nonconsensual if the evidence of consent is not captured on a body-worn camera or provided in writing. However, the requirement for officers to obtain this consent on BWC should be more explicit in the legislation—namely that officers must ask for this consent and obtain it audibly on their BWC.

Additionally, there remain significant barriers to ensuring that such a provision is enforceable and that officers are held accountable for violations, the first being this provision lacks a private cause of action. We urge the Council to remove that limitation on line 356 of the Bill. Another barrier is the access to BWC footage and officer failures to comply with BWC rules as mentioned. Officers should be required to carry cards that identify their names and badge numbers and include the consent question clearly in writing along with the number for the Office of Police Complaints for civilians with whom they conduct these consent searches. The legislation should be explicit that any evidence resulting from such a search will then be inadmissible in court.

There is an argument to made about whether searches by law enforcement are ever truly "consensual." The power imbalance between an officer and a civilian often forces individuals to inadvertently waive their rights. Even reasonable adults are susceptible to coercion under such circumstances. As we see frequently with the waiving of Miranda rights, youth often fall victim to such susceptibility.[41] While we recognize the Council's attempt to address the issue of consent with regards to youth, we agree with others that the legislation does not go far enough to protect young people from this type of coercion.
Young people are both impressionable and fearful of—even conditioned to obey—authority figures. This is especially true for Black and Brown youth, whose perception of law enforcement is typically not positive, due to their experiences with being harassed and overpoliced. Given history and evidence from developmental research, which show that the adolescent brain is not fully developed to give adolescents the capability to make well-reasoned decisions, especially under intense stress or fear, it is unreasonable to expect youth to waive their rights and provide affirmative consent. We therefore support an outright ban on consent searches for youth.

4. <u>End Qualified Immunity and Qualified Privilege</u>
One of the greatest barriers to police accountability nationwide and in the District is the inability of civilians who are harmed by police officers' actions to hold them accountable in court.

A major obstacle is the doctrine of qualified immunity, a legal defense that shields police officers from liability for even egregious misconduct. Under this doctrine, even if officers violate the Constitution, courts cannot hold them liable unless binding precedent previously held very similar

[41] See Justia opinion summary on *J. D. B. v. North Carolina*, 564 U.S. 261 (2011). Available at https://supreme.justia.com/cases/federal/us/564/261/.

conduct unlawful.[42] Ending qualified immunity for law enforcement has rightfully become a central focus of demands for police accountability nationwide because of how it has emboldened police officers to use excessive force and otherwise violate the constitutional rights of civilians without fear of repercussions.[43] In a recent opinion granting a Mississippi officer qualified immunity, U.S. District Court Judge Carlton W. Reeves lamented the harms of the qualified immunity doctrine, tracing the origins of the doctrine to the Reconstruction era. Following a list of cases where qualified immunity impeded police accountability, Judge Reeves expressed the complicity of courts in practically turning the doctrine into "absolute immunity."[44]

While the fight to end qualified immunity continues through the courts, D.C. can and should pass a law providing that anyone who suffers a constitutional violation has a cause of action to challenge it, and that qualified immunity will not serve as a defense. Colorado has recently adopted such legislation,[45] and the Virginia House has too.[46] Under Colorado's recently-passed statute, victims of police misconduct will be permitted to bring a lawsuit against officers to enforce the Colorado Constitution, and officers will not be allowed to shield themselves with the doctrine of qualified immunity which has served to protect officers from accountability and deny families justice. D.C. should look to these examples, and pass similar legislation that would allow community members to hold police responsible when they violate laws, policies, and community trust.

Qualified privilege is a legal rule that protects police officers from tort liability under the D.C. common law. Under this doctrine, officers who reasonably believe that their actions are legal can get away with using unconstitutional amounts of excessive force or arresting people without

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[42] For example, the Sixth Circuit held that qualified immunity protected officers who sicced a dog on a man sitting down with his hands up because it couldn't find a decision expressly saying that that act was illegal. The Court held that prior decisions holding it unlawful to sic a dog on a man lying down in surrender, were not close enough. See *Baxter v. Bracey & Harris* Supreme Court petition. https://www.supremecourt.gov/DocketPDF/18/18-1287/95661/20190408145246695_Baxter%20v%20Bracey%20Petition%20for%20Writ%20of%20Certiorary.pdf

[43] Fuchs, H. "Qualified immunity protection for police emerges as flash point amid protests." The New York Times, June 23, 2020. Available at https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html.

[44] *Jamison v. McClendon,* No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723 (S.D. Miss. Aug 4, 2020). See also Jouvenal, J. "Judge's blistering opinion says courts have placed police beyond accountability." August 6, 2020. Available at https://www.washingtonpost.com/crime-law/2020/08/06/judges-blistering-opinion-says-courts-have-placed-police-beyond-accountability/.

[45] In June of this year, the Colorado State Assembly passed the only police reform bill in the country, so far, that effectively ends qualified immunity for officers. Senate Bill 20-217 gives victims of police misconduct the right to file a civil lawsuit against an officer who is found to have violated their rights. Beginning July 1, 2023, officers can be held personally liable for five percent or up to $25,000 (whichever is less) of the judgement or settlement unless the amount is uncollectible (in which case the employer must pay the full judgment or settlement). See Colorado State Assembly. "Senate Bill 217 – Enhance Law Enforcement Integrity." Passed June 19, 2020. Available at https://leg.colorado.gov/sites/default/files/2020a_217_signed.pdf.

[46] Unfortunately, the Virginia Senate failed to pass HB-5013. Virginia General Assembly. "HB 5013 Civil action for deprivation of rights; duties and liabilities of certain employers." Virginia LIS, passed by indefinitely in the Judiciary Committee September 10, 2020. Available at https://lis.virginia.gov/cgi-bin/legp604.exe?ses=202&typ=bil&val=hb5013.

probable cause.[47] There's an easy fix to qualified privilege: the Council can abolish it! This change would not impose liability on officers who make legal arrests or use legal amounts of force, because then no one's rights have been violated. Instead, the proposed change would mean that when officers exceed their powers—even due to confusion—their victims can still hold them accountable.

5. Create a private cause of action for violations of the First Amendment Assemblies Act

We also urge the Council to add a right-to-sue provision to the First Amendment Assemblies Act, D.C. Code §§ 5–331.03 to 5-331.17 (the "FAAA"). That statute, enacted by the Council in 2005, provides significant protection to the rights of peaceful demonstrators in D.C. But when MPD doesn't follow the rules, people can suffer real injuries—for example, when MPD improperly uses chemical weapons, or assaults and arrests people who didn't leave an area because the police didn't give an audible dispersal order as the FAAA requires.[48]

6. Increase oversight of acquisition and use of surveillance technology by law enforcement

As previously stated, law enforcement agencies often use surveillance tools to police communities. Currently, MPD and other District agencies are able to acquire and use powerful surveillance technologies without any oversight from the D.C. Council or community, because the District has no laws that require such oversight. This means significant decisions about surveillance occur in secret, without meaningful discussion about the ramifications and costs for D.C. residents. Current laws have not been able to keep up with the evolution of these technologies[49], which threaten civil rights and civil liberties of all DC residents. But communities that are already overpoliced—including Black and Brown communities, low-income communities, Muslim communities, immigrant communities, LGBTQ communities, and political activist groups—face the greatest threats to their civil rights. The Community Oversight of Surveillance-D.C. coalition (COS-DC), of which the ACLU-DC is a member, has been working on legislation to bring very necessary oversight. We urge the Council to adopt this legislation, or at minimum, commit to holding a hearing on the issue.[50]

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[47] *See, e.g.*, *Jenkins v. District of Columbia*, 222 A.3d 884, 900 (D.C. 2020) (applying rule to excessive force claim); *Minch v. District of Columbia*, 952 A.2d 929, 938 (D.C. 2008) (applying rule to false arrest claim).

[48] ACLU-DC saw both of these types of violations, and others, during MPD's response to the 2017 Inauguration Day demonstrations. And we are again pursuing reports of similar FAAA violations by MPD during the civil rights demonstrations this summer. People who are harmed because of such violation should be able to obtain compensation for their injuries. See "Civil rights groups sue Trump, Barr for tear-gassing protesters outside white house." ACLU-DC, June 4, 2020. Available at https://www.acludc.org/en/news/civil-rights-groups-sue-trump-barr-tear-gassing-protesters-outside-white-house.

[49] Modern surveillance technologies can collect sensitive information about our private lives without our knowledge or consent. Technologies such as drones, license plate readers, video cameras, and online monitoring software can easily be misused to discriminate, invade privacy, and chill First Amendment freedoms. Databases generated by these technologies are vulnerable to breach and other exploitation efforts, including by agencies like ICE.

[50] The COS-DC legislation provides a viable path for the D.C. Council and public to engage with decisions about proper use of modern surveillance technology. The legislation does not ban surveillance technologies, but rather ensures that decisions about their use are made with thoughtful consideration and buy-in from the public and elected lawmakers, and that the operation of approved technologies will be subject to rules that safeguard residents' rights and provide transparency.

III. Remove policing and criminalization from public safety response

As we testified earlier this summer at the budget oversight hearing for the Metropolitan Police Department, in order to have real transformational change, the District must divest from policing and reimagine a system of public safety that decenters criminalization and policing in favor of one that invests significant resources into the community and focuses on non-police responses to enforcing laws. Some of our recommendations for doing this include:

1. Remove police officers from schools

   The ACLU-DC is a strong supporter of the Police-Free Schools campaign being spearheaded by the Black Swan Academy.

   Police presence in our schools does not make young people safer, but instead causes further trauma when normal adolescent behavior or trauma responses are criminalized.[51] 92 percent of school-based arrests are of Black students. Black girls in D.C are 30 times more likely to be arrested than white youth of any gender identity. 60% of girls arrested in D.C are under the age of 15, and many are disciplined and referred to police for their trauma responses to experiencing sexual violence in their lives.[52] Our youth need our support, not to be pushed away from education and down a path of criminalization. We urge the Council to eliminate the MPD School Safety Division and remove police officers from DCPS public and charter schools.

2. Limit police enforcement of traffic stops

   We also urge the Council to follow the example of jurisdictions like Berkeley, CA, which passed legislation transferring traffic enforcement away from the police.[53] We recommend that most traffic enforcement be shifted to a non-police agency like the Department of Motor Vehicles. Police should not be tasked with enforcing laws that can be enforced by other agencies.[54]

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[51]Past data analyzed by the ACLU shows that schools with police reported 3.5 times as many arrests of children as schools without police, and have higher rates of suspensions and expulsions. These harms disproportionately impact Black and Brown students (particularly Black girls), students with disabilities, and LGBTQ students.
Whitaker, et al. "Cops and no counselors: How the lack of school mental health staff is harming students." American Civil Liberties Union. Available at https://www.aclu.org/report/cops-and-no-counselors.

[52] Vafa, et al. "Beyond the walls: A look at girls in dc's juvenile justice system." Rights4Girls & Georgetown Juvenile Justice Initiative, 21-22, March 2018. Available at https://rights4girls.org/wp-content/uploads/r4g/2018/03/BeyondTheWalls-Final.pdf.

[53] The legislation created a new Department of transportation tasked with transportation planning and traffic enforcement—intended to reduce and eliminate race-based pretextual traffic stops. See City of Berkeley Office of the Mayor. "Proposed Omnibus Motion on Public Safety Items (Items 18a-e)." Starts on page 2. Available at https://www.cityofberkeley.info/Clerk/City_Council/2020/07_Jul/Documents/2020-07-14_Item_18_Omnibus_Recommendation_-_Supp.aspx.

[54] From July 22 to December 31, 2019, MPD officers made 42,532 "traffic" stops. Of all stops categorized as "ticket only," Only seven, or 0.016%, led to an assault on a police officer charge. Only 122 stops in this category, or 0.29%, involved a gun offense or was for a violent crime. We recognize that arrests may not be a perfect proxy for threats to officers. However, the fact that only 0.30% of traffic stops resulted in arrests for assaulting an officer, gun/ammunition possession, or a violent crime suggests that traffic stops are not as dangerous as MPD contends.

3. Create a robust non-police crisis response system

   As we continue to reckon with state-sponsored violence in our communities, we must all think deeper about building a world that reimagines what public safety looks like. It is critical that we shift away from the paradigm that public safety centers around policing, and instead address public safety from a public health perspective.

   It is clear that we cannot continue to ignore the startling connection between crisis prevention-based 911 calls and police brutality. However, 911 has become the only option for people looking for non-violent and non-carceral alternatives. Regardless of the role people feel that police serve in public safety, the facts are they often arrive at the scene armed with deadly weapons and a lack of mental health training, with devastating results. We must invest in a system of crisis response that centers the real needs of the community—following the leadership of and listening to the communities most violently impacted by a lack of options, to those already engaged in crisis prevention in this city, and to those providing direct services. D.C. should look to program models CAHOOTS, based in Eugene, OR.[55]

4. Significantly expand the role of violence interruption and trauma-informed approaches

   The tragic shooting and death of Deon Kay is not only the ultimate example of the ineffectiveness of MPD's approach to violence intervention (namely through its gun recovery program), but is also the logical conclusion of a policy that not only meets violence with violence, but actually escalates and incites it — especially in our Black communities. Kay, who had turned 18 less than a month prior to the incident, was connected to various DC agencies, which means there were various nonviolent avenues for engagement that would have spared his life.

   The District must make greater effort to fully realize the vision of the NEAR Act,[56] which the created violence prevention and interruption programs. District's budget still equates policing with public safety and funds MPD at the expense of other critical programs. We needs to move away from relying on police to solve problems that can be addressed through other means and should invest more in those critical violence prevention and interruption programs. It is imperative that the Council expands the role of violence interrupters in the community and invest more in non-police trauma-informed approaches to intervention.

5. Rehaul the District's Criminal Code to decrease penalties and decriminalize offenses

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[55] CAHOOTS (Crisis Assistance Helping Out On The Streets) is a program of the White Bird Clinic in Eugene-Springfield, OR, that provides 24/7 mobile crisis intervention. The programs provides immediate stabilization in case of urgent medical need or psychological crisis, assessment, information, referral, advocacy & (in some cases) transportation to the next step in treatment. In Eugene, teams are dispatched through the Eugene police-fire-ambulance communications center, while in the Springfield urban growth boundary, they are dispatched through the Springfield non-emergency number. Each team consists of a medic (either a nurse or an EMT) & a crisis worker (who has at least several years of experience in the mental health field). https://whitebirdclinic.org/cahoots/..

[56] B21-0360 - Neighborhood Engagement Achieves Results Act of 2015. Available at https://lims.dccouncil.us/Legislation/B21-0360.

As we know, D.C. is not immune to the tough on crime policies that have proliferated the country over the last 40-50 years. Like other cities, the District expanded harsh penalties for acts that should be addressed with a public health approach. It is our understanding that CCRC has substantial recommendations that are forthcoming in the Spring and we look forward to working with the Council as it considers the commission's recommendations.

6. Automatic License Plate Readers

The use of automatic license plate readers (ALPR) raises serious concerns and have the potential to violate people's First Amendment right to privacy and Fourth Amendment[57] right prohibiting unreasonable searches, as indicated by OPC's report.[58] With regards to First Amendment violations, ALPRs can track people's movements and determine where someone is at a particular time on a particular day. Data stored from ALRPs overtime, and later aggregated, can be used to track people's associations, and patterns of behavior. There is also the issue of transparency because we do not know how and with whom law enforcement shares data collected by ALPRs.

IV. Other Recommendations

As it is currently written, Subtitle D of the legislation, which establishes a "Use of Force Review Board" only authorizes the Board to shall review uses of force. The Council should expand the Board's role to include such duties as making reports, making recommendations, or even imposing discipline. In addition, the Council should consider empowering the Board to subpoena records and the power to compel testimony.[59]

V. Conclusion

George Floyd, Breonna Taylor, Marqueese Alston, Jeffery Price, D'Quan Young, Raphael Briscoe, Terrence Sterling. It is important to remember the tipping point that got us to this moment, but also important to remember that the ACLU-DC, coalition partners, community members have been demanding change for years. This Council has a rare moment in time when real, visionary, transformational change is possible. The ACLU-DC supports this proposed legislation but urges the Council not to squander the opportunity to go much further.

We look forward to working closely with the Council, with community partners, and with the recently formed police reform commission to incorporate these and other changes.

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[57] See *Neal v. Fairfax County Police Dep't*, 94 Va. Cir. 485, 486 (2016).

[58] Police Complaints Board. "PCB policy report #20-2: automated license plate readers." D.C. Office of Police Complaints. Available at https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/ALPR.FINAL .pdf.

[59] Supra note 14. See Subtitle D. Use of Force Review Board Membership Expansion, p. 11.

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Testimony of Ruth Lindberg
Manager, Health Impact Project
The Pew Charitable Trusts

Council of the District of Columbia
Committee on the Judiciary and Public Safety
October 15, 2020

Dear Chairperson Charles Allen and members of the Council of the District of Columbia's Committee on the Judiciary and Public Safety. My name is Ruth Lindberg and I am a manager with The Pew Charitable Trusts' Heath Impact Project. Pew is an independent nonprofit organization that applies a rigorous, analytical approach to improve public policy, inform the public, and invigorate civic life. My work involves assisting local, state, and national organizations to include health considerations in policy decisions across multiple sectors, such as housing, education, and criminal justice. Thank you for inviting me to testify today on Bill 23-0882, the Comprehensive Policing and Justice Reform Amendment Act of 2020.

My colleagues and I completed a health note of this bill, which I submitted with my written testimony and that you also received through correspondence from the Council's Office of the Budget Director. A health note is a brief, objective, and nonpartisan summary of how proposed legislation could affect health. The aim of health notes is to provide evidence to inform decision-making: they are not intended to support or oppose legislation.

For the past three years, the Health Impact Project has been testing this approach in jurisdictions across the United States to help lawmakers learn the potential health implications of proposed legislation and policies. In May, we received a technical assistance request from Chairman Mendelson inviting us to coordinate with the Office of the Budget Director to conduct health notes on legislation being reviewed during Council Period 23.

This health note examined the available evidence regarding potential health effects of seven components of the bill. Our analysis identified several aspects with a strong evidence base, as well as other components that have some research or that are not well researched in terms of their effects on health. Today I will focus on three findings from our analysis.

First, this bill has important implications for health equity—the guiding principle that disparities in health outcomes caused by factors such as race, income, or geography should be addressed and prevented, providing opportunities for all people to be as healthy as possible. In the U.S., lifetime risk of being killed by police is greatest for Black men and women, American Indian/Alaska Native men and women, and Latino men as compared to their White counterparts. Among the 1,242 reported use of force incidents by the Metropolitan Police Department of the District of Columbia in 2018, over half resulted in a reported injury to the subject. Although 48% of District residents are Black, 90% of all uses of force in 2018 involved Black citizens, and only 14% of subjects were reportedly armed.

Second, we found strong evidence supporting the relationship between several components of the bill and individual and community health. For example, our analysis found that chemical and projectile weapons, such as tear gas or rubber bullets, in crowd-control settings can cause significant injuries, permanent disabilities, and death. To the extent that the bill results in a decreased use of these weapons, it could reduce the risk of negative health outcomes. Additionally, there is strong evidence that fatalities resulting from the actions of law enforcement officers and serious use of force incidents can negatively affect mental health of family members, communities, and officers, with Black communities disproportionately affected. Exposure to videos of these fatalities and serious use of force incidents can be traumatic for family and friends of the decedent and for the community at large, with implications for mental health and stress-related physiological responses. Although consultation with experts in trauma and grief prior to the release of the footage could help individuals who see the videos cope and manage these effects, many videos are released via news outlets and social media rather than by police departments.

Finally, we found evidence that health effects could vary depending on how policies are implemented. For example, there is some evidence that the adoption of strict policies on use of force tends to reduce police officers' use of physical coercion. This could have potential benefits for health by decreasing the risk of injury during encounters between police and the public. However, the benefits of these policies for health depends on how they are implemented and enforced, and the development of appropriate accountability structures. And while a fair amount of evidence shows short-term benefits of specific types of implicit bias training for law enforcement officers, the research highlights the importance of quality curricula and instruction and ongoing training.

Thank you so much for your time.

Sincerely,

Ruth Lindberg
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HEALTH NOTE: Comprehensive Policing and Justice Reform Amendment Act of 2020
Bill 23-0882
Council of the District of Columbia, Council Period 23

Introduced by:
Councilmembers Allen, Cheh, Grosso, Nadeau, Silverman, R. White, Bonds, Gray, McDuffie, Pinto, Todd, T. White, and Chairman Mendelson

Bill Summary:[1]
Establishes comprehensive policing and justice reform for District residents and visitors.

Health Note Analysts:
Health Impact Project, The Pew Charitable Trusts

Additional Information:
Direct inquiries to 202-540-6012; healthimpactproject@pewtrusts.org; https://www.pewtrusts.org/en/projects/health-impact-project [2]

What is the goal of this health note?

Decisions made in sectors outside of public health and health care, such as in education, housing, and employment, can affect health and well-being. Health notes are intended to provide objective, nonpartisan information to help legislators understand the connections between these various sectors and health. This document provides summaries of evidence analyzed by the Health Impact Project at The Pew Charitable Trusts while creating a health note for Council of the District of Columbia Bill 23-0882. Health notes are not intended to make definitive or causal predictions about how a proposed bill will affect health and well-being of constituents. Rather, legislators can use a health note as one additional source of information to consider during policymaking. The analysis does not consider the fiscal impacts of this bill.

How and why was this bill selected?

With the help of the Council of the District of Columbia's Office of the Budget Director, the Health Impact Project identified this bill as one of several important policy issues being considered by the Council during Council Period 23. The health note screening criteria were used to confirm the bill was appropriate for analysis. (See Methodology on page 8.) The project selected Bill 23-0882 for analysis because of its potential to affect the health and safety of residents who interface with law enforcement as well as the officers themselves. There is a strong evidence base linking violent encounters with police and effects on individual and community health.[1]

SUMMARY OF HEALTH NOTE FINDINGS

There are approximately 18,000 local, county, state, and federal law enforcement agencies in the United States, staffed by more than 697,000 officers.[2] In 2018, an estimated 85,000 people were treated in emergency departments for nonfatal injuries from encounters with law enforcement officers.[3] Lifetime risk of being killed by police is greatest for Black men and women, American Indian/Alaska Native men and women, and Latino men as compared to their White counterparts.[4] In response to these and other concerning statistics, policymakers are exploring ways to improve interactions between law enforcement agencies and the public, reduce the risk of encounters that result in injury or death, and strengthen accountability. This review presents evidence, gathered through an expedited review of literature published in the past five years and earlier seminal research, on the potential effects of B23-0882 on determinants of health and health outcomes.

B23-0882 aims to "provide comprehensive policing and justice reform for District residents and visitors."[5] This health note reviews the available evidence regarding potential health effects of seven components of the bill:

- Prohibiting the use of neck restraints.
- Improving access to body-worn camera (BWC) video recordings of fatalities resulting from the actions of law enforcement officers or serious use of force.
- Expanding continuing education.
- Use of force reforms.
- Restricting the purchase and use of military weaponry.

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[1] Summary as described by the Council of the District of Columbia, https://lims.dccouncil.us/Legislation/B23-0882. The Health Impact Project conducted this health note based on the bill as introduced.
[2] The Health Impact Project is committed to conducting non-partisan research and analysis.

- Limiting the use of internationally banned chemical weapons, riot gear, and less-lethal projectiles.
- Enfranchising all eligible District residents incarcerated for felony convictions.

Below is a summary of key findings:

- The health effects from implementing policies to prohibit the use of neck restraints by law enforcement officers are **not well researched**. Studies have shown, however, that certain types of neck restraints can cause injury or death.[6] If implemented, the District of Columbia could evaluate the policy's effects on the health of residents and law enforcement officers.
- There is **strong evidence** that fatalities resulting from the actions of law enforcement officers and serious use of force incidents can negatively affect mental health of family members, communities, and officers, with Black communities disproportionately affected.[7] Exposure to videos of fatalities resulting from the actions of law enforcement officers can be traumatic for family and friends of the decedent and for the community at large, with implications for mental health and stress-related physiological responses.[8] Given the effects of these videos on mental health outcomes, consultation with experts in trauma and grief prior to the release of the footage could help viewers cope and manage these effects. However, exposure to videos of fatalities resulting from the actions of law enforcement officers and serious use of force incidents often occur through news and social media outlets, which police agencies cannot control.
- A primary goal of expanding the release of BWC video recordings is to increase transparency and accountability.[9] This review did not identify any studies specifically examining the relationship between changes in police accountability or transparency and health. Although the evidence regarding the effects of body worn cameras (BWCs) on officers' use of force, policing activities, and citizens' complaints is **mixed**, one national survey found that most respondents believed BWCs would increase police transparency and improve police-citizen relations.[10]
- There is a **fair amount of evidence** of short-term benefits of specific types of implicit bias training for law enforcement officers; however, the longer-term effects are **not well researched**.[11] Implicit biases can manifest in unequal treatment of individuals belonging to different demographic groups.[12] Experts suggest the importance of quality curricula and instruction, and reinforcing initial training as components of a jurisdiction's police reform efforts.[13]
- There is a **fair amount of evidence** that the adoption of strict policies on use of force tend to reduce police officers' use of physical coercion, with potential benefits for health by decreasing the risk of injury during encounters between police and the public.[14] The impacts of these policies on officer behavior vary based on implementation, adherence, accountability, and training.
- There is **strong evidence** that the use of chemical and projectile weapons, such as tear gas or rubber bullets, in crowd-control settings can cause significant injuries, permanent disabilities, and death.[15] To the extent that the bill results in a decreased use of these weapons, it could reduce the risk of negative health outcomes.
- Research for this analysis did not identify any studies specifically examining health effects from restoring people's right to vote. However, there is **strong evidence** that civic engagement, which includes voting, is positively associated with health, and there is **a fair amount of evidence** specifically documenting the association between voting and health outcomes including physical and mental health, health behaviors, and well-being.[16] One study also suggested a potential relationship between voting and lower rates of recidivism.[17]

METHODS SUMMARY

To complete this health note, Health Impact Project staff conducted an expedited literature review using a systematic approach to minimize bias and identify recently published studies to answer each of the identified research questions. In this note, "health impacts" refer to effects on determinants of health, such

as education, employment, and housing, as well as effects on health outcomes, such as injury, asthma, chronic disease, and mental health. The strength of the evidence is qualitatively described and categorized as: not well researched, mixed evidence, a fair amount of evidence, strong evidence, or very strong evidence. It was beyond the scope of analysis to consider the fiscal impacts of this bill or the effects any funds dedicated to implementing the bill may have on other programs or initiatives in the state. To the extent that this bill requires funds to be shifted away from other purposes or would result in other initiatives not being funded, policymakers may want to consider additional research to understand the relative effect of devoting funds for this bill relative to another purpose. A detailed description of the methods is provided in Methodology Appendix on page 8.

WHY DO THESE FINDINGS MATTER FOR THE DISTRICT OF COLUMBIA?

In 2018, there were 1,242 reported use of force incidents by the Metropolitan Police Department of the District of Columbia (MPD), an increase of 83% since 2015.[18] Fifty-five percent of these resulted in a reported injury to the subject. Although 48% of District residents are Black, 90% of all uses of force in 2018 involved Black citizens, and 14% of subjects were reportedly armed.[19]

WHAT ARE THE POTENTIAL HEALTH EFFECTS OF B23-0882?

Effects of prohibiting the use of neck restraints

- Research for this analysis did not identify any studies specifically examining the health effects of prohibiting the use of neck restraints by law enforcement officers. The research also did not identify any estimates of how frequently these restraints are used in police encounters.
- The intent of a vascular neck restraint is to cause temporary unconsciousness by restricting blood flow to the brain.[20] Restraints that compress the carotid arteries and jugular veins in the neck can result in severe hemorrhage or permanent injury, particularly if improperly applied or if the subject has an underlying health condition that makes the restraint more dangerous.[21] Striking the carotid sinus, also found in the neck, can even cause a fatal heart attack.[22] Therefore, to the extent that the bill results in a decreased use of these restraints, it could reduce the risk of negative health outcomes.

Effects of improving access to body-worn camera video recordings

- In addition to the devastating consequence of loss of life, fatalities resulting from the actions of law enforcement officers and serious use of force incidents can harm the health of family members, communities, and officers. For example, research on the effects of these incidents on Black communities shows that witnessing excessive use of violence and exposure to videos of fatalities resulting from the actions of law enforcement officers can be traumatic for family and friends of the decedent and for the community at large, with implications for mental health and stress-related physiological responses.[23] These fatalities and injuries can also result in financial strain for households stemming from time away from paid work to grieve, funeral costs, and lost income due to disabilities or among family members of a decedent, with negative effects on health through, for example, changes in food or housing security.[24] And several longitudinal studies have documented the negative health effects for police officers from experiencing a traumatic incident at work, including higher likelihood of post-traumatic stress disorder.[25]
- Research for this analysis did not identify any studies examining the effects of policies to ensure BWC videos of fatalities resulting from the actions of law enforcement officers or serious use of force are released using best practices in trauma and grief. Given the evidence of triggering effects of these videos on mental health outcomes, consultation with experts in trauma and grief prior to

the release of the footage could help viewers cope and manage these effects. However, exposure to videos of these fatalities and serious use of force incidents often occur through traditional and social media, which police agencies cannot control. Evidence exists supporting the influence of media consumption on attitudes toward police legitimacy regarding use of force.[26] Studies also support the strong influence of social media and news organizations on public perceptions.[27]

- Expanding the release of BWC video recordings aims to increase transparency and accountability, decrease use of force and change officer and civilian behavior, as well as expedite resolution of complaints and lawsuits.[28] Evidence on BWCs' impact on police use of force, citizen complaints, policing activity, and judicial outcomes is mixed.
    - Several systematic reviews have reported on these topics, with some studies finding reductions in use of force and resident complaints, and, in neighborhoods of concentrated disadvantage, decreases in low-level citations—which can lead to debt or imprisonment if the subject is unable to pay—and "self-initiating" activities such as pedestrian and vehicle checks.[29] For example, one randomized control trial found that BWCs reduced complaints from outside of the police department by 65%; another non-randomized study found a reduction of 62%.[30] Other research, including a randomized control trial involving 2,224 MPD officers, found no discernable effects of implementation of BWCs on police use of force, citizen complaints, or policing activity.[31]
    - A 2015 national cross-sectional survey found that most respondents felt BWCs would help increase police transparency (91%), reduce excessive use of force (80%), improve police-citizen relationships (66%), and increase citizen trust in police (60%).[32] An average of only 36% of respondents thought that BWCs could decrease racial tension between the police and minority communities.[33] Black respondents communicated less optimism in terms of BWCs' potential effects on transparency and citizens' relationships with and trust in the police. Despite their awareness of the technology's limitations, 85% of all respondents were supportive of requiring BWCs.[34]
    - The evidence concerning the effects of BWC footage on observers' judgements of interactions between police and the public is also mixed. [35]
        - A 2019 experiment examined the effects of BWCs on mock jurors' judgments in a case in which a community member (defendant) was charged with resisting arrest, but where the officer's use of force in conducting the arrest was controversial. When participants viewed BWC footage of the arrest, compared with when footage was transcribed or absent, they were less likely to vote the defendant guilty of resisting arrest, and also rated the officer's use of force less justifiable, and the officer more at fault and less credible.[36]
        - Conversely, a 2018 study used an experimental approach with nearly 400 publicly available police videos to compare variations in observers' judgement when witnessing the same police-public encounter via BWC or dashboard camera footage. The findings suggested that jurors and the general public may be less likely to judge a body camera wearer's actions as intended to produce a specific outcome, such as injury or death, compared with dashboard camera videos.[37] Researchers hypothesize that this could occur because the observer sees and takes on the perspective of the person wearing the BWC.[38]
        - Furthermore, a 2019 study involving 627 participants found that BWC footage can lead people to perceive officers more favorably than when they view the same encounter from a camera perspective that includes both the officer and civilian.[39]

Effects of mandating and expanding continuing education

- Researchers hypothesize that law enforcement officers' perception of Black citizens as "dangerous" is associated with disproportionate rates of force used against Black citizens; in other words, implicit biases could influence officer behavior, with potential risks to health for non-White Americans.[40] Studies have found that White officers are more coercive than Black officers towards Black individuals.[41]
- To address these disparities, implicit bias training has become more common in police departments across the U.S due to recommendations from the President's Task Force on 21st Century Policing, with the average training lasting about 5 hours. Although these trainings can show short-term reductions in implicit biases against racial and ethnic minorities, the evidence regarding long-term effects is inconclusive and suggests the importance of continuous training.[42]
    - Several reviews have identified promising practices in reducing implicit bias, at least in the short term. One meta-analysis examining 494 studies on change in implicit bias found that the most successful interventions "associate sets of concepts, invoke goals or motivations, or tax mental resources ... whereas procedures that induced threat, affirmation, or specific moods/emotions changed implicit bias the least." However, the authors found no evidence that changes to implicit bias result in behavior changes.[43]
    - A systematic review of 30 studies examining implicit bias interventions found that the most effective interventions involved intentional strategies to overcome biases, exposure to individuals from other races and ethnicities who counter common stereotypes, empathizing with the outgroup, building new associations, and provoking emotion.[44]
    - One randomized control trial that framed changing implicit biases as breaking a bad habit gave participants in the treatment group a set of strategies to choose from to combat their own implicit biases and asked them to report on their use over the course of two months. The study found a sustained reduction in Implicit Association Test scores among the treatment group over the duration of the test period, as well as greater self-reported awareness and concern about discrimination.[45]

Effects of use of force reforms

- One study found that having strict policies on use of force tended to reduce police officers' use of physical coercion.[46] Given that more than half of the use of force incidents in D.C. resulted in injury in 2018, strategies that could reduce use of force could reduce the risk of injury during encounters between police and the public.[47]
- The effectiveness of these policies depends on implementation, adherence, accountability, and training. Although research is limited, there are increasing indications that de-escalation training may be one effective strategy to reduce the use of force.[48] One study that analyzed the New Orleans Police Department's efforts to comply with a federal consent decree found that changing policy and regulation was not sufficient to ensure compliance within the police department. They found that the following model for implementing organizational and cultural change was most effective: "frequently measure what you want to change; produce actionable, clear results; and hold leadership accountable for performance."[49]

Effects of limiting use of chemical weapons, riot gear, and projectiles and restricting the purchase and use of military weapons

- This review examined the evidence around each of the following components separately: limiting or restricting the use of chemical weapons, riot gear, projectiles, and military weapons. It did not yield any studies that examined health effects resulting from policies that restrict the use of military weapons, chemical weapons, or projectiles. However, a strong body of research shows that

projectiles and exposure to chemical weapons, such as tear gas and pepper spray, can cause a range of negative health effects:

  - Kinetic impact projectiles, such as rubber and plastic bullets, can cause significant negative health effects including: penetrative injuries; trauma to the head, neck, and torso; lacerations; long-term neurological effects; and death.[50] A systematic review of injuries, permanent disabilities, and deaths from projectiles in crowd-control settings worldwide over a 27-year period found that 71% of the total injuries were severe, and that 15.5% of survivors suffered permanent disabilities.
  - Tear gas can cause skin irritation, eye pain, excessive secretion of tears, blepharospasm (uncontrollable eyelid movements, such as twitching), coughing, and chest tightness, among other effects.[51] Studies have also shown that exposure to high concentrations of tear gas can result in severe respiratory symptoms, cardiovascular and gastrointestinal effects, severe eye trauma, and permanent disabilities.[52]
  - A systematic review that examined injuries, permanent disabilities, and deaths from chemical irritants worldwide over a 25-year period found that, among nearly 6,000 people who were exposed to irritants such as tear gas and pepper spray, 87% suffered injuries or died as a result of the exposure.[53] Of these injuries, 8.7% were severe, 17% were moderate, and 74.3% were minor.
  - Stun grenades, also known as flashbang grenades, are usually considered a non-lethal device used to distract occupants of a building before law enforcement officers enter. However, a ProPublica investigation found that 50 Americans, including police officers, have been seriously injured or killed by stun grenades between 2000 and 2014.[54]

- Evidence from two systematic reviews suggests that chemical weapons and projectiles can be used inappropriately in crowd-control settings.[55] For example, a systematic review concluded that deployment of kinetic impact projectiles, such as rubber and plastic bullets, may occur in crowds at distances much closer than deemed "safe."[56]
- Research also suggests that Special Weapons and Tactics (SWAT) units are increasingly using military style weaponry to search people's homes rather than their original purpose to handle hostage and active shooter situations.[57] A report by the American Civil Liberties Union that analyzed 800 SWAT deployments conducted by 20 law enforcement agencies across the U.S. from 2011 to 2012 found that 79% percent of the events involved executing a search warrant at a person's home, and 60% involved drug searches.[58] Only 7% of the SWAT deployments examined involved hostage, barricade, or active shooter situations.[59] Their analysis also found that at least 54% of the people targeted for searched executed by SWAT teams were either Black or Latinx.[60]
- Research for this health note did not yield any studies specifically examining the health effects of riot gear or of limiting the use of riot gear.

Effects of restoring the right to vote

- Research for this analysis did not identify any studies specifically examining health effects from restoring people's right to vote. However, research among the general population shows that voting and other forms of civic engagement are positively associated with health outcomes including physical and mental health, health behaviors, and well-being.[61]
- One study of 1,000 youth followed longitudinally examined political participation in the 1996 election and subsequent criminal behavior. This study suggested a potential relationship between voting and lower rates of recidivism. Specifically, those who vote were less likely to be arrested and incarcerated, and less likely to report committing certain crimes such as violent offenses.[62] The study also showed consistently lower rates of subsequent arrest, incarceration, and self-reported criminal behavior among voters as compared to nonvoters, though the relationship between voting and subsequent arrest did not appear to depend on criminal history.[63]

WHICH POPULATIONS ARE MOST LIKELY TO BE AFFECTED BY THIS BILL?

Research shows that Black Americans are more likely than Whites to experience an injury related to a police intervention and to be killed by police officers.[64] One estimate suggested that Black residents accounted for 86% of arrestees in Washington, D.C. between 2013 and 2017, but represented 47% of the population.[65] Although there is limited research on the relationship between negative police encounters and health outcomes, the available evidence shows that Black and Latino men who report more frequent police encounters report higher rates of trauma and anxiety and that, among Black men, experiencing frequent, discriminatory law enforcement encounters is associated with higher depressive symptom scores.[66]

Coercive policing and negative police encounters tend to be geographically concentrated in predominately Black and Latino neighborhoods.[67] One study showed that the level of racial residential segregation was a strong and positive correlate of the Black and White disparity in fatal police shooting rates.[68] A growing body of evidence shows the negative effects of frequent interactions with police or living in over-policed neighborhoods on mental health, resulting in trauma and anxiety symptoms.[69] One study found a significant negative association between having been stopped and subjected to a physical search by the police and self-reported thriving, similar to thriving rates reported by those who have been incarcerated multiple times.[70] These findings demonstrate how even lower-intensity interactions with the criminal justice system can be significantly associated with lower self-reported conditions of well-being.[71] Insofar as the provisions of this bill result in a reduction of use of force or over-policing in D.C. communities of color, families of color — particularly Black and Latino young men — could experience mental health benefits.

The use of chemical weapons could have negative health impacts for medically vulnerable populations. Research suggests that children, seniors, and individuals with underlying respiratory, skin, and cardiovascular illnesses are at greater risk for negative health effects from exposure to chemical weapons such as tear gas.[72]

HOW LARGE MIGHT THE IMPACT BE?

Where possible, the Health Impact Project describes how large the impact may be based on the bill language and literature, such as describing the size, extent, and population distribution of an effect. In 2018 in D.C., two citizens were fatally injured by police officers and the Use of Force Review Board determined that 10 allegations, or 37%, of all excessive force allegations, were supported by the evidence.[73] Under the emergency police reform legislation, the D.C. Board of Elections has mailed ballots to 2,400 residents serving prison sentences for felony convictions.[74]

It was beyond the scope of this analysis to consider the fiscal impacts of this bill or the effects any funds dedicated to implementing the bill may have on other programs or initiatives in the District. To the extent that this bill requires funds to be shifted away from other purposes or would result in other initiatives not being funded, policymakers may want to consider additional research to understand the relative effect of devoting funds for this policy relative to another purpose.

APPENDIX: METHODOLOGY

Once the bill was selected, a research team from the Health Impact Project hypothesized connections, or pathways, between the bill, heath determinants, and health outcomes. These hypothesized pathways were developed using research team expertise and a preliminary review of the literature. The selected bill components were mapped to steps on these pathways and the team developed research questions and a list of keywords to search. The research team reached consensus on the final conceptual model, research questions, contextual background questions, keywords, and keyword combinations. The conceptual model, research questions, search terms, list of literature sources, and draft health note were peer-reviewed by two external subject matter experts. The experts also reviewed a draft of the health note. A copy of the conceptual model is available upon request.

The Health Impact Project developed and prioritized 15 research questions related to the bill components examined:

- To what extent does prohibiting police use of neck restraints affect use of force?
- To what extent does access to BWCs affect police use of force?
- To what extent does access to BWCs affect the number of citations or arrests?
- To what extent does consideration of trauma and grief effects in advance of release of BWCs affect health outcomes?
- To what extent does access to BWCs affect health outcomes?
- To what extent does restricting use of military weapons affect health outcomes?
- To what extent does restricting use of riot gear affect health outcomes?
- To what extent does restricting use of chemical weapons affect health outcomes?
- To what extent does restricting use of less-lethal projectiles affect health outcomes?
- To what extent does police training on bias, racism, and white supremacy affect use of force in interactions between the police and racial and ethnic minorities?
- To what extent does allowing incarcerated individuals to vote affect their self-reported physical and mental health?
- To what extent does allowing incarcerated individuals to vote affect their feeling of disenfranchisement?
- To what extent does allowing incarcerated individuals to vote strengthen their social ties and connections to the broader society?
- To what extent do police reform efforts affect chronic stress among racial and ethnic minorities?
- To what extent is police/community cooperation improved when use of force is reduced?

The research team next conducted an expedited literature review using a systematic approach to minimize bias and answer each of the identified research questions.[c] The team limited the search to systematic reviews and meta-analyses of studies first, since they provide analyses of multiple studies or address multiple research questions. If no appropriate systematic reviews or meta-analyses were found for a specific question, the team searched for nonsystematic research reviews, original articles, and research reports from U.S. agencies and nonpartisan organizations. The team limited the search to electronically available sources published between September 2015 and September 2020.

[c] Expedited reviews streamline traditional literature review methods to synthesize evidence within a shortened timeframe. Prior research has demonstrated that conclusions of a rapid review versus a full systematic review did not vary greatly. M.M. Haby et al., "What Are the Best Methodologies for Rapid Reviews of the Research Evidence for Evidence-Informed Decision Making in Health Policy and Practice: A Rapid Review," *Health Research Policy and Systems* 14, no. 1 (2016): 83, https://doi.org/10.1186/s12961-016-0155-7.

The research team searched PubMed and EBSCO databases along with the following leading journals in public health, as well as sector-specific journals suggested by subject matter experts for this analysis (e.g., criminology and policing) to explore each research question: American Journal of Public Health, Social Science & Medicine, Health Affairs, Criminology, The Police Journal, Policing: A Journal of Policy and Practice, and Police Quarterly.[d] For all searches, the team used the following search terms: police, prohibit neck restraints, use of force, police body cameras, citations, arrests, accountability, trauma, grief, police body camera footage, restrict military weapons or chemical weapons or projectiles, incarceration, voting, connect*, social, police training, racism, police transparency, community trust, health, injury, and disability. The team also searched ACLU, Brookings Institution, Center for Policing Equity, U.S. Department of Justice, Urban Institute, and The Sentencing Project for additional research and resources outside of the peer-reviewed literature.

After following the above protocol, the team screened 476 titles and abstracts,[e] identified 98 abstracts for potential inclusion, and reviewed the full text corresponding to each of these abstracts. After applying the inclusion criteria, 44 articles were excluded. Five additional sources were incorporated based on feedback from the expert reviewers, and 25 additional sources were identified upon review of the included articles. A final sample of 30 articles, including 2 meta-analyses and 4 systematic reviews, was used to create the health note. In addition, the team used 32 references to provide contextual information.

Of the studies included, the Health Impact Project qualitatively described and categorized the strength of the evidence as: not well researched, a fair amount of evidence, strong evidence, or very strong evidence. The evidence categories were adapted from a similar approach from Washington state.[75]

Very strong evidence: the literature review yielded robust evidence supporting a causal relationship with few if any contradictory findings. The evidence indicates that the scientific community largely accepts the existence of the relationship.
Strong evidence: the literature review yielded a large body of evidence on the association, but the body of evidence contained some contradictory findings or studies that did not incorporate the most robust study designs or execution or had a higher than average risk of bias; or some combination of those factors.
A fair amount of evidence: the literature review yielded several studies supporting the association, but a large body of evidence was not established; or the review yielded a large body of evidence but findings were inconsistent with only a slightly larger percent of the studies supporting the association; or the research did not incorporate the most robust study designs or execution or had a higher than average risk of bias.
Mixed evidence: the literature review yielded several studies with contradictory findings regarding the association.
Not well researched: the literature review yielded few if any studies, or yielded studies that were poorly designed or executed or had high risk of bias.

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[d] American Journal of Public Health, Social Science & Medicine, and Health Affairs were selected using results from a statistical analysis completed to determine the leading health research journals between 1990 and 2014 and in consultation with policing and criminal justice experts. Merigó, José M., and Alicia Núñez. "Influential Journals in Health Research: A Bibliometric Study." Globalization and Health 12.1 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4994291/.
[e] Many of the searches produced duplicate articles. The number of sources screened does not account for duplication across searches in different databases.

EXPERT REVIEWERS

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Testimony of the
D.C. Open Government Coalition

by

Thomas M. Susman
President

before the
Committee on the Judiciary and Public Safety
Council of the District of Columbia

Hearings on
B23-0882, the "Comprehensive Policing and Justice
Reform Amendment Act of 2020"

October 15, 2020

Chairman Allen and members of the Committee, I am Thomas Susman, president of the D.C. Open Government Coalition and a resident of Ward 4. I appreciate the opportunity to testify today on behalf of the Coalition and to offer our comments and suggestions regarding public access to police body-worn camera (BWC) videos, which is addressed in title I, subtitle B, of your "Comprehensive Policing and Justice Reform Amendment Act of 2020."

Our Coalition played an active role in discussions leading to the Council's public access requirements in the 2015 BWC legislation and rules, and members of our Board have testified and submitted statements to the Council on this issue on previous occasions.

D.C.'s policy of treating BWC video under the Freedom of Information Act's standards of public access and privacy protection was a step forward, though in practice the results have not been encouraging. The proposed legislation provides an opportunity to clarify and expand upon some elements that may be unique to BWC videos that will provide greater certainty and improve efficiency in affording public access.

I will not go into the benefits of having BWC video accessible to the public. They can be summed up in a few words: accountability, exoneration, credibility, and public trust. Accountability includes the public's and affected individuals' ability to monitor and assess the conduct of police officers, as well as helping to shape the conduct of officers in the field, especially regarding potential use of force and

discriminatory policing practices against District residents. And some research has concluded that more police officers are exonerated than found culpable of misconduct charges through BWC videos

The Comprehensive legislation (B23-0882) contains a number of important provisions designed to improve access to BWC video recordings. It requires the Mayor to release within 5 days the name and BWC recordings of officers involved in a death or serious use of force; requires preservation of BWC recordings relating to a Council Committee on the Judiciary and Public Safety investigation or request and provision to the Committee of unredacted recordings within 5 days of a request; and creates a process for input to the Mayor from the subject or next of kin who do not consent to release of a BWC recording.

DCOGC welcomes the new requirement that the Mayor *shall* release BWC video within 5 business days in cases of officer-involved death or serious use of force. This requirement should be expanded to include video footage from all officers on the scene. The immediate discussion of the September 2nd shooting of Deon Kay was only possible because it happened just a few weeks after the Council required prompt video release. We testified at last year's BWC oversight roundtable about the community's need for wider access to other BWC video and the Mayor's failure to exercise her discretionary authority to meet that need.

Additionally, allowing early access to viewing video footage by victims' families is good policy, but this should not equate to a "victims' veto"; even after a bereaved family has viewed a BWC video, the public interest in access is not diminished.

While application of the DC FOIA to public requests for access to BWC videos should suffice in providing standards and procedures for public disclosure, that has not been the experience of requesters from both the media and the community. We thus propose the addition of language to the legislation that addresses four issues:

- First, the bill should more precisely define what constitutes a personal privacy interest sufficient to warrant redaction when videos are released.
- Second, the bill should include cost-reduction steps such as exploring in-house redaction and setting limits on fees that can be charged for release of BWC videos pursuant to a FOIA request.
- Third, the bill should clarify the "investigation" exemption that can now be asserted without explanation or justification yet causes delays.
- And fourth, the bill should require that in cases of mandatory release (the most serious incidents) all officers' video should be released.

We highlight five ways that the camera program could better serve public information. And for future consideration we remind the Council of the need to open police complaint and discipline investigations, since these are now closed by restrictive legal interpretations in the executive branch that can only be corrected by statute.

I. The bill should define the private data to be safeguarded

Privacy protection needs definition so that it does not defeat access by raising costs and delays (discussed below) and making released video unintelligible. All these presently result from MPD over-redaction, done according to opaque rules. The bill should change this.

Coalition Board Member Fritz Mulhauser testified last year on DCOGC's efforts to discover the standards for redaction of BWC videos before public release. He explained our efforts through two FOIA requests and an appeal to get records showing the MPD redaction standards that guide contractors' work, and its legal basis, but with limited success. His testimony stated:

> *We received one undated sheet of paper [attachment omitted]. Some of the several dozen listed items to be redacted are obvious and raise no questions, such as details of suspects, witnesses or confidential sources. These would be omitted from paper records at least as long as investigation or legal action is under way. But others have highly questionable legal basis:*
>
> - *faces of anyone not involved,*
> - *face (plus ID and badge) of any officer,*
> - *any house number or name of residences,*
> - *any vehicle license plates, and*
> - *any audio with references to such items.*

Police officers are public servants who wield governmental power and are paid by taxpayer dollars. The idea that their identities should be shrouded when in public performing their duties is absurd, as litigation established years ago when courts told police they could not stop citizens from videotaping them at work in public. *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011). And, while the privacy of certain individuals and in certain venues should be safeguarded, people and cars and house numbers that are videoed in public spaces are, by definition, already in the public domain and should not be subject to redaction.

Common categories of video footage to be accorded privacy protection through redaction include:

- Death or serious injury;
- Nudity;
- Minors under the age of 16;
- Detention for mental health or drug treatment purposes;
- Personally identifiable information, which should be clearly defined;
- Footage taken inside a private dwelling without express consent of the resident;
- Identity of a sex crime or domestic violence victim; and
- Confidential informants and witnesses.

Redaction or withholding of footage when an officer enters a private dwelling can be protected, but the bill should specifically prohibit redaction of officers' faces or badges, of bystanders in public places, of persons who interact with officers but are not arrested or charged, and of audio in public places.

II. The bill should control the costs of public access

According to the MPD, the D.C. FOIA requires redaction of many private details before releasing BWC video, and MPD employs contractors to blur faces and other identifying information. Requesters are charged $23 for each minute of the contractors' work, and charges estimated in response to past requests run from thousands to millions of dollars.

The cost is related to MPD's overly broad definition of privacy-protected details that should be masked, as discussed above. Our coalition has asked MPD for documents explaining the basis for these sky-high costs, but none have been forthcoming.

The Director of D.C.'s Office of Open Government, in testimony a year ago before the Council, recommended that "MPD should release to the public in the form of policy or regulation, redaction guidance that explains the cost of the act of redaction in actual work hours (cost per hour)." We agree. OOG Director Niquelle Allen also discussed in that testimony and in our recent webinar the advancing art and science of video redaction that may be at a stage that it can be done in-house at much lower cost than through private for-profit contractors. The Council needs to send a message to the executive to follow through on the steps needed to make access affordable.

Clarifying that significantly less redaction is required for BWC video footage that is released to the public, as is recommended above, will also result in significantly lower costs of access. For example, the Baltimore Police Department ordinarily redacts nothing and charges $30 for BWC videos filmed in public places.

III. The bill should set limits on the investigation exemption

The FOIA exemption for "investigatory records compiled for law-enforcement purposes" delays access, since in D.C. serious misconduct is investigated first for possible criminal charges by federal prosecutors and then for possible internal discipline by MPD investigators. The long delays in these steps are well known here, as discussed in the Bromwich 2016 report (finding median time for a US Attorney investigation to be a full year). Legislators elsewhere have addressed investigative delays thoughtfully, requiring time-limited secrecy be justified in public writings, renewable only upon further explanation. Sec. 2 of California SB 1421 at (b)(7) is an example of how to handle this.

IV. The bill should require release of all BWC video relevant to any incident

The mayor has interpreted the required release to include only video from the officer involved in the shooting or other use of serious force. This unduly restrictive and typically makes it hard for the public to understand what happened. The bill should add language to require release of all relevant video.

Additionally, there is no need to limit public access to BWC videos to officer-involved shootings or serious use of force. These videos are public records like any other in the District and should be subject to disclosure under the DC Freedom of Information Act.

V. The bill should strengthen public understanding of policing by requiring additional public information about the BWC program

In our statement to the Council last year, the Coalition spelled out five suggestions proposed by the D.C. Open Government Coalition for ways BWC video could serve transparency beyond being available upon request. They remain valuable ideas today and cold readily be incorporated into the pending bill:

- **Improve public reporting by adding analysis of BWC video and statistics**. The required reports are brief and late. Only eight data points are required (hours of BWC video collected; how many times BWC equipment failed and why; number and results of internal investigations of complaints for failure to turn BWC on; number of times BWC video used in internal affairs investigations; number of times BWC video used to investigate public complaints; number of BWCs assigned to different police units; number, result and cost of FOIA requests; and number of BWC videos by type of event recorded). D.C. Code § 5-116.33(a). Early reports were timely but of the five due for 2017-2019, four have been late by as much as 10 months.

The most recent is for the first half of 2019. Though they include important data, none are explored further. For example, what is being done about the widespread failure to activate the cameras (shown in the high rate of sustained complaints of such failures--78 percent of 1,514 complaints at one point in the past)? Nor is there any account of the results of the 20,754 videos used in internal investigations and the 3,779 used by the Office of Police Complaints. The public reasonably expects MPD to use BWC video to improve policing and the law does not stop MPD from exploring the data in more depth in order to report how that is going.

- **Use mayoral override more often to release BWC video that can educate the public**. The law allows the mayor to release video "in matters of significant public interest." 24 DCMR § 3900.10. A notable occasion when disclosure would have fostered public understanding was the case of controversial police actions in Deanwood in June 2018 (the "Nook's barbershop" incidents), where police used force on a summer sidewalk that seemed wildly unnecessary to many. Amid huge community outcry, the mayor claimed BWC video showed important details not seen on cell phone video—but then rejected community requests to see those BWC details. In response to a Coalition request for records documenting any disclosures of BWC videos, the mayor's FOIA officer said there were no responsive records. The law allows consultation with prosecutors and police about such releases but in response to the Coalition's request for records of such communications (and possible vetoes) the mayor's office declined to produce internal communications.

- **Provide data on video viewing by subjects**. Subjects have the right to view BWC video of themselves, 24 DCMR § 3902.5. No public data is available to show whether that right is being exercised or even offered.

- **Improve police YouTube release channel**. Released videos were for a time posted some years ago. See https://www.youtube.com/channel/UCSVpCusv_bqfKHyOj21jZqQ (six incidents, 129 total videos). A pilot test of more proactive release could show if reviving this is useful to the public.

- **Continue evaluation of the BWC program and expand outside use of data**. MPD has offered no public analysis of its own, nor suggested how it may be following the law that directs that it "shall engage academic institutions and organizations to analyze the BWC program," 24 DCMR § 3902.7. The phased rollout of equipment and training allowed an elegant but disappointing comparative study of citizen complaints and use of force in 2015-17 by officers on patrol with and without cameras. The MPD and The Lab (a study team within the Office of the City Administrator) prepared that report. BWC video, as a huge sample of police conduct in the field, is also a rich source for other kinds of studies beyond direct evaluation of camera effects. See, for example, a revealing Stanford review of transcripts of what was said by officer and driver in thousands of traffic stops in Oakland, California. It documented what everyone suspected but couldn't prove -- large differences in respect shown by the officer based on the driver's race.

For future legislation: Access to police complaint and discipline investigation files

DCOGC believes that MPD complaint and discipline investigation records should be publicly available: The Council should by statute clarify that the public interest in accountability justifies access to complaint and discipline investigation files. This step was taken by California and New York legislatures and should be taken here. The head of the D.C. Office of Police Complaints agreed in a

recent press interview, stating "It would add a lot to community trust if the community was aware what kind of discipline was being handed out to MPD officers."

Conclusion

When the District invested millions of dollars in the BWC program a few years ago, the public had high expectations that BWC video footage would benefit both the public and the MPD and bring about greater accountability, more assured exoneration of officers experiencing conflicts with the public, credibility of the workings of the justice system, and public trust in our government. The high expectations for the use of BWCs have not been realized. While BWC videos have proved indispensable to establishing facts in judicial proceedings, public access remains limited, and MPD continues to be silent on its own uses and protocols.

In the attached memorandum summarizing "State and Local Policies Regarding Public Access to Policy Body-Worn Camera Videos," DCOGC and our outside counsel Ropes & Gray LLP have gathered and summarized relevant legislation from other states and comparable cities. We believe that this information will be helpful to the Council and in other jurisdictions considering how to legislate in this area.

Enactment of the "Comprehensive Policing and Justice Reform Amendment Act of 2020" provides an opportunity for the District – both its residents and the police department – to realize more fully the benefits of police body-worn cameras.

ATTACHMENT: "State and Local Policies Regarding Public Access to Police Body-Worn Camera Videos" (Sept. 2020)

* * * *

The Open Government Coalition is a citizens' group established in 2009 to enhance public access to government information and ensure the transparency of government operations of the District of Columbia. Transparency promotes civic engagement and is critical to responsive and accountable government. We strive to improve the processes by which the public gains access to government records (including data) and proceedings, and to educate the public and government officials about the principles and benefits of open government in a democratic society.

On September 29, 2020. The D.C. Open Government Coalition sponsored a webinar focusing on the use of BWCs in the District and the need for legislative reform focused on disclosure policies and practices. A video of that program can be viewed at: https://vimeo.com/464587376.

State and Local Policies Regarding Public Access to Police Body-Worn Camera Videos

Executive Summary
September 2020

The issue of whether police should wear body cameras recording their actions and public access to the video footage became an increasingly active area of public debate following the tragic shooting of Michael Brown in Ferguson, Missouri, as well as the videotaped chokehold death of Eric Garner in New York City, and has only increased in prominence after similar footage, such as videos showing the suffocation of George Floyd in Minneapolis, has become all too common.

The D.C. Open Government Coalition has an interest in enhancing the public's access to government information and ensuring the transparency of government operations. Accordingly, the Coalition, in conjunction with Ropes & Gray LLP, has been tracking laws and proposals governing police body-worn camera (BWC) recordings in 50 states and 15 major cities since 2015. The information contained in this executive summary is current as of September 25, 2020, and was obtained through a combination of outreach to state and local governments and research into legislative and media sources.

The Coalition is hopeful that its work will be helpful to state and local legislators seeking to understand the choices their peers across the country have made and spurring those legislators to action. More importantly, the Coalition hopes that this work will energize transparency advocates across the country to understand not just what the law is, but what it could be. By providing this resource, the Coalition intends to further its ultimate goal of advancing open government in the District of Columbia and throughout the nation.

Elements of Body Camera Proposals

At the outset of this analysis, the Coalition focused on four areas relevant to the handling and availability of police BWC recordings:

- Collection of police BWC footage;
- Retention of police BWC footage;
- Applicability of existing Freedom of Information Act (FOIA) laws and exemptions; and
- Related police dashcam footage rules.

Footnotes throughout the discussion below provide examples of states that have adopted the policies discussed.

State Policies

Overview

- A majority of states—at least 34—have passed some form of legislation addressing police BWC footage.[1] The general trend appears to be towards more comprehensive policies regarding use and collection of BWC recordings and increased public disclosure, including, in some cases, automatic public disclosure of footage of "critical" incidents involving use of force by a police officer.
- Only a handful of states have not proposed any police body cam legislation at the state level in recent years.[2]
- Other states have introduced legislation addressing police BWC videos, which either is under consideration[3] or has been debated and rejected or indefinitely stalled in the legislative process.[4]
    - A trend among some states in the past five years has been to create a task force or commission to study and make recommendations regarding the use of BWCs in the state.[5] This often leads to adoption of a model BWC policy for the state, but does not always lead to meaningful reform in that state.
    - Some states have introduced legislation that would specifically exclude body and/or dashboard camera footage from the state's open records law[6], while others have considered (or adopted) comprehensive legislation covering collection, retention, and public access to footage, either on a standalone basis or as part of broader police accountability or body cam legislation.
    - Budgetary concerns continue to be cited as a reason for lack of adoption of BWCs. In some states, BWC laws have included funding provisions, and these laws often include requirements for law enforcement agencies to adopt policies that meet minimum requirements to obtain funding for BWCs.[7]

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[1] CA, CO, CT, FL, GA, ID, IL, IN, KS, KY, LA, MA*, MD, MI, MN, NB, NJ*, NM, NV, NY, NH, NC, ND, OH, OK, OR, PA, SC, TX, UT, VA, VT, WA, and WI. *In MA and NJ, legislation has passed both houses of the state legislature but has not yet been finalized.
[2] AK, AZ, DE, MT, and WV.
[3] IL and ME.
[4] HI, IA, MS, RI, SD, and TN.
[5] Colorado legislation created a commission tasked with studying and recommending policies on the use of body cameras. The report was released in 2016, but in accordance with the statutory mandate, it did not consider issues related to public access to body camera footage. Colorado adopted comprehensive BWC legislation in 202 that will go into effect in 2023. In 2019, Connecticut legislation created a task force to study police transparency and accountability. In 2020, Maryland created a Law Enforcement Body Camera Task Force to create recommendations on economical storage and retention of police body camera footage by December 1, 2020.
[6] For example, a new bill introduced in Alabama in March 2020 (HB 373) excludes body and dashboard camera footage from the definition of public record and specifies very limited circumstances in which the public could have access to footage. South Carolina has adopted legislation that excludes body camera footage from the state's public records law.
[7] For example, SC. Although South Carolina's law was passed in 2015, it has not yet been fully funded, and adoption of BWCs in the state has been slow as a result.

Collection

Well over half of the states have at least proposed legislation regarding the collection of police BWC footage. There is a range of enacted rules on this issue:

- On one end of the spectrum, some states have enacted laws that delegate the drafting of collection policies (or model collection policies) to a third party. This would generally be a law enforcement agency that is likely to craft policies more favorable to law enforcement interests than civil liberty considerations.[8]
- Although some states have proposed legislation that broadly requires police to record in nearly all circumstances, the vast majority of states that set forth collection guidelines take a more moderate approach, requiring recording but enumerating exceptions where recording can be stopped, such as allowing that cameras may be turned off when:
    - The officer is inside a patrol car;
    - A victim or witness requests the camera be turned off;
    - The officer is interacting with a confidential informant;
    - The officer is engaging in community caretaking functions; or
    - A resident of a home requests the camera be turned off when an officer enters the home under non-exigent circumstances.

Retention

Over half of the states have proposed legislation regarding the retention of police BWC footage. As with collection, there is a wide range of approaches:

- Several states have enacted or proposed rules that delegate to local police the authority to craft retention requirements, which tend to result in police-friendly provisions.[9]
- Most states, however, have enacted laws that set specific retention timelines for BWC footage.[10] Recordings are retained for periods ranging from seven to 180 days, with between 30 and 90 days as the most frequent periods.
    - Most states allow for a longer retention period of up to two or three years for special circumstances, including when:
        - A complaint has been filed associated with the recording;
        - An officer discharged a firearm or used excessive force;
        - Death or great bodily harm resulted from the officer's conduct;

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[8] FL, IL, MD, NB, NM, NV, NC, OR, PA, SC, UT, VA, and WA. These policies typically have to meet minimum standards set by statute. In South Carolina, a law enforcement agency's policy must be approved by the state Law Enforcement Training Council if the agency receives grant money to implement the use of body cameras. In Virginia, policies must be subject to public review and comment before being adopted.

[9] MD, NY, OH, UT, and VT. In Maryland, a state commission is expected to issue recommendations regarding economical storage and retention of BWC footage by the end of 2020.

[10] CA, FL, GA, ID, IL, IN, MA, MI, MN, NB, NH, NJ, NM, NV, OK, OR, SC, TX, WA, and WI. In MA and NJ, legislation has passed both houses of the state legislature but has not yet been finalized.

    - The recording led to detention or arrest;
    - The officer is the subject of an investigation;
    - The recording has evidentiary value; or
    - The officer requests that the video be retained for the longer period.
- Some states expressly prohibit destruction of a recording after receipt of a public records request.[11]

FOIA Applicability

There are mixed practices among states on the whether body camera footage is covered under existing FOIA laws (and their exemptions) or whether the footage requires a specifically enumerated exception. Some states have proposed[12] or adopted[13] legislation that specifically excludes body camera footage from the state's FOIA law.

- Several states have issued either blanket prohibitions on accessing police BWC footage under FOIA or conditional prohibitions barring access unless certain factors, such as firearm discharge or use of force, are present.[14] Some states only allow a victim or other person depicted in the footage to have access.[15]
- Some states have adopted or proposed statutory provisions that explicitly seek to include body camera footage within the purview of state open record laws, either generally or through specific FOIA provisions applicable to body camera footage (which may or may not be more burdensome for requestors than the state's general FOIA request process).[16]
- Most states that have addressed the FOIA exemption question have suggested that police body camera footage may not be released in instances where privacy concerns enter the picture, or where footage would interfere with an active investigation.[17] Where privacy concerns are present, some states allow the subject to waive the privacy interest and consent to disclosure.[18]
- Recently, an increasing number of states have adopted policies regarding automatic public disclosure of BWC videos. Automatic public disclosure typically applies to footage of incidents involving an officer discharging a firearm or using force that results in death or serious bodily injury or when a member of the public files a complaint.[19] Some states require release of the video to family members or representatives of the subject of police use of force prior to public release.[20]

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[11] ID and WI.
[12] AL.
[13] PA and SC.
[14] IL, NH, OR, and UT
[15] IL, IN, NC, SC, and WY.
[16] CA, FL, OH, PA, VT, and WI.
[17] CT, FL, GA, IL, IN, KS, KY, LA, MI, MN, NB, ND, NY, TN, TX, UT, VT, WA, and WI . Under New Jersey's proposed legislation, BWC video may be exempt from public disclosure upon request of the subject or the subject's parent/guardian or next of kin.
[18] CO.
[19] CA and CO.
[20] CO.

- States have proposed a number of specific circumstances where body cam footage would be exempt from disclosure, such as where footage:
  - Relates to law enforcement investigations; or
  - Displays:
    - Death or serious injury;
    - Nudity;
    - Minors under the age of 16;
    - Detention for mental health or drug treatment purposes;
    - Personally identifiable information;
    - The identity of a sex crime or domestic violence victim; or
    - Confidential informants.

Dashcam Policies

States treat the retention and release of police daschcam videos differently, with some states opting for much narrower public access than others.[21] However, most dashcam footage policies, by contrast to proposed BWC policies, treat dashcam footage as covered by general FOIA exemptions.[22] In Rhode Island and Virginia, dashcam videos are expressly excluded from the state's public records law. While states appear more comfortable with the public accessing records of dashcams than they are at the present time with public access to the broader range of footage that is collected by police BWCs, policies continue to diverge.

City Policies

While crafting open-record and right-to-know laws has largely been handled on the state level, decisions regarding whether or not to purchase body cameras—and if so, in what quantity—as well as implementation policies, are vested in various city and county legislative bodies. Of the 15 major U.S. cities the Coalition surveyed, all have at some point implemented a pilot program to test different BWC offerings and develop workable policies for wider implementation or adopted policies and procedures regarding use of body cameras.[23]

All cities have issued guidelines regarding the collection and retention of body camera footage that are, particularly in comparison with many state laws, quite transparency-friendly. Cities typically require retention for a period of 90 days and can require retention for much longer depending on the nature of the recording. While disclosure of certain recordings is generally prohibited, including recordings (1) where there is a reasonable expectation of privacy, (2) where a confidential informant or undercover officer's identity might be revealed, and (3)

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[21] For example, North Carolina explicitly covers "a visual, audio, or visual and audio recording captured by a . . . dashboard camera" under its restrictive law. Oklahoma also has specifically addressed dashcam videos in its public records statute.
[22] WI and WY.
[23] Atlanta, Boston, Chicago, Dallas, Detroit, Houston, Los Angeles, Miami, Minneapolis, New York, Philadelphia, Phoenix, San Diego, San Francisco, and Seattle.

during personal conversation, collection is generally mandated by city guidelines in a wide range of situations, including:

- Enforcement stops;
- Arrival when on call for any service;
- Pursuits (both vehicular and non-vehicular);
- Arrival at crime scenes;
- Execution of warrants or "knock and talk" operations;
- Consensual searches;
- Planned or anticipated arrests;
- Inventorying of seized property;
- Field sobriety tests; and
- Whenever the officer's training and experience causes him or her to believe the incident needs to be recorded to enhance reports, preserve evidence, or aid in subsequent court testimony.

Many of the cities surveyed also have adopted policies regarding automatic public release of body camera footage in certain circumstances. For example

- The Los Angeles Police Commission in 2018 directed the LAPD to release all relevant video of officer-involved shootings from body camera, dashcam, bystander or other cameras within 45 days of the shooting. At the time it was cited as the largest department in the nation to proactively release such video. The policy also requires the release of footage any time an officer uses force that results in hospitalization and allows the police chief and commission to release video of other high profile incidents on a case-by-case basis.
- The Dallas Police Department in 2020 established a policy to release footage of police shootings or use of force that results in serious injury or death and deaths in custody within 72 hours of the injury or death. The next of kin and certain government and police officials are entitled to review the footage before it is released.

Decisions occurring at the local level are significant for three reasons. First, many municipal proposals and policies are being developed and enacted at a much faster pace than their state counterparts. Second, the interplay between local and state officials on this issue has created an environment where some cities have attempted to craft a model policy to anticipate and guide statewide debate. Finally, local-level policies appear to be more transparency-oriented than the majority of state-level laws. While these state-level laws are likely to control the conversation going forward—particularly as most cities defer to the state level policy on exempting police body camera footage from public access—local-level policies provide the beginnings of a way forward for advocates of transparency and accountability.

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The D.C. Open Government Coalition invites public feedback and comments about this report. Please feel free to contact us at info@dcogc.org.

D.C. Open Government Coalition
Public Access to Police Body Camera Recordings
Last updated September 24, 2020

	Legislation or Bill(s)	Collection of Video	Retention of Video
Alabama	No statute or proposal relevant to body cameras at the state level. A new bill introduced in March 2020 (HB 373) would deem body and dashboard camera footage not to be a public record and list very limited circumstances in which the public can request access to it.	None	None

Alaska	No statute or proposal relevant to body cameras at the state level. Body cameras are not required in Alaska.	None	None

Arizona	No current statute or proposal relevant to public access to body camera footage at the state level. The governor's fiscal year 2021 budget proposes spending approximately $5 million to provide body cameras to all sworn officers in the Arizona Department of Public Safety.	None	Subject to general retention requirements under Arizona state archives law (no special requirements for body camera footage).

Arkansas	No statute or proposal relevant to body cameras at the state level.	None	None

California	In 2018, California passed two pieces of legislation relating to public access to police body camera recordings, which have been codified at Cal. Penal Code §§ 832.7-832.8 and Cal. Gov't. Code § 6254.	Reforms at the state level in California have largely focused on retention and release of recordings. Individual police departments have adopted policies regarding use of body cameras by officers.	Nonevidentiary body camera footage must be retained for at least 60 days, after which it may be erased, destroyed or recycled. Agencies are free to keep data for more than 60 days. Evidentiary body camera footage must be retained for at least two years if any of the following circumstances is present: (i) the recorded invident involved use of force by an officer or an officer-involved shooting, (ii) the recorded incident led to the detention or arrest of an individual, or (iii) the recording is relevant to a formal or informal complaint against law enforcement. If the recording contains evidence that may be relevant to a criminal prosecution, it should be retained for any time in addition to that that may be relevant to the prosecution. Records or logs of access and deletion of data from body cameras must be maintained permanently. Cal. Penal Code § 832.

Colorado	HB 15-285 created a commission tasked with studying and recommending policies on the use of body cameras. The report was released in February 2016 (https://cdpsdocs.state.co.us/ors/docs/reports/2016_BWCs-Rpt.pdf). It focused on six specific issues, mostly related to policies governing use of cameras. Public access to body camera footage was not included in the report. Colorado SB20-217 (passed in June 2020) will require all Colorado state and local police officers to wear body-worn cameras beginning July 1, 2023.	SB20-217 will require law enforcement officers to activate the camera when enforcing the law or responding to any possible violations of the law.	Subject to general retention requirements under Colorado state archives law (no special requirements for body camera footage).

Connecticut	Public Act 19-90 (signed into law in 2019) establishes a task force to study police transparency and accountability and makes certain body camera or dashcam recordings disclosable to the public within 96 hours after the incident.	Conn. Gen. Stat. § 29-6d(g) disallows recordings of officers outside the scope of an officer's duties, of undercover officers or informants, or of individuals in hospitals (other than suspects).	Subject to general retention requirements under Connecticut law.

Delaware	House Concurrent Resolution 46 encouraged relevant organizations (Delaware Police Chiefs' Council, Office of the Attorney General, the Department of Safety and Homeland Security, the Delaware Fraternal Order of the Police, and the Delaware State Troopers Association) to adopt a uniform policy regarding body-worn cameras for law enforcement agencies. DE state police instituted a body-worn camera pilot project in 2016. In March 2016, the Delaware Police Chiefs' Council issued a model body worn cameras policy (https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2018/03/Model-Policy-Body-Worn-Cameras.pdf). There is no statewide requirement to use body cameras.	The model policy states that officers must turn on cameras "when an arrest or detention is likely; when the use of force is likely; or any other incident where the safety of people and property in Delaware is promoted." It also states that body cameras should not be used during "encounters with undercover officers or confidential informants, and instances where a victim or witness could request the camera be turned off."	The model policy requires that body camera data be retained for "such time as is necessary for training, investigation or prosecution" and that data be "securely stored in an agency-approved storage location."

Florida	Fla. Stat. § 943.1718 requires police departments that elect to use body cameras to adopt policies and procedures governing their use. It does not require any agency to equip its officers with body cameras.	Individual departments are required to establish policies and procedures that address, among other things, use of body cameras, the right of an officer to view footage before making a statement and general guidelines for the proper storage, retention and release of audio and video recordings from body cameras.	Law enforcement agencies are to retain body camera recordings for at least 90 days (Fla. Stat § 119.071(2)(l)(5)).
Georgia	GA Code § 50-18-96 provides retention requirements and exceptions. Body cameras are not required in Georgia.	None	Footage to be retained for at least 180 days, and generally for at least 30 months if the recording is part of a criminal investigation, shows a vehicular accident, shows the detainment or arrest of an individual, or shows use of force by an officer (GA Code § 50-18-96).
Hawaii	Several bills have been proposed and defeated, but policies on collection and retention of videos have been implemented across the state at the municipal level.	None	None

Idaho	Idaho Code § 31-871 covers, among other things, requirements for retention of digital records created by a law enforcement agency in the performance of its duties that consist of a recording of visual or audible components or both.	None	Requires all video and audio records created by law enforcement to be retained for 200 days if the record has "evidentiary value" and for 60 days if the record has no evidentiary value. A recording has evidentiary value if it depicts the use of force by a government agent, an arrest or events leading up to an arrest, the commission of a crime, an event
Illinois	50 Ill. Comp. Stat. 706/10 does not require law enforcement to use body cameras, but requires the Illinois Law Enforcement Training Standards Board to create guidelines for local departments that use body cameras to create written policies regarding their use. The act includes mandatory standards for collection, retention, and FOIA accessibility. Proposed HB 2517 would require that all law enforcement agencies use body cameras. It has been in committee since March 2019.	Cameras must be turned on when the officer is on duty and must be capable of recording for 10 hours or more Cameras may be turned off when: (1) the officer is inside a patrol car with a dashcam, (2) a victim or witness requests the camera be turned off, (3) the officer is interacting with a confidential informant, (4) the officer is engaged in community caretaking functions Dashcams purchased with grant money must be turned on during the officer's entire shift, and have microphones to record the officer outside of the car.	Recordings must be retained for 90 days If the footage is flagged, it must be retained for two years. Footage is flagged when: (1) a complaint has been filed, (2) an officer discharged a firearm, (3) death or great bodily harm occurred, (4) the recording led to detention or arrest, (5) the officer is subject to an investigation, (6) the recording has evidentiary value, (7) the officer requests the video be flagged. Footage from dashcams purchased with grant money must be retained for two years, and be made available upon request to the subject of the recording.

Indiana	Ind. Code 5-14-3-5.1 to -5.3 (2016) regulates public access to and retention of law enforcement recordings. It was reported that some police departments stopped using body cameras after the legislation was enacted, blaming, among other things, the cost and burden of complying with storage, retention and redaction requirements. There is no statewide requirement to use body cameras in Indiana.	None	State-level agencies must retain "unaltered, un-obscured law enforcement" recordings for 280 days. Other public agencies must retain footage for at least 190 days. Footage must be retained for 2 years if someone has requested the recording or a complaint has been filed regarding the law enforcement actions in the video. It must be retained until any civil or criminal proceeding regarding recorded events is complete.
Iowa	No active bills on requiring police body cams, or public access to their footage. In 2017, proposed legislation would have added provisions regarding body camera recordings to Iowa's public records law. H.F. 77 (2017).	None	None

Kansas	Kan. Stat. 45-254 makes body and dashcam footage subject to the state's Open Records Act, but does not require officers to wear cameras or retain footage.	None	None

Kentucky	Ky. Rev. Stat. 61.168 lays out special rules for disclosure of body camera footage (dashboard mounted cameras are specifically excluded from the rules), but generally subjects recordings to the state Open Records Act and delegates policymaking on retention to the Kentucky Department of Libraries and Archives. Pending 2020 HB 219 would make it a class D felony for an officer to interfere with a body camera recording with the intent to obstruct justice. There is no statewide requirement to use body cameras.	None	None

Louisiana	La. Stat. Ann. 44:3 exempts body camera footage from disclosure where the footage is found by the custodian to violate an individual's reasonable expectation of privacy. There is no general statewide mandate regarding use of body cameras.	None	None
Maine	No statute or proposal relevant to body cameras at the state level. There is a pending bill to create a working group to study body cameras (SP 198). The bill currently is in committee.	None	None

Maryland	Md. Code Pub. Safety § 3-511 required the Police Training Commission to create minimum standards for collection, retention, and disclosure of police body camera footage. Per the Body-worn Camera Policy, agencies must issue a written policy prior to implementing a body-worn camera program and it must meet or exceed the minimum standards. Pursuant to HB 739 (2020), a Law Enforcement Body Camera Task Force was created and tasked with issuing recommendations on economical storage and retention of police body camera footage by December 1, 2020. Pending 2020 HB 128 would require Maryland State Police to adopt guidelines and issue body cameras.	created minimum standards for when recordings are mandatory, prohibited, or discretionary, when consent is required for recording, and when a recording may be ended. Generally officers must begin recording at the initiation of a call for service or an encouter with a member of the public that is investigative or enforcement in nature or when any encounter becomes confrontational after the initial contact. Officers must stop recording if a victim, witness or other individual requests it; during routine administrative activities or during non-work related personal activity. Once a recording has started, the office may not stop recording until the encounter has fully concluded; the officer leaves the scene and anticipates no further involvement in the event; or when a victim, witness or other individual wishes to make a statement but refuses to be recorded or requests that the camera be turned off. See Body-worn Camera	Recommendations expected to be released by December 1, 2020.

Massachusetts	Sweeping police reform legislation (S. 2820), including provisions regarding body cameras, has been passed by the Massachusetts house and senate and currently is in conference.	The S 2820 taskforce would adopt regulations for basic statewide standards for training law enforcement officers in the use of body cameras. The taskforce would specify the types of encounters and interactions that must be recorded and what notice, if any, must be given to those being recorded. The taskforce would also determine when a body camera should be activated and when to discontinue recording.	S 2820 would require recordings to be deleted within no less than 180 days but no more than 30 months if the recording is not related to a court proceeding or criminal investigation. Recordings that are related to a court proceeding or criminal investigation would be retained for the same period of time that evidence is retained in the normal course of the court's business for a record related to a court proceeding.
Michigan	Legislation regarding disclosure and retention of body camera recordings was enacted in Michigan in 2017. The law requires law enforcement agencies that use body cameras to develop written policies regarding their use. The Michigan State Police have adopted a policy regarding body camera and in-car video recording systems (available at https://www.michigan.gov/documents/msp/OO_39_Body_Worn_Camera_and_In-Car_Video_Recording_Systems_579030_7.pdf). There is no statewide requirement to use body cameras.	use body cameras to use them for all dispatched or self-initiated police action and in all contact with citizens in performance of official duties, with limited exceptions. Officers are not required to record encounters with undercover officers or confidential informants; during routine duties that traditionally do not require enforcement action (e.g., community service events); when a citizen asks the officer to stop recording (e.g., a witness will not give a recorded statement); or when a situation develops rapidly and the officer is not able to safely turn on the camera. It was reported in June 2020 that	The body camera disclosure and retention law requires that (i) all body camera recordings be retained for not less than 30 days; (ii) body camera recordings that are the subject of an ongoing criminal or internal investigation, or ongoing criminal prosecution or civil action, be retained until the ongoing investigation or legal proceeding is completed; and (iii) body camera recordings relevant to a formal complaint against the officer or agency be retained for not less than 3 years.

Minnesota	Minnesota Statute 13.825 governs public access to body camera usage for departments that use body cameras. There is no statewide requirement to use body cameras. See https://www.mnchiefs.org/body-camera-resources.	None	Recording data that is not related to a criminal investigation must generally be retained for 90 days, unless: (a) the data documents (i) the discharge of a firearm by an officer, or (ii) use of substantial bodily harm by an officer, which in either case the data must be retained for at least one year; (b) a formal complaint is made against an officer related to the incident, in which case the data must be retained for at least one year; or (c) the subject of the data submits a written request, in which case the subject may request that the law enforcement agency retain the data for up to 180 days. A government entity may retain a recording for as long as reasonably necessary, if related to the incident and for possible evidentiary use.

Mississippi	Several bills have been proposed in state legislature but none have passed.	No state-wide body camera legislation has been enacted in Mississippi.	None

Missouri	Proposed HB 2645 would establish a Task Force on Body-Worn Cameras to examine the use of body cameras by law enforcement in the state, and require delivery of a report on the use of body cameras to the Governor and General Assembly by December 31, 2020. The bill is pending before the legislature.	State law does not require police officers to collect body camera videos.	Stat. §610.100), body camera and dashcam recordings are considered closed records until an investigation becomes inactive. A person in the video, their parent/guardian (if person is a minor), their first degree family member (if person is dead or incompetent), their attorney, or their insurer may obtain a unedited copy of a recording that is considered "closed" if: (1) the parties submit a written request or (2) the recording is for the purposes of investigation of any civil claim or defense. Any person may bring a claim in the circuit court having jurisdiction to order disclosure of a closed recording, but the court must consider a lengthy factor test. Any person who requests and receives a recording recorded in a nonpublic location is prohibited from disclosing the recording, including any description of any part of the recording, without noticing each officer whose image or sound is in the recording and allowing them no less than 10 days to file and serve an
Montana	No bills proposed or enacted.	None	None

Nebraska	Any law enforcement agency that uses body cameras must adopt a written policy in conformance with minimum standards set by statute. The statute also required the Nebraska Commission on Law Enforcement and Criminal Justice to publish a model policy, which is available at https://ncc.nebraska.gov/forms. Neb. Rev. Stat. Ann. § 81-1452 - 1454. There is no statewide requirement to use body cameras.	Under relevant portions of the model policy, officers may not use a body camera to knowingly record: (1) encounters with undercover officers or confidential informants (when recording could create a dangerous situation or diminish investigative success); (2) in places where a person would intend to be undressed and have a reasonable expectation of privacy (e.g., locker room), unless the recording is part of an ongoing investigation; or (3) in any court, administrative, or mental health proceedings, or any activity within a courtroom or courthouse, unless part	Per the statute, body camera recordings must be retained for a minimum of 90 days from the date of recording. Recordings involved in a criminal or civil court proceeding must be retained until a final judgment or determination is made. Recordings that are part of a criminal investigation that have not resulted in an arrest or prosecution must be retained until the investigation is closed or suspended. Neb. Rev. Stat. Ann. § 81-1454. Under the model policy, personnel may not alter or erase any body camera recordings without prior written consent from a

Nevada	Law enforcement agencies require uniformed officers who routinely interact with the public to wear body cameras while on duty. Nev. Rev. Stat. Ann. § 289.830.	Under the statute's minimum standard, body cameras must be activated whenever an officer responds to a call for service or at the start of any other enforcement or investigative encounter between a uniformed officer and member of the public. The officer must not deactivate the body camera until the conclusion of the encounter. Officers are prohibited from recording general activities and must "protect the privacy" of persons in a private residence, seeking to anonymously report a crime, or claiming to the be victim of a crime. Nev. Rev. Stat. Ann. § 289.830(1)(a)-(d).	Under the statute's minimum standard, body camera video recordings must be retained for no less than 15 days. Nev. Rev. Stat. Ann. § 289.830(1)(e).

New Hampshire	Any law enforcement agency that uses body cameras must meet the minimum statutory standards set forth in N.H. Rev. Stat. Ann. § 105-D:2. Use of body cameras is not mandatory.	while an officer is in uniform. An officer must activate the body camera and start recording upon arrival on scene of a call for service, when engaged in any law enforcement-related encounter or activity or, if required by local policy, upon activation of lights and siren. Officers must not record: (1) entire duties or patrols, "indiscriminately"; (2) communications with other police personnel, unless such communications are "incidental" to a permissible recording; (3) known undercover officers or confidential informants; (4) intimate searches (e.g., strip search); (5) interviews with a crime victim, unless express consent is obtained prior to recording; (6) interactions with a person seeking to report a crime anonymously, unless given consent; (7) while on the grounds of any school, unless responding to an imminent threat to life or health or a call for service; (8) when on break or otherwise engaged in personal	Body camera recordings must be retained for at least 30 days and at most 180 days, from the date the images were recorded. However, recordings must be retained for at least 3 years if the officer whose BWC made the recording, or a related agent, captures images involving: (1) action by an officer that involves use of deadly force or restraint; (2) discharge of a firearm; (3) death or serious bodily injury; or (4) an encounter about which a complaint has been filed with the police department within 30 days after the encounter. Recordings must also be retained for at least 3 years if it is retained by the law enforcement agency as evidence in a civil case, criminal case, internal investigation, or employee disciplinary investigation. N.H. Rev. Stat. Ann. § 105-D:2.

New Jersey	Legislation that would require all police officers in New Jersey to use body cameras and regulate their use has been passed by both houses of the state legislature as of August 27, 2020. See New Jersey Assembly Bill 4312.	law enforcement officers are authorized to wear body cameras in the state. The body camera must be placed to maximize ability to capture video. The body camera functions must be activated whenever an officer is responding to a call to service or at the initiation of an encounter with a member of public. The body camera must remain activated until the encounter has concluded and the officer has left the scene. If there is an immediate threat to the officer's life or safety, which makes activating the body camera impossible or dangerous, the officer must activate the body camera at the "first reasonable opportunity." The officer must inform the subject that they are being recorded as close to the beginning of the encounter as possible. The officer must ask whether the subject wants the officer to stop recording, and must immediately stop recording based on the response when: (1) entering a private residence without a warrant	Under the proposed legislation, body camera footage must be retained by the law enforcement agency for 6 months from the date it was recorded. However, body camera recordings must be retained for at least 3 years if the recording contains use of force, events preceding and including an arrest for a crime or attempted crime, or an encounter about which a complaint has been filed by the subject of the recording. Body camera recordings must also be retained for at least 3 years if a longer retention period is requested by: (1) an officer whose body camera recorded the footage and the officer reasonably asserts that it has evidentiary value; (2) an officer who is the subject of the video reasonable asserts that it has evidentiary value; (3) any member of the public who is the subject of the recording; (4) any parent/guardian of a minor who is the subject of the recording; or (5) a deceased subject's next of kin or designee.

New Mexico	In July 2020, police reform legislation was enacted that requires police officers to wear body cameras. Each law enforcement agency must adopt a policy governing body cameras that must meet minimum standards under the statute. See N.M.S.A. 1978 § 29-1-18 (effective September 20, 2020).	Law enforcement officers are required to wear and activate body cameras while on duty. Policies must require activation of a camera whenever a police officer is responding to a call for service or at the initiation of any other law enforcement or investigative encounter between a police officer and a member of the public. Policies must prohibit deactivation of the camera before the conclusion of an encounter. Policies must include disciplinary procedures for officers who fail to use cameras, who manipulate footage or prematurely destroy footage.	Any video recorded by a body camera shall be retained by the law enforcement agency for a minimum of 120 days.

New York	S.B. S8493, requiring body camera usage by state police in New York, was passed and has been codified as N.Y. Exec. § 234 (signed June 6, 2020; effective April 1, 2021).	§ 234 creates a New York state police body camera program within the division of state police, which shall provide body cameras to be worn by officers at all times while on patrol. Exempts the following situations from the recording requirement, at the discretion of the officer: (1) sensitive encounters (as described in the section) and (2) request from member of public to turn off the camera (officer not required to turn off).	No length of time specified in § 234. Requires division of state police to preserve recordings, create a secure record of recordings, ensure that officers have sufficient storage capacity on their devices, ensure that officers have access to cameras, and perform upkeep on equipment. Proposed legislation S.B. 8736 (July 13, 2020; currently in committee) would specify that footage preservation should last three years from the date of the recording, and that if the recording is evidence in "any investigation of any nature[,]" it shall be preserved "for longer than three years[.]"

North Carolina	Session Law 2016-88 (N.C. Gen. Stat. Ann. § 132-1.4A) governs public access to body camera footage. Body cameras are not required in North Carolina.	§ 132-1.4A requires agencies that use body cameras to adopt a policy regarding the use of body cameras but does not specify minimum standards that must be met.	§ 132-1.4A provides that any recording subject to the statute shall be retained for at least the period of time required by the applicable records retention and disposition schedule developed by the Department of Natural and Cultural Resources, Division of Archives and Records.

North Dakota	N.D. Cent. Code § 44-04-18.7 governs, in part, public access to body camera footage. Body cameras are not required in North Dakota.	None	None

Ohio	Ohio Stat. § 149.43 governs public access to police body camera footage. Body cameras are not required in Ohio.	HB407 (proposed in the 2015-2016 legislative session; currently in committee) would require each law enforcement agency that uses body cameras to enact a publicly available policy that addresses activities during which operation of the body camera is mandatory, optional, or prohibited, as well as standard procedures for obtaining consent to operate the body camera when entering private residences and exceptions to the consent requirement for circumstances in which obtaining consent would be impracticable.	HB585 (proposed in the 2015-2016 legislative session; currently in committee) would require a local records commission to maintain records from a body camera for a minimum of one year, unless the law enforcement agency in question is subject to a records retention schedule that establishes a longer period of time. HB407 would require each law enforcement agency that uses body cameras to enact a publicly available policy that addresses record retention requirements, including the length of time body camera footage is to be retained and the method of storing that footage. § 149.43 requires a public office to make a copy of its records retention schedule available to the public.

Oklahoma	Oklahoma's public records law has included a separate, highly detailed section governing police body-worn camera and dashcam footage. These records generally are considered public records, subject to certain exceptions. Okla. Stat. tit. 51, § 24a.1 et seq., as amended by HB 1037. Oklahoma law also requires audio and video recordings to be retained for time periods specified in the statute. Okla. Stat. tit. 19, § 517.1	Body cameras are not required, but if a law enforcement agency does collect video, the following categories are subject to public inspection: (1) use of force by officer; (2) pursuits; (3) traffic stops; (4) arrests; (5) investigative detentions; (6) any act that deprives someone of liberty; (7) any act that causes officer to be investigated; (8) recordings "in the public interest"; (9) contextual events before any of the above.	§ 517.1 requires recordings from body cameras to be kept for a minimum of 180 days from the date of the incident. They are to be kept for a minimum of one year if they relate to or directly depict: (1) an officer-involved shooting; (2) use of lethal force; (3) incidents resulting in medical treatment; (4) incidents identified in a written application for preservation of the recording of the incident if the request is received prior to the 180-day preservation period; an (5) incidents identified for presevation by the DA.
Oregon	Oregon's public records law conditionally exempts body camera footage from public disclosure. Or. Rev. Stat. § 192.501(40). While body cameras are not required in Oregon, agencies that use them are required to adopt policies that meet certain minimum standards. Or. Rev. Stat. § 133.741.	recording from commencement of probable cause or reasonable suspicion and the time when the officer begins to make contact with the suspect, until completion of officer's participation in the contact. Notwithstanding this requirement, a law enforcement agency may, in its own policies and procedures, provide for exceptions to the recording	Footage must be retained for at least 180 days but no more than 30 months for recordings unrelated to a court proceeding or ongoing investigation.

Pennsylvania	Body cameras are not mandatory in Pennsylvania. The state has a specific statutory provision governing public access to body and dash camera recordings. 42 Pa. Stat. and Cons. Stat. Ann. § 67A03, § 67A04, § 67A05	67A07 requires a law enforcement agency that makes a recording to establish public written policies for when the devices shall be in operation. Policies created by law enforcement agencies must include a statement that a violation of the policies will subject the violator to disciplinary action. The statute also provides that the PA Commission on Crime and Delinquency is authorized to condition funding or grants related to body cameras on policies compliant with the Commission's recommendations. The PCCD's Policy Recommendations are available at https://www.pccd.pa.gov/criminaljustice/advisory_boards/Documents/BWC%20Policy%20Recommendations%20Commission%20Approved.pdf. The Policy Recommendations require officers to record at the initiation of an encouter that is investigative or enforcement in nature or when any encounter becomes confrontational.	No explicit requirement to preserve. § 67A07 requires a law enforcement agency that makes a recording to establish public written policies for how and for how long recordings shall be preserved. § 67A03 requires preservation of unaltered recording in the event that the recording has been requested no less than the amount of time needed to respond, or the time necessary for pending or allowable judicial review of the request. § 5706 requires the state police to annually establish and publish standards in the Pennsylvania Bulletin for equipment standards for the devices and for secure storage of recordings. Additionally, the Policy Recommendations include provisions governing storage and retention of footage, but do not specify time periods.

Rhode Island	Body cameras are not required in Rhode Island. Proposed H.B. 5926, which would have introduced statewide policy standards for use of body cameras by law enforcement, was introduced but stalled in committee in 2017. The bill would have governed when the camera should be activated by the officer and when its use should be discontinued. It would contain provisions governing retention and access to body camera footage, and would allow victims to obtain access to the footage. In August 2020, it was reported that at least one state representative was working on proposed legislation to require use of body cameras by all	Under Rhode Island law, all motor vehicle stops conducted by police vehicles with dashcams must be recorded barring specific exceptions outlined in the bill. Body cameras are not required in Rhode Island. Proposed H.B. 5926 would limit body camera use to uniformed on duty officers or officers operating marked vehicles, SWAT officers and others engaged in planned actions or uses of force. It did not include a mandate that all such officers use body cameras.	Non-evidentiary recordings are maintained for sixty days, and evidentiary recordings are maintained at least until resolution of the applicable investigation or court proceeding, and thereafter in accordance with retention periods for complaint report files. See https://www.sos.ri.gov/assets/downloads/documents/LG6Police.pdf. Proposed H.B. 5926 would require retention for six months from the date it was recorded, then permanently deleted.Footage would be retained for at least 3 years if it captures any use of force, events leading up to and including an arrest for a felony offense or events that constitute a felony offense, or an

South Carolina	In 2015, South Carolina adopted a statewide police body camera law, which is now codified at S.C. Code Ann. § 23-1-240. The legislation included funding to purchase cameras, and requires state and local law enforcement agencies to develop policies and procedures regarding use of body cameras. The program has not been fully funded yet, and many agencies still are not using cameras. See https://www.postandcourier.com/news/despite-celebrated-2015-law-body-cameras-for-sc-law-enforcement-lack-state-funding/article_0741c19e-9aa8-11ea-ad54-33fb0ac91f15.html.	Requires police to use bodycams, with collection policies set forth in the agency's body camera policies and procedures, which must be approved by the state Law Enforcement Training Council. The law provides that a state or local law enforcement agency is not required to implement the use of body cameras pursuant to this section until the agency has received full funding from the Council. As August 1, 2020, the full-funding for the program still has not been provided, so the program is not yet in place according to news reports.	The Law Enforcement Training Council requires recordings that are non-investigative, non-arrest and not part of any internal investigation to be retained for not less than 14 days. Other recordings must follow applicable rules regarding retention for that type of record.
South Dakota	SB 100, introduced in January 2020, would have created regulations on body camera deactivation, video collection, retention, and investigation. Senators amended the bill, eliminating all of these provisions and creating a task force to investigate the use of body cameras instead. This bill was defeated by the Senate State Affairs Committee.	None - body cameras are not required	None

Tennessee	Three statewide bills have been introduced (HB0413/SB 0824; HB 1475/SB 1321; SB 2941/HB 2936), but they all have been either deferred or have stalled.	Proposed SB 2941/HB 2936 would have required all police officers to wear and activate their body cameras any time they are interacting with the public. If an officer fails to activate or tampers with body-worn or dash camera footage or operation, the bill would create a rebuttable presumption in investigations and legal proceedings that the missing footage would have reflected misconduct by the officer.	None

Texas	In 2015, Texas passed legislation providing grant funding for body cameras, subject to conditions. See Texas Occupations Code, Chapter 1701, Subchapter N. Proposed HB 3757 (stalled in committee since 2019) would remove the requirement that local body cam policies allow a police officer to view the body cam recording of an incident before making a statement.	Requires bodycams, if worn, to be actived only for a "law enforcement purpose"; Requires officers to explain the reason if the camera is de-activated during a call for assistance, but officers may freely de-activate for a "non-confrontational" encounter; local jurisdictions must develop additional policies consistent with legislation. (TX Occupations Code Sec. 1701.657). The Texas Commission on Law Enforcement has published two sample policies (see https://www.tcole.texas.gov/content/body-worn-camera-policies).	Minimum 90 days (TX Occupations Code Sec. 1701.655(b)(2)); if recorded event depicts the use of deadly force or gives rise to criminal or administrative investigation, the recording must be kept until resolution of proceeding. (Sec. 1701.660(a)). A person depicted in such a recording (or their authorized representative) may view the recording if the law enforcement agency determines that this would further a law enforcement purpose. (Sec. 1701.660(a-1)).

Utah	Utah law mandates that all law enforcement agencies using body cameras adopt a written policy with certain minimum requirements. Proposed SB 210 would allow for adverse inference jury instruction against an officer who deactivated their body camera without a documented a reason for doing so, if the defendant shows that the officer acted intentionally or with reckless disregard, and the officer's failure to follow regulations is reasonably likely to affect the outcome of the defendant's trial. Proposed SB 160 would have removed the provision that allowed officers to deactivate their body cameras when speaking to another officer or a supervisor, but the bill did not pass.	Officers must activate body worn cameras prior to any law enforcement encounter, or as soon as is reasonably possible (Utah Code 77-7a-104(4))/ The recording must continue in an uninterrupted manner until after the conclusion of the matter, or until the officer's direct participation in the law enforcement encounter is over (Utah Code 77-7a-104(5); 77-7a-104(8)). An officer can turn their body camera off in the middle of a law enforcement encounter while consulting with a supervisor or another officer, or if the person being recorded requests it (Utah Code 77-7a-104(8)).	Recordings must be retained for an unspecified period "in accordance with applicable federal, state, and local laws." (Utah Code 77-7a-107(1)) A previous proposal, H.B. 386, would have provided further guidance, mandating that general recordings be retained for at least 30 days but not longer than 180 days, but it did not pass.

Vermont	Vermont has passed a staewide body camera law which, among other things, required its Law Enforcement Advisory Board (LEAB) to propose a model state policy. SB 219, signed into law in June 2020, requires police departments to equip all officers with body cameras. (The mandate will be added as Sec. 7. 20 V.S.A. § 1818).	Policy (available at https://vcjtc.vermont.gov/) requires police officers to activate body worn cameras in the following situations: a. All calls for service in which citizen contact is made; b. All traffic stops; c. All citizen transports (excluding ride-alongs); d. All investigatory stops; e. All foot pursuits; f. When arriving at law enforcement events and/or citizen contacts initiated by other Officers; g. Other incidents the officer reasonably believes should be recorded for law enforcement purposes, i.e., any contact with the public that becomes adversarial after initial contact. The Model code states that recordings should include (but are not limited to): a. Arrests of any persons; b. Searches of any kind; c. Seizure of any evidence; d. Requests for consent to search; e. Miranda warnings and response from in custody suspect; f. Statements made by citizens and defendants; g. K-9 searches of vehicles; h. Issuance of written violations. The Model Policy	There is not a state-wide law. However, the LEAB Model Code states, "An agency may delete [body worn camera] recordings only if it has a record retention schedule approved by the State Archivist or the deletion is already authorized by law;" and "If a recording is used in a disciplinary action against an employee, then the recording shall be held for a minimum of three years from the completion of the disciplinary action, or a length of time designated in bargaining contract." Releasing video without the specific authorization of the agency head is prohibited.

Virginia	In June 2020, the legislature passed H 246 (enacted at §9.1-102 and §15.2-1723.1), which requires law enforcement agencies to create public policies for regulating use of body cameras based on the Virginia Department of Criminal Justice Services's Model Policy on Body-Worn Cameras. All policies must go through public review and comment before being enacted. The law does not require local departments to adopt any paticular language from the Model Policy or to establish a policy on specific categories like collection or retention. Body cameras are not required in Virginia.	Justice Services's current Model Policy (written in 2015 and available at https://www.dcjs.virginia.gov/law-enforcement/model-policies-virginia-law-enforcement-agencies) states that officers should activate their body cameras "during each law enforcement-public encounter related to a call for service, law enforcement action, subject stop, traffic stop, and/or police/deputy services provided that such activation does not interfere with officer/deputy safety or the safety of others." Officers should also activate cameras "for tactical activities such as, searches of buildings and vehicles, searches for suspects and missing persons, seizing and processing evidence, and building checks when security alarms are triggered." The Model Policy also states that officers should do their best to make sure the cameras are actually recording the incident instead of non-evidentiary footage like the sky or grass. If the officer failed to collect video, they	Video retention is handled by the Library of Virginia. If a record is deemed to have no evidentiary value, it is deleted after 30 days. If it does have evidentiary value, it will be assigned to another retainment schedule depending on whether the case was resolved and the seriousness of the video content. There is currently a working group that is determining whether this policy should be changed. The working group was extended until October of 2020. (https://www.vaco.org/body-worn-camera-workgroup-to-be-extended/)

Washington	Washington law requires any law enforcement agency using body cameras to establish policies governing their use.	Law enforcement agency policies must include (1) when body cameras are to be activated and deactivated, (2) how law enforcement officers respond to incidents where the subject is unwilling to communicate due to the recording, (3) how law enforcement officers document deactivation decisions, (4) how law enforcement officers inform members of the public of recording, (5) training regarding body cameras, and (6) security of body camera records. (RCW 10.109.010)	Law enforcement agencies must retain recordings for at least 60 days.
West Virginia	None	None	None

Wisconsin	SB 50, passed in February 2020, added a section to the Wisconsin Code on Body Cameras (W.S.A. § 165.87). In 2017, AB 557 was introduced, but failed to pass. It would have created more detailed guidelines for collection of video than SB 50, as well as similar retention mandates.	Wisconsin law requires law enforcement agencies to create and publish online their rules for the use, maintenance and storage of body cameras and resulting data, as well as any limitations on which officers can wear body cameras and which situations/people they can record with body cameras. The statute does not provide any guidelines for activation, deactivation, or possible limitations.	retained for at least 120 days after the date of recording. If the footage recorded any of the following, the footage must be retained until the final disposition of any investigation or case: 1) an encounter that resulted in the death of or physical injurt to an individual; 2) an encounter that resulted in custodial arrest; 3) A search during an authorized temporary questioning pursuant to W.S.A. § 968.25 (when officer believes person or another is at risk of physical injury and conducts a search of that person for weapons); 4) an encounter in which the officer uses force, unless the only force was shooting an injured wild animal. If law enforcement, prosecutors, defendant, a court, or a board of police/fire commissioners decide that the footage has evidentiary value, it can be retained beyond 120 days. Footage used in a civil, criminal, or administrative proceeding cannot be deleted unless a court or hearing examiner determines it is okay to do

Wyoming	None	None	None
New York, NY	Pursuant to Patrol Guide, Procedure No: 212-123, effective as of August 3, 2020, activation of body worn cameras for all uniformed members of the NYC Police Department is mandatory during certain police actions.	Officers must record certain events, including: all uses of force, all arrests and summonses, all interactions with people suspected of criminal activity, all searches of persons and property, any call to a crime in progress, some investigative actions, and any interaction with emotionally disturbed people. Officers may not record certain sensitive encounters, such as speaking with a confidential informant, inverviewing a sex crime victim, or conducting a strip search.	The NYPD will retain all video recordings for 18 months. Video of arrests and other significant incidents will be retained longer.

Los Angeles, CA	The Los Angeles Police Commission approved the Los Angeles Police Department's policy on April 28, 2015, requiring all officers to use body cameras (available at http://lapdonline.org/lapd_manual/volume_3.htm#579.15).	Officers must turn on body cameras when engaging in "investigative or enforcement" activities involving the public (including pulling over drivers, making arrests, engaging in foot pursuits, transporting suspects, and interviewing witnesses and victims)	Los Angeles follows California law

Chicago, IL	Per Special Order S03-14 (effective since April 30, 2018), all sworn members and their immediate supervisors assigned to a Bureau of Patrol district normally assigned to field duties and any other member at the discretion of the district commander will be assigned and utilize a body worn camera.	Recordings of all law enforcement related activities are required to be made. Entire incidents, if possible, should be recorded. Law enforcement related activities include, but are not limited to, the following: investigatory stops, traffis stops, pursuits, arrests, use of force incidents, interrogations, searches, high-risk situations, any adversarial encounter with the public, and any other instance when enforcing the law.	All digitally recorded data created by the body camera will be retained in accordance with the Department's Forms Retention Schedule (CPD-11.717) and the Illinois Officer-Worn Body Camera Act (50 ILCS 706/10). Recordings made on body worn cameras must be retained for a period of 90 days unless any incident captured on the recording has been flagged. Under no circumstance will any recording of a flagged incident be altered or destroyed prior to two years after the recording was flagged.

Dallas, TX	Dallas instituted a body camera policy in 2015 with General Order 332.00.	Officers are instructed under Dallas policy to record all contacts that are conducted within the scope of official law enforcement activity, including (but not limited to): (1) all enforcement stops, (2) arrival when on any call for service, (3) pursuits, both vehicular and non-vehicular, (4) arriving to all crime scenes, (5) during execution of warrant or "knock and talk" operations, (6) during consensual searches, (7) during any planned or anticipated arrest, (8) during the inventorying of seized property, (8) when conducting field sobriety tests, and (9) whenever the officer's training and experience causes him or her to believe the incident needs to be recorded to enhance reports, preserve evidence, and aid in subsequent court testimony.	Recordings will be kept for at least 90 days.

Houston, TX	The Houston Police Department issued General Order 400-28 on March 23, 2016 (updated Aug. 16, 2017) establishing guidelines for the use of body worn cameras.	Officers are required to activate body cameras prior to conducting various activities, including (a) responding to a call for service (b) a traffic or pedestrian stop, or responding to an "on view" incident (c) executing a search or arrest warrant (d) transporting a prisoner or passenger (e) any hostile or contentious interaction. Officers may also record "casual interactions" with members of the public or interactions with confidential sources. Camera must be muted before speaking to a DA or a confidential informant. Officers may turn off their recording devices when responding to traumatic incidents if required to get a statement from a victim. Cameras must be turned off in bathrooms and showers unless the officer is responding to criminal activity.	For Class B misdemeanors and above, footage is retained for 10 years. For Class C misdemeanors and traffic stops it is retained 2 years. All other footage is retained 180 days.

Philadelphia, PA	In April 2015, Philadelphia passed directive 4.21, Body Worn Cameras (https://www.phillypolice.com/assets/directives/D4.21BodyWornCameras-rev1.pdf) governing use of body cameras by Philadelphia police officers.	Authorized body-worn cameras shall be activated when responding to all calls for service and during all law enforcement related encounters and activities involving the general public, including (1) responding to crimes in progress, (2) engaging in vehicular or non-vehicular pursuit, (3) conducting any vehicular or pedestrian investigation, (4) initiating sight arrests or citations, (5) taking statements or information from a victim or witness (6) handling disturbances or crisis-related incidents, (7) handling protests or demonstrations, and (8) whenever confronted by hostile members of the public (9) any situation which the officer believes should be recorded (10) conducting a suspect confrontation (i.e., show-up identification of a suspect) with suspect recorded if reasonable per	The retention period of body camera footage shall be no less than 75 days, unless the digital recording is required for evidentiary purposes or further review. If the video is marked as evidence, the retention period will be the same as required for the appropriate investigative file.

Miami, FL	In April 2016, the Miami-Dade Police Department ("MDPD") established body camera guidelines (https://www.miamidade.gov/police/library/bwc-policy.pdf). Body cameras must be worn by uniformed sergeants and officers during their tour of duty. Certain specialized officers are also required to wear a body camera.	place the body camera in record mode as soon as is practicable when involved in an encounter. The policy requires recording for all traffic stops, citizen contacts related to law enforcement, impaired driver investigations, vehicle/foot pursuits, calls for service, prison/citizen transports, and statements made by suspects, searches, arrest situations, and other situations. Once the BWC is on, the officer must continue to record until the event has concluded. Officers are not required to inform an individual or obtain their consent about the recording. Officers must not record where an individual has a reasonable expectation of privacy and can honor a victim's request to stop recording, unless the recording is related to an arrest or search. Officers can also turn off the body camera for intelligence gathering when the individual will not provide information on video. Officers must record until an event concludes and turn over the body camera to an	Body camera data is property of the MDPD and considered an official public record of the department. Non-evidentiary data must be retained for at least 90 days, or as long as needed for administrative investigations or litigation. Data must be retained in compliance with the retention schedules published by the Department of State, Division of Library and Information Services.

Atlanta, GA	Per APD.SOP.3133, effective May 19, 2020, all sworn employees issued a body worn camera shall use it during the course of regular duty, approved overtime, and any other situations which are deemed necessary by the Atlanta Police Department.	Body cameras must be used to observe, photograph, videotape, or record activities that occur in places where there is a reasonable expectation of privacy if they occur in the presence of the law enforcement officer.	Recorded data shall remain stored on a secured storage network. Minimum retention guidelines require the following years for the listed categories: (1) 5 years for general citizen contact, investigations, arrests, use of force, sUAS videos, investigations, incident report, accidental - training, supervisor request, CEW Firing Log - test, and traffic enforcement; and (2) indefinitely for homicide-sex crimes, serious injury / fatality motor vehicle collisions, restricted, pending review, and ID technician.

Boston, MA	Per the BPD's Body Worn Camera Policy (BPD Rule 405), Boston police officers must wear and activate body worn cameras while performing any patrol function, as determined by the Police Commissioner (available at https://static1.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/5db05d41e4661c456ab6b870/1571839297911/SO19-015.pdf).	Officers shall record all contact with civilians in the following occurences: vehicle stops, person stops, dispatched calls for service, initial responses by patrol officers, transport of prisoners, pat frisks and searches of persons incident to arrest, incidents of emergency driving, incidents of pursuit driving, crowd control incidents where officer reasonably believes may result in unlawful activity, any adversarial contact (including use of force). If an officer fails to activate the body worn camera, officer must document the failure in the incident report.	Recordings are kept in a cloud-based storage platform managed by the Video Evidence Unit according to the following schedule: (1) indefinite retention for death investigations, Code 303-lethal / less lethal, sexual assualt / abused person; (2) 7 years for use of force, arrest, and felony-no arrest; (3) 3 years for misdemeanor-no arrest, investigate person or premise; (4) 90 days for significant event - public safety, traffic stop, encounter/fio, sick assist, no report-dispatch/onsite; (5) 30 days for test/taining.

San Francisco, CA	The City began equipping officers with body cameras as early as 2013 and adopted a Body Worn Camera Policy in 2016 (available at https://www.sanfranciscopolice.org/sites/default/files/2018-11/COMMISSION-DGO-10.11-BODYWORNCAMERAS.pdf).	Policy requires activation of body worn cameras during (1) detentions and arrests, (2) consensual encounters with the police, (3) 5150 evaluations, (4) traffic and pedestrian stops, (5) vehicular and non-vehicular pursuits, (6) use of force, (7) service of warrants, (8) searches , (9) transportation of arrestees or detainees, (10) during hostile citizen encounters, (11) other circumstances where recording would be valuable, and (12) only in situations that serve a law enforcement purpose. The policy indicates that cameras should not be activated when encountering (1) sexual assault and child abuse victims, (2) situations that could compromise the identity of confidential informants or undercover operatives, and (3) strip searches, unless the officer can articulate an exigent circumstance requiring deviating from this rule.	The policy requires the Department to maintain all recordings for at least 60 days. The Department was required to retain the footage for at least two years, however, if the recording (1) showed an officer's use of force, (2) led to the detention or arrest of an individual, or (3) was relevant to a formal or informal complaint.

Phoenix, AZ	The Phoenix Police Department initially deployed body cameras in 2013 as part of a U.S. Department of Justice pilot program. Since then, deployment has been very slow and largely nonexistent. Advocates have called on the Department to speed up deployment. A 2017 Body-Worn Video Technology policy is available online (https://www.bwcscorecard.org/static/policies/2017-05%20Phoenix%20BWC%20Policy.pdf) but it is not clear if this policy remains in effect.	Per the 2017 policy, users must wear the body camera anytime they may become involved in any enforcement activity while on duty in patrol or workingoff-duty, extra-duty, or any other uniformed assignment. They must activate the camera before engaging in any enforcement contact. The requirement is not intended to be punitive in those situations where a reasonable justification can be made for non-activation. May interrupt or deactivate recording in specific situations.	Per the 2017 policy, retention by the Police Department is required for at least 190 days following the date of the recording. Retention period may be longer in the event the video is the subject of a litigation hold, a criminal case, or part of other discovery.
Detroit, MI	Following a 2015 pilot program, in May 2016 the Detroit City Council approved a $5.2 million contract designed to issue 1,500 body and dash cameras throughout the department. Detroit has adopted a Body Worn Cameras Policy (available at https://detroitmi.gov/sites/detroitmi.localhost/files/2018-03/BODY%20WORN%20CAMERAS.pdf).	Directive #304.6 (2017) requires all Detroit Police Department members who have citizen interactions in the daily performance of their duty to wear a body camera. Body cameras must be activated prior to initiating, or as soon as is practical after initiating, all contacts with citizens in the performance of the officer's official duties. The camera must remain on until the event is completed.	Directive #304.6 requires all media captured by a body camera to be securely stored and maintained by a the department or a third-party vendor for a period of 90 days, but may be retained for longer for administrative or legal reasons.

Seattle, WA	Under Executive Order 2017-03, the Seattle Police Department has equipped all front-line police officers with body cameras. The Department's Manual has a section on in-car and body-worn video (https://www.seattle.gov/police-manual/title-16---patrol-operations/16090---in-car-and-body-worn-video). The Department maintains a helpful web page with information and resources related to use of body cameras (https://www.seattle.gov/police/about-us/body-worn-video).	[illegible] during all dispatch calls, before arriving on the scene to ensure that there is enough time to turn on the camera; traffic and Terry stops; on-view infractions and criminal activity; arrests and seizures; searches and inventories of vehicles, persons, or premises; transports (excluding ride-alongs); following or riding in abulances or medic units that are transporting persons involved in an event to a medical facility; vehicle pursuits; questioning victims, suspects, or witnesses. If an officer can't record the beginning of an event, they should start recording as soon as possible. Officers must record the event to its conlcusion (when officer has concluded their involvement in the event AND there is little likelihood that the officer will continue to have contact with persons involved in the event). Unless there is a crime in progress or another situation in which an officer can be lawfully present without a warrant, officers may not record on	[illegible] RCW 42.56.240 (which lists instances in which the footage is exempt from public inspection) and is not known to have captured a unique or unusual incident that could result in litigation or criminal prosecution will be kept for **60 days** after the recording was made. (Law Enforcement Record Retention Schedule Version 7.2, Section 8.1, LE2016-001 Rev. 1). Body camera footage not governed by RCW 42.56.240 that is not known to capture an unusual incident that would likely result in litigation or criminal prosecution will be retained for 90 days after the recording is made. (Law Enforcement Record Retention Schedule Version 7.2, Section 8.1, LE09-01-09 Rev. 4). Body camera and dashcam footage retained as part of a case must be retained until the case is over and all possible appeals have been exhausted, and then destroyed. (Law Enforcement Record Retention Schedule Version 7.2, Section 8.1, LE09-01-08 Rev. 3).

Minneapolis, MN	All Minneapolis patrol and SWAT officers are equipped with cameras (approximately 600 officers). The Minneapolis Police Department maintains a Body Worn Cameras Policy in its Policy and Procedure Manual (available at https://www.insidempd.com/wp-content/uploads/2017/07/Update-Body-Worn-Camera-Policy.pdf).	call, officers must activate their body cameras when two blocks away from the incident or when they recieve the call, whichever is later. Officers must also activate their body cameras when 1) self-initiating a call; 2) prior to taking any law enforcement action; 3) Prior to making an investigatory contact; 3) When any situation becomes adversarial; 4) Prior to assisting a citizen during in-person encounters (other than basic assistance, like giving directions); 5) when instructed to directed to activate the body camera by a supervisors. Examples of situations that would require body camera activation include: (1) traffic stops, (2) suspicious person and vehicle stops, (3) vehicular responds requiring emergency driving, (4) vehicular pursuits, (5) work-related transports, (6) searches, (7) contact involving actual or anticipated criminal activity, (8) contact involving actual or anticipated physical or verbal confrontation, (9) when	Training, startup checks, petty misdemeanor, non-evidence/general recording, and protected recordings are all nonpublic and retained for one year. Citizen complaints are nonpublic and retained for three years. Videos of arrest/evidence, Use of Force, and Police Discharge of a Firearm are retained for 7 years. Videos that show use of force that resulted in substantial bodily harm and footage that shows police discharge of a firearm are public. Videos of arrest/evidence and other Use of Force videos are nonpublic. Any video classified as a "Significant Event" is nonpublic and retained for a minimum of 7 years. (See 4-223 IV. A. 8. d. of the Minneapolis Police Department Policy & Procedure Manual for more information on what each classification category entails).

San Diego, CA	The San Diego Police Department maintains a procedure regarding body cameras (available at https://www.sandiego.gov/sites/default/files/149.pdf).	circumstances, including during (1) enforcement related contacts, (2) arrests, (3) searches (of prisoners, residential dwellings, and commercial buildings), (4) passenger transport, and (5) suspect interviews. Recording is required during suspect interviews unless the suspect declines to make a statement because of the body camera; if recording, officers must record the entire interview. Recording is discretionary during (1) victim and witness interviews (except for in domestic violence cases, in which the victim interview should be recorded by at least audio), and (2) scene documentation. Recording is prohibited during (1) non-work related activity, (2) during administrative investigations, (3) during line-ups or briefings, (4) during major crime briefings, homicide breifings, or during homicide walk-throughs, (5) during contact with confidential informants, (6) where patient privacy is at issue, and (7) during demonstrations	Department policy requires officer to enter metadata for any recorded event and then upload the video to a website that impounds the data for retention. All recordings related to any criminal proceeding, claim filed, pending litigation, or a personnel complaint, are to be preserved until the matter is resolved and/or in accordance with state law.

FOIA Exemptions	**Related Dashcam FOIA Exemptions**	**Notes**
None specific to body camera recordings. Law enforcement investigative records are generally shielded from public record requests (Al. Code § 12-21-3.1(b)).	None specific to dashcam footage. Law enforcement investigative records are generally shielded from public record requests (Al. Code § 12-21-3.1(b)).	

General FOIA exemptions (Alaska Stat. § 40.25.120).	General FOIA exemptions (Alaska Stat. § 40.25.120).	While not directly on point, the Alaska Supreme Court ruled that disciplinary records of law enforcement officers are confidential personnel records under the State Personnel Act. *Basey v. State of Alaska* , Sup. Ct. No. S-17099 (April 24, 2020). The chief of the Anchorage police department stated in June 2020 that the department supports body camera usage but that their contents would be kept confidential under state law (see https://midnightsunak.com/2020/06/09/apd-chief-we-support-body-cameras-but-investigations-of-officer-conduct-remain-confidential-under-alaska-law/).

General FOIA exemptions	General FOIA exemptions	records, but may be withheld in the interest of privacy, confidentiality or the best interests of the state (Carlson v. Pima County). Arizona Revised Statute § 38-1116 states that statements made by an oficer about his involvement in a use-of-force or accidental physical injury incident may not be the sole basis for discipline against the officer unless he/she reviewed related body-worn camera recording before making the statement. In 2015, SB1300 established a Law Enforcement Officer Body Camera Study Committee (repealed June 30, 2016). When SB1300 was introduced (before amended and passed), it sought to exclude such footage from the definition of a public record. In March 2020, the AZ Mirror surveyed and published a report on Arizona metropolitan police departments' policies on public access to body camera footage (see https://www.azmirror.com/2020/03/20/tempe-blurs-all-police-body-

A record depicting the death of a law enforcement officer is confidential and exempt from disclosure under the Arkansas public records law (Ark. Code An.. § 12-6-701). Records related to "undisclosed investigations by law enforcement agencies of suspected criminal activity" are exempt from Arkansas's public records law (Ark. Code. Ann. § 25-19-105(b)(6)).	Same as previous. Note that these are general exemptions for public records, i.e. not specific to police body camera or dashboard camera footage.	None

Video/audio recordings related to a "critical incident" may be delayed no longer than 45 days unless disclosure would interfere with an active investigation (e.g., endangering safety of a witness or confidential source). If the agency delays, it must provide a written explanation of the specific basis for the determination and the estimated date for disclosure. There is a detailed procedure for further delays in releasing video. "Critical incidents" include incidents in which a firearm is discharged by an officer or in which use of force by an officer results in death or great bodily injury. Cal. Gov't. Code § 6254. Other video/audio (i.e., not related to a critical incident) is subject to California's public records act.	Same as previous.	None

Under SB20-217, all recordings of an incident that led to a complaint aginst the police must be released to the public, unedited, within 21 days after receipt of the complaint. Video recordings involving a death must be provided upon request to a family representative at least 72 hours prior to public release. Additionally, certain footage is redacted/blurred -- e.g., juveniles, mental health crises, etc. in the interest of that person's privacy. If redacting or blurring footage is insufficient to protect the relevant privacy interest, the victim has the option to waive his/her privacy interest and have the footage released to the public.	Same as previous	None

Public Act 19-90 requires that footage depicting an incident be released to the public no later than 96 hours following the recorded incident (if the officer chooses not to review the recording) or no later than 48 hours after the officer reviews the recording -- whichever is earliest. Disallowed recordings under Conn. Gen. Stat. § 29-6d(g)(1) as well as recordings depicting deceased victims, minors, and/or victims of violent crimes are exempt under Connecticut's public records law. In the case of a minor, it can be released with consent. Conn Gen. Stat. § 29-6d(g)(2). More generally, law enforcement records may be withheld if disclosure would reveal identity of an informant, info to be used in related law enforcement action, or for certain crimes (Conn. Gen. Stat. Ann. § 1-210(3)).	Covered by general FOIA exemptions	None

Covered by general FOIA exemptions. Del. Code Ann. Tit. 29 § 10002(1)	Covered by general FOIA exemptions. Del. Code Ann. Tit. 29 § 10002(1)	None

Florida's public records law includes special provisions for body camera footage. Body camera footage that is taken in a private residence, inside a health care or social services facility or in a place that a reasonable person would expect to be private is exempt. Body camera footage must be disclosed to a person recorded by a body camera (or their personal representative), to a person not depicted in the recording if the recording depicts a place where the person lawfully lived at the time of the recording, or purusant to a court order. The statute enumerates factors that the court must consider when deciding whether to release	None specific to dashcam footage. Active criminal investigative information is exempt from record requests (Fla. Stat. § 119.071(2)(c)).	Florida law requires local agencies to include in their body camera policies provisions that permit officers to review footage at their request before writing a report or giving a statement regarding what took place (Fla. Stat. § 943.1718(2)(d)).
Police audio and video recordings made in places with a reasonable expectation of privacy are exempt (GA Code § 50-18-72). Material related to pending police investigations is also exempt.	Same as previous.	Recordings exempt if they would interfere with an investigation/proceeding, endanger someone or breach confidentiality in some way (Ga. Code Ann. § 50-18-70-77).
None	None	None

Covered by general FOIA exemptions	Covered by general FOIA exemptions	None
Body camera recordings are not subject to FOIA unless the request is from the subject of the encounter or their attorney, the footage was flagged due to the filing of a complaint, the discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm, unless a witness or victim depicted in the video had a reasonable expectation of privacy at the time and does not consent to disclosure. FOIA disclosures must be redacted to remove identification of all who are not an officer, the subject of an encounter, or directly involved in an encounter.	Covered by general FOIA exemptions	None

Recordings may be requested by the subject of the video or their representative, the owner of the premises depicted in the video or the victim of the crime depicted in the video. The agency may deny the request if it would expose a vulnerability to terrorist attack, would pose a threat to public safety, would interfere in an investigation or an individual's right to a fair trial, or would "not serve the public interest." Decisions by agencies can be appealed to state courts. Agencies must redact death or serious injury, nudity, minors under 18, victims and witnesses of	Same as previous	None
Covered by general FOIA exemptions	Covered by general FOIA exemptions	None

All FOIA exemptions for criminal investigation records apply. Criminal investigation records are not available to the public unless a court decides that disclosure (a) is in the public interest, (b) would not interfere with law enforcement action, investigation or prosecution (c) would not compromise an undercover agent or confidential informant (d) would not reveal	Same as previous	None

cannot be released if they would reveal the identity of unknown informants or would interfere with an ongoing investigation or adjudication. For body camera footage, agencies cannot release footage that shows (a) the interior of a private residence where there is a reasonable expectation of privacy without permission of the resident (b) someone at a medical facility for treatment (c) HIPAA-protected information (d) a correctional facility in a way that would compromise security (e) sexuality or nudity (f) a minor child (g) a dead body (h) witnesses, confidential informants or undercover officers (i) a domestic violence shelter or program (j) information protected by FERPA (k) FBI-designated non-public or classified Criminal Justice Informational Services data (l) the institutionalization of a mentally ill person (m) serious injury or death of	Covered by general FOIA exemptions	None

Police can refuse to disclose body camera footage if "found by the custodian to violate an individual's reasonable expectation of privacy." Determinations that the footage should not be disclosed may be challenged by filing a lawsuit. Recordings made while the officer is not acting in the scope of their official duties do not need to be disclosed if it "would violate a reasonable expectation of privacy." Requests for footage must include reasonable detail as to the date, time, location or persons involved. The custodian can deny a request for lack of specificity.	Covered by general FOIA exemptions	See 2019 Body Camera Survey, Louisiana Commission on Law Enforcement and Administration of Criminal Justice, Statistical Analysis Center (March 1, 2020, available at http://lcle.la.gov/programs/uploads/2019%20Body%20Camera%20Survey%20%20House%20Concurrent%20Resolution%20No.%2052.pdf).
Covered by general FOIA exemptions	Covered by general FOIA exemptions	None

None specific to body camera recordings. The Body-worn Camera Policy states that body cam video/audio recordings will be released as required under Maryland's Public Information Act or other governing law.	Covered by general FOIA exemptions	None

The taskforce would recommend and adopt regulations pertaining to handling requests for the release of information recorded by a body camera to the public.	Covered by general FOIA exemptions	None
The law exempts from disclosure body camera recordings that are (i) taken inside private places; (ii) the subject of a civil action in which the requesting party and public body are parties; or (iii) subject to regular FOIA restrictions. Disclosure of body camera recordings is subject to crime victim protections.	Covered by general FOIA exemptions.	None

data as private. Body camera data is considered private or non-public unless: (1) the data documents the discharge of a firearm by an officer in the course of duty; (2) the use of force of an officer results in substantial bodily harm; (3) the subject of the data requests that it be made public, so long as the officer and subject's identities are redacted in certain circumstances; or (4) data that is part of an active or inactive criminal investigation to protect the identity of an undercover officer, victim or alleged victim of a sex crime, informant, witness, 911 caller, juvenile witness, mandated reporter, or deceased person whose body was unlawfully unburied. Law enforcement agencies may redact or withhold access to portions of data that are public if the data is "clearly offensive to common sensibilities." Any person may bring an action in district court to authorize disclosure of private or nonpublic data. The court must consider whether the	Subject to general FOIA exemptions	None

Subject to general FOIA exemptions	Subject to general FOIA exemptions	The Mississippi ACLU has reviewed and summarized policies of different police departments in the state and recently published a report (available at https://www.aclu-ms.org/sites/default/files/field_documents/aclu_bodycam_ex_summary-digital.pdf).

Recordings may be ordered closed or redacted if the safety of the victim, witness, or other individual cannot be reasonably insured or if a criminal investigation is likely to be jeopardized.	Recordings may be ordered closed or redacted if the safety of the victim, witness, or other individual cannot be reasonably insured or if a criminal investigation is likely to be jeopardized.	None
Subject to general FOIA exemptions	Subject to general FOIA exemptions	None

The model policy does not include provisions relating to public access to body camera footage. Neb. Rev. Stat. § 84-712.05(5) provides that records developed or received by law enforcement may be withheld from the public if the record constitutes a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training.	Same as previous.	None

Any record made by a body camera is a public record that may be requested only on a per incident basis. If the record contains confidential information that cannot be redacted, then the record may be available for inspection only at the location where such record is held. Nev. Rev. Stat. Ann. § 289.830(2).	None	None

Body camera recordings are for law enforcement purposes only. Access to body camera data must be authorized by the head of the law enforcement agency. Recordings must not be divulged or used by a law enforcement agency for any commercial or other non-law enforcement purpose. N.H. Rev. Stat. Ann. § 105-D:2.	None	None

Under the proposed legislation, the following body camera records would be exempt from public disclosure: (1) video footage not subject to a 3-year retention period (as described earlier); (2) video footage subject to a 3-year retention period because the subject has filed a complaint about the encounter and requests that the footage not be disclosed to the public; (3) video footage that an officer reasonably asserts has evidentiary value of the officer wore the body camera that recorded the footage or the officer is the subject of such footage; or (4) video footage requested to remain private by the subject, their parent or guardian (if a minor), or next of kin/designee (if deceased).	Covered by general FOIA exemptions. Ganzweig v. Township of Lakewood held that if police require the regular recording of police activities, the videos are subject to the state Open Public Records Act	None

Covered by general FOIA exemptions.	Covered by general FOIA exemptions	None

Covered by general FOIA exemptions NY Public Officers Law §§ 86; 87 Exemption exists if disclosure of the body camera video would interfere with police investigations or judicial proceedings, deprive a person of a right to a fair trial, identify a confidential source or disclose confidential information relating to a criminal investigation, or reveal non-routine criminal investigative techniques or procedures.	Covered by general FOIA exemptions NY Public Officers Law §§ 86; 87 Exemption exists if disclosure of the dashboard camera video would interfere with police investigations or judicial proceedings, deprive a person of a right to a fair trial, identify a confidential source or disclose confidential information relating to a criminal investigation, or reveal non-routine criminal investigative techniques or procedures.	§ 234 provides that the Attorney General may investigate any instances where body cameras fail to record an event pursuant to that section. Proposed legislation, S.B. 8736 (July 13, 2020) would amend this to grant investigatory power instead to the internal affairs department of the division of state police.

By statute, body camera and dash camera footage are not state public records or personnel records. Law enforcement agencies have the discretion to release footage to people who are recorded (and only those portions relevant to the request), and if the agency denies a request to disclose the footage, the recorded individual must bring a claim in court to attempt to obtain the footage. Law enforcement agencies may deny a request on confidentiality, sensitivity, safety, or investigarory / other legal grounds. There is no mechanism for law enforcement to release videos to the general public other than through a court order.	§132-1.4's definition of “recording” includes visual, audio and visual and audio captured by both body-worn cameras and dashboard cameras. Specifically, the statue defines recording as “a visual, audio, or visual and audio recording captured by a body worn camera, a dashboard camera, or any other video or audio recording device operated by or on behalf of a law enforcement agency or law enforcement agency personnel when carrying out law enforcement responsibilities." The same requirements apply to body camera and dash cam recordings.	None

N.D. Cent. Code § 44-04-18.7 (2015) provides a specific exemption (classified as an "exempt record") if footage is "taken in a private place." § 44-04-17.1 The definition of exempt record states that while an exempt record is not required to be open to the public, it may be open in the discretion of the public entity. § 44-04-18.1 exempts records relating to a public entity's internal investigation of a complaint against an entity or employee for misconduct until the investigation is complete, but no longer than 75 calendar days from the date of the complaint. This section could potentially apply to law enforcement body camera footage.	Covered by general FOIA exemptions	No statute specifically provides that body camera footage is a public record, but state statute does designate body camera footage taken in a private place as a record exempt from public records law. § 44-04-18 requires public entities to provide a copy of the public record requested. Permits a public entity to refuse to allow inspection of records or provide copies if "repeated requests for records disrupt other essential functions of the public entity[.]"

and dashboard camera footage are public records subject to Ohio's public records law, subject to limited exceptions. "Restricted portions" of body camera or dashboard camera recordings are not public records. "Restricted portions" is defined as any visual or audio portion of a body-worn camera or dashboard camera recording that shows, communicates, or discloses the following: (1) identity of image of a minor or information leading to the identitfication of a minor who is the primary subject of the recording; (2) death, severe act of violence or serious injury, unless caused by officer; (3) nudity; (4) protected health information; (5) identity of a sex crime victim; (6) information identifying a confidential informant; (7) properietary police tactical information; (8) personal conversations between officers or between officers and public unrelated to law enforcement activity; (9) the interior of a private residence or business unless the	Same as previous.	Following passage of the amendments to Ohio's public records law, the ACLU said that "For states around the country considering rules for police body cameras, they should look to a new Ohio law for how to do it right when it comes to holding police accountable." See https://www.aclu.org/blog/privacy-technology/surveillance-technologies/ohio-bucks-bad-trend-new-police-body-camera-law.

§ 24a.8 provides that body camera recordings that depict the following may be redacted: (1) death or serious injury, unless caused by officer; (2) nudity; (3) minors under the age of 16; (4) detention for mental health or drug treatment purposes; (5) personal information; (6) identity of sex crime or domestic violence victim; (7) confidential (and some other) informants; (8) identity of officer during pending investigation; (9) information that would compromise an ongoing criminal investigation, subject to certain time limits.	Dashcam recordings that depict the following are exempt from disclosure: (1) death or serious injury, unless caused by officer; (2) nudity; (3) minors under the age of 16; (4) detention for mental health or drug treatment purposes; (5) personal information; (6) identity of sex crime or domestic violence victim; (7) confidential (and some other) informants; (8) identity of officer during pending investigation.	None
unless "public interest" requires disclosure. If footage is released, all faces must be obscured. If footage is part of a sealed court record, it may not be disclosed. Requests for disclosure of footage must identify the approximate date and time of the incident and be "reasonably tailored to include that material for which a public interest requires disclosure."	Covered by general FOIA exemptions	The ACLU has published recommendations for Oregon law enforcement body camera policies (https://www.portlandoregon.gov/police/article/713622).

statute specifically governing public access to body camera footage, in lieu of providing access under Pennsylvania's general Right-to-Know law. Under the statute, public access to body camera footage is subject to a number of burdensome and restrictive provisions. For example, § 67A03 requires written request for footage by hand delivery or certified mail with proof of service to the designated open-records officer for the law enforcement agency within 60 days of when the recording was made, and the request must specify with particularity the incident or event that is the subject of the recording, including date, time and location. The request must include a statement describing the requestor's relationship to the incident. § 67A04 provides that if a law enforcement agency determines a recording contains potential evidence in criminal matter, confidential information, or victim information,	Same as previous. Prior to passage of the 2017 statute exempting police audio and video recordings from the state's Right-to-Know Law, the Pennsylvania Supreme Court had granted access to dashcam footage under the Right-to-Know Law.	Media outlets have reported that it has been extremely difficult for requestors to obtain access to footage (see, e.g., https://www.mcall.com/news/watchdog/mc-nws-pennsylvania-police-dash-camera-recordings-not-released-act-22-story.html). Proposed legislation introduced in October 2019 would permit electronic requests for recordings, change the written request requirements to only require "sufficient specificity to identify" the recording, and remove the requirement that a request provide a reason. The proposal would also create a uniform request form and change the agency response period from 30 days to 5 days.

While dashcam recordings are expressly carved out from the scope of the state's access to public records act, there is not a clear statutory mandate regarding body camera footage. Proposed H.B. 5926 would make footage a public record under the public records act (38-2-1) and permit public access to footage upon request, so long as identities of minor children are obscured and details that would violate and individual's privacy are redacted, or consent given by the individual(s) whose information would be revealed. A member of the public who is the subject of a recording or their representative / next of kin may view	Rhode Island law requires dashcam recordings of all traffic stops. By statute, dashcam recordings are not public records under the state's access to public records act. A passenger who is recorded and his/her legal counsel has the right to review the in-car recording at the police station if the passenger became the subject of the police interactions recorded, provided that the viewing does not compromise an active investigation. The law requires the police department to have a policy regarding retention of such recordings, including that they must be retained for at least ten days after final resolution of the investigation or proceeding. The policy must prohibit attempts to disengage, tamper with	None

Blanket exemption for bodycam footage: the only persons who are entitled to view footage are those depicted in video, subject to legal action connected to recorded event, or whose property has been seized or damaged in relation to the recording. An attorney for any of the above may also request and receive the footage. Other disclosure is permitted at the discretion of the South Carolina Law Enforcement Division. Legislation introduced in January 2020 (HB 4695) would amend this section to provide that those who are entitled to request the footage may release it to a third party with no legal restrictions, and that an attorney representing an elegible	Covered by general FOIA exemptions	The South Carolina Law Enforcement Training Council's Body-Worn Camera Guidelines can be found here: https://www.masc.sc/SiteCollectionDocuments/Public%20Safety/BWC_guidelines.pdf.
Covered by general FOIA exemptions	Covered by general FOIA exemptions	None

Proposed SB 2941/HB 2936 would require police body camera video and audio to released to the public, unedited, within 14 days after the incident. § 10-7-504 makes body camera footage confidential and not subject to public inspection when it features a) minors, when taken within a school that serves any grades from kindergarten through grade twelve (K-12); b) The interior of a facility licensed under title 33 or title 68; and c) The interior of a private residence that is not being investigated as a crime scene.	Covered by general FOIA exemptions. SB 2941 would make dashcam footage available to the public within 14 days after the incident.	None

Footage related to criminal or administrative investigation is exempt from public view until close of proceedings (may be released if agency believes release furthers law enforcement purpose); any recording made in "private space" is also exempt (Sec. 1701.661(f)).	Same as previous	Sec. 1701.655 (b)(5) of the Texas Occupations Code requires that officers be allowed to review body camera footage of an incident before making a statement on that incident. The Texas Criminal Justice Coalition has proposed suggestions for improving the state's laws governing body cameras (see https://www.texascjc.org/system/files/publications/Body_Camera_Policy_Recommendations_August_2106.pdf).

determining whether recordings are considered private records under Utah's FOIA law, a governmental entity or court must weigh personal privacy interests and public interests served by disclosure. 63G-2-302**.** The Utah Code also states that body camera video taken inside a home or residence is considered private unless it shows the comission of a crime, records an encounter between an officer and a person that results in death or bodily injury, includes an encounter in which an officer fires a weapon, depicts an encounter that is the subject of a complaint against an officer or a law enforcement agency, or an authorized representative of the person featured in the video has requested the video be reclassified as public. Utah Code 63G-2-305 considers body camera video and audio taken inside a hospital or health care facility to be a private records, subject to the same exceptions listed above, in 63G-2-302.	Covered by general FOIA exemptions	None

All body camera recordings are subject to Vermont's open record request laws. 1 V.S.A. § 317. Notably, the open records laws explicitly state that "records relating to management and direction of a law enforcement agency; records reflecting the initial arrest of a person, including any ticket, citation, or complaint issued for a traffic violation, ... and records reflecting the charge of a person shall be public." This should apply to body camera recordings. Recordings that, if released, would interfere with investigation or enforcement, or would harm someone's right to a fair trial, are not considered public. When Vermont's code contains similar terms to 5 U.S.C. § 552(b)(7) (Freedom of Information Act), the courts should follow the U.S. Courts' interpretations of those terms.	Covered by standard FOIA exemptions	None

Footage related to a criminal investigation is exempt from FOIA requests. The Model Policy states that all other requests should be submitted to the local chief of police/sheriff.	VA's FOIA has an exemption for records used in criminal investigations, including dashcam videos. They are not subject to the Act, but may be disclosed at the discretion of the records custodian.	None

Body camera footage is exempt if disclosing it would violate an individual's right to privacy. (Wash. Rev. Code Ann. Section 42.56.240) Footage that would fall under this exemption includes footage that shows the interior of someone's home, the inside of a hospital or medical facility, a minor, an intimate image, and a dead body. These exemptions do not apply to individuals directly involved in the recorded incident and their attorneys. Requests for body camera footage must specifically identify either (1) the name of a person involved in an incident, (2) the incident or case number, (3) the date, time, and location of the incident, or (4) identify an officer involved in the incident	RCW 46.35, while not specifically referencing police dashcams, provides that recordings made in a motor vehicle may not be accessed by a person other than the vehicle's owner, except pursuant to a court order or discovery request, and even then the information is private and confidential. RCW 9.73.090(1)(c) prohibits public access to dashcam videos if there is actual, pending litigation that arose from to events of the recording.	None
Subject to general FOIA exemptions	Subject to general FOIA exemptions	None

Body camera footage is generally subject to Wisconsin's Open Records Law. Footage that could violate a person's privacy (e.g., of a minor, of a residence where a person generally expects privacy, or a violent crime) is exempt unless the public interest in viewing the footage outweighs public policy privacy concerns. This exemption is not applicable if the subject of the video does not object to the footage being shared. (W.S.A. § 165.87)	The public can request police dashboard camera videos under Wisconsin's Open Records Law.	None

W.S. 16-4-203 says that generally, the custodian of a "peace officer recording" recording may not share police body camera footage. Footage must be shared with law enforcement or public agencies if they need it to conduct official business. The custodian may share footage with the person of interest, if the footage depicts deadly force or serious bodily injury, in response to a complaint against law enforcement personnel, or in the interest of public safety.	Same as for body cameras. The statute W.S. 16-4-203 applies to both body worn cameras and dashcams.	None
New York City follows New York State law	New York City follows New York State law	Officers must tell members of the public that they are being recorded unless the notification would compromise the safety of any person or impede an investigation. Officers do not need a person's permission to start, or to continue, recording.

In 2018, the LA Police Commission voted unanimously to direct the LAPD to release all relevant video of officer-involved shootings from body camera, dashcam, bystander or other cameras within 45 days of the shooting. At the time it was cited as the largest department in the nation to release such video (see https://www.scpr.org/news/2018/03/20/81795/lapd-set-to-release-body-camera-videos-what-will-w/#:~:text=In%20an%20historic%20decision%2C%20the,45%20days%20of%20the%20shooting). The policy also requires the release of footage any time an officer uses force that results	Los Angeles follows California law	None

Chicago follows Illinois law	Chicago follows Illinois law	Program Evaluation Committee which is responsible for: 1. ensuring the program is operating efficiently and within compliance of the law, Department policies, and best practices. 2. evaluating the effectiveness of the program and determine if it should be continued, expanded, modified, or terminated. 3. advising the Superintendent on the recommendations concluded by the committee. Additionally, a 2019 report by the City of Chicago Office of Inspector General (available at https://www.scribd.com/document/420220157/CPD-s-Random-Reviews-of-Body-Worn-Camera-Recordings#download&from_embed) found that CPD watch operations lieutenants failed to complete required reviews of body camera footage, and that the department does not have a standardized process to do so, and provided

Information recorded by body cameras is considered "public information" subject to public records law, including Chapter 552 of the Texas Government Code. As part of policy changes implemented in Dallas in July 2020, footage of police shootings or use of force that result in serious injury or death, and deaths in custody will be released within 72 hours of the injury or death (previously the footage was released on a case-by-case basis). The subject or their next of kin and certain government/police officials (including the involved officer) can review the footage before release.	Dashcam footage is also subject to the 72 hour rule.	None

The Texas Public Information Act broadly exempts from disclosure any information held by a law enforcement agency that deals with the detection, investigation or prosecution of a crime if disclosure would interfere with those functions. According to the Houston Chief of Police, family members of a police-shooting victim can review footage, but only if they agree for the footage to be publicly released.	The Texas Public Information Act broadly exempts from disclosure any information held by a law enforcement agency that deals with the detection, investigation or prosecution of a crime if disclosure would interfere with those functions.	None

Access to recordings by non-law enforcement personnel is goverened by relevant state law (42 Pa. Cons. Stat. Ch 67A).	Access to recordings by non-law enforcement personnel is goverened by relevant state law (42 Pa. Cons. Stat. Ch 67A).	None

Public access is in accordance with Florida law.	Public access is in accordance with Florida law.	None

Atlanta follows Georgia law	Atlanta follows Georgia law	The Live Streaming feature enables remote viewing of an officer's body camera while in recording mode. Through the Evidence.com portal, an authorized supervisor can select a camera displayed on the live map and begin viewing and hearing what the body camera is currently recording. The live streaming feature enables a supervisor, to view, in real time, an officer's situation during a call for service.

Boston follows Massachusetts law.	Boston follows Massachusetts law.	None

Governed by the California Public Records Act. Goal is to release body camera recordings to the greatest extent possible, unless disclosure would (1) endanger the safety of a witness or another person involved in an investigation, (2) jeopardize the successful completion of an investigation, or (3) violate local, state or federal laws including the right to privacy.	Governed by the California Public Records Act	None

Release subject to public records laws and department policies pertaining to release of records (Operations Order 4.6). Citizens not allowed to review video captured by body camera unless their is an investigative reason to do so. During the summer of 2020, the PPD announced that it would begin releasing footage within 10-14 days following an incident.	None	None
Covered by FOIA No recording may be released to any third-party without review by the Law Department to make the necessary legal determination whether a portion or the entire video may be exempt from disclosure.	None at the local level	None

Seattle's Police Policy and the Public Records Act, all body camera footage is available to the public unless a specific legal exemption exists. Legal exemptions include videos that are part of an open and active investigation or if releasing the video creates a serious privacy concern. The police department can't withhold an entire video because part of it falls under an exemption; the department must redact the exempted part of the video and release the video with an explanation for the redactions. If the recording includes victims, witnesses, or complainants, officers must ask these persons if they want their identifying information disclosed. Their preference supersedes a disclosure request made by another person. If the victim, witness, or complainant is incapcitated, the officer may indicate non-disclosure if they think that disclosure would threaten the person's life, safety, or property. (Seattle Police Department Manual,	Subject to state law.	Seattle police policy requires officers to check their body and dash cameras at the start of their shift to ensure that it is working. The policy also requires officers to inform people that they are being recorded (either when the officer arrives or when a new person enters the scene), and to make reasonable efforts to convey this to non-english speakers.

Governed by state law. Data collected via body cameras is considered "nonpublic data" unless the data depicts the discharge of a firearm by and officer in the course of duty, the use of force by an officer that results in substantial bodily harm, or if a subject of the video requests that it be made accessible to the public (13.825 Subdivision 2). If a video is deemed public, data on subjects who do not want their identity released and data on undercover officers must be redacted before the video is released. (13.825 Subdivision 2). If body camera footage is part of an ongoing investigation, it is private (13.82 subdivision 7). Police departments may redact anything that is "clearly offensive to common sensibilities." (13.825, subdivision 2). Additionally, any person who wishes to compel disclosure of body camera data may bring an action in district court. (13.825, subdivision 2).	Follows state law.	In June of 2020, the police department changed its policy so police officers could no longer view body camera footage of an incident before making a statement on it. (Previously, they were allowed to). After a city audit in 2018, Minneapolis changed its body camera laws and created disciplinary guidelines for officers who fail to follow department policy. Under this policy, officers who violate body camera rules would face punishments from a 40 hour suspension to termination.

is bound by SB 1241, passed in 2019, which made certain body camera recordings open to the public: records that depict an officer discharging a firearm or using force that resulted in death or bodily injury; records related to an incident in which a law enforcement or oversight agency found that an officer engaged in sexual assault with a member of the public; and records that relate to an incident in which a law enforcement or oversight agency found that an officer was dishonest in reporting, investigating, or prosecuting a crime, or in the investigation of the misconduct of another officer. (California Penal Code section 832.7(b)). The San Diego Superior Court found this law to be retroactive, meaning it applies to current and all past records. The San Diego police union did not appeal this determination, but other departments across California have. The San Diego Police Departments posts body cam footage and related	The department treats body camera and dash cam footage under the same release policies.	Unlike many other states and cities, San Diego's body camera policy does not include a presumption of privacy in one's residence, so it does not require officers to inform people they are interacting with that they are being recorded. There are a few exceptions to this, and if a person asks if they are being recorded, officers should say yes. San Diego has also had a serious issue of officers sexual assaulting people they transported. Because of this, the body camera policy includes provisions stating that if two officers are transporting a passenger, one must have their body camera on at all times; if one officer is transporting a female passenger, they must have their body camera on the entire time; and if an officer is transporting a female passenger or prisoner, they must notify the radio dispather of their beginning and ending mileage.

Statement on behalf of
the Center for Democracy & Technology
before the
D.C. Council Committee on the Judiciary and Public Safety
Public Hearing on B23-0723, The Rioting Modernization Amendment Act of 2020, B23-0881, The Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020 and B23-0882, The Comprehensive Policing and Justice Reform Amendment Act of 2020

Thursday, October 15, 2020
By Mana Azarmi, Policy Counsel

Chairman Allen and members of the Committee, thank you for the opportunity to testify at today's hearing. My name is Mana Azarmi and I am a Policy Counsel with the Center for Democracy & Technology.[1] CDT is a nonprofit advocacy organization headquartered in D.C. dedicated to advancing the rights of the individual in the digital world.

The killings of George Floyd, Breonna Taylor, and so many other Black people at the hands of the police have sparked a long overdue reckoning on how our country approaches policing. This reckoning must include by extension, police use of surveillance technology. Unchecked and secret high-tech policing may exacerbate existing racial inequality in our society, and has the potential to chill the exercise of First Amendment-protected speech, intrude on individual privacy, and cast entire communities under a cloak of suspicion.[2] This summer protestors agitating for racial justice around the nation and here in the District were met not only with physical violence, but also the watchful digital eyes of government.[3] Seeking protection from one form of government abuse should not subject a person to another form of it.

District residents need assurances that we are protected from inappropriate government surveillance when we take to the streets, and that we are protected from discriminatory uses of surveillance technology.[4] This requires scrutinizing the technology the MPD already possesses,

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[1] Center for Democracy & Technology, www.cdt.org/about. Our Freedom, Security & Technology Project is dedicated to protecting individual privacy from unwarranted government intrusion. https://cdt.org/area-of-focus/government-surveillance/.

[2] *See e.g.*, Brian Barret, *The Baltimore PD's Race Bias Extends to High-Tech Spying, Too*, Wired (Aug. 16, 2016), https://www.wired.com/2016/08/baltimore-pds-race-bias-extends-high-tech-spying/; Adam Goldman and Matt Apuzzo, *NYPD Defends Tactics over Mosque Spying; Records Reveal New Details on Muslim Surveillance*, Huffington Post (Feb. 25, 2012), http://www.huffingtonpost.com/2012/02/24/nypd-defends-tactics-over_n_1298997.html; Dave Mass & Jeremy Gillula, *What You Can Learn From Oakland's Raw ALPR Data*, EFF (Jan. 21, 2015), https://www.eff.org/deeplinks/2015/01/what-we-learned-oakland-raw-alpr-data.

[3] Heather Kelly and Rachel Lerman, *America is awash in cameras, a double-edged sword for protesters and police*, WaPo (Jun. 3, 2020), https://www.washingtonpost.com/technology/2020/06/03/cameras-surveillance-police-protesters/; Zolan Kanno-Youngs, *U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance,* N.Y. Times (Jun. 19, 2020), https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html.

[4] For an overview of the types of surveillance technology owned by local police departments please see, COMMUNITY CONTROL OVER POLICE SURVEILLANCE: TECHNOLOGY 101, ACLU (2020), https://www.aclu.org/report/community-control-over-police-surveillance-technology-101.

and the technology it may one day seek to obtain. For example, currently, MPD possesses facial recognition technology,[5] which studies demonstrate is less accurate when used on people with darker skin and women,[6] heightening the risk of misidentification and false arrest for such individuals.[7] Any interaction with police may be lethal—especially for communities of color—and this technology risks increasing such encounters. Facial recognition technology can also be used to identify individuals at sensitive locations that may reveal religious or political preferences, such as at places of worship or social protests. We do not know if MPD's technology has been tested for racial bias, or if it is routinely re-evaluated for biases. We do not know if MPD has adopted robust safeguards to protect individual rights. We are in the dark because MPD did not engage the public or City Council prior to deciding to acquire the technology. If in the future, MPD decides to acquire predictive policing software—which is also riddled with racial bias concerns[8]—there is nothing in place to trigger and inform City Council consideration of such a decision. Worse still, without our knowledge, MPD may already possess it. The stakes are simply too great for privacy, civil rights and civil liberties for this lack of oversight to be acceptable.

CDT is a member of a coalition of organizations called Community Oversight of Surveillance-DC, or COS-DC, which seeks to pass legislation that would require transparency, meaningful public input, and D.C. Council approval for all DC government uses of surveillance technology.[9] Our proposed ordinance would ensure democratic control over police surveillance technology, and would subject its uses to oversight and auditing to ensure that policies are adopted to protect individual rights, and that they are abided by. This process would help breed trust in the community, and it would help the City Council make responsible financial decisions about how to invest in public safety.

Sixteen jurisdictions around the nation have already passed laws like this.[10] DC should be next. To begin the process of considering the COS-DC legislation we ask the Council to hold a public

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[5] Letter from Chief of Police Cathy L. Lanier to Councilmember Charles Allen, (March 2, 2020), https://dccouncil.us/wp-content/uploads/2020/03/JPS-Performance-Oversight-Responses-2020-MPD.pdf (confirming the Metropolitan Police Department's use of facial recognition technology in response to Committee questions).

[6] Patrick Grother, Mei Ngan, Kayee Hanaoka, FACE RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS, NISTIR 8280, NAT'L INST. OF STANDARDS AND TECHNOLOGY (Dec. 2019), *available at* https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf.

[7] Kashmir Hill, *Wrongfully Accused by an Algorithm*, NY Times (Jun. 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html; Kris Holt, *Facial recognition linked to a second wrongful arrest by Detroit police*, Engadget (July 10, 2020), https://www.engadget.com/facial-recognition-false-match-wrongful-arrest-224053761.html.

[8] Rashida Richardson, Jason Schultz & and Kate Crawford, DIRTY DATA, BAD PREDICTIONS: HOW CIVIL RIGHTS VIOLATIONS IMPACT POLICE DATA, PREDICTIVE POLICING SYSTEMS, AND JUSTICE (Feb. 13, 2019). 94 N.Y.U. L. REV. ONLINE 192 (2019), *available at* SSRN: https://ssrn.com/abstract=3333423.

[9] *Community Oversight of Surveillance DC*, https://takectrldc.org/ (last visited Oct. 14, 2020).

[10] *COMMUNITY CONTROL OVER POLICE SURVEILLANCE*, ACLU (last visited Oct. 14, 2020), https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance?redirect=feature/community-control-over-police-surveillance. *See e.g.*, OAKLAND, CAL., ORDINANCE NO. 13,489, MUN. CODE CH. 9.64 (Supp. 2019) (adopted May 15, 2018), *available at*

roundtable on the state of surveillance in the District this fall. The public and our representatives in City Council must play a meaningful role in decisions about community policing in the fight for racial justice. Attention must be paid to police surveillance technology as well. CDT and our partners in COS-DC look forward to working with members of the Council in this effort.

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http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/standard/oak070617.pdf; SAN FRANCISCO, CAL., ORDINANCE NO. 102-19, STOP SECRET SURVEILLANCE ORDINANCE, ADMINISTRATIVE CODE-ACQUISITION OF SURVEILLANCE TECHNOLOGY (adopted May 14, 2019), *available at* https://sfgov.legistar.com/View.ashx?M=F&ID=7206781&GUID=38D37061-4D87-4A94-9AB3-CB113656159A; NASHVILLE, TENN., ORDINANCE NO. BL2017-646, METRO. CODE § 13.08.08 (Supp. 2019) (adopted June 7, 2017), *available at* https://www.nashville.gov/mc/ordinances/term_2015_2019/bl2017_646.htm.

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By e-mail October 23, 2020

The Honorable Charles Allen
Chairman, Committee on the Judiciary and Public Safety
District of Columbia Council
John A. Wilson Building, Room 412
1350 Pennsylvania Ave. NW
Washington, D.C. 20004

Dear Chairman Allen and Members of the Committee:

The Reporters Committee for Freedom of the Press appreciates the opportunity to contribute to this conversation and to comment on the bills under discussion: the Rioting Modernization Amendment Act of 2020 (B23-0771); the Internationally Banned Chemical Weapons Prohibition Act of 2020 (B23-0882); and the Comprehensive Policing and Justice Reform Amendment Act of 2020 (B23-882). At the outset, we welcome the Committee's attention to these important issues.

Founded in 1970, the Reporters Committee is an unincorporated nonprofit association dedicated to safeguarding the right to a free and unfettered press. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect essential First Amendment freedoms. This summer, in jurisdictions across the country, the Reporters Committee has defended the right of journalists to do their jobs without fear of retaliation, rubber bullets, or tear gas.[1] Our hope in these comments is to highlight why the reforms under discussion matter to the journalists who have risked their safety covering protests against systemic racism and police brutality—and to note room for further progress.

* * *

The right to document government activity in public has long been protected by the First Amendment. *See, e.g.*, *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st. Cir. 1999). As the U.S. Department of Justice has explained, that freedom is "not only required by the Constitution" but also "consistent with our fundamental notions of liberty." *See* Statement of Interest of the United

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[1] *See, e.g.*, *Reporters Committee Condemns Arrest of Journalist Josie Huang*, Reporters Comm. for Freedom of the Press (Sept. 16, 2020), https://bit.ly/2TcQhbA; *Letter to California Governor Denounces Police Attacks on Journalists*, Reporters Comm. for Freedom of the Press, (July 8, 2020); https://bit.ly/2Tal6Of; *In Letter to New York Officials, Reporters Committee Denounces Police Attacks Journalists*, Reporters Comm. for Freedom of the Press (June 7, 2020), https://bit.ly/35mymFk; *Reporters Committee Letter to Minnesota Officials Denounces Polices Attacks on Journalists*, Reporters Comm. for Freedom of the Press (June 2, 2020), https://bit.ly/3kkbcpa.

States, *Sharp v. Baltimore City Police Dep't*, No. 1-11-cv-02888 (D. Md. Jan. 10, 2012). But the indiscriminate use of riot-control tactics—along with the improper use of criminal charges like unlawful assembly, failure to disperse, or rioting—makes it exceptionally difficult to exercise that right safely.

This summer has seen a staggering number of police attacks on clearly identified journalists. Here in Washington, D.C. alone, among the incidents documented by the Reporters Committee and the Press Freedom Tracker, a reporter for the *Washington Examiner* was pepper sprayed while carrying a bag clearly marked "PRESS;" a journalist with *Voice of America* caught an officer on video firing a projectile at him, even though his press badge was displayed; and an Australian news crew was assaulted by U.S. Park Police, live on air, during the clearing of Lafayette Park. *Cf.* Third Amended Complaint, *Black Lives Matter D.C. v. Trump*, No. 1:20-cv-01469 (D.D.C. Sept. 3, 2020) (raising claims against both federal and local law enforcement officers in connection with the clearing of protesters from the park). All told, nationwide, more than eight hundred press freedom violations have been reported to the Tracker in connection with the protests. *See* U.S. Press Freedom Tracker (last visited Oct. 23, 2020), https://pressfreedomtracker.us/.

These interactions run counter to established First Amendment protections for the press. When law enforcement officials assault someone they know or should know to be journalist, they violate clearly established law and are not entitled to qualified immunity. *See Higginbotham v. New York,* 105 F. Supp. 3d 369, 379-80 (S.D.N.Y. 2015) (collecting cases). Even where the use of force is incidental rather than retaliatory, a crowd-control response that is not tailored to accommodate lawful reporting violates the Constitution. *See Index Newspapers, LLC v. U.S. Marshals Service*, No. 20-35379 (9th Cir. Oct. 9, 2020), slip op. at 32 ("[P]eaceful protesters, journalists, and members of the general public cannot be punished for the violent acts of others."). But after-the-fact litigation cannot put a reporter back on the scene if rubber bullets drive that reporter away.

In that light, we appreciate the Committee's effort to ensure fewer are fired in the first place. Unfortunately, experience has made clear that the language under consideration is ambiguous. The legislation provides that less-lethal or chemical munitions "shall not be used by MPD to disperse a First Amendment assembly." MPD, though, appears to interpret that language to permit their use *during* a protected assembly so long as the officers' specific intent is not to disperse protected activity. *See* Rachel Kurzius, *Would D.C.'s Police Reform Bill Have Stopped MPD from Pepper Spraying Protestors?*, NPR (June 25, 2020), https://n.pr/3jKCk05 (quoting MPD spokesperson Brianna Jordan); *cf.* D.C. Code § 5-331.16(b)(1) (setting out pre-amendment standards for the use of irritants). That is not, as we understand it, what the Council intended, and it is not an approach that provides adequate breathing space for lawful reporting.[2]

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[2] Oregon's experience has been similar: When its Governor signed a bill to limit the use of tear gas to "riots," police in Portland declared a riot the same night—and twenty more over the next two months. *See* Jonathan Levinson, *Portland Protests Frequently Labeled 'Riots,' But Some Say Police Use Laws Arbitrarily*, OPB (Aug. 28, 2020), https://bit.ly/30QMfdd.

We urge the Committee to make clear that the use of crowd-control munitions is prohibited where the *effect* would be to disperse those engaged in protected activity. "The proper response to potential and actual violence is for the government to ensure an adequate police presence . . . and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment activity as a prophylactic measure." *Index Newspapers*, No. 20-35379, slip op. at 32 (quoting *Collins v. Jordan*, 110 F.3d 1363, 1373 (9th Cir. 1996)).

* * *

With similar concerns in mind, we appreciate the Committee's attention to the chilling effect of vague, poorly defined criminal charges like "rioting." Across the country, law enforcement officers have used a range of these overbroad "public order" offenses—such as rioting, failure to disperse, unlawful assembly, or obstruction of a police officer—in a manner that has impaired lawful newsgathering. To cite a prominent example: In Los Angeles County, sheriff's deputies violently arrested KPCC reporter Josie Huang for exercising her right to record their response to a protest. *See Reporters Committee Condemns Arrest of Journalist Josie Huang*, Reporters Comm. for Freedom of the Press (Sept. 16, 2020), https://bit.ly/2TcQhbA. The Sheriff's Department cited Ms. Huang for obstruction, initially claiming that she did not comply with the deputies' instruction to give them space and did not identify herself as press. Video evidence made clear that neither claim was true. *Id.* While the District Attorney declined to pursue charges, the damage had already been done—the deputies prevented Ms. Huang from documenting their enforcement actions related to the protest.

As this Committee is aware, the same dynamic has played out in the District. *See* D.C. Code § 22-1322(a) (defining the offense of rioting). During the J-20 protests in 2017, a number of journalists were arrested and charged with rioting while they were engaged in lawful newsgathering at the scene. Thankfully, none of those charges ended in conviction—a District jury acquitted one defendant, and prosecutors ultimately dismissed the remaining charges. *See, e.g.*, Jaclyn Peiser, *Journalist Charged with Rioting at Inauguration Protest Goes Free*, N.Y. Times (Dec. 21, 2017), https://nyti.ms/3nvG2NA. But the law remains badly in need of reform. The statute relies on concepts as vague as "tumultuous" conduct and "does not include the common law requirement of a common purpose or intent on the part of the rioters." Gabe Rottman, *Memo to D.C.: Protesters Are Not Rioters*, Wash. Post. (Feb. 4, 2018), https://wapo.st/3jGikvL (quoting *United States v. Matthews*, 419 F.2d 1177, 1190 (D.C. Cir. 1969) (Wright, J., dissenting)).

In one key respect, the Rioting Modernization Amendment Act improves on that status quo: It requires that the individuals charged themselves commit or attempt a predicate criminal offense. But the Act is unnecessarily broad in ways that could nevertheless chill reporting from the scene of a demonstration. For instance, acts that "cause[] or would cause . . . damage to, or taking of, property" are predicate offenses. Of course, reporters do not have a First Amendment right to cause property damage; still, charges for trespassing, an offense that arguably involves risks to property, have been

misused to target reporters. *See, e.g.*, Mark Berman, *Washington Post Reporter Charged with Trespassing, Interfering with a Police Officer*, Wash. Post (Aug. 10, 2015), https://wapo.st/2Teu5xN. In some cases, avoiding plausible trespass liability will be almost impossible: In the chaos of a protest, it can be exceptionally difficult to stay within the bounds of a public forum, especially where a police response gives reporters no lawful place to go. In Minneapolis, for instance, a correspondent for the *L.A. Times* was forced to scale a wall to escape a cloud of tear gas after officers backed the press into a corner. *See* Molly Hennessey-Fiske, *Times Reporters Recounts Being Hit With Rubber Bullets by Minnesota Police*, L.A. Times (May 30, 2020), https://lat.ms/3ogwUNl.

Once an individual has arguably committed a predicate offense, the Act's *mens rea* provision is too vague to provide meaningful protection. A defendant can be charged if they are "reckless as to the fact nine or more other people are attempting to commit or committing a criminal offense . . . in the area perceptible to the person." It is not clear what it means to be reckless as to the presence of someone you do not know whose actions you do not and cannot control. *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (noting that the constitutional bar on vague criminal laws is "more stringent" when overly broad laws "threaten[] to inhibit the exercise of constitutionally protected rights," such as "the right of free speech"). This recklessness provision would continue to deviate from the common law, under which "the true gravamen of the offense" of riot was the fact that participants had "*planned*" to commit violent acts together, "for that is what made the entire group, rather than just the actual and direct perpetrators of the violent or tumultuous behavior, guilty of the offense." *Schlamp v. State*, 891 A.2d 327, 332 (Md. 2006) (emphasis added). As a result, the Act still threatens to impose liability for the uncoordinated actions of third parties, which would chill First Amendment activity—including newsgathering and reporting—in the District of Columbia.

We urge the Committee to amend the Act to address these concerns: by making clear that mere trespass is not a predicate offense, and by making clear that individuals can only be convicted if they share a common, unlawful intent with the other assembled individuals who commit criminal acts. Those revisions would ensure that "rioting" does not sweep in reporters engaged in lawful First Amendment activity at a protest.

* * *

The Reporters Committee appreciates the opportunity to present these views. Please do not hesitate to contact Grayson Clary, the Stanton Foundation National Security/Free Press Fellow at the Reporters Committee, at gclary@rcfp.org with any questions.

Sincerely,

Grayson Clary
Stanton Foundation National Security/Free Press Fellow
Reporters Committee for Freedom of the Press

Written Testimony to the Committee on the Judiciary & Public Safety
Charles Allen, Chairperson

Public Hearing on

B23-0723, The "Rioting Modernization Amendment Act of 2020"

B23-0771, The "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020 ACT OF 2020"

AND

B23-0882, The "Comprehensive Policing and Justice Reform Amendment Act of 2020"

October 15, 2020

Submitted by Jonathan Blanks, Visiting Fellow in Criminal Justice
Foundation for Research on Equal Opportunity

Thank you for the opportunity to provide testimony on the "Comprehensive Policing and Justice Reform Amendment Act of 2020" and other topics related to the Metropolitan Police Department (MPD). My name is Jonathan Blanks and I'm a criminal justice fellow at the Foundation for Research on Equal Opportunity, a nonpartisan think tank focused on how to provide economic opportunity to those who have least access to it. I am also a Ward 6 resident interested in making D.C. a safer and better place for all who live and visit here. I commend Chairman Allen and the rest of the Council for taking up these important matters.

My testimony reflects my interests and concerns with the laws and policies governing MPD actions and how they affect the communities its officers are sworn to protect and serve.

Background and Expertise

In these fractious political and social times, the most polarizing voices often dominate the public debate. Of course, these voices often represent those individuals most directly affected by both the status quo and proposed changes to it, and it is thus important not to marginalize those individuals who may have the most direct stake in the political outcomes at issue just because some of their ideas seem radical. Nevertheless, when shaping policy, stakeholder buy-in is crucial to policy success and thus I provide these comments to the committee as ideas for how best to move forward for the benefit of both police officers and community members.

My father was a police officer in my hometown of Fort Wayne, Indiana from 1957 to 1978, retiring with the rank of Lieutenant. He was among the first generation of Black police officers during a time of a cultural (rather than legal) Jim Crow discrimination in the state and worked through the social upheaval and change of the 1960s and 70s. My father imparted in me a respect for police, as he was proud of his time with the FWPD, but he was also a realist who did not make excuses for bad officers or bad policy. It is through this lens that I view the state of policing in America today.

I have spent more than a decade learning about policing as a think tank writer and researcher. Among other things, I've collected and read thousands of news articles chronicling local police misconduct as the managing editor of the (now-defunct) website PoliceMisconduct.net. Through that data collection and other observations, I came to believe that the MPD is among the most professional and least corrupt major city police departments in the United States. This view was confirmed by my experiences with MPD's Citizen Engagement Academy and a number of subsequent ride-alongs with patrol officers in 2019. I maintain that opinion to this day.

However, the state of American policing is in terrible shape. The problems that have led to this situation are historic, structural, legal, social, cultural, political and too numerous to get into in this testimony. These problems manifest from causes both inside and outside of departments, which leads to wide variance between not only between jurisdictions but also within policing organizations.

That said, the vast majority of the American people still want police, and I count myself among them. But even granting that eliminating the need for police through community improvement is a goal worth working toward—like the goals of perfecting liberty and ending racism—leaders still must craft policy recognizing that police departments are and will remain public institutions for the foreseeable future. As such, finding solutions that work in the shared interests of the police and the community is the only workable path forward.

Beyond Police-Violence Triage

The three bills before the council impose a number of prohibitions and policy remedies that, if enacted and implemented in good faith, will likely make the District of Columbia safer and make its police department more accountable and transparent. A recurring theme in these bills are means to address and presumably reduce incidents of MPD violence. However, it is important that policymakers take steps to reduce the opportunities for that violence to occur in the first place.

Nonviolent police encounters can harm communities, and particularly African Americans, who bear the brunt of overpolicing in D.C. and across the nation. Unnecessary and antagonistic involuntary police contact has a cost to communities that is often ignored by police leadership in the name of proactive policing. This is hardly exclusive to MPD, but data show MPD deploys some version of these tactics without evidence of tangible benefit to community safety or security. In this respect, the proposed Comprehensive Policing and Justice Reform Amendment Act of 2020 is sadly inadequate.

Gun Recovery Myopia

All available data-driven evidence indicates MPD is not reducing serious crimes like homicide through aggressive policing. Not only are these policies ineffective, they make officers' jobs more difficult by breeding resentment and mistrust from community members, and particularly Black residents. The most glaring way MPD officers are working against both the community and themselves is in their drive to recover illegal firearms.

In numerous media and public events over the years, Chief Peter Newsham has repeatedly emphasized that his officers—both patrol and specialized teams like the Gun Recovery Unit (GRU)—are focused on getting guns off the street. While MPD has undoubtedly been successful in that respect, with thousands of guns recovered during his tenure as chief, recorded homicides have reached at least 160 people the last two years, with 2019's total of 163 the District's highest number of homicides since 2008.

Racially Biased NSID Stops

Thanks to the reporting requirements of the NEAR Act, we now have data from MPD's Narcotics and Special Investigations Division (NSID), the home of the GRU, and it confirms an overwhelming concentration of aggressive policing against Black men. In the report, which tracked NSID officers' stops from August 2019 through January of this year, NSID officers stopped 3,226 Black individuals—almost 90 percent of the people they stopped.[1] 1,672 of that number were searched or frisked[2], and from those, NSID officers recovered 210 firearms[3]. That produces an NSID firearm hit rate per stop of a Black individual to 6.5 percent. But even throwing in drugs and other contraband, and reading these numbers in the most flattering way to NSID[4], more than 80 percent of the Black people they stop looking for drugs and guns have nothing on them.[5]

Of course, NSID makes up a small fraction of MPD and accordingly patrol officers stop far more people. The National Police Foundation report showed that from July 2019 through the end of the year, a similar but not identical timeframe covered in their report, MPD as a whole recorded 62,842 stops.[6] Although data is available on those stops as well, I focus on NSID because "The overarching mission of NSID is to reduce violent crime in D.C. through countering the trafficking of humans, firearms, and substances; interdicting illegal firearms; and, identifying and apprehending large-scale sellers of illicit substances" and the NSID is "responsible for all long-term, complex, and multi-jurisdictional investigations of vice-related complaints (e.g. drugs and prostitution) and conspiracies."[7] In short, because their mission is to reduce violent crime and their actions would presumably be more targeted than an officer on patrol, NSID should have the greatest success identifying and finding the guns and drugs they search for. And yet, a majority of the people these special units stop aren't carrying any contraband, and few of them are carrying the firearms that Chief Newsham says are a priority.

Bad Stops, Blown Cases

But even when MPD officers recover guns, the cases are not the proverbial slam dunk. A 2018 investigative report by WAMU showed that as many as 40 percent of simple gun possession

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[1] "Metropolitan Police Department Narcotics and Specialized Investigations Division Police Foundation Report," prepared by the National Police Foundation (hereafter NSID Report), Fig. 2, p.21, available at https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/National%20Police%20Foundation%20MPD%20NSID%20Report%20September%202020%20Final.pdf.

[2] *Ibid.*, Table 6, p. 18.

[3] *Ibid.*, Table 7, p. 19.

[4] Because more than one item of contraband could be seized during any given search, the "hit rate" was certainly lower per stopped individual.

[5] I chose to cite hit rate per stop rather than per search because stops themselves can be harmful. Focusing on how productive a search is glosses over how the search came to happen in the first place. But even using that data, almost 2/3 of searches or pat-downs of Black individuals by NSID officers recovered no contraband. (NSID Report, Table 6 at 18.)

[6] *Ibid.*, p. 16, citing Metropolitan Police Department February 2020. Stop Data Report, available at https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Stop%20Data%20Report.pdf.

[7] NSID Report, p. 8.

cases brought in the District are ultimately dismissed in court.[8] Such a high dismissal rate on possession charges strongly suggests illegal searches or other misconduct by police.[9] If the number is anywhere near that high in cases where guns are present, one must consider how many individuals are likely being subjected to illegal police searches but never see the inside of a courtroom. Perhaps the analytical scrutiny produced by the NEAR Act has lessened this problem in the years since, but the numbers produced confirm both ongoing racial disparities of MPD stops and that innocent Black people are overwhelmingly the target of these tactics.

Investigatory Stops Do More Harm than Good

I've previously written about how and why investigatory police stops of both motorists and pedestrians can erode police legitimacy, particularly among Black Americans.[10] Individuals resent being investigated because a police officer is looking for evidence of a crime without the legal justification to suspect any crime has occurred. The U.S. Supreme Court decision in *Whren v. United States* (1996)—which originated here in D.C.—provided the legal blueprint for police officers around the country to subvert racial profiling prohibitions by allowing officers to cite any one of myriad traffic violations to stop a vehicle in order to investigate a crime they have no legal reason to suspect.[11]

Book length studies such as *Pulled Over: How Police Stops Define Race and Citizenship* show that Black individuals are far more likely to be subject to dubious pretextual investigatory traffic stops and are more likely to mistrust and resent the police because of those stops.[12] This resentment stems, in part, from Black drivers correctly believing they were targeted because of their race.[13] Other studies show that resentment is reflected in the social and familial networks of those who have negative experiences with police, reflecting a high social cost to every day policing strategies.[14] By contrast, Black drivers who were subject to traffic safety stops for unambiguous moving violations—such as speeding—did not produce mistrust of police, even when those stops resulted in ticketing or arrest.[15]

It is hardly a wonder that policing tactics that treat innocent Black people like criminals would have negative effects on police-community relations. But that mistrust can have a public-safety

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[8] Patrick Madden, "Collateral Damage: Caught Between Gun Violence And Aggressive Policing," WAMU.org, September 19, 2019, available at https://wamu.org/story/18/09/19/collateral-damage-caught-gun-violence-aggressive-policing/.

[9] A conviction for illegal gun possession does not require a person intending to use the gun for any other crime, possession itself is typically enough for a conviction. The exclusionary rule—that evidence obtained by police illegally should not be used against a defendant—would be the most likely explanation a simple possession case would be dismissed.

[10] Jonathan Blanks, "Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy," *Case Western Reserve Law Review*, Vol. 66, Issue 4, (2016), pp. 931-46, available for download at https://scholarlycommons.law.case.edu/caselrev/vol66/iss4/5/.

[11] *Ibid.* p. 932.

[12] Charles R. Epp, Steven Maynard-Moody, & Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship*, University of Chicago Press (2014) (hereafter *Pulled Over*) Table 7.1, p. 144.

[13] *Ibid.*, p. 6.

[14] See, *e.g.*, Patricia Y. Warren, "Perceptions of Police Disrespect During Vehicle Stops: A Race-Based Analysis," *Crime and Delinquency*, Vol. 57, Issue 3, (2011), pp. 356-76.

[15] *Pulled Over*, pp. 83; 156-7.

impact because individuals who don't trust police officers are going to be less likely to cooperate with them, making serious crime-solving more difficult.[16] This creates a situation in which police become adept at manufacturing low-level arrests in Black neighborhoods but struggle to close major cases like homicides in those same communities.[17]

Ending Rather than Amending Consent Searches

The Comprehensive Policing Bill, if passed in its current form, would require MPD officers to calmly explain to an individual that they have a right to refuse an officer-requested search that is based solely on their consent.[18] This may mitigate some problems that arise when police agencies use consent searches to search for evidence of crimes they lack legal reason to suspect, including deception and coercion,[19] but this is only a marginal improvement on the status quo. Indeed, the request to search is often adding insult to injury if the initial stop is perceived as illegitimately based on race or other bias:

> "[A] deeper truth has been forgotten in the effort to legitimate inquisitive police stops by making the officer more polite. What makes inquisitive police stops so offensive to so many African Americans and Latinos is not that the officers are carrying them out are impolite or even frankly bigoted, but that these stops are common, repeated, routine, and even scripted.This scripted practice treats its targets not as individuals worthy of dignity but as numbers to be processed in search of the small percentage who are carrying contraband or have an outstanding warrant."[20]

Consent searches are means to subvert the Fourth Amendment rights to be secure in one's person and effects, and police have abused the discretion to ask for that consent for decades.

Left to their own devices, police tend to train and act to the bare minimum required by law. As police can use any vehicle-related violation to stop and question a motorist under *Whren*, so too have officers used the Supreme Court ruling in *Terry v. Ohio* (1968) to stop millions of pedestrians to question and frisk them for weapons.[21] The most glaring example is New York City's Stop and Frisk program that stopped approximately four million people—the majority of whom were young Black and Latino men—over its most active ten-year period.

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[16] See, *e.g.*, Jill Leovy, *Ghettoside: A True Story of Murder in America*, Spiegel & Grau, (2015). Among other things, when trying to solve a murder, Los Angeles homicide detectives had to overcome community mistrust driven by actions of other LAPD officers.

[17] See Jill Leovy, "The Underpolicing of Black America," *Wall Street Journal*, January 23, 2015, available at https://www.wsj.com/articles/the-underpolicing-of-black-america-1422049080.

[18] Washington, D.C. Council Bill B23-0882, "Comprehensive Policing and Justice Reform Amendment Act of 2020," Subtitle F. Limitations on Consent Searches, pp. 13-15 available at https://legiscan.com/DC/text/B23-0882/2019.

[19] See discussion of coercion and deception in Blanks "Thin Blue Lies," *supra* at note 10, at Part III, pp. 935-37 and Part V, pp. 940-942.

[20] *Pulled Over*, p. 6.

[21] Although *Terry* acts as the primary legal basis for aggressive pedestrian stops, the Court's opinion warned against the widespread use of field interrogations and frisking individuals because they "cannot help but be a severely exacerbating factor in police-community tensions." *Terry v. Ohio*, 392 U.S. 1 (1968) at 14, note 11, available at https://supreme.justia.com/cases/federal/us/392/1/.

But young Black men in D.C. are likewise familiar with that practice. In a dyspeptic concurrence written because the U.S. Court of Appeals for the D.C. Circuit is bound by Supreme Court precedent, Judge Janice Rogers Brown wrote about the tactics of the Gun Recovery Unit:

> "[GRU actions comprise] a rolling roadblock that sweeps citizens up at random and subjects them to undesired police interactions culminating in the search of their persons and effects. If the Fourth Amendment is intended to offer meaningful protection in the context of *Terry* stops, the voluntary consent exemption cannot be used to engage with members of the public *en masse* and at random to fabricate articulable suspicions for virtually every citizen officers encounter on patrol."[22]

While requiring GRU and other MPD officers to inform a stopped person that they have the right to refuse a search is an improvement, the unsettling and unnecessary involuntary contact with police is an overlooked harm insufficiently addressed in the pending legislation.

Re-task NSID Officers

Given the number of innocent people stopped and searched by NSID, it is fair to question whether their current constitution and *modus operandi* are serving the public interest. Certainly, NSID has taken many illegal guns off the street, but at the cost of the personal security of thousands of innocent District residents and primarily our Black neighbors. Removing illegal guns from the street is a noble idea in principle, but that does not excuse the tactics—both legal and illegal—that MPD has employed to follow through with that task.

Evidence-based policing research suggests that increasing visible police presence in certain "hot-spots" of criminal activity can reduce incidents of crime, often without "displacement" effects where criminal activity simply moves to other less-policed zones.[23] Importantly, such strategic deployment of officers can often be implemented without resorting to the aggressive methods that result in stops, searches, and arrests. Indeed, it is impossible for police presence to deter crime if the officer is processing an arrest at the station house.

Moreover, MPD has not been immune to the officer turnover and attrition that is affecting many police departments nationwide. Different people will have divergent views as to why those shortfalls happen within and between police agencies, but this is a reality police departments have to manage. Perhaps NSID officers should be re-tasked to patrols near hot-spots rather than continue the practices that don't seem to be reducing gun violence in the District.

Conclusion

The status quo of policing needs to change in D.C. and across the country.

D.C. residents want to be safer, and most MPD officers undoubtedly want the same for them. And while illegal guns are unquestionably bad, the aggressive methods MPD has used to recover them have not been effective in reducing violent crime. Evidence shows that the division most

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[22] *U.S. v. Gross*, 784 F.3d. 784, at 791 (Brown J., concurring) (D.C. Circuit 2015).

[23] See, "5 Things You Need to Know About Hot Spots Policing & the Koper Curve Theory," National Police Foundation, available for download at https://www.policefoundation.org/5-things-you-need-to-know-about-hot-spots-policing-the-koper-curve-theory/; see also, generally, Evidence-Based Policing Matrix, created by Center for Evidence Based Crime Policy, George Mason University, that features a number of rigorous studies on which police tactics work and do not. Available at https://cebcp.org/evidence-based-policing/the-matrix/.

responsible for bringing those numbers down harassing innocent people while homicides creep upward.

Beyond being ineffective, such invasive policing by MPD disrupts the lives and personal security of innocent individuals going about their daily lives, and do so in a way that is justifiably perceived as racially biased against Black residents.

Suspicionless, pretextual investigatory stops ensnare far more innocent people than guilty and, though blessed by the Supreme Court, are noxious to the presumption of innocence enshrined in the Constitution.

While the procedural safeguards for consent searches included in the Comprehensive Policing and Justice Reform Amendment Act of 2020 is an improvement compared to the status quo, the MPD should be strongly discouraged from making unnecessary stops in the first place. There is no way to build effective relationships with officers who stop you because they think you look like a criminal.

The NSID and its component units create arrests, but many of those officers could likely be better used in less antagonistic roles that support community well-being and public safety. Their current methods of operation are not in the public interest.

Thank you again for this opportunity to share my thoughts with you.

Jonathan Blanks
Visiting Fellow, Foundation for Research on Equal Opportunity
Ward 6 Resident

Vera INSTITUTE OF JUSTICE

Testimony of Akhi Johnson
Reshaping Prosecution Program Deputy Director
Vera Institute of Justice
Hearing on Comprehensive Policing and Justice Reform Amendment Act of 2020
Committee on Judiciary and Public Safety

Oral testimony provided on October 15

Good morning, my name is Akhi Johnson. I am a DC resident and the Deputy Director of the Vera Institute of Justice's Reshaping Prosecution Program. Vera is a research-based non-profit that works with government stakeholders to end mass incarceration.

Prior to joining Vera, I was an Assistant United States Attorney in the District for five years. Throughout my time as a prosecutor I saw the racial disparities in our system on a daily basis. Regrettably, I didn't critically examine why those disparities existed and I didn't take it upon myself to craft policies that addressed them.

The pursuit of equal justice under the law requires eliminating bias and racial disparities from our system. As part of that pursuit, the Council should consider prohibiting pre-textual stops – those where someone is detained for a minor infraction while police seek evidence of a more serious crime. These stops increase racial bias in the system and do not provide a public safety benefit.

People of color are stopped, questioned, and searched at higher rates even though they are not more likely to possess contraband.[1] A 2019 study of 100 million traffic stops nationwide found that Black and Latinx drivers were more likely to be stopped and searched despite not being more likely to carry contraband.[2] Moreover, beyond racial disparities, the vast majority of stops don't result in the recovery of contraband.[3]

Similar trends exist in the District. Based on MPD data from July to December 2019, they conducted nearly 63,000 stops.[4] Black people accounted for 72% of all stops, even though we make up less than 50% of the population.[5] And, less than 1% percent of all stops resulted in a weapon recovery.[6]

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[1] Charles R. Epp, Steven Maynard-Moody, and Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* (Chicago and London: The University of Chicago Press, 2014), 3.
[2] Emma Pierson, Camelia Simoiu, Jan Overgoor, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops across the United States* (Stanford, CA: Stanford Computational Policy Lab, 2019), https://5harad.com/papers/100M-stops.pdf.
[3] Epp, Maynard-Moody, and Haider-Markel, *Pulled Over*, 2014, 9. See also David Rudovsky and David Harris, "Terry Stops-and-Frisks: The Troubling Use of Common Sense in a World of Empirical Data," *University of Pennsylvania Public Law and Legal Theory Research Paper Series* No. 18-10 (2018), 34-35, https://www.law.upenn.edu/live (of 297,000 frisks conducted in New York in 2012, only 2% resulted in a weapon recovery).
[4] *Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data*, American Civil Liberties Union – DC, June 16, 2020, 2, https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf.
[5] Ibid.
[6] Ibid., 1.

Research has shown that limiting police stops to those for public safety reasons reduces racial disparities. Officers often describe two categories of stops: must stop situations, like a DUI, when there is a serious risk to safety, and situations where there are pretext reasons, like dark window tint, when officers merely *want* to stop someone. When researchers isolated the two categories, they found that "virtually all of the wide racial disparity" could be attributed to pre-textual stops.[7]

Although recent MPD data did not specifically track them, there are indications that pretext stops in DC have significant racial disparities. The closest approximation in current MPD data are stops that did not result in a warning, ticket, or arrest – effectively those where there was no public safety concern. Black people accounted for 86% of those stops.[8]

By condoning pre-textual stops, we sanction officers focusing on "suspicious people" instead of suspicious actions, and allow racial bias to distort our pursuit of equal justice. I will submit written testimony to supplement my remarks that includes proposed legislation to eliminate these stops. Thank you.

Supplemental written testimony

The proposed legislation below addresses pre-textual traffic stops.[9] I focus on traffic stops because other organizations have noted ways to curb pretext pedestrian encounters by, among other things, greater restrictions on consent searches.

The legislation would limit traffic stops to offenses that pose a significant public safety threat. If the legislation is passed, people could no longer be stopped for trivial infractions like dark window tint, object hanging from a rearview mirror, or partially obstructing a license plate. To enforce the prohibition, the legislation adopts a version of the exclusionary rule to prohibit the use of evidence obtained from non-public safety stops.

Section (a) of the legislation attempts to capture conduct that poses a significant safety risk. The section does not include all offenses that could impact safety, especially if the concerning conduct is captured by a more narrowly tailored provision. For instance, section (a) does not list any municipal regulations because the only regulations posing a significant risk to safety (i.e. colliding) are aptly captured by the D.C. code provision for reckless driving – which is included in section (a).

The proposal would also require a judge to find probable cause of the offense given to justify a stop, which safeguards against a public safety reason being used to disguise a pre-textual one. For example, an officer reports conducting a stop to investigate a DUI and recovers evidence of a different crime. Under existing law, the stop is permissible as long as there was reasonable articulable suspicion of any offense – even if not related to the reason given for the stop. This allows stops for any reason, no matter how minor, and provides no check on the subjective basis for the stop.

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[7] Epp, Maynard-Moody, and Haider-Markel, *Pulled Over*, 2014, 72.
[8] *Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data*, American Civil Liberties Union – DC, June 16, 2020, 1, https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf.
[9] The Council can prohibit pre-textual stops even though they are constitutional. Under *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001), a state can impose greater restrictions on police activity than those required by the federal constitution – which sets the minimum protections a state must afford its residents.

Under the proposal, however, a judge would have to find probable cause (a higher standard than reasonable suspicion) of the DUI (the officer provided basis) before admitting the recovered evidence. As such, the judge's finding helps ensure that the stop was actually related to public safety and not a pretext to investigate.

Finally, in deciding whether to prohibit pretext stops, I don't think we should overlook the safety risks that traffic stops pose to police officers. According to research by the Department of Justice, "the most common type of Self-Initiated Activity involved in a fatality was when an officer initiated a traffic stop."[10] To ask officers to continue conducting traffic stops for minor infractions that don't impact public safety is problematic for the reasons noted above, but it also unnecessarily places them in dangerous situations.

Proposed legislation

(a) A law enforcement officer may only conduct a stop or seizure to investigate a violation of Title 50 of the D.C. Code or Title 18 of the DCMR based on the following offenses:

- Failure to restrain a child (§§ 50-1703 – 50-1708);
- Distracted driving (§ 50-1731.03);
- Use of safety belts (§ 50-1802);
- Speeding and reckless driving (§ 50–2201.04);
- Leaving after colliding (§ 50–2201.05c);
- Negligent homicide (§§ 50-2203.01 – 50-2203.03);
- Driving while under the influence of alcohol (§§ 50-2205.01 – 50-2205.03); or
- Impaired operating or driving (§§ 50-2206.01 – 50-2206.59).

(b) A stop or seizure premised on any other violation of Title 50 of the D.C. Code, or any violation of Title 18 of the DCMR is not permissible. Evidence obtained from an impermissible stop or seizure under this section shall not be admissible in any criminal proceeding.

(c) Evidence obtained from a permissible stop or seizure, as defined in subsection (a), shall only be admissible in a criminal proceeding if a judicial officer finds probable cause of the offense provided to justify the stop or seizure.

[10] Nick Bruel and Desiree Luongo, *Making it Safer: A Study of Law Enforcement Fatalities Between 2010 – 2016*, December 2017, 38, https://cops.usdoj.gov/RIC/Publications/cops-w0858-pub.pdf.

MPD 1D Citizens Advisory Council

Connecting MPD Through People, Technology and Information

Testimony

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Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020

Monday 15 October, 2020

09:00 AM

The First District CAC is a registered 501(c)(3) charitable organization in good standing, our tax ID is 83-0343770. Donations to the First District CAC are fully tax deductible to the extent permitted by law.

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Greetings Chairman Allen, Members of the Judiciary and Public Safety Committee, Bonds, Gray and Cheh. We also send greetings to your fellow Members, Mendelson, McDuffie, Nadeau, Todd, T. White, R. White, Silverman, Pinto and Grosso.

I am Bobby Pittman and today, I submit this testimony **(Part I)** on **Bill B23-0882** ***Comprehensive Policing and Justice Reform Act of 2020*** on behalf of the First District Citizens' Advisory Council, Inc. and the communities we advocate for which includes businesses, tenants, residents and our visitors to the nation's capital. We can unequivocally state that the number one issue when on public space is safety, security, and a sense of not having to worry about being attacked, robbed. People, Black, White, Asian, Latino, African or Indian do not wish to be the victims of burglary, murder or robbery. When planning a trip to a strange city, travelers want to know that risks in the District of Columbia are at a minimum. If you reduce the number of police you increase the risk of public safety. The numbers speak are clear. Not everyone reports incidents of crime to the police for many reasons. There must be those considerations as well. The Council's legislation threatens to increase insurance costs on taxpayers, raise the price of medical coverage, car insurance and miscellaneous expenses that the Council's Budget Office has not computed. These are all increased cost for doing business in the District of Columbia at a time when we are threatened by a pandemic which is not going away soon.

Reimaging Policing is always ongoing and should be as our society grows. We also recognize the issues of ***Justice*** exceeds uniformed police officers. The institution of policing and the cultures that derive from being in a police organization. The Justice system has many moving parts. To truly understand policing is to know that policing is both science and art. Police as a working profession include management that is properly trained in how to manage field operations, community interactions, statistics, performance, forecasting of events, arrests and diversions, juveniles, senior citizens, mental illness contact, discipline versus punishment of employees, trusts from the external and internal customer and so much more.

Your heart must be in policing, not just your mind. We advocate for compassion, empathy and a love of the community you care for and serve when you accept the uniform of the people of the District of Columbia. We expect our police to be responsive and courteous even when they must make an arrest. Sometimes that is not easy. Sometimes some of our officers fail to meet that goal and sometimes the reinforcement of Master Patrol Officers, Sergeants and Lieutenants missed that mark in all neighborhoods. Sometimes command officials override good decision on the ground and that can affect outcomes. We know this and we are working on ways to address these shortcomings without interfering in the daily management of our police. We know that working with the executive team of Chief Newsham we can research and develop modules where our Captain, Inspectors, Commanders and Assistant Chiefs are given the data and tools to ensure that we are not punishing but correcting behavior in all police in

our communities that leads to a wrong way of policing. We believe these types of constructive actions will benefit the District of Columbia.

This is the real world and while any police chief would establish procedures for how an organization should perform it is unrealistic given the current set of tools that are in use by many organizational structures that we would meet these goals without some reform. So yes, I think we all agree that we must examine cultures, bias from police, and community. It's no different for the Council, as none of you know everything, each staff member does or each other and we don't hold you to such standards. The Community bears equal responsibility for how it is policed. Its easy to blame police, however community must be held to bear for what it allows in term of policing and what it allows individuals of the community to accept as its norm.

The Council of the District of Columbia has taken on the challenge of addressing these issues. If the Council chooses to take this action, then the Council must equally accept responsibility to addressing community behavior. We all have a role in society and there are rules that all must abide by and to if society is to remain civil. We can help the Council develop tools to be better. The issue of policing, its effects, the trauma created in the communities is also shared by police personnel. It does not go away because that police officer goes home. I can tell you that all seven CACs have spent countless hours in discussion around the issues that exploded in 2020. I can also tell you; we were not surprised that this day has come. Some of us have been planning for how to respond to events like this for years.

What, I present today is crafted to address what we think the Council should be looking at as it relates to the Metropolitan Police Department. We will be submitting an additional testimony by next week which specifically addresses issues outlined in the legislative bill being discussed today. Its too large of an issue to place everything at your table in one setting. It requires consumption and digestion of voluminous amounts of material. So, let us begin the adventure. Here is what we believe our voters, including the DC Council should consider when approaching the Metropolitan Police Department:

1. In 1968, there was a project that would have combined civilians with police to manage policing. That project did not go well for many reasons. The police along with certain democratic interests wanted it to fail and it did. There is history to the Metropolitan Police at least attempting to reform its practices under then Chief Wilson.

2. The protests of the past 5 months and indeed looking backward to Rodney King and even further to the 1968 riots and all that has happened in between those years, policing has had individuals who have not lived up to what community would expect. However, the vast majority always answered the call in the manner that community needed. We recognize there are many people out in society and in the National Capitol Region who have had traumatic experiences involving police which we believe has created an aggregate of animosity towards DC police rightly or wrongly deserved. We are still filtering that out.
3. **Community Policing** – establish what this really means. Almost every officer has their own definition. Query police managers at every level to ensure they understand the term and its mission. Regularly assess each police district to determine how the goals are met. Community meetings are not community policing. We believe all police departments should have to meet the goal of making constructive contact with those they serve. As a legislative body, as advisory councils, we need and we must collaborate with police management, union officials and policing researchers to determine exactly what metrics we should develop for our state. We should reexamine those metrics yearly or every two years to determine if they are capturing the necessary data that 1.) helps us to truly understand how effective our policing is beyond making arrest, responding to calls for service or traditional crime statistics. 2.) we should implement a tool through OUC (Office of Unified communications) to reverse call the 911 caller to assess how that consumer perceived our police response. We should include in the Body Worn Camera system a tool that allows the officer to rate the condition of the call as the officer saw it. We can use that data district by police district to determine effectiveness of policing, quality assurance of policing and training, understanding of police procedure, direct personal attitudes associated with the officer or officers that responded to the call and overall perception of police. In redacted form this information can be shared with the community and police in roll-call, not to embarrass police managers but to educate community and police on response management as a class and training tool. This will require re-training and there will be resistance internally to such a radical idea. However, my team see this as a part of 21st century policing. 3.) A gentleman called into the Kojo Nnamdi show a few months ago with an idea that there should be an app that allows the user to text directly to police what they think is abuse by police. Kojo pushed back on this idea, however we agree. We think that a National Capital Region Police access application should be developed which allows a user to notify Public Safety Answering Point (PSAP) of activity that the user thinks may not fit any police agency expectation by a police officer. That information and GPS data would be transmitted to the appropriate law enforcement agency for investigation.

It goes further, there would be a public side of this that allows the public to see how many referrals have gone to each agency in our 24 local governments and 3 states. Again, this requires a retooling of thinking because everyone hides data until it comes out in court. Our goal is to avoid court by catching those who may need a review and also looking at our public in ways that we can build confidence in the System to hear a concern, address that concern and bring resolution to the concern that is raised. It is our belief that this will help reduce the level of trauma that is out there. Then and only then, can we then come back to our 24 communities, but specifically in the District of Columbia an ask for trust.

4. **Arrests** – In the 20th century a police officer was often considered productive based on how many arrests that officer was responsible for in a given period. District Inspectors and Deputy Chiefs would refer to the good officers who were out making those arrests. Officers who spent more time befriending the community were less effective. Community Services Officers were even less respected because they were the baby police. Some of that thinking continues in our country and in our city. While I can give answers to how we change, I challenge the Community, including you the Council to help design a metric that takes us beyond just making arrest. What I learned long ago was arrest don't change behavior. Most of us would be terrified to be arrested. So, when you have a community of people who tell you they are not afraid of being arrested it tells you that community has become numb. It tells you that we have to change our strategies to reach that part of the community. It tells you that other government agencies, non-profits and members of the community on the block have to step up. We are our brothers and sister's keeper. What affects your neighbor affects you. I caution however codifying certain statues and prohibiting certain techniques and tools while looking polished and sounding nice may not provide you with the results you seek. We are all charged with addressing violent offenders, who must be dealt with by our police. Those who riot are not protesters and must be addressed by our police. Those who will not allow Council Members to enter the Wilson building and block your path from moving are ultimately addressed by the police. We have national and international responsibilities of our police that include anti-terrorism (including domestic terror threat) response. Our police have US Marshal interaction as deputies and other missions. Our police have duties to the US Secret Service and the President of the United States in protection and movement. You the Council must understand this issue of police officer and the weapons they use is so much bigger than the legislation you are considering and must be reasoned carefully.

5. **<u>The Tale of Two Consumers of Police</u>** – Oftentimes when our citizens and residents are polled regarding their views of the police, we hear from those respondents that are not likely to be arrested. There is the other consumer of police services, those who are in constant conflict, repeated arrest, and situations where contact on the street is not welcomed. We have and know there are generational attitudes toward policing that we must overcome. We must develop a metric for determining how our police interact in these situations. A question, we have long struggled with is how do we ensure that **Officer A** in the Seventh District and **Officer B** in the Second or First District approach the same situation the same way? An argument used is that an encounter using **Officer A** who encounters a citizen who does not receive a police officer as calmly as **Officer B** situation. I reject that notion as citizens advisory councils have expectation and demand that our citizen contacts with police be respectful period. Getting to how we change this requires much more understanding of how police operate and on how citizens respond. You must understand both equally.
6. **<u>Stopped by Police What Now</u>** – No one wants to be detained by police. Can police do a better job of explaining the stop and can those stopped consider their reactions? How do we develop a metric for teaching de-escalation on both sides of the stop?
7. **<u>Policing in Schools</u>** – The elimination of security guards, special police officers and police in schools, parochial, private, charter or public based on the **data (in the District of Columbia-only)**results in far less violence than would occur if police were not present. In our research of SROs (School Resource Officers) we have found:
    - **a.** SRO's are routinely thought of by students as someone they can ask for help with safety from other students.
    - **b.** SRO's interact with school administrators, parents/guardians, and students to assist with resolving students' problems.
    - **c.** SRO's are trained and the Metropolitan Police Department is a member of the National School Resource Officer Association (NSROA). According to NSROA The Centers for Disease Control reports that in 2009, the most recent year for which statistics are available, 5.6% of children nationwide carried a weapon on to school property at least one a day in the 30 days before the survey, 7.7% were threatened or injured with a weapon on school property during the 12 months before the survey,11.1% were in a physical fight on school property during the 12 month period, 19.9%were bullied, 5% did not go to school at least one day in the month before the survey because they felt it was unsafe to be at school or to travel to and from school, 4.5%drank alcohol and 4.6% used pot on school property at least once in the 30 days before the survey, and 22.7% were offered, sold, or were given illegal drugs on school property in the 12 months before the survey.

d. From Child Welfare Reform Law to the School Safety Team - The major experience of public schools in the last quarter-century in America has been about relationships—from isolation to involvement—through interagency reform. The integration of this model of assessing and providing for the needs of students, including their safety, is a version of comprehensive child welfare reform law. When critics of school disciplinary policies attempt to link their criticism to the mere inclusion of an interagency partner it reflects a fundamental misunderstanding of both child welfare law and education law. There-fore, any discussion about reform in school safety law has to take into proper account the model by which communities and institutions share their duties and responsibilities to children, right down to the public school campus and the school resource officer.

e. **Evolution of the Collaborative Model of Child-Welfare Law** Early development of the interagency model focused on child victimization, neglect, and abuse. In 1984, the United States Department of Justice began to encourage coordination of units of state and local government.

f. **Congress** added its voice bypassing The Child Abuse Prevention and Treatment Act, which conditioned federal funding on the effective use by states of multidisciplinary teams and coordinating councils. The focus of collaborative programs on child victimization, abuse and endangerment remains the most compelling feature of child welfare reform law and, understandably, heavily in-fluence school safety programs.

g. **The Triad of SRO Responsibility** Effective SRO programs recognize and utilize the special training and expertise law-enforcement officers possess that is well suited to effectively protect and serve the school community. SROs contribute to the safe-schools team by ensuring a safe and secure campus, educating students about law-related topics, and mentoring students as counselors and role models.

8. Which Students Are Arrested the Most?

Location	Total Student Enrollment	Percentage of Schools With Police	Number of Arrests*	Percentage of Arrests	Number of Referrals	Percentage of Referrals
Washington, D.C.	76,276	69.307%	288	0.378%	364	0.477%
Maryland	882,334	33.404%	1,911	0.217%	3,308	0.375%
Virginia	1,274,850	44.456%	851	0.067%	14,629	1.148%

In MCPS, 460 students were arrested in the past three school years, according to data presented to the school board on Monday. Of those arrests, 382 (83%) were of Black and Hispanic students. Eleven percent of arrests were of white students during the same time period. MCPS' student population is about 27% white, 21% Black and 32% Hispanic, according to MCPS data.

These are the fundamental concerns we have ahead of the supplemental testimony that we hope you will consider. We will submit part II of our testimony in the coming days, which will address more of the pending legislation. We are your partners and a repository of police knowledge. We have existed since the late 1960s and would be delighted to share with you how our police have and continues to evolve.

Thank you for allowing us to share. We look forward to working with you on behalf of all people who are serves by the District of Columbia.

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Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020

Thursday 15 October, 2020 Part II

09:00 AM

The First District CAC is a registered 501(c)(3) charitable organization in good standing, our tax ID is 83-0343770. Donations to the First District CAC are fully tax deductible to the extent permitted by law.

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Greetings Chairman Allen, Members of the Judiciary and Public Safety Committee, Bonds, Gray and Cheh and to your fellow Members, Mendelson, McDuffie, Nadeau, Todd, T. White, R. White, Silverman and Grosso.

I am Bobby Pittman and today, I submit the second part of our testimony on **B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT, B23-0723, THE "RIOTING MODERNIZATION AMENDMENT ACT OF 2020", and B23-0771, THE "INTERNATIONALLY BANNED CHEMICAL WEAPON PROHIBITION AMENDMENT ACT OF 2020"**on behalf of the First District Citizens' Advisory Council and the communities we advocate for in the Nation's Capital.

After hearing the testimonies of others (some of whom live in the District but may not be voters and seeing the protest of many who we are certain don't live in the District of Columbia, there are several issues that caught our attention. We heard "defund the police" and we heard "seek justice". We believe its important to place Justice in a separate discussion as we believe that involves the Courts which should have serious oversight and review. That is a discussion we hope to have another day.

Today we wish to focus on the Police. Our view is we can treat the symptoms of the police; effects of traffic stops, shootings, asset forfeiture, warrants etc. that will have traction, however we do not believe that will solve the issues of policing. We believe there are ways to preserve the budget of the police and create a budget for non-police responders to mental health crisis, homeless and non-violent nuisances that the consumer calls the police for in the District of Columbia. We believe that for comparison sake, Washington, DC is not Seattle, Washington, Ferguson, Missouri, Chicago, Illinois or even Prince Georges, Montgomery, Arlington or Fairfax counties. We recognize we have our issues. We note for the record our police STOP a large number of people for many reasons. We recognize also that interactions with children/students does not yield the arrests, many of these other jurisdictions have amassed. We want everyone else to see that as well.

How do we fix our problems as a family? We acknowledge on all sides of the issue that we can all do better. The Police are the face of government for many people, as that initial encounter can have long-lasting, if not permanent effects of individuals and communities. The 1DCAC understands that policing in the 20th and 21st centuries is not looking to prior times and tying policing of certain regions of the fledging nation to acts of capturing runaway slaves or containing Irish and Scottish immigrants. That is too simplistic and narrow view in our opinion. In some places policing was a duty no one wanted. Our police/sheriff/constable origins derive from England and has indeed been used to victimize all demographics of people in this country. Lots of people hate the police regardless of color of skin or class. This is where we are now and how we believe we move forward. Police are community and are family regardless of issues that exist. Organizations such as police advisory councils exist to bridge those gaps between citizens and citizens with police powers.

1. The Cost of Calling 911 with a Police Response

In the late 1980's calling 911 for a medical issue would result in a fire truck and pumper coming to the location with an ambulance to follow. In a committee we analyzed the cost of that response and determined it was too expensive and unnecessary. It was changed to a single engine response and unfortunately, we also closed firehouses.

In the mid 1990's we tried to reduce the number of ambulance runs by creating the *Make The Right Call* campaign. Finally, a program to address issues of certain consumers of that part of the 911 system so that resources are not overtaxed came online.

Now we look at police response. To fully understand what we are spending on police and understand where our real needs are, we should cost out policing. What is the cost of dialing 911 and getting a response? How much does it cost for a police officer to arrive on a scene? What is the cost of writing a report? How much does an arrest cost? How much does an investigation and prosecution costs versus incarceration? How much does it cost to have a police officer in a school and is that cost the same school to school and how do we evaluate the presence and interactions? Can we weight the responses positive and negative and arrive at a core value for police effectiveness? If we can do this based on the number of schools and interactions, we believe we can then begin to have a picture of exactly what portion of police ratio we need, versus social, medical and mental health specialists assigned to schools.

To have a blanket statement repeated by multiple people testifying on a script of what has happened in other jurisdiction is a malpractice of legislating. We need more information about what police do in schools, how police spend their time when they are not answering a radio run. If we apply a value for community interaction, patrolling, writing reports, arrests, and all of the other functions, the picture becomes even clearer.

2. Supervision and Discipline

Maybe frontline supervisors should have more responsibility, than simply writing up officers for an infraction of the rules. Our goal is for responsibility to be shared for what goes wrong within an individual unit (a police station, sector, or division perhaps). Maybe supervisors should be held accountable at every level for performance evaluation and discipline. In other words, if you are a sergeant you have some responsibility for how your platoon behaves and performs. If they do not evaluate well, you don't either. If there are multiple discipline issues, then there has to be something wrong with supervision and management. There must be better incentives to fix these issues that tie supervisors to officers. The same must be for lieutenants on through to assistant chiefs. The goal is to ensure there are enough supervisors in place to respond to active scenes, respond to community inquiries, train and evaluate the actions of officers who are on the streets or in assignments where they come into contact with the public. We believe, if we add a valuation system here, we begin to create more controls and start a management system that is traceable and available in a transparent manner. This is a part of the community building process.

3. Quality Assurance Controls

We have heard the argument for not calling the police. It starts with 911 or in our city's case the Office of Unified Communications. We looked at what some were saying about the police response they received. Some outcomes where less than ideal. We thought how do we change this? Our solution is to change 911. After police close a call, within a 72-hour period, a reverse 911 call is sent to the end user who dialed 911 asking for an evaluation that is no more than 5 questions or points. If the response is less than a certain value, the incident is automatically flagged for follow up by a police supervisor and a OUC supervisor. Each would have to verify that certain data had been received from the end-user before the call could be considered complete. The police officer who had the contact would use a device or BWC to also measure their feelings about the reactions to the caller. The idea here is to develop internal/external tracking tools to identify patterns, behaviors of certain neighborhoods and police officers and their response. The methodology would have to be developed in a manner that near eliminates bias in the application. We believe it is impossible to eliminate bias to level zero because we are human, and all humans have bias. It is however possible to manage bias.

There would also be measurement for those who don't respond to the query. The data from the police officer and from the end user would be compared and analyzed every 90 day period for comparison in a yearly report. We then can develop outcomes and deliverables which the Administration and the community can see. We believe this is the formation of community management of policing. We must let police do their jobs otherwise we will be accused of meddling. We do not think that is helpful.

4. National Capital Region Application 911+ (PLUS)

We suggest developing an app which we call 911+ which could be managed through OUC or the City Lab and eventually jointly with PSAPs (Public Safety Answering Points) in the region and possibly expandable to West Virginia and Delaware since we are all connected. The app would allow through text, email, phone the opportunity to immediately report a police encounter that someone feels should be investigated. Then there would be documented follow-up.

5. Non-Police Agencies

Blaming police for the social ills that exist, we object to this but understand it also. The communities demand that police respond. We can provide documented proof and testimony if necessary, from former police officials who have spent hours attempting to get DPW, DCRA, CFSA, DOH and other agencies simply to show up! I can even tell you when certain officials are/were to be on call through HSEMA for emergencies they do not always answer the call in the middle of the night even though they are paid to perform that task. I suggest we must have dedicated night teams that specifically work nights, weekends, and holidays. They must coordinate with MPD and FEMS and respond where police need a different type assistance. When police are outgunned or in certain situations, they call for SWAT (ERT). This is simply developing a different type of SWAT without guns, but you still need the police.

6. School Resource Officers and Youth Services Division

While I appreciate the Committee's concern about SROs, we suggest that this approach be data driven. SRO's in schools play a vital role. What would be helpful is ensuring that there is law that allows the assigned SRO to a school to have classification to know if a student has special needs or is dealing with specific types of trauma. The SRO must be trained and capable of meeting students who are in distress without arrest. The variations can occur when a teacher or school administrator demands that a student be arrested. I do not believe the Committee has considered the many different calls for students touching students or sexual abuse which happens every day all day in schools. The police must respond to this regardless of social workers, nurse, and psychologist.

SRO's need to have access to a student's IEP or their 504 plan. Why? Because an assigned SRO is handicapped when called by teachers to assist with a child who is having difficulties in the learning space. The Council should inquire into these types of issues to better understand why Police are needed.

We all know that many children are abused in their familial environments. Whether the first responders are people without guns, the people with guns will still have to show up. Consideration should be given to this duplication of responses. The question is how do we capture that data and how do we share that in a cumulative manner that helps CACs and the Council of the District of Columbia understand what goes on in schools? We believe these are solvable problems.

7. Violence Interrupters, Social Workers, Mental Health Specialists and Liability Costs

There is no question that all these services are needed and welcomed by the Metropolitan Police Department and our communities. As you structure these programs and responses without police as backup, what happens if a Violence Interrupter is killed by someone they are responding to save? What happens if a mental health worker is killed while responding to a distress call or if the person, they have responded to kills them? Is the city indemnified from harm? Who will pay the expenses of the victim?

What happens if the person in distress or the people around them attack non-police responders? Is there a provision to charge that adult or juvenile with harming a public safety responder? Who pays the medical bills or psychological treatment that may be incurred?

Will this new group of responders have a right to unionize as issues associated with responding become clearer of the present danger to being in an unsafe environment? How will legislation address what the Executive can do to protect this new group of public safety workers?

What happens if a member of this group refuses to respond to a situation, they deem unsafe? What regulations will come from your existing legislation to address these issues? If while responding to an emergency will these responders without police have emergency lights and sirens? What happens when one is involved in a crash, hurts a pedestrian or a cyclist (the new ones refuse to get out of the way) or they kill someone while responding? The City is liable. What do we do then? Should we cap compensation, should we use other municipal measure to protect taxpayer dollars while being fair to all involved? Where do they park while responding to an emergency? Will they get ticketed? All reasonable questions.

Tuesday, October 20, 2020 in Philadelphia, a **Violence Interrupter** shot and killed a sex worker who attempted to rob him while armed. How is the current legislation prepared to handle a situation like this? What happens if a juvenile of whom law enforcement concludes is acting out because of their home life, attacks one of these workers? Is this legislation prepared to address those issues or charge the juvenile?

What is the direction to the Office of the Attorney General and the US Attorney of filing charges that may result from the response by this new group of First Responders?

8. Masks versus Face Coverings

We caution the Council to look carefully at eliminating the ability of law enforcement to stop, detain or arrest someone with a mask. Face coverings are new to our world (the western hemisphere). Masks are not new and have a history.

We believe language must be inserted in your current bill that allows for prosecution of those who use masks to commit crime. We also believe that face coverings and or masks under the medical definition of a mask should reference using a mask for fear or committing a crime can be prosecuted. We have inserted below our reference to why we think this is possible to legally and fairly legislate:

Anti-Mask Laws

By Robert A. Kahn

Other articles in Categories of Laws and Proposed Laws

Members of the Church of the American Knights of the Ku Klux Klan march around the Madison County Courthouse in Canton, Miss. Klan members argued that if their masks were removed, they would face harassment. Opponents contended that most anti-mask laws violate the equal protection clause because they make exceptions for Halloween masks, masquerade ball masks, and masks worn for medical reasons, but not masks for political acts. (AP Photo/Rogelio Solis, used with permission from The Associated Press)

The earliest laws banning masked demonstrations date back to the antebellum era. In 1845 New York made it illegal to appear "disguised and armed." Most anti-mask laws were passed, however, in response to the Ku Klux Klan, whose members used masks to hide their identities as they terrorized their victims.

Around 15 states have anti-mask laws, as do many counties and municipalities. Most anti-mask laws do not target specific groups explicitly. Instead, they use neutral language, typically banning mask wearing that intimidates others.

Supporters of such laws argue that wearing masks emboldens people to commit crimes and makes those crimes more frightening to the victims. Opponents argue mask laws impair freedom of association. Opponents, in turn, make three arguments.

First, they invoke freedom of association, claiming that mask laws deprive wearers of the anonymity needed to express their views. They rely on NAACP v. Alabama (1958), which held that because its members feared harassment from opponents of civil rights, the NAACP did not have to reveal its membership list unless Alabama could supply a compelling state interest.

Klan members argued that if their masks were removed, they would face harassment. The Klan's unpopularity added fuel to this argument. For example, in American Knights of the Ku Klux Klan v. City of Goshen (N.D. Ind. 1999), a court found that Klan members had indeed suffered harassment, through vandalism and bomb threats, and ultimately invalidated the city's anti-mask law.

The Second Circuit Court of Appeals, in Church of the American Knights of the Ku Klux Klan v. Kerik (2d Cir. 2004), held that harassment of Klan members was irrelevant because the Constitution guarantees only the right to speak, not the conditions under which one speaks. Furthermore, in most cases involving the Klan, courts held that protecting citizens from intimidation was a compelling state interest.

Non-Klan mask wearers generally fared better when making freedom of association claims. In Aryan v. Mackey (N.D. Texas 1978) and Ghafari v. Municipal Court (Ct. App. 1978), political opponents of the shah of Iran successfully argued that they needed masks to avoid reprisals from the shah's security forces.

Anarchists convicted under New York's anti-mask law failed, however, to raise a constitutional claim in People v. Aboaf (Crim. Ct. 2001) because they could not show any harassment beyond famous anarchists having been persecuted in the past.

The earliest laws banning masked demonstrations date back to the antebellum era. In 1845 New York made it illegal to appear "disguised and armed." Some 15 states have anti-mask laws, as do many counties and municipalities. Most anti-mask laws do not target specific groups explicitly. Instead, they use neutral language, typically banning mask wearing that intimidates others. In this photo, members of the Anonymous group wear Guy Fawkes masks in Los Angeles, California. (Image via Vincent Diamante on Flickr, CC BY-SA 2.0)

Some have argued masks constitute symbolic speech. Second, opponents of anti-mask laws argued, largely unsuccessfully, that masks constitute symbolic speech.

In Klan cases, courts held that the masks added little to the expressive content of the rest of the Klan regalia. They also ruled that the state's concerns about safety and avoiding intimidation easily satisfied the substantial state interest test for symbolic speech cases.

Distinguishing between threatening and nonthreatening masks

Third, opponents contended that most anti-mask laws violate the equal protection clause because they make exceptions for Halloween masks, masquerade ball masks, and masks worn for medical reasons, but not masks for political acts.

These arguments convinced the California court in Ghafari but not the Georgia Supreme Court in State v. Miller (S.E. 2d 1990), which defended Georgia's exemptions as distinguishing between threatening and nonthreatening masks.

Overall the general trend has been toward upholding anti-mask laws, at least where mask wearers cannot show direct, specific evidence of harassment.

This article was originally published in 2009. Professor Rob Kahn teaches at St. Thomas University School of Law in Minneapolis, Minnesota. His 2004 book Holocaust Denial and the Law: A Comparative Study (Palgrave 2004) dissertation examines Holocaust denial litigation. He has also written on topics such as cross-burning in the United States, blasphemy regulation and the defamation of religions debate, and use of law to ban statements about the past.

9. DC Law on Mask states

§ 22–3312.03. Wearing hoods or masks.

(a) No person or persons over 16 years of age, while wearing any mask, hood, or device whereby any portion of the face is hidden, concealed, or covered as to conceal the identity of the wearer, shall:

(1) Enter upon, be, or appear upon any lane, walk, alley, street, road highway, or other public way in the District of Columbia;

(2) Enter upon, be, or appear upon or within the public property of the District of Columbia; or

(3) Hold any manner of meeting or demonstration.

(b) The provisions of subsection (a) of this section apply only if the person was wearing the hood, mask, or other device:

(1) With the intent to deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States or the District of Columbia from giving or securing for all persons within the District of Columbia equal protection of the law;

(2) With the intent, by force or threat of force, to injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;

(3) With the intent to intimidate, threaten, abuse, or harass any other person;

(4) With the intent to cause another person to fear for his or her personal safety, or, where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability; or

(5) While engaged in conduct prohibited by civil or criminal law, with the intent of avoiding identification.

(Mar. 10, 1983, D.C. Law 4-203, § 4, 30 DCR 180.)

Prior Codifications

1981 Ed., § 22-3112.3.

Section References

This section is referenced in § 22-3312.04 and § 23-581.

Emergency Legislation

For temporary (90 days) repeal of this section, see § 108(a) of Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 (D.C. Act 23-336, July 22, 2020, 67 DCR 9148).

Title: Section 66-3.2 - Face-Coverings

Effective Date

10/07/2020

Section 66-3.2 Face-Coverings

(a) Any person who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or face-covering when in a public place and unable to maintain, or when not maintaining, social distance.

(b) Any paying passenger of a public or private transportation carrier or other for-hire vehicle, who is over age two and able to medically tolerate a face covering, shall wear a mask or face-covering over the nose and mouth during any such trip; any employee of such public or private transportation carrier who is operating such public or private transport, shall likewise wear a mask or face-covering which covers the nose and mouth while there are any paying passengers in such vehicle.

(c) Any employee who is present in the workplace shall be provided and shall wear a mask or face-covering when in direct contact with customers or members of the public, or when unable to maintain social distance. Businesses must provide, at their expense, such face coverings for their employees.

(d) Business operators and building owners, and those authorized on their behalf or otherwise authorized to use the building shall deny admittance to any person who fails to comply with this section and shall require or compel such persons' removal. Provided, however, that this regulation shall be applied in a manner consistent with the federal American with Disabilities

Act, New York State or New York City Human Rights Law, and any other applicable provision of law.

(e) For purposes of this section:

(i) Face-coverings shall include, but are not limited to, cloth masks (e.g. homemade sewn, quick cut, bandana), surgical masks, N-95 respirators, and face shields.

(ii) A person shall be considered as maintaining social distancing when keeping at least six feet distance between themselves and any other persons, other than members of such persons' household.

Statutory Authority

Public Health Law, Sections 201, 206 and 225 & Executive Order 202.14

Volume

VOLUME A-1a (Title 10)

10. Who is Killed in the National Capital Region?

1) At least 109 people died in police encounters in Maryland between 2010-2014.

These deaths were dispersed throughout the state in 17 counties and Baltimore

City. At least 109 people died in police encounters in Maryland between 2010-2014.

These deaths were dispersed throughout the state in 17 counties and Baltimore City. Nearly one-third of those who died were age 25 or younger. The ages of those who died ranged from 15-78; their average age was 35. Five of those who died were women; three of these women were Black. During the same time period, four officers died in civilian encounters. Two of Them died in vehicle pursuits and two were shot. One was shot in a raid and the other was shot when off-duty and working as a security guard.

County Deaths

Allegany 1

Anne Arundel 4

Baltimore City 31

Baltimore County 13

Carroll 2

Cecil 3

Charles 2

Frederick 4

Harford 3

Howard 4

Montgomery 10

Prince George's 21

Queen Anne's 2

Somerset 2

St. Mary's 2

Washington County 1

Wicomico 3

Worcester 1

Total 109

We believe some of the sentiment against DC Police results from experiences in the National Capital Region.

In conclusion we ask the Council of the District of Columbia to slow down the movement on

B23-0723, THE "RIOTING MODERNIZATION AMENDMENT ACT OF 2020"

B23-0771, THE "INTERNATIONALLY BANNED CHEMICAL WEAPON PROHIBITION

AMENDMENT ACT OF 2020"AND B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"

There are enormous costs associated with many aspects of what the Council is attempting to implement. There are many consequences that have not been explored. The police commission you have established is not balanced and is singularly focused on eliminating police from schools without a clear understanding of what police in DC actually do in schools. The efforts to remove chemical weapons is short sighted and does not consider that these chemicals may actually be needed! We understand that some exposed to these chemicals can have adverse effects. Why not change when, how these chemicals are deployed including proving notification to those who are about to become exposed to those chemicals. We believe that our police would be willing to meet the Council at this point.

We thank you for the opportunity to share our thoughts.

Testimony on Police Reform Bills

By

Brenda Lee Richardson

October 15, 2020

Good morning Councilmember Allen and other distinguished Councilmembers. My name is Brenda Lee Richardson. I am a resident of Ward 8 and a strong supporter of the Metropolitan Police Department. As I reviewed the Police Reform Bills, I am mindful of a few things as we look at this golden opportunity to re-ignite our spirits and re-imagine our future in collaboration with the community, the Metropolitan Police Department and our policymakers.

When it comes to police reform there are two significant partners that play a critical in the implementation process:

- The Community
- Metropolitan Police Department

Together we serve on the frontline as agents of change. PSA 702 has been working closely with the 7th District Police to improve our relationship and looking at better ways to respond to each other. We learned almost 4 years ago that the best way to approach public safety is by:

1. Understanding the culture of the community and the police department. I attended the Community Engagement Academy that gave me a totally different perspective of the police.
2. Acknowledging the trauma and exhaustion that disfavored communities are exposed to on a daily basis and how it adversely impacts our mental well-being.
3. Communicating with each other to ensure that we are clear about our roles and responsibilities. Yes, communities have a role as well – to abide by the law.
4. Responding to community and MPD in a humanizing way is very important. Police reform is unlikely to be effective if arduous efforts are not made to encourage disfavored community to respond when they see or hear something as it relates to crime or violence.
5. We have also been working on improving favorable police visibility with a myriad of projects that we have worked on over the years (i.e. StoryTime

with MPD with young children during the summer months.) This affords both parties to see each other differently and in a positive view.

We cannot legislate effective policies without meaningfully engaging the community and the police department who are ultimately impacted by the decisions of our Councilmembers. It also looks like MPD has no formal role in the DC Police Commission. I find that very interesting.

Your experience is not my experience. When you are exhausted by the daily trauma of living in disfavored communities from my view the police are guardians who keep me safe when no one else will.

Our legislators have an opportunity to bridge the gap between the community and the police. In closing please be mindful there is also great concern about a reduced police force and the depth of greater anxiety that will not only be imposed on under-resourced communities who are on life support but the police force as well. Thank you.

Georgine L Wallace

As I noted in my oral remarks, for the last four years, I've served as the Community Facilitator for Southwest, now Police Service Areas 103 and 105. I coordinate the monthly PSA meeting and educate the community on public safety issues. We also work on enhancing our communication with the entire Southwest Community. Some areas are more receptive than others. In the interest of full disclosure, I am also a 2016 graduate of the Community Engagement Academy.

The Rioting Modernization Act is headed in a good direction but I encourage you to work with not only MPD but the USAO to clarify it. By making rioting a secondary charge, you may be unwittingly protecting those demonstrators who damage property and threaten the livelihoods of businesses. The additional, oddly specific, provision of nine or more people acting in concert impedes the ability to charge those who violate it. The Chicago Seven are proof that fewer than 9 people can start a riot. Charging individuals will be difficult. I encourage you take a second look and tweak this bill to ensure the protection of peaceful demonstrators and provide law enforcement with the ability to charge those who violate our laws and our trust.

The use of chemical irritants are prohibited by two of the bills. Looking at section 102 5-331.16, "a commanding officer at the scene" makes the decision to deploy canisters. Rather than prohibit its use completely, move the authority to deploy tear gas canisters up the chain of command to someone not as engaged- a cooler head. Then evaluate the policy change in a year. Completely abolishing the use of tear gas severely limits non- lethal options for officers when a group refuses to disburse and turns aggressive. The use of tear gas should not be used as readily. However, MPD should be provided with a mechanism to defend the city and themselves when a crowd is non-responsive. I saw many friends hurt this summer. In fact the officer with the serious leg injury mentioned in the Chief's video was one of our best from the First District.

Line 183 in the Comprehensive Policing and Justice Reform Act prevents an officer's ability to view BWC footage when making their initial report. Changing the ability to review the BWC for minor details may result in less accurate reports. If not edited at a later date, criminal defense attorneys could use missing details to exonerate a client on a technicality. Plus, officers may be reprimanded or accused of lying if they omit anything. I was in exchanges of gunfire as a teenager and I know that your memory can get

fuzzy. Officers or their supervisors should be allowed to least add an addendum if the footage reflects that the officer flipped events or had a memory lapse. Director Tobin noted that officers had to do reports from memory in the past. Well, in the past, reports were not then compared to a recording that missed little if anything and was available to everyone but the officer writing the report.

The addition of citizens from each ward to the Office of Police Complaints Board provides greater citizen representation. The elimination of an MPD representative from the Board will mean the loss of a knowledge base of police policies and procedures that is essential to the process. Expand the Board but omit the at-large member and retain the MPD position. Or, add an MPD Commander or Chief as a non-voting member as Chief Burke suggested. This allows the civic involvement you seek and lends higher credibility to the Board's actions and any reports or recommendations to other government entities.

The importance of the knowledge of police policies and procedures was evident when I viewed the Police Reform Commission meetings. As a taxpayer, I am not exactly thrilled that at least half of the commission is clueless as to police procedures (at least until the 9/14 meeting). If the Council is spending precious city resources on consultants for this Commission, the Commissioners should at least try to learn about why and how officers do certain things. A ride along or a tour of the academy for the entire Commission would be helpful. In fact, such activities would be good for all of the appointees to the Commissions or Boards provided for in this bill.

We are living in a time when it is vital that law enforcement respects those they protect. It is also important that respect be afforded to them as well. The current practice to plea down Assault on a Police Officer to simple assault is well-known. I first heard about it from an eleven year old whose older cousin bragged that did not matter that he hit an officer. Several officers told me it happened to them and that they felt betrayed when the charge changed. Thank you for fixing this.

I want to close my testimony by making it clear that I have not always been a fan of law enforcement. I was raised in the mountains of Pennsylvania where the State Police assigned to the area were not worthy of wearing a badge. They not only refused to respond to calls for service at night but they harassed the residents when they deigned to appear. Because of their negligence, I had to learn how to shoot at the age of four, guard my parent’s home starting at age 9, and hold an adult male at gun point at age 12 after he attempted to hurt my elderly father. I was 13 when 5 of my male classmates decided to attack me as I walked from one school building to another. A teacher called the State Police but the officer said that they would not respond because girls from my neighborhood probably asked for it. I

had to go back to my classroom and sit with my attackers for the remainder of the school year. I was afraid to tell my mom and lied to her as to why my shirt was ripped. When I visit the area today, I am followed, they attempt to search my car, and they harass me. Needless to say, I do not visit very often. It took me over a decade to trust MPD. I had to learn that you need to evaluate each officer on his or her own merits and not hate the badge.

I would like to bring one more thing to your attention and that is the morale of the MPD. My First District Officers have been working long hours and covering shifts for officers injured in civil disobedience duty or on COVID protocol. Most went for over a month without a day off, working at least a 12 hour shift each day. Earlier this year, people lined up to do special things for all first responders: buying lunches, waving at them, etc.). Now, only medical first responders are portrayed as heroes in commercials or public acknowledgements. The country has essentially turned its back on the good officers who are worthy of the uniform. Even my church deleted a prayer for first responders from the weekly bulletin. I struggle to keep good officers in the First District and my PSAs. I try to work with them to let them know they are valued. An officer who feels valued will value others. They are no different than the rest of us.

I ask the Council to not only consider the above changes and concerns but to also be mindful that your words often wound even if you do intend them in that way. We do need to make changes but we also need to keep our best in a MPD uniform. Thank you for your time and your own service to our City.

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October 15, 2020

Good morning Members of the Committee, thank you for this opportunity to testify. As the Chairman of the D.C. Police Union, I speak on behalf of more than 3,600 sworn police officers, detectives and sergeants who serve this community as members of the MPD. 66% of our members are minorities, making us a minority-majority Union. I have been a DC resident and a DC police officer for fifteen years and I take great pride in serving this city.

In regards to the Police Reform Bill, the Union has a number of significant objections to the technical and legal aspects of much of the Bill, some of which are being challenged in the Court system. Because of the limited time I have in this hearing, those objections have been highlighted in great detail in our written testimony, which has been provided to the Council and made available to the public on our website, DCPoliceUnion.com.

I will focus my time today on more general aspects of the Bill that our members believe will have a considerable impact on the hiring, retention, and attrition of the MPD, as well as an impact on our ability to provide quality and efficient service to citizens.

Let me first say that the Union remains steadfastly committed to important discussions on police reform and is always willing to be on the cutting edge of professional policing, we have only asked that the voices of the men and women who perform this work every day be included in these deliberations.

That being said, the Council has approached the idea of "Police Reform" in an extremely myopic manner. Legislation should be based on rigorously established empirical data and research, not anecdotal complaints or unrelated incidents that occur halfway across the country.

The Police Union made a public statement on June 8 which stated, *"[T]he outcome of the current language in the Bill will undoubtedly result in an exponential increase in crime and a mass exodus in personnel."* While many Councilmembers scoffed at this assertion, it seems that in just four months, both of these predictions have come to pass.

Crime data on the department's website from June 1st to this week confirms our suspicions about the devastating impacts of this law. Take areas like Ward 7 and Ward 8 where, just since June 1, shootings are up 25% and 30% respectively. Or take burglaries in Ward 3, which are up *122%* since June 1. Since the announcement and passage of this temporary bill, citywide homicides have increased 27%.

Just this past weekend we had 6 homicides in a 20 hour period, bringing our Y-T-D homicides to 155, putting us on pace for murders in the District to reach numbers not seen in over 12 years.

All of this can be attributed to the implementation of the police reform bill and its chilling effect on professional and responsible policing.

While the impact on crime is harrowing enough, the effect it has had on attrition is also startling. Between January and July, MPD lost an average of 20 members per month. Since August 1st, the department has lost 80 members, nearly doubling the average. Over half of those that left were resignations.

What the Union is asking from the Council is simple. Please be guided by the data and not rhetoric, not demagoguery, and certainly not abhorrent videos of police officers in other jurisdictions. The Council has instituted a commission to provide review, and the DC Auditor has launched a probe of similar concerns as well.

We encourage the Council to refrain from instituting any permanent policy until these reports are completed. The members of the DC Police Union thank you for your time today.

Gregg Pemberton
Chairman
DC Police Union

Encl: Full written testimony and comments on the Comprehensive Policing Reform and Justice Act of 2020

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October 15, 2020

VIA FIRST CLASS MAIL AND ELECTRONIC MAIL

Council of the District of Columbia
Committee on the Judiciary & Public Safety
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Comprehensive Policing and Justice Reform Amendment Act of 2020

Dear Councilmembers:

I am writing as Chairman of the Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union ("D.C. Police Union") and on behalf of the nearly 3,600 members of the D.C. Police Union regarding the proposed legislation entitled the Comprehensive Policing and Justice Reform Amendment Act of 2020 (the "Act"). The Act proposes sweeping changes to many of the laws, rules, and regulations that govern D.C. Police Union members. Notably, several of the provisions contained in the Act are subject to pending lawsuits in the U.S. District Court for the District of Columbia and the Superior Court of the District of Columbia, challenging the constitutionality of identical provisions contained in the predecessor Emergency Act. Therefore, it would be premature for the Council to enact permanent legislation prior to these Courts determining the legality of the Act. While I have concerns about many of the proposed amendments contained in the Act, I have focused my comments on five specific proposals that are most troubling.

1. Eliminating Collective Bargaining Rights of Police Officers

Subtitle L of the Act proposes to amend D.C. Code § 1-617.08 to state: "All matters pertaining to discipline of sworn law enforcement personnel shall be retained by management and not be negotiable." Act at 20. This proposal would strip the D.C. Police Union of its collective bargaining rights over the disciplinary process, which help to ensure that the disciplinary process provides members with their due process rights and complies with the CMPA's requirement that "disciplinary actions may only be taken for cause." *See* D.C. Code § 1-616.51(1). Singling out police officers and stripping them of their most important right that arises in collective bargaining is unprecedented and legally invalid. Significantly, this amendment is currently being challenged in the U.S. District Court for the District of Columbia on the grounds that it violates the United States Constitution's equal protection and substantive due process requirements, is an unconstitutional bill of attainder, violates the Contracts Clause of the Constitution, and violates the District of Columbia Home Rule Act. The Constitutional challenge to this amendment is fully-briefed and awaiting a ruling from the Honorable James E. Boasberg. *See FOP v. District of Columbia, et al.*, Case No. 1:20-CV-02130. Therefore, the Council should refrain from enacting permanent legislation until the U.S. District Court rules on the constitutionality of Subtitle L.

In the District, the CMPA guarantees all employees the right to "organize a labor organization free from interference, restraint, or coercion" and "[t]o bargain collectively through representatives of their own choosing." Designating discipline as non-negotiable for only one union in the District contradicts these guaranteed rights of all employees. In attempting to defend this amendment, the District has argued that it is necessary to prevent police officers from being shielded from accountability. However, stripping D.C. Police Union members of their bargaining rights does nothing to increase accountability. Instead, the collectively bargained disciplinary process in place between the D.C. Police Union and the MPD helps to ensure that D.C. Police Union members receive the due process rights they are guaranteed under D.C. law. For example, D.C. Code § 1-616.51 requires that the disciplinary system include:

> (1) A provision that disciplinary actions may only be taken for cause;
> (2) A definition of the causes for which a disciplinary action may be taken;
> (3) Prior written notice of the grounds on which the action is proposed to be taken;
> (4) Except as provided in paragraph (5) of this section, a written opportunity to be heard before the action becomes effective, unless the agency head finds that taking action prior to the exercise of such opportunity is necessary to protect the integrity of government operations, in which case an opportunity to be heard shall be afforded within a reasonable time after the action becomes effective; and
> (5) An opportunity to be heard within a reasonable time after the action becomes effective when the agency head finds that taking action is necessary because the employee's conduct threatens the integrity of government operations; constitutes an immediate hazard to the agency, to other District employees, or to the employee; or is detrimental to the public health, safety or welfare.

D.C. Code § 1-616.51. Moreover, D.C. Code §1-616.52 provides that "[a]n official reprimand or a suspension of less than 10 days may be contested as a grievance" and "[a]n appeal from removal, a reduction in grade, or suspension of 10 days or more may be made to the Office of Employee Appeals." The Office of Employee Appeals permits parties to request "an evidentiary hearing to adduce testimony to support or refute any fact alleged in a pleading." 6-B DCMR § 624.1. These required, statutory due process rights have provided the framework for the D.C. Police Union and the MPD to negotiate a disciplinary system that adheres to these requirements and ensures that D.C. Police Union members receive the due process rights they are guaranteed.

Thus, many of the provisions contained in the disciplinary article of the Collective Bargaining Agreement ("CBA") between the D.C. Police Union and the District help to ensure that discipline is administered in a manner that comports with due process, thereby decreasing the likelihood that discipline will be overturned based on an error or a due process violation committed by the MPD. This process does not remove the final decision on discipline from the Chief of Police and does not preclude the Chief from imposing discipline in a swift manner. Indeed, even the right to appeal certain suspensions and terminations only accrues *after* the Chief has imposed final agency action and the member has been suspended or terminated. By taking away the D.C. Police Union's right to bargain over discipline, it appears that the Council wants the Chief of Police to have the ability to summarily discipline or terminate D.C. Police Union members without first providing them with basic due process rights aimed at ensuring that discipline is properly imposed in a fair manner. In doing so, the D.C. Council is actually attempting to shield MPD management from any

accountability on how it imposes discipline and is opening up all future discipline to due process challenges.

In addition, the D.C. Police Union is similarly situated to other public employees and unions that engage in the same police-related activity, but are nonetheless left untouched by the Act. As with the D.C. Police Union, the Fraternal Order of Police maintains labor committees (*i.e.*, unions) for public employees in four other departments and agencies within the District: (1) the District of Columbia Department of Corrections; (2) the District of Columbia Housing Authority; (3) the District of Columbia Department of General Services' Protective Services Division; and (4) the District of Columbia Department of Youth Rehabilitation Services. The public employees under these FOP unions all share substantial similarities to D.C. Police Union members, including the ability to make arrests, the ability to carry non-lethal and lethal weapons, and the ability to legally use physical force on the District's citizens. *See* D.C. Code § 6-223 (conferring on the Housing Authority Police Department "the same powers, including the power of arrest . . . as a member of the Metropolitan Police Department" and authorizing the carrying of handguns). Notably, each of these unions operates under their own collective bargaining agreements that contain express disciplinary procedures distinct from the procedures afforded under the CMPA. Thus, through Subtitle L, the District has separated the D.C. Police Union and its members into a new, distinct class, distinguishing them from all other similarly situated District employees and has discriminated against that class by stripping them of their right to bargain with management concerning discipline. As such, Subtitle L violates the equal protection requirements contained in the United States Constitution through the disparate treatment of similarly situated employees, and the Council should strike it from the Act.

2. <u>Requiring Immediate Release of Body Worn Camera Footage and Names of Officers</u>

Subtitle B of the Act requires the Mayor to "[w]ithin 5 business days after an officer-involved death or the serious use of force, publicly release the names and body-worn camera recordings of all officers who committed the officer-involved death or serious use of force." Act at p. 5. This amendment removes any discretion previously held by the Mayor in the release of body-worn camera recordings and unquestionably puts the lives of D.C. Police Union members, their families, and members of the public in jeopardy. The great danger caused by Subtitle B was immediately evident through the recent release of the body-worn camera footage and name of the officer involved in the September 2, 2020 shooting incident. Despite the fact that the shooting was justified, immediately upon release of the officer's name and the body-worn camera footage numerous death threats were made against the officer and D.C. Police Union members generally. For example, one threat stated: "we need the police officer's picture so we can see who he is…it's not going to be safe for him no more…street justice is the best for this cop…we need to know who he is an address and everything." Through the release of the officer's name and body-worn camera recordings, criminals seeking "street justice" will be able to identify the officer and attempt to carry out a death threat against the officer and the officer's family.

In addition, Dr. Beverly Anderson, the Clinical Director of the Metropolitan Police Employee Assistance Program ("MPEAP"), stated that public release of body-worn camera footage depicting a death in which an officer is involved can inflict serious psychological trauma on the officer and their families. Dr. Anderson further noted that in the early days following a serious use of force incident

or incident concerning an officer involved death, officers are particularly vulnerable to psychological harm, which would be exacerbated by the public release of the body-worn camera footage of the incident.

In addition to the significant risk of harm caused by Subtitle B, Subtitle B also impermissibly intrudes on the Mayor's exclusive power and duty to "preserve the public peace," and "prevent crimes and arrest offenders" by requiring her to release body-worn camera footage and names of officers, even if it will jeopardize the arrest of criminals, the prosecution of crimes, and place citizens of the District and police officers at immediate risk of significant bodily harm. Subtitle B of the Act has removed the necessary discretion the Mayor previously had in executing her specifically-delegated executive duties. This necessary discretion was described by Michael R. Sherwin, Acting United States Attorney for the District of Columbia, who expressed serious concerns that the immediate release of body-worn camera recordings "could create a narrative that makes it difficult to conduct an investigation, as it may lead witnesses to a conclusion that affects their testimony." Acting U.S. Attorney Sherwin also raised concern that the early release "could inadvertently publicize the identities of witnesses" and could result in "unjust reputational harm" that would "unjustly malign an officer" who is involved in justified use of force. These legitimate concerns became a reality and were crystallized through the death threats and unjust maligning of the reputation of the officer involved in the September 2, 2020 shooting incident.

The predecessor to Subtitle B contained in the Emergency Act is currently being challenged in the Superior Court of the District of Columbia. *See FOP v. District of Columbia, et al.* Case No. 2020 Ca 003492 B. Notably, during the August 13, 2020, temporary restraining order hearing held before the Honorable Hiram Puig-Lugo, Judge Puig-Lugo expressed significant concerns regarding the cavalier nature in which Subtitle B disregarded officers' safety and privacy rights through the immediate release of body-worn camera footage and officer names. As such, the Council should refrain from enacting permanent legislation until the Superior Court rules on the legality of Subtitle B.

3. <u>Prohibiting the Review of BWC Recordings by Investigating Officers</u>

The Act further proposes the amendment of 24 DCMR § 3900.9, to state: "Members may **<u>not</u>** review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing." Act at p. 7 (emphasis added). A sworn members' ability to review BWC recordings when drafting initial reports is critical to ensure that crimes committed against District residents are properly investigated and solved; suspects are properly identified, arrested and ultimately convicted; citizens are protected in instances of ongoing crimes; and future crimes are prevented. By preventing arresting officers from having access to critical evidence when drafting their initial reports, the Act jeopardizes these vital components necessary to allow the MPD to accomplish its mission. The MPD's General Order concerning the Field Reporting System states:

> A field reporting system that provides accurate information to members within the Department and to the citizens we serve is an essential part of delivering effective law enforcement services.
>
> . . . .
>
> The need to document and preserve information gathered from reported offenses and incidents provides a record for action taken by law enforcement members, whether

> self-initiated or in response to a request for police services, **helps ensure that appropriate enforcement action is taken when conducting investigations and provides information that can be used to identify crime trends and solve crimes**.

General Order 401.01 at p. 1-2 (emphasis added). Notably, sworn members "shall not be relieved from their shift until all reports are completed accurately and have been submitted and approved." *Id*. at p. 9. The MPD's Body-Worn Camera Sworn Program explicitly permits members to "use BWCs to record initial interviews of victims, complainants and witnesses." General Order 302.13 at p. 9. Thus, by preventing sworn members from reviewing BWC recordings when drafting initial reports, the Act impedes ongoing investigations and the arrests of suspects by interfering with police officers' access to evidence in connection with reporting critical information they receive from victims, complainants, and witnesses that was captured on BWC. This will undoubtedly result in an increase in crime and a decrease in crime prevention.

If a victim provides critical information identifying a violent suspect during an interview conducted on BWC, and the sworn officer cannot review that interview when drafting the initial report, critical identifying information may be left out of the report, thereby decreasing the chances of an arrest and increasing the probability that the violent suspect will commit a crime against another victim. For example, if a child has been kidnapped and an officer is prevented from reviewing necessary information obtained during an interview on BWC, the missing details in the initial report could prevent the child from being located and a suspect from being apprehended before a tragedy occurs. Conversely, if an initial report is conducted without the aid of BWC recordings, the wrong suspect could be identified in the report resulting in unnecessary arrests and encounters between police and innocent citizens.

Precluding sworn members from reviewing BWC recordings when drafting initial reports unnecessarily threatens the District's ability to obtain convictions in nearly all crimes committed in the District. Indeed, if an officer drafts an initial report without the aid of BWC recordings and simply forgets a fact that occurred during the incident, but one that can be easily observed on the BWC recording, this unintentional omission will be used by defense attorneys to attempt to create reasonable doubt at trial and avoid a conviction. Just as the Council would not prevent a detective from reviewing crime scene photographs when attempting to solve a crime, the Council should not preclude sworn members from reviewing BWC recordings when creating initial reports that are critical to criminal investigations and solving crimes. Through the Act, the District would unnecessarily restrict its own access to critical evidence when drafting reports and taking positions related to criminal prosecutions. This artificial restriction on its own access to evidence will jeopardize the District's ability secure convictions.

The Act's proposed amendment would further contradict the stated policy of the BWC program, which is as follows:

> It is the policy of the MPD to use BWCs to further the mission of the Department, promote public trust, and enhance service to the community **by accurately documenting events, actions, conditions, and statements made during citizen encounters, traffic stops, arrests, and other incidents, and to help ensure officer and public safety**.

General Order 302.13 at p. 1-2 (emphasis added). The BWC's ability to document events, conditions, and statements is rendered meaningless if those events, conditions, and statements cannot then be included in initial reports and used for law enforcement purposes.

Moreover, the review of BWC recordings currently in place requires sworn members to notify Department officials if they observe any violation of Department policies, laws, rules, regulations or directives. Specifically, 24 DCMR § 3900.8 requires: "When reviewing BWC recordings, members shall immediately notify Department officials upon observing, or becoming aware of, an alleged violation of Department policies, laws, rules, regulations, or directives." Thus, continuing to allow sworn members to review BWC recordings to assist in initial report writing will preserve the requirement that any violation of Department policies, laws, rules, regulations, or directives observed on the BWC recording will be immediately brought to the attention of Department officials.

4. <u>Removing All Police Officers from the Office of Police Complaints Board</u>

Subtitle C of the Act further proposes to remove the MPD representative from the Police Complaints Board. *See* Act at p. 10. This proposal undermines the purpose of the Police Complaints Board and the Office of Police Complaints as a whole. D.C. Code § 5-1102 sets forth the purpose of the Police Complaints Board and the Office of Police Complaints, as follows:

> The purpose of this subchapter is to establish an effective, efficient, and fair system of independent review of citizen complaints against police officers in the District of Columbia, which will:
> (1) Be visible to and easily accessible to the public;
> (2) Investigate promptly and thoroughly claims of police misconduct;
> (3) Encourage the mutually agreeable resolution of complaints through conciliation and mediation where appropriate;
> (4) Provide adequate due process protection to officers accused of misconduct;
> (5) Provide fair and speedy determination of cases that cannot be resolved through conciliation or mediation;
> (6) Render just determinations;
> (7) Foster increased communication and understanding and reduce tension between the police and the public; and
> (8) Improve the public safety and welfare of all persons in the District of Columbia.

D.C. Code § 5-1102. To help achieve this purpose, the Police Complaints Board is empowered, in part, as follows:

> The Board shall conduct periodic reviews of the citizen complaint review process, and shall make recommendations, where appropriate, to the Mayor, the Council, the Chief of the Metropolitan Police Department ("Police Chief"), and the Director of the District of Columbia Housing Authority ("DCHA Director") concerning the status and the improvement of the citizen complaint process. The Board shall, where appropriate, make recommendations to the above-named entities concerning those elements of management of the MPD affecting the incidence of police misconduct, such as the recruitment, training, evaluation, discipline, and supervision of police officers.

. . . .

The Board shall review, with respect to the MPD:

(A) The number, type, and disposition of citizen complaints received, investigated, sustained, or otherwise resolved;

(B) The race, national origin, gender, and age of the complainant and the subject officer or officers;

(C) The proposed discipline and the actual discipline imposed on a police officer as a result of any sustained citizen complaint;

(D) All use of force incidents, serious use of force incidents, and serious physical injury incidents as defined in MPD General Order 907.07; and

(E) Any in-custody death.

D.C. Code § 5-1104. The unprecedented proposal to remove the MPD representative from the Board would eliminate necessary background, context and a perspective on citizen complaint matters that can only be provide by an MPD representative. A board designed to review complaints against other professionals, such as doctors or engineers, would not be comprised solely of members outside of the profession. Such boards would necessarily include members of the profession they are reviewing to provide necessary context, governing protocols, and perspective. The Act's proposal would also greatly diminish the Board's ability to accomplish its purpose of increasing communication and understanding and reducing tension between the police and the public because an MPD representative would no longer serve on the Board to consider, more fully understand, and convey to MPD management the complaints raised by citizens. The removal of the MPD representative from the Board would further threaten the Board's purpose and ability to render just determinations and provide adequate due process protection to officers accused of misconduct.

The Act further proposes to empower the Executive Director of the Office of Police Complaints with the ability to initiate the Executive Director's own complaint against a police officer for "abuse or misuse of police powers that was not alleged by the complainant in the complaint." *See* Act at p. 10. This proposal completely re-writes the purpose of the Office of Police Complaints, which was established to address citizen complaints against police officers, often times through "conciliation, mediation, or other dispute mechanism techniques," to enhance "communication and mutual understanding between the police and the community." D.C. Code § 5-1101. The Act's proposal would replace this purpose with a system in which the Executive Director generates complaints against police officers where none have been made by a citizen.

As proposed, the Executive Director would be empowered to serve nearly all roles in the "citizen" complaint process, including the role of the complainant, the initial complaint review process, the assigning of the complaint to a complaint examiner, and the ultimate disposition of the complaint to the MPD for discipline or the U.S. Attorney for criminal prosecution. Any hearing then conducted by the Office of Police Complaints for a complaint made by the Executive Director would presumably require the Executive Director to testify as the complainant. This would serve to deprive the sworn member of due process and a fair hearing when the Executive Director, who will ultimately refer the case for discipline or criminal prosecution, also testifies against the member in a hearing before a complaint examiner who was appointed by the Executive Director. It should be noted that the Executive Director and OPC are proposing sweeping changes to the disciplinary process that would effectively take the final decision on discipline away from the Chief of Police and

place it in the hands of the Police Complaints Board in instances where OPC's Executive Director believes the discipline should be harsher.

Moreover, the Executive Director is an unelected official, with no law enforcement background, who is appointed to a three-year term by the Police Complaints Board. *See* D.C. Code § 5-1105. The Act's proposal would greatly expand the jurisdiction of the Executive Director to incidents that involve any purported "abuse or misuse of police powers that was not alleged by the complainant." Currently, the Office of Police Complaint's jurisdiction is limited to citizen complaints involving incidents such as "use of language or conduct that is insulting, demeaning, or humiliating" and "failure to display required identification or to identify oneself by name and badge number when requested to do so by a member of the public." D.C. Code § 5-1107. Empowering the unelected Executive Director with such unfettered discretion and wide-ranging jurisdiction would be unprecedented. Even the D.C. Inspector General, which is an independent office, has limited jurisdiction and scope of its investigatory authority. The proposed Act would remove any such jurisdictional restrictions on the Executive Director while at the same time greatly expanding the scope of his authority. It should be noted that the Executive Director already serves as a member on the Use of Force Review Board that reviews all instances of serious use of force involving sworn officers. Therefore, the Executive Director already actively participates in the review of "excessive force" matters involving police officers and there is no need to expand his jurisdiction and authority to any type of misconduct when the purpose behind the legislative change is to address issues relating to excessive force.

5. Eliminating the Requirements of Bringing Timely Charges Against Officers in Use of Force Cases

The Act proposes to amend D.C. Code § 5-1031 to include a new subsection that states: "If the act or occurrence allegedly constituting cause involves the serious use of force or indicates potential criminal conduct by a sworn member or civilian employee of the Metropolitan Police Department, the period for commencing a corrective or adverse action under this subsection shall be 180 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause." Act at p. 20-21. The proposed amendment to D.C. Code § 5-1031 does not define "serious use of force." However, the Act's proposal seeks to expand the time for commencing corrective action to 180-days. Corrective action is the lowest level of discipline imposed on sworn members and includes a letter of prejudice or an official reprimand. Thus, the Act's undefined "serious use of force" could encompass any use of force, however minor, involving a sworn officer because it encompasses the commencement of corrective action. The Council should understand that sworn members are placed in non-contact status during the pendency of these investigations. This means the officer has his badge and all weapons taken, his police powers revoked, and has no public contact. Because the vast majority of use of force incidents are ultimately determined to be justified, the proposed amendment will result in countless sworn members being placed on non-contact status for extended periods of time, preventing them from providing necessary policing to the citizens of the District.

To the extent that the Act's proposed amendment intends to adopt the definition of "serious use of force" contained in the MPD's General Orders, the proposed expansion of the time for commencing corrective or adverse action to 180-days is not necessary. The current version of D.C.

Code § 5-1031(b) contains a tolling provision that addresses cases involving ongoing criminal investigations, as follows:

> If the act or occurrence allegedly constituting cause is the subject of a criminal by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.

D.C. Code § 5-1031(b).

In practice, when the Department believes that conduct by a sworn member may involve serious use of force or potential criminal conduct, the case is referred to the U.S. Attorney for the District of Columbia to determine whether the U.S. Attorney's Office will pursue criminal prosecution of the sworn member. Pursuant to D.C. Code § 5-1031(b), when the matter is referred to the U.S. Attorney's Office and under active investigation by the office, the 90-day period for commencing corrective or adverse action is tolled until the U.S. Attorney completes its criminal investigation. In cases in which the U.S. Attorney declines to criminally prosecute the sworn member, the U.S. Attorney issues a formal letter advising the Department that it is declining criminal prosecution and that the Department can now proceed with whatever administrative action it deems appropriate. The time period from when the Department refers the matter to the U.S. Attorney until the U.S. Attorney issues its declination letter often takes several months. Thus, in many cases that involve serious use of force or potential criminal conduct well over 180-days passes from the date of the incident to the date that the Department commences any adverse action against the sworn member. Expanding the time to bring a disciplinary action against an officer under the proposed legislation to 180 business days, when combined with the existing tolling provisions and the Department's practice of delaying action until a deadline is upon it, will result in many of these investigations taking well over a year to conclude. These substantial delays will take officers off the streets for extended periods of time, cost the citizens of the District in both wasted tax dollars and a decrease in available crime prevention, and likely violate the officer's dues process rights, resulting in un-sustained disciplinary action.

Notably, this Committee previously considered and rejected a proposal to repeal D.C. Code § 5-1031, determining that such action would result in "abusively long disciplinary investigations." Indeed, this Committee determined that the 90-day deadline currently set forth in D.C. Code § 5-1031 created a "system of accountability that is responsive and effective," as follows:

> The 90-day rule serves multiple purposes, but at its core, it is a protection for the employee. At the time the 90-day rule was established, the committee report for the Omnibus Act stated, "Employees should not be subject to disciplinary action for an incident that occurred three years prior, especially when management knew about the incident and [chose] not to pursue action at that time. How can employees defend themselves or get on with their lives once an allegation has been made? . . . **Without a timeline requirement in place, the Committee found that MPD and FEMS had "failed to process discipline cases in a timely fashion."**

> **The history of the timeline further reveals that a promise by either department to efficiently process disciplinary cases, in place of an enforceable rule, is not sufficient.** Years before the 90-day rule was created, a 45-day rule governed disciplinary proceedings, not just at MPD and FEMS, but across other District agencies, as well. The 45-day rule was repealed by the "Omnibus Personnel Reform Amendment Act of 1997" because it was found to be "unduly restrictive" in some cases. However, the Committee on Government Operations wrote in its corresponding report that it expected that 45 days would "remain the goal, and that agencies will take appropriate action within that time frame in all but the most unusual instances." By 2003, it was clear that goal was not being met. **The committee report for the Omnibus Act concluded that the repeal of the 45-day rule resulted instead in abusively long disciplinary investigations that were conducted against employees by MPD and FEMS in the absence of a mandatory deadline.**
>
> Chief of Police Cathy Lanier testified at the public hearing on Bill 20-810 that the 90-day rule must be repealed in order to increase police accountability and to ensure that officers who should not be on the force are not kept on due to a technicality. The Committee shares the Chief's concerns for accountability; however, the risk of losing disciplinary appeals to the 90-day rule must be weighed against the value that the rule provides. **The 90-day rule protects employees who are being administratively investigated from working under the threat of disciplinary action for an excessive length of time; the rule prevents the government from having to pay employees who are put on administrative leave for an exorbitant length of time during the pendency of these investigations; and the rule incentivizes MPD and FEMS to follow up on allegations of misconduct quickly, to conduct investigations efficiently, and to resolve disciplinary cases in a timely fashion – three things that all lead to a system of accountability that is responsive and effective.**

See Committee Report on Bill 20-810 at 2-3 (emphasis added).

Moreover, "[a]ll incidents involving deadly force, serious use of force, or the use of force indicating potential criminal conduct" are investigated by the MPD's Internal Affairs Division after the U.S. Attorney conducts its criminal investigation. *See* General Order 901.08 at p. 4. "[A]ll use of force investigations completed by the Internal Affairs Division" are then reviewed by the Use of Force Review Board, which includes the Executive Director of the Office of Police Complaints as one of its a members. *See* General Order 901.09 at p.2. Notably, as part of this review process, "The Use of Force Review Board shall review the actions of all members involved in the use of force incident, not just the actions of the member(s) who used force." *Id*. at p. 5. The Use of Force Review Board is then empowered to affirm or reject the Internal Affairs investigation's recommendation and refer the matter for discipline when it determines that a violation has occurred. Importantly, the Use of Force Review Board has an assigned administrator who is required to track all investigations to determine if any are at risk of missing the 90-day deadline contained in D.C. Code § 5-1031, and the Office of Risk Management further conducts periodic audits to review the timeliness of cases submitted to the Use of Force Review Board. *See id*. at p. 8-9. Thus, the MPD

has developed several levels of review for all serious use of force incidents and multiple checks and balances to ensure that such investigations and reviews are completed before the expiration of the 90-day deadline contained D.C. Code § 5-1031.

During these difficult times, the nearly 3,600 members of the D.C. Police Union remain steadfastly committed to serving and protecting the citizens of the District of Columbia. I welcome the opportunity to address the Council on these issues and answer any questions it may have.

Very Truly Yours,

Greggory Pemberton,
Chairman D.C. Police Union

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Testimony on behalf of the Partnership for Civil Justice Fund
before the D.C. Council Committee on the Judiciary Hearing on Bill 23-723, the "Riot Modernization Act of 2020," and Bill 23-882 and the "Comprehensive Policing and Justice Reform Amendment Act of 2020."

By Mara Verheyden-Hilliard, Executive Director

I am Mara Verheyden-Hilliard, co-founder and Executive Director of the Partnership for Civil Justice Fund. As a constitutional rights litigator specializing in First Amendment and police misconduct cases, much of my and my organization's work focuses on the unique area at the intersection of First and Fourth Amendment rights and the defense of free speech and assembly. I am also a life-long resident of the District of Columbia.

We wish to thank Councilmember Allen for the opportunity to speak at this hearing and for his and other councilmembers' efforts in recognizing the critical moment that we are in, and moving to act in response to the demands and needs of the people standing against racism, seeking change and demanding justice.

Over the last two decades, my organization has litigated most of the major cases in the District of Columbia that resulted in meaningful equitable changes and reforms and restrictions on police conduct – reforms that federal judges have called historic and a benefit for future generations. Our cases have been litigated against both the DC Metropolitan Police Department and its highest officials and against federal police including Park Police.[1]

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[1] Among the District cases are: *Becker, et al. v. District of Columbia, et al.*, Civil Action No. 01-0811, U.S. District Court for the District of Columbia (successfully resolving claims for mass false arrest, excessive force and other violations by law enforcement in connection with the April, 2000 IMF/World Bank protests in Washington, D.C. including changes in policies and practices and more than $14 million in damages), *Barham, et al. v. Ramsey, et al.,* Civil Action No. 02-02283, U.S. District Court for the District of Columbia (successfully resolving claims of false arrest in connection with the September, 2002 IMF/World Bank protests in Washington, D.C., including changes in policies and practices for both the MPD and the Park Police, and more than $10 million in damages) Circuit opinion at: 434 F.3d 565 (D.C. Cir. 2006): *Mills, et al v District of Columbia*, (obtaining unanimous ruling in the U.S. Court of Appeals for the D.C. Circuit finding Washington, D.C. police's military-style checkpoint program to be unconstitutional and ultimately forcing rescission of operation) Circuit opinion at: 571 F.3d 1304

In the context of free speech and policing in D.C. it is important to understand where we were in the past and what has occurred in the interim in order to understand where we are now, and what can and should be done now.

We have represented protestors, journalists, tourists, passers-by, legal observers – all of whom have been subject to false arrest and brutality while lawfully exercising or being in proximity to free speech activities in Washington, D.C., and through a series of cases and through related work undertaken by the D.C. Council major reforms were put in place restricting and making unlawful police tactics that punished, suppressed and disrupted First Amendment protected assembly and organizing activities.

In addition to the equitable and injunctive relief we obtained, the D.C. Council enacted landmark legislation, the First Amendment Rights and Police Standards Act which went into effect in 2005. This legislation had a significant impact on the ability of people to exercise their free speech rights in D.C. However, ever since the current Chief of Police, Peter Newsham, has taken office, the MPD has violated the FARPSA with impunity time and again, and appears to be regularly using the existing rioting statute, D.C. Code § 22-1322, in an unlawful effort to get out from under the conduct requirements and First Amendment protections contained in the FARPSA, D.C. Code § 5-331.01 *et seq.*

Twenty years ago, attending demonstrations in Washington, D.C. carried significant risk of police abuse and false arrest. Our peacefully protesting clients were beaten bloody with batons, police routinely trapped and detained demonstrations, surrounded demonstrators with riot gear-clad officers keeping people from joining demonstrations and making free speech activities look presumptively criminal, assaulted demonstrators with motorcycles and bicycles which they used to flank demonstrations, soaked people in pepper spray, and on multiple occasions engaged in mass false arrests, including sweeping more than 1000 peaceful people off the streets, and hog-tying them in stress and duress positions for more than 24 hours. We brought the successful class actions resulting from the two largest mass arrests of the post-Vietnam era, *Becker v District of Columbia* and *Barham v Ramsey. Barham,* the infamous Pershing Park mass arrest, resulted in a ruling before the U.S. Court of Appeals for the District of Columbia Circuit finding that the representations and assertions of the Assistant Chief of Police were "ludicrous" and "indefensible." That Assistant Chief was Peter Newsham.

Through these cases, the MPD and its legal counsel were exposed for engaging in significant cover-ups including issues involving destruction and tampering with key evidence. Our cases exposed and worked to end the MPD's illegal practice of sending undercover officers on long-

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(D.C. Cir. 2009); *Bolger, et al. v. District of Columbia*, Civil Action No. 03-906, U.S. District Court for District of Columbia (obtaining settlement in favor of political activists who were targeted and falsely arrest by law enforcement based on political affiliation; obtaining major sanctions against the OAG for discovery abuse); *A.N.S.W.E.R. Coalition v. Norton*, Civil Action No. 05-00071, U.S. District Court for the District of Columbia (successfully enjoining permitting system restricting First Amendment assembly along Presidential Inaugural Parade route).

term assignments posing as activists to infiltrate peaceful protest groups without any allegation of criminal activity and further acting as *agents provocateur* attempting to encourage peaceful activists to undertake unlawful actions - actions which were rejected.

Under the leadership of Councilmember Kathy Patterson, and with the assistance of Mary Cheh (who was not on the council at that time) serving as a special investigator, the D.C. Council engaged in an extensive investigation into police misconduct in the context of demonstrations including fact finding, interviews and multiple days of hearings and testimony. The findings and report of that investigation are incorporated here by reference. The First Amendment Rights and Police Standards Act (FARPSA) was the result.

That law had a major and beneficial impact on the ability of people to express themselves in Washington, D.C. However, as mentioned earlier, the Metropolitan Police Department has sought to evade the requirements of the law, wrongfully pointing to the District's riot statute as an exception to its obligations under that law, and using the riot statute to undertake mass false arrests and threaten people with extensive jail time without basis in law or fact.

We believe it is imperative that the Council act to end this practice, which poses a fundamental threat to free speech and civil rights in the District.

The D.C. Police and the Attorney Generals' offices have leaned on one outlier case in the District, using it as a playbook for repression against mass assembly and defense of that repression. That case, *Carr v District of Columbia* was brought in the wake of our litigation (we did not bring or litigate that case) and its very negative outcome has been injurious to demonstrators in Washington, D.C. and around the country. *Carr* is a go-to for defending unlawful indiscriminate mass arrests and for attempting to justify acting without the constitutional requirement of particularized probable cause, and the use of the riot statute has been a linchpin in those efforts. The indictments for those arrested at the Trump inauguration of 2017 read as if they were written with the *Carr* opinion adjacent and the fact pattern for the police response to demonstrators appeared carried out specifically with that in hand. The *Carr* case did not appear to be vigorously litigated and unfortunately went up to appeal on limited record but it has had an outsized impact and has laid the foundation for the MPD's now employed practice of declaring First Amendment assemblies "riots," acting against demonstrators without particularized probable cause, punishing lawful associational activity, and in so doing claiming that they are not subject to the restrictions of the FARPSA. This must stop, and the Council has the ability to end this practice.

At the onset, we wish to make clear that we believe that the riot statute should be repealed in its entirety.

The criminal code already addresses any crime of violence or property crime that could be encompassed by the riot statute. The statute serves prosecutors' abusive practices of charge-stacking to force innocent people to plea to lesser offenses or otherwise face decades in prison.

In the context of First Amendment activities, the riot statue is serving as a weapon against free speech, sweeping up persons solely because of their association with and proximity to other

people who share a political point of view. Even in the circumstances where someone may be credibly alleged to have violated an element of the criminal code, the riot statute is serving as a means to arrest *everyone else in any proximity* who may have done nothing more than been at a demonstration where such act is alleged to have occurred[2].

The FARPSA, and the Constitution, make clear however, that in the context of First Amendment activities, the government and the police must act with precision.

The proposed reform to the riot statute is a significant improvement, and in the absence of a complete repeal, should be further refined to provide the protections for First Amendment activities that are imperative.

The reform proposal includes the following language, "(b)(1) nothing in this section shall be construed to prohibit conduct protected by the First Amendment Rights and Police Standards Act of 2004..."

This language will not serve its intended effect. The FARPSA is not a grant of rights or authorization of conduct to persons engaged in free speech activities. Rather it is a series of prohibitions on illegal police tactics that abridge freedom of speech, assembly and association. Directly relevant to the riot statue, are the prohibitions under the FARPSA at D.C Code §§ 5-331.07 and 5-331.08.

These requirements restrict general orders to disperse and group arrests or kettling, recognizing that in the context of First Amendment assemblies there are very limited circumstances where law enforcement may act against a group as a whole. Only where a substantial number of persons are engaged in specified unlawful actions may a group be acted against as a group through dispersal and thus the extinguishing the free speech. These statutory provisions reinforce requirements of particularized probable cause, and require that even under the limited circumstances where the police may act towards the group as a whole, they must give notice to the demonstration group by a means calculated to be heard by all subject to the order, and opportunity to comply with a lawful dispersal order including through identifiable exits. This prohibits the police practice of kettling and mass sweeps of persons including arrests without opportunity to disperse. It is these requirements that the MPD has sought to evade through its abuse of the riot statute.

Any riot statute reform must include language explicitly stating that "a person participating in a First Amendment activity shall have no obligation to extinguish her protected activity by leaving or otherwise disassociating herself from a demonstration, regardless of unlawful conduct that may occur by other persons also present, in the absence of a lawful order to disperse and opportunity to comply with such order issued in accordance with FARPSA at D.C Code §§ 5-331.07 and 5-331.08."

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[2] This also provides easy opportunity for the deployment of *agents provocateur*, where one or a handful of persons' violations of the law can be used as the basis to arrest hundreds of others who have committed no crime and are otherwise lawfully present at a demonstration or march.

Moreover, the FARPSA should state that nothing in the riot statute acts to limit the restriction on and requirements of police conduct in the context of First Amendment activity codified by the FARPSA. Police failure to comply with the legal requirements of the FARPSA should serve as a clear defense to any riot charges.

Further the FARPSA should be amended to include an explicit private right of action for violations of the law. Officers and command staff should not be able to violate the law with impunity and without accountability to the persons who suffer harms from those violations.

With regard to other proposed reforms to the riot statute, the Council should eliminate proposed (a)(1)(B) and (a)(2)(C). It is a danger to the residents of the District of Columbia's multi-unit housing areas to create further opportunity for criminalization of their day-to-day lives. Many of these residents already feel that they are living in open air jails and subject to the abuse of police and Special Police Officers. Many who have organized for tenants' rights have been threatened with penalty for doing so, and this provision directly threatens tenant organizers' ability to engage in lawful organizing activity. The addition of "sexual contact" similarly opens the door to abusive enforcement because of the breadth of the definition of the offense.

Finally, the *mens rea* requirement of the statute in proposed (a)(3) should be changed from "reckless" to "knowing." A mere reckless requirement will tend towards criminalizing proximity, rather than intentional actions.

<u>Ban on Military Weapons, Indiscriminate Weapons Deployment and Establishment of Community Control Over Weapons and Surveillance Techology</u>

We support Bill 23-882's restrictions on the acquisition and use of military weapons. We also believe that the Council should impose greater oversight on the acquisition of weapons in general. Any weapons that the MPD wishes to obtain, as well as surveillance technology, should be subject to review by the public and the Council. The Council should require the MPD to submit a listing of all current weapons and surveillance technology to it for review and approval, and require submission on a regular basis any other proposed acquisitions – including donated weapons and technology through the Police Foundation. The Council and the public should have opportunity to review whether such weapons or surveillance technologies are appropriate for use against the civilian resident population, the impact and scope of such material, the intended use and restrictions on use, all warning materials, and other information on the impact of such weapons or technology. They should also have full information about police training in use of the materials. Based on this information, and public input, the Council should approve or disapprove any such acquisitions. The Council owes this to their constituents, the residents of the District of Columbia.

We support Bill 23-771's prohibition on the use of chemical irritants. Use of many so-called "less lethals" are by their nature indiscriminate in effect and impact and are therefore, by their very use, a violation of First Amendment and Fourth Amendment rights when used in the context of mass assembly. To that end, we believe that there should be an immediate ban on all weapons of indiscriminate nature include stinger grenades and other projectile weapons for the same constitutional reasons.

The Public's Right to Know the Actions of the Police Force

Police are commissioned by the government to use lethal force and deprive persons of their liberty. They are interacting with the public and in public view and cannot be allowed suddenly upon use of force to attempt to retroactively cloak and conceal those activities. Nor should the decision as to disclosure of crucial information regarding police actors and actions be left in the hands of the MPD itself or the Mayor's Office or the OAG. The OAG has a conflict between public disclosure and its often scorched earth litigation to defend police misconduct and has repeatedly and consistently worked to protect information that should be made public from disclosure. There must be an independent review body that can assess body cam footage and other information for public release in conformance with public records laws

Consent Searches

The PCJF strongly endorses the proposals that seek to create constitutional safeguards in the context of "consent" searches. This can be strengthened by requiring that all such consent discussions and requests be visible and audible on camera and that in the absence of such recording any search shall be deemed nonconsensual and any evidence obtained inadmissible. Just as with interrogation, youth "consent" searches should be banned as a young person facing an officer with the weight of authority, and a gun, cannot be assumed to meaningfully give voluntary consent.

The Police Cannot Discipline Themselves

It is not possible to have effective police accountability and discipline when it is left up to the institution itself. Over our years of litigation, time and again, we have found that the institutional officials within the police department do more than disregard police misconduct, they ratify it. Policing must be subject to effective independent civilian review. The disciplinary process must be removed from the bias and confines of the MPD. It also must rest fully outside of any relationship with the OAG. The officers and command staff of the MPD know that they can generally act with impunity, that there will be no meaningful discipline and that they can rely on the full resources of the District's residents' tax dollars and the OAG's lawyers to defend them, even with egregious violations of the law. There must be a fully independent review process that does not include law enforcement personnel or any other entity with a conflict of interest that has the authority to evaluate police conduct and take meaningful action in response.

Accountability Also Requires an End to Qualified Immunity

Similarly, the Council should create a right of action for violations of the Constitution under District of Columbia law that eliminates the defense of qualified immunity. This would provide an opportunity for justice and accountability for the residents of the District of Columbia.

This would be a meaningful change, and while it, along with all the other reforms discussed are just a step on the path to justice, it is that path that the people of the District and of the United States have made clear must be taken. This is an important moment to take these steps, and we appreciate the Council's efforts to take action in the service of justice.

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Written Submission of International Center for Not-for-Profit Law
to the Washington DC City Council Committee on the Judiciary and Public Safety

Nick Robinson, Legal Advisor
Oral Testimony: October 15, 2020
Written Submission: October 23, 2020 (expanded from oral testimony)

Thank you for providing me the opportunity to speak today. My name is Nick Robinson. I am a legal advisor at the U.S. Program of the International Center for Not for Profit Law (ICNL) based here in Washington DC. We have advised policymakers in the U.S. and around the world on how to create a legal environment that better protects the freedoms of association, assembly, and expression.

We welcome the proposed Rioting Modernization Amendment Act of 2020. In recent months, the U.S. has seen overbroad and outdated anti-riot acts being used to target and harass peaceful protesters during the ongoing nationwide demonstrations for racial justice. As I wrote in a recent piece in NBC THINK, anti-riot acts have a history of being abused by police and prosecutors. In our work globally, we find that anti-riot acts are one of the favorite tools of authoritarian regimes to crack down on protesters given how much discretion they frequently provide the government.

Arguably there is no need for anti-riot acts at all. If someone commits violence or vandalism they can be punished, frequently severely, for assault, destruction of property, or another related crime. Indeed, the District's anti-riot act is rarely used, and when it has been used it rarely results in a successful prosecution, and almost never any jail time.

I attach for the record data on the use of the anti-riot act I received from the DC Sentencing Commission covering the period 2012 to 2020. It shows that between January 1, 2012 and August 31, 2020 there were 241 instances of cases being filed in DC Superior Court under the anti-riot act. The overwhelming majority arose from the J20 incident, in which over 200 protesters were arrested and charged with rioting during demonstrations on the Inauguration Day of President Trump in January 2017. Of the 23 convictions under the anti-riot act, 22 were at the misdemeanor level and only 2 resulted in anyone being sentenced to time in jail.

This data from the DC Sentencing Commission also details arrest records from 2020 under the anti-riot statute. There were 110 arrests under this act from January 9 to August 31st. While the data is not yet available, my understanding is that most of these arrests have not resulted in charges under the anti-riot act. Instead, the record shows that over the past decade when the anti-riot act has been used it has been used as a tool for the police to engage in mass arrests, but almost never leads to any successful prosecutions.

The revised act being considered today is a clear improvement. Notably, it requires that individuals charged with rioting have to be engaged themselves in a criminal offense that causes, or would cause, bodily injury, property damage, or sexual contact. It reduces the maximum penalty for the crime of rioting from a felony to a misdemeanor. It also eliminates the incitement to riot offense, which in its current wording criminalizes "urging" someone to

riot. The Fourth Circuit and a U.S. district court judge in the 9th circuit recently found that similar incitement language in the federal anti-riot act was unconstitutional.

While we broadly support the proposed reform, it could be made even stronger. In particular, we make the following recommendations:

1. There should be more explicit language to ensure that the anti-riot act cannot be used to bring attenuated charges against protesters or be used to stack charges against protesters. The current anti-riot act was used in both manners in the J20 incident, where many of those accused were charged as a "conspirator to riot" or "aiding and abetting a riot". Those charged then became liable for property damage done by others. This is why many of the protesters faced upwards of 60 years in jail for essentially merely being present at a protest where property destruction occurred.

   The Council should make clear in the bill that merely being present near those engaged in unlawful activity does not then make one liable for rioting, including under a theory of conspiracy or aiding and abetting. In addition, the Council should make clear that being found guilty of rioting does not make one liable for other criminal offenses that occur during a riot. In other words, one can be guilty of rioting and any criminal offense one engages in, but not other criminal offenses that occur at a "riot".
2. The Council should also detail what specific "criminal offense[s]" would constitute a component of "rioting". For example, would someone jaywalking who bumps into another during a demonstration be considered to be engaged in an offense that would be covered by the anti-riot act since jaywalking is an "offense" and bumping into someone could cause physical injury. In particular, the Act could require that the underlying offense be a "felony criminal offense" to convey the severity required of the underlying crime. This would be in line with how, for instance, Hawaii defines a "riot" which is that those engaged in the underlying conduct must intend to commit or facilitate a "felony".
3. The Council should also eliminate the provision that "rioting" can take place in a "communal area of multi-unit housing" as it is unjustified, and the data shows this is not where rioting has historically occurred. This provision seems to be taken from DC's disorderly conduct statute, but the current anti-riot act does not have a similar provision nor is it present in anti-riot acts in other states. The arrest data for DC's anti-riot act for this year also shows that no one was arrested in the communal area of multi-unit housing. Keeping this provision in the Act is unnecessary and can lead to abuse of the Act by law enforcement, particularly at public housing.
4. The bill should reiterate the protections provided to peaceful protesters when others are engaged in unlawful conduct that are already provided under the First Amendment Rights and Police Standards Act of 2004 (FARPSA). If law enforcement followed the rules laid out in FARPSA many of the controversial incidents involving the arrest of protesters in recent years would likely never have occurred, both better

safeguarding the First Amendment rights of protesters and saving the District significant resources.

Turning to the Comprehensive Policing and Justice Reform Amendment Act of 2020, we think that there needs to be significantly more robust restrictions on the use of less lethal weapons. We have undertaken extensive analysis of how different states and cities have restricted these types of weapons, like chemical irritants and kinetic projectiles, in crowd control (attached).

DC's proposed approach of banning the use of these weapons to disperse First Amendment assemblies does not go nearly far enough. It is just too easy for law enforcement to declare an assembly unlawful and then subsequently use these weapons against protesters.

Instead, the Council should adopt a more holistic approach. This would involve, first, banning the most dangerous of these weapons for use in any type of crowd control. As my colleague from Physicians for Human Rights testified some less lethal weapons are just much more dangerous than others – particularly kinetic impact projectile weapons. The Council should prohibit these weapons for crowd control or at the very least require that the public participate in procurement of these weapons, including assessing the relative safety of different types of LLWs.

Second, for any approved less lethal weapons, the Council should place significant restrictions on their use for crowd control. This can include a proper trigger for use, such as preventing actual physical violence to persons; appropriate command authorization; a requirement for a warning and opportunity to disperse; and a requirement that these weapons can only be used by specifically trained officers.

Finally, there should also be required public reporting detailing when these weapons are used and why de-escalation strategies were not effective. If there are violations of these restrictions by MPD, there should be consequences – offending officers should be punished and those who were injured by these weapons should be able to receive compensation from the District.

Finally, I wanted to speak in support of the repeal of DC's anti-face mask law. An anti-mask law clearly does not make sense during a pandemic and, more generally, it just gives too much discretion to law enforcement. In this ICNL article on state anti-face mask laws we find that most states do not have anti-mask laws and do not seem to suffer any negative consequences as a result. New York state repealed their archaic anti-mask law earlier this year, and we applaud the Council for also taking this sensible step.

Thank you for having me today, and I am happy to share additional information.

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The International Center for Not-for-Profit Law (ICNL) works to improve the legal environment for civil society, philanthropy, and public participation in the United States around the world.

LEGISLATIVE BRIEFER

Legislative Options to Restrict the Use of Less Lethal Weapons in Crowd Control

AUGUST 2020

The killing of George Floyd by police in Minneapolis, Minnesota, in May 2020 sparked nationwide protests against police violence targeting Black Americans. It also led to a confrontational response. Law enforcement have used tear gas or rubber bullets on protesters in over 100 U.S. cities.

The use of these and other "less lethal weapons" (LLWs) for crowd control has been heavily criticized.[1] These weapons were often used indiscriminately against peaceful assemblies and were blamed for escalating confrontations. Dozens of people were injured by "less lethal" projectiles, including peaceful protesters, journalists, and legal observers. Numerous lawsuits have been filed against municipalities for violating the constitutional rights of demonstrators in the use of these LLWs.

In response to criticism over the use of LLWs at protests, municipalities, states, and the federal government have introduced, and in many cases enacted, new legislation to limit the use of these weapons.

This briefer provides an overview and analysis of the most common types of reforms. It calls for a prohibition on the use of these weapons at First Amendment assemblies, and a ban on the use of the most dangerous forms of these weapons in crowd control more generally. If these weapons are used for crowd control, to protect public safety and ensure they are not used against peaceful protesters, legislators should impose a rigorous set of restrictions on their use. They should also mandate reporting and transparency requirements in their procurement and use.

The manufacture of these weapons is poorly regulated. As a result, weapons that create disproportionate safety concerns are both widely available to, and wielded by, law enforcement officers who may not fully understand the harm they can cause. There is

[1] For a description of common less lethal weapons and their health impact, see PHYSICIANS FOR HUMAN RIGHTS, CROWD-CONTROL WEAPONS AND SOCIAL PROTEST IN THE US 6 (June 2020)

an urgent need for the federal government to mandate independent testing and transparency requirements for manufacturers.

Banning Less Lethal Weapons at First Amendment Assemblies

Less lethal crowd control weapons, like tear gas, rubber bullets, or sonic weapons, are inherently indiscriminate when used in the context of a protest. As such, they should be prohibited to the police or to disperse First Amendment assemblies, including protests, rallies, and parades.[2]

Some recent legislation bans the use of crowd control weapons at First Amendment assemblies. For instance, under legislation recently enacted in Washington DC, chemical irritants and less lethal projectiles "shall not be used by [the police] to disperse a First Amendment assembly."[3]

While this is an important prohibition, it still potentially allows for these weapons to be used on peaceful protesters. Law enforcement might declare peaceful protests that are not properly permitted unlawful, and thus not a protected "First Amendment assembly." Similarly, if there is a confrontation or isolated disturbances at a protest, law enforcement has, at times, declared the entire assembly unlawful. In either of these scenarios, law enforcement could then potentially use LLWs against peaceful protesters.

Banning Disproportionately Dangerous Less Lethal Weapons for Crowd Control

Some jurisdictions have proposed or enacted bans on categories of less lethal weapons, such as kinetic impact projectiles, chemical irritants, disorientation devices, and acoustic weapons.[4] For example, Seattle has enacted a complete ban on the use of such "crowd control weapons" by law enforcement.[5]

Bans have two primary benefits. First, restrictions short of a ban, as this briefer has described and will detail further, can allow for continued abuse of these weapons against peaceful protesters and others. Second, some of these weapons are disproportionately dangerous, and there is no reason to use them for crowd control given alternatives available to the police.

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[2] Law enforcement may disperse assemblies only in exceptional cases, following carefully delineated rules that among other things require giving a clearly audible order to disperse and providing an adequate opportunity for the crowd to comply.

[3] Washington DC B23-0825 (2020)

[4] ICNL has tracked recently introduced legislative initiatives to ban or restrict the use of Less Lethal Weapons. See, ICNL, Reforms Introduced to Protect the Freedom of Assembly

[5] Seattle Ordinance 126102 (2020) (The ban applies not only to Seattle police, but also law enforcement agencies with which they have mutual aid agreements operating in the city. The ban exempts oleoresin capsicum spray unless it was used at a First Amendment protected event or landed on another individual besides where it was targeted.)

KINETIC IMPACT PROJECTILES

Kinetic projectiles have long been singled out by experts as raising inordinate safety concerns.[6] During the ongoing Black Lives Matter protests, as many as 60 protesters have been hit in the head with kinetic projectiles, causing traumatic brain injuries, blindness, and bone fractures. Kinetic projectiles with a metallic component – such as certain rubber bullets, bean bag rounds, and pellet rounds – are particularly dangerous.

Given these longstanding and well-documented safety concerns, many jurisdictions have introduced legislation to ban kinetic projectiles for use in crowd control.[7] Barring a complete ban, they should be prohibited until independent and rigorous testing can provide legislators with needed information to properly assess the safety of particular kinetic impact projectiles.[8]

Other countries have prohibited the use of less lethal kinetic impact projectiles in crowd control. For example, several countries in Europe, including the United Kingdom, have banned, or discontinued, the use of rubber bullets and similar kinetic projectiles.

DISORIENTATION DEVICES

Flash bangs, blast balls, and stun grenades also raise significant safety concerns for their use in crowd control. These weapons have severely injured protesters and can trigger cardiac arrest.

Physicians for Human Rights found that while these weapons "stated objective is to cause disorientation and a sense of panic, the potential for injuries caused by the pressure of the blast or by shrapnel from the fragmentation of the grenade is disproportionately high, and could even lead to death."[9]

ACOUSTIC WEAPONS

Acoustic weapons emit painful levels of sound and can cause long-term injury to hearing. Few jurisdictions have used these weapons against the public. Given the lack of understanding about their effect, they should be banned as a tool of crowd control, or at least prohibited until their impact on health can be further studied.[10]

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[6] Rohini J. Haar et al., *Death, injury, and disability from kinetic impact projectiles in crowd-control settings: a systematic review*, 7(1) BMJ 2017) (surveying the academic literature to use injury data on 1984 people who had been shot with kinetic impact projectiles in crowd control settings from around the world. 53 people died of their injuries and 300 suffered permanent disabilities).
[7] See, for example, New York S8516 (2020); Minnesota HF 86 (2020); or Massachusetts HD 5218 (2020).
[8] Amnesty International has called for such a prohibition, AMNESTY INTERNATIONAL, USA: THE WORLD IS WATCHING, MASS VIOLATIONS BY U.S. POLICE OF BLACK LIVES MATTER PROTESTERS' RIGHTS 64 (2020) (also calling for independent and rigorous testing of kinetic impact projectiles before their use by law enforcement).
[9] PHYSICIANS FOR HUMAN RIGHTS, CROWD-CONTROL WEAPONS AND SOCIAL PROTEST IN THE US 6 (June 2020)
[10] *Id.* at 8 (making a similar recommendation that sonic weapons be banned at least until their health effects can be further studied).

TEAR GAS AND CHEMICAL IRRITANTS

Tear gas and other chemical irritants can also cause substantial health consequences.[11] The American Thoracic Society has warned that "[t]hey cause significant short- and long-term respiratory health injury and likely propagate the spread of viral illness, including COVID-19." Protesters have repeatedly been hit with tear gas canisters fired by law enforcement, sometimes causing severe injury.

Several states have introduced legislation that would ban the use of chemical irritants like tear gas for crowd control. For example, California has introduced legislation that bans the use of all CN tear gas or CS gas for crowd control.[12] Many of these bills make an exception for the use of oleoresin capsicum spray (i.e., pepper spray) when used in a targeted and proportionate manner.

Restrictions on Use

Where Less Lethal Weapons are used for crowd control, legislators have considered other options to restrict the use of these weapons and enhance transparency and accountability. Although such restrictions provide some protection, they each have deficiencies. As such, legislators should adopt these restrictions as a package to better protect First Amendment activity and public safety.

TRIGGER FOR USE

Besides banning these weapons entirely at First Amendment assemblies, legislators have prohibited the use of less lethal weapons for crowd control more generally unless there is precipitating violent conduct or the threat of imminent violence. These measures provide some protection but need to be carefully crafted not to provide law enforcement too much discretion, which can lead to abuse.

RIOT

Under legislation enacted in Oregon:

"A law enforcement agency may not use tear gas for the purposes of crowd control except in circumstances constituting a riot."[13]

This trigger of requiring a riot adds additional protection against the abuse of LLWs for crowd control, but in many states, the standard for a riot is not a high threshold. In fact, commentators have long noted that riot statutes in many states are so broad and vague that they are likely unconstitutional. For example, in Oregon, a person is guilty of rioting if they engage with at least five other persons "in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm." This is a relatively subjective standard that can potentially be triggered in situations where there is only isolated property destruction or "tumultuous" conduct

[11] See, for example, Massachusetts HD 5218 (2020); New York S 8512 (2020); Minnesota HF 86 (2020); and Ohio HB 707 (2020).
[12] California AB 66 (2020). CN and CS gas are both commonly used in tear gas.
[13] Oregon HB 4208 (2020)

that law enforcement judges are causing "public alarm." As such, even with this provision, law enforcement retains relatively wide discretion in declaring a largely peaceful protest a riot and then using crowd control weapons.

Where this standard is introduced, legislators should also closely examine the definition of a riot in their jurisdiction to ensure that it is not vague or overly broad.

NECESSARY AND PROPORTIONATE TO PREVENT IMMINENT HARM

In Massachusetts, legislators have proposed that law enforcement can only use LLWs if

"measures used are necessary to prevent imminent harm and the foreseeable harm inflicted by the [LLW] is proportionate to the threat of imminent harm."[14]

This language around proportionately provides limited protection but ultimately is subjective and malleable. For example, it is not clear if harm also includes property damage or what response is proportionate. Under this standard, a law enforcement officer might decide it is proportionate to fire tear gas towards a crowd in response to relatively minor property damage.

PREVENTING PHYSICAL INJURY OR THREATS TO LIFE

In California, legislators have drafted a bill that would require that to use a less lethal weapon for crowd control that "the use is objectively reasonable to defend against injury to an individual, including any peace officer."[15]

This standard usefully distinguishes between violence to persons and damage to property, but still provides relatively wide latitude to officers. It also does not have an imminence requirement, providing more latitude for the officer's subjective interpretation of the situation.

In Portland, Oregon, the mayor of the city prohibited the Portland police from firing tear gas except for in cases of "violence that threatens life safety" situations. This standard heightens the standard for harm to persons, but again can be interpreted subjectively by an officer.

PROCEDURE FOR USE

Jurisdictions have introduced several procedural measures to restrict the use of less lethal weapons in the context of crowd control. These restrictions can be usefully constraining but still allow for the possibility of abuse.

WARNING AND OPPORTUNITY TO DISPERSE

A number of states and municipalities require that officers provide a warning and opportunity to disperse before using LLWs against a crowd.

In Oregon, in the restricted situations in which tear gas can be used, an officer must first:

[14] Massachusetts S 2820 (2020)
[15] California AB 66 (2020)

"(a) Announce the agency's intent to use tear gas; (b) Allow sufficient time for individuals to evacuate the area; and (c) Announce for a second time, immediately before using the tear gas. . . ."[16]

A similar provision was recently enacted in Colorado.[17]

TRAINED OFFICERS ONLY

LLWs should only be used by those who are trained to use them. California's proposed legislation states that kinetic impact projectiles or chemical agents shall only be deployed and used by officers to disperse an assembly "who have received training on their proper use that is approved by the Commission on Peace Officer Standards and Training."[18]

This requirement is important but depends significantly on the quality of the training and certification process. Further, law enforcement agencies need to have robust systems in place to discipline officers who deviate from rules around the use of these weapons.[19]

COMMAND AUTHORIZATION

Some jurisdictions have required that tear gas can only be used if approved by the commanding officer on the scene.[20]

DE-ESCALATION FIRST

In legislation introduced in Massachusetts, one of the requirements before using a crowd control weapon is that "de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances."[21]

This provision is a helpful legislative reminder, and de-escalation tactics should be part of any training in the use of these weapons. Still, by itself, this requirement may not be a significant barrier to law enforcement using these weapons given the subjective language.

NO INDISCRIMINATE USE

In Colorado, new legislation states that law enforcement shall not "discharge kinetic impact projectiles indiscriminately into a crowd."[22] This is a helpful reminder to law

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[16] Oregon HB 4208 (2020)
[17] Colorado SB 20-217 (2020) (requiring that before firing tear gas law enforcement must issue "an order to disperse in a sufficient manner to ensure the order is heard and repeated if necessary, followed by sufficient time and space to allow compliance with the order.")
[18] California AB 66 (2020)
[19] BOSTON POLICE, COMMISSION INVESTIGATING THE DEATH OF VICTORIA SNELGROVE (Stern Report) 40 (May 25, 2005) (recommending that only certified officers should be able to use less lethal weapons).
[20] Washington DC, First Amendment Rights and Police Standards Act of 2004, Sec. 116 ("Large scale canisters of chemical irritant shall not be used at First Amendment assemblies absent the approval of a commanding officer at the scene, and the chemical irritant is reasonable and necessary to protect officers or others from physical harm or to arrest actively resisting subjects.") (note: this provision has since been repealed as Washington DC has now banned the use of tear gas to disperse First Amendment assemblies.)
[21] Massachusetts S 2820 (2020)
[22] Colorado SB 20-217 (2020)

enforcement officers, who should never fire anything "indiscriminately" at the public, but is only a starting point in the required restrictions of the use of these weapons.

Damages

To ensure compliance with rules on LLWs, jurisdictions can create additional damages that can be awarded to protesters injured by law enforcement for failing to abide by them. For example, a person injured by an officer in violation of Seattle's new prohibition on LLWs is entitled to at least $10,000 in damages, plus attorney and court fees.[23]

Reporting and Public Participation Requirements

Reporting and public participation requirements help create transparency and accountability around the procurement and use of these weapons.

REPORTING AFTER USE

Law enforcement should be required to make a public report any time less lethal weapons are discharged in the context of crowd control, detailing how the weapons were used, what precipitated their use, and why de-escalation tactics failed. This report should be reviewed by an independent body that can make further factual findings and recommendations.

Under a proposed bill in Massachusetts, if law enforcement uses tear gas or rubber bullets "against a crowd," the officer's appointing agency "shall file a report with the police office standards and accreditation committee detailing all measures that were taken in advance of the event to reduce the probability of disorder and all measures that were taken at the time of the event to de-escalate tensions . . ." The committee "shall review the report and may make any additional investigation" to determine whether the use of the weapon was justified.[24]

REPORTING BEFORE USE

Transparency and public participation should be required when procuring and setting rules for the use of LLWs in the context of crowds. Law enforcement should have to disclose to the public what less lethal weapons they have procured and the rules for their use.[25] When procuring such weapons, they should submit a report detailing their relative safety compared to alternatives, as well as their potential impact on First Amendment rights. Such a report should be submitted to either a legislative or citizen-controlled body for independent oversight.

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[23] Seattle Ordinance 126102 (2020)
[24] Massachusetts S 2820 (2020)
[25] Such provisions can potentially be modeled on Community Control Over Police Surveillance legislation. See, ACLU Community Control Over Police Surveillance.

Transparency and Testing Requirements for Manufacturers

Experts, the public, and law enforcement itself still know too little about the actual harm LLWs can cause because of a lack of transparency and testing by manufacturers. Before a law enforcement agency ever uses them, these weapons should go through rigorous and independent testing to assess their safety and ability to perform as recommended by manufacturers. Manufacturers should be required to disclose to the public the components of these weapons, such as the chemicals in a chemical irritant, and their recommended use.

The federal government is particularly well-positioned to legislate these transparency and testing requirements. However, state and local governments can at least require local law enforcement agencies to disclose the recommendations they receive from manufacturers about how these weapons should be used. They can also prohibit law enforcement from purchasing these weapons unless they have gone through independent testing, or at the very least, require law enforcement to report on how they assessed the relative safety of the weapons they procure.

Conclusion

Governments should prohibit the use of these LLWs in the context of First Amendment assemblies, and ban the use of the most dangerous of these weapons for any type of crowd control. When these weapons are deployed for crowd control, in order to protect First Amendment rights and public health, the government should impose a strict set of restrictions on their use as well as reporting and transparency requirements in their use and procurement.

The manufacture and sale of these weapons are poorly regulated. Law enforcement agencies frequently do not understand the risk posed by LLWs. The federal government should require manufacturers to submit these weapons to rigorous and independent testing and be transparent about both their components and recommended use.

Contact Information

If you have questions, would like to learn more about this issue, or ICNL's U.S. Program, please contact us:

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Hon. Milton C. Lee
Chairman

Barbara S. Tombs- Souvey
Executive Director

TO: **Nicholas Robinson, Legal Advisor**

FROM: **Taylor Tarnalicki, Research Analyst**

DATE: **October 5, 2020**

SUBJECT: **Anti-Riot Statute**

Presented below is a response to the data request submitted by Nicholas Robinson on behalf of the International Center for Not-For-Profit Law. This response includes an evaluation of both sentencing trends and arrest trends for the District of Columbia's Anti-Riot statue, D.C. Criminal Code Sections 22-1322(b),(c),(d), as well as a data set for each type of data (sentencing and arrest). Each analysis is performed independently given that the Commission is in the early stages of consuming arrest data from the Metropolitan Police Department (MPD), and the limited data currently available impacts the agency's ability to perform a single comprehensive analysis. Details describing each analysis are presented below.

Sentencing Data: January 1, 2012 – August 31, 2020

- Includes data pertaining to all cases filed in D.C. Superior Court between January 1, 2012 and August 31, 2020 where there is at least one (1) anti-riot statute present at any phase of the case, including: 1) the Prosecution Phase, 2) the Indictment Phase, and/or 3) the Court Phase.

Between 2012 and 2020 there were a total of 241 cases filed in D.C. Superior Court where there is at least one count for the anti-riot statute (felony and/or misdemeanor) present at any phase of the case. However, only 23 cases (9.5%) resulted in a conviction for the anti-riot statute; 22 convictions were at the misdemeanor level and one conviction was at the felony level.

Arrest Data: January 9, 2020 – August 31, 2020

- Includes data pertaining to all arrests where the individual was arrested for at least one anti-riot charge.

Between January 9, 2020 and August 31, 2020 there were a total of 110 individuals arrested under the anti-riot statute; 106 individuals (96%) were charged with anti-riot felony, four (4%) were charged with anti-riot misdemeanor.

As stated above, each analysis is performed independently. The sentencing analysis provides an overview of the sentencing trends for the 241 anti-riot cases filed since 2012. Specifically, it addresses the disposition of all counts on the case, the type and length of sentence imposed for counts resulting in a conviction, as well as trends for any additional charges that did not result in a conviction. The arrest analysis identifies the total number of arrests for each type of anti-riot charge (felony vs misdemeanor), as well as any additional offenses included in the arrest.

I. Key Findings

A. Overall – Individual Level

The table below presents data at the individual level. Specifically, it identifies the total number of individuals charged with the anti-riot statute, the total number convicted, as well as the total number arrested. Please note that the sentencing data and arrest data presented in this analysis IS **NOT** LINKED in any way.

		CASE TYPE		
Data Type	**Total Individuals**	**Anti-Riot** *Felony Only*	**Anti-Riot** *Misd Only*	**Anti-Riot** *Felony & Misd*
Sentencing	241 Charged	Charged: 20	Charged: 9	Charged: 212
	23 Convicted	Convicted: 1	Convicted: 4	Convicted: 18[1]
Arrest	110 Arrested	Arrested: 106	Arrested: 4	-

B. Sentencing Data

- Between January 1, 2012 and August 31, 2020 there were a total of 453 anti-riot counts filed (252 felonies, 201 misdemeanors), belonging to 241 cases and 241 offenders.
  - Of these 453 anti-riot counts, only 23 counts (5%) resulted in a conviction, with 22 misdemeanor convictions and one felony conviction.

- There were 23 anti-riot counts that resulted in a conviction. Twenty-one counts received a probation sentence. The average probation sentence to serve was 6.7 months.
  - Two counts did not receive a probation sentence:
    - One count received a six-month incarceration sentence. This case also included an assault on a police officer charge that was dismissed as a part of a plea agreement.
    - One count received a short split sentence[2].

- There were a total of 241 anti-riot cases filed between January 2012 and August 2020. Almost all cases were filed in 2017 (234 cases, 97%).

- In total, there were 1,858 counts filed among all 241 anti-riot cases. Combined, felony and misdemeanor anti-riot counts represented about one-quarter (453, 24%) of all counts filed.
  - The most frequently filed secondary offense was Destruction of Property $1000 or more, which represented over half (1,059, 57%) of all counts filed. However only one of these counts resulted in a conviction, which received a 24-month probation sentence.

- Only 22 cases had a single anti-riot count filed; 21 of which were felonies and one (1) of which was a misdemeanor.
  - Only two of these single count anti-riot cases resulted in a conviction; both were misdemeanors that were pled down from felonies.

[1] All 18 individuals were convicted for the misdemeanor statute

[2] The short split sentence was imposed for the only ant-riot felony conviction; all other anti-riot convictions were misdemeanors.

- Age at offense information is available for 221 individuals, with an average age at offense of 27 years old, and a median age at offense of 26 years.
    - The age at offense could not be determined for 20 individuals due to the cases being sealed.

- The majority (210, 85%) of individuals charged with the anti-riot statute were White. Black individuals only represented 4% of the charged population.
    - Race information was missing for 27 individuals.

- Approximately 34% of individuals charged with the anti-riot statue were female, which is a greater proportion of females compared to other offense types/categories[3]. Of the 22 individuals convicted, 5 (23%) were female.

C. Arrest Data

- Between January 9, 2020 and August 31, 2020 there were 110 unique individuals arrested and charged with the anti-riot statute.
    - The vast majority (106 individuals, 96%) were charged under the felony statute while only four individuals (4%) were charged under the misdemeanor statute.

- Of the 110 individuals arrested, 30 (27%) were also charged with additional offenses. The most common secondary offense was burglary II.
    - 93% of the individuals who were charged with multiple offenses were charged with burglary II

- In this timeframe, there were three "peak" time periods (days) where anti-riot arrests were made:
    - May 31, 2020 28 arrests, 25%
    - June 1, 2020 27 arrests, 25%
    - August 14, 2020 36 arrests, 33%

- Individuals who were between the ages of 22 and 30 at the time of the offense represented 59% of the arrested population. This age group was followed by individuals aged 18-21, who represented 30%.
    - Information for all other age groups is presented in the arrest analysis section on page 8.

- Males represented 70% of the arrested population, compared to females who represented 26%

- The majority of individuals arrested were Black (55%) followed by Whites, who represented 27% of the arrested population.

[3] The D.C. Sentencing Commission 2019 Annual Report indicated that overall, females only accounted for 5.8% of sentences imposed. When examining sentences by offense type, females were most frequently sentenced for Violent and Drug offenses, however they only represented less than 10% of all offenders convicted of these types of offenses. https://scdc.dc.gov/node/1479516

II. Anti-Riot Sentences

A. Overall

The charts below illustrate the sentencing and disposition information for all 241 anti-riot cases (representing 1,858 counts and 241 individuals) that were filed between January 1, 2012 and August 31, 2020. Of the 30 counts that resulted in a conviction, all but two (2) received a probation sentence. The remaining two (2) counts received an incarceration sentence; sentencing information for these convictions is referenced in footnotes three and four.

Total Cases Filed	Total Counts Filed	Total Individuals Charged
241	**1,858**	**241**

1. Total Number of Convictions

The table below identifies the total number of counts filed for each offense, as well as the total number of conivctions for each offense. Please note that one case can have multiple counts. For example, there were 18 total cases that had more than one 'riot act -felony' count filed. Offenses that received at least one conviction are shaded in light blue.

Charged Offense	Counts Filed *1,858*	Convictions *30*
Anti-Riot -Felony	**252**	**1**
Anti-Riot -Misd	**201**	**22**[4]
Destruction of Property $1000 or More	1068	1
Conspiracy	212	-
Assault On A Police Officer	113	3
Resisting Arrest	8	1
Destruction of Property less than $1000	1	-
Shoplifting	1	1
Unlawful Entry - Public Property	1	1
Deface Private/Public Property	1	-

All Convictions (30 counts): The vast majority of convinctions (29, 97%) were the result of a plea agreement; only one conviction (1, 3%) was the result of a bench trial.

All Non-Convictions (1,828 counts): The majority (1,599, 87%) of counts that did not result in a conviction were dismissed, though a handful of counts (56, 3%) were deemed not guilty as the result of a jury trial[5].

[4] 19 of the anti-riot misdemeanor convictions were initially charged as anti-riot felony. All other convictions represented in the table align with the charged offense

[5] Other disposition types for non-convictions include: 1) Acquitted, 2) Dismissed as Part of a Plea Agreement, 3) DWP No Police Officer, and 4) Nulle Prosequi

2. Average Probation Sentence

The table below displays the total number of counts sentenced, and the average probation sentence to serve for each convicted offense. Two convictions resulted in an incarceration sentence, and have been omitted from this analysis. Sentencing information for both these counts can be found at the footnotes at the bottom of the page.

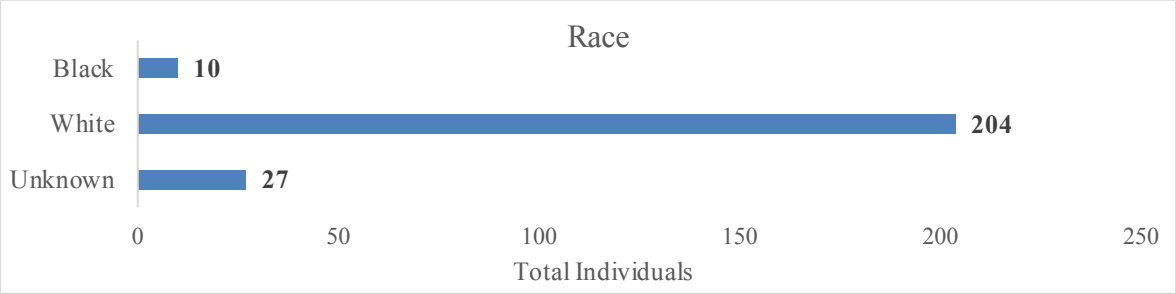
Convicted Offense	Total Counts Sentenced	Average Probation Sentence
Riot Act -Felony	**1**	**Short Split** ***4 months prison*** ***24 months probation***
Riot Act -Misd	**22**	**6.76 months**[6]
Destruction of Property $1000 or More	1	24 months
Assault On A Police Officer	3	24 months[7]
Resisting Arrest	1	24 months
Shoplifting	1	12 months
Unlawful Entry - Public Property	1	12 months

[6] One count received a 6 month incarceration sentence, which is not factored into the average probation sentence calculation
[7] One count received a 2 month incarceration sentence, which is not factored into the average probation sentence calculation

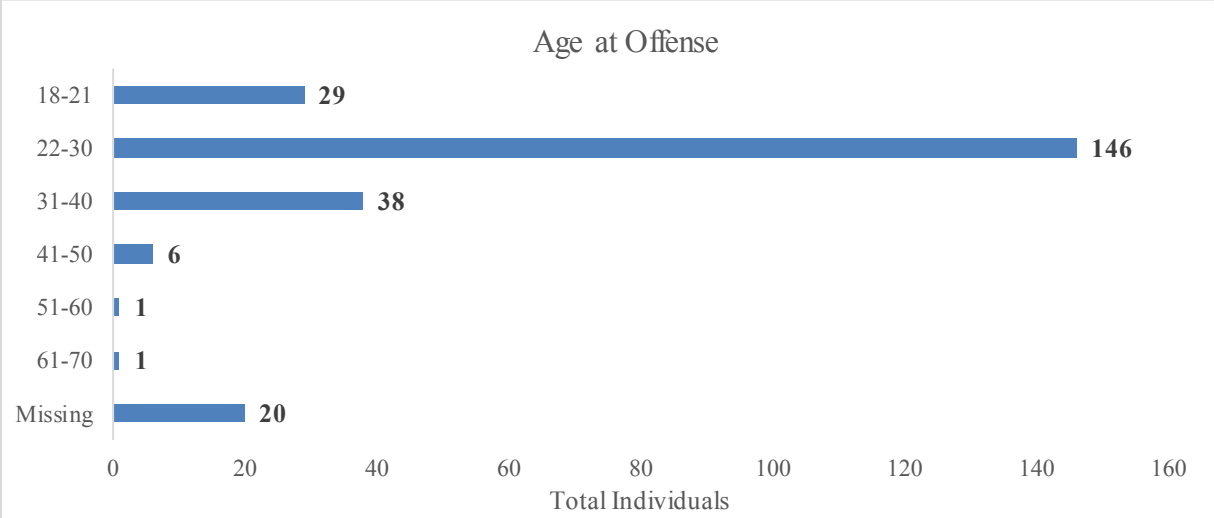
B. Demographics

The tables below identify the demographic trends among the 241 indivduals charged and/or convicted of the anti-riot statute.

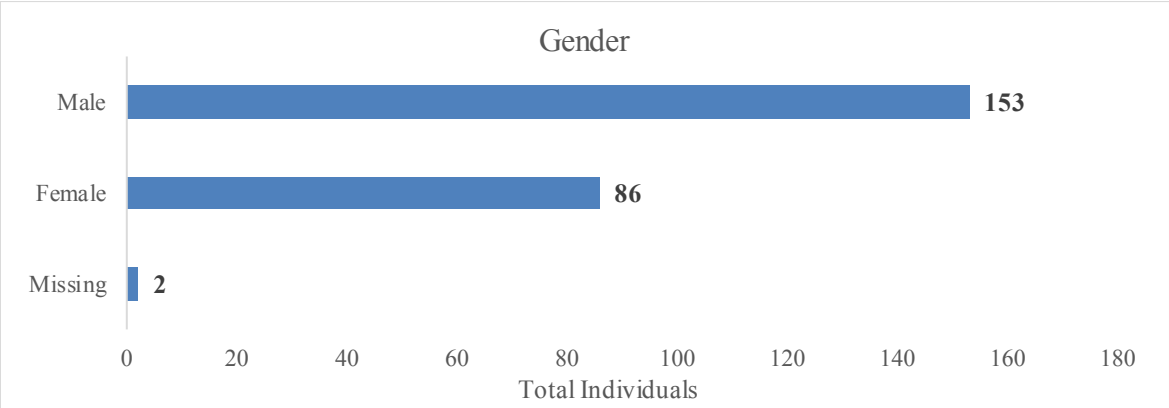
1. Race



2. Age at Offense



3. Gender

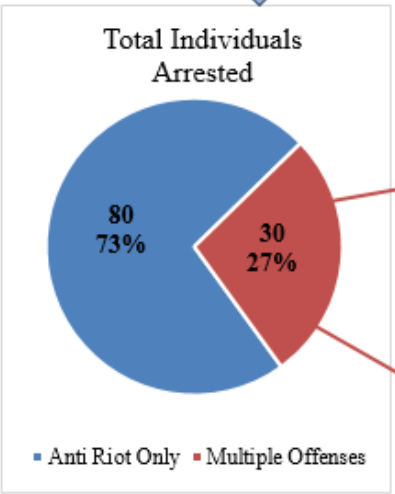


III. Anti-Riot Arrests

A. Overall

Between January 9, 2020 and August 31, 2020 there were 110 individuals arrested and charged with the anti-riot statute, either at the felony or misdemeanor level. Thirty of these individuals (27%) were also charged with additional offenses; there were a total of 154 unique charges among the arrested population[8]. A series of charts/tables detailing this information is presented below.

Total Individuals Arrested	Total Charges
110	154



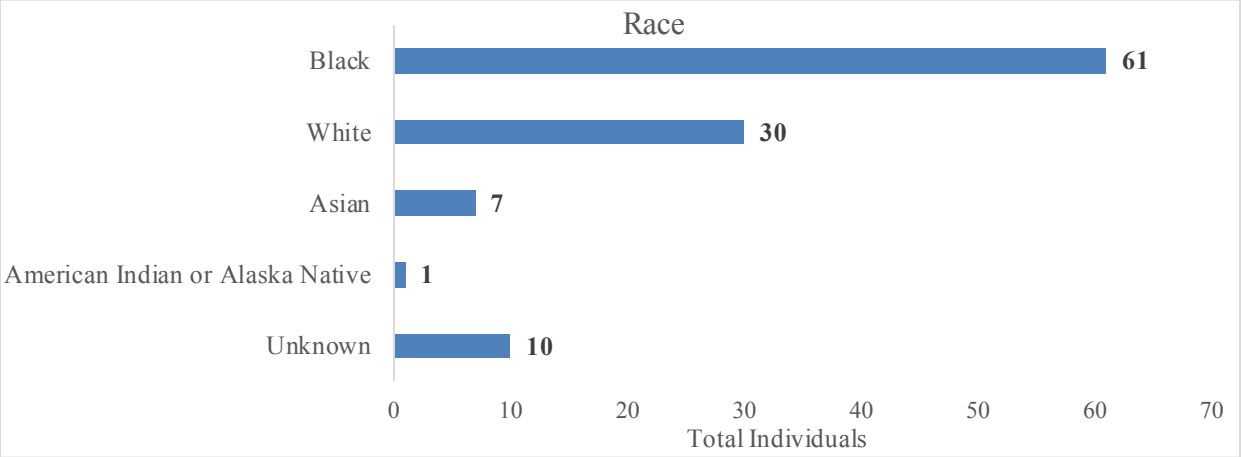
Charge Description	Total # Charges
Anti-Riot -felony	**106**
Anti-Riot -misdemeanor	**4**
Burglary II	28
Curfew Violation	5
Resisting Arrest	4
Unlawful Entry	3
Assault On A Police Officer (simple Assault)	2
Destruction Of Property Less Than $1000	1
Poss Of A Controlled Substance -misd	1
Total	**154**

[8] There were a total of 74 unique charges among the 30 individuals that were arrested for multiple offenses. This is represented in the red slice of the pie chart (30 anti-riot charges – one per individual), as well as the red shaded rows in the corresponding table (44 additional charges).

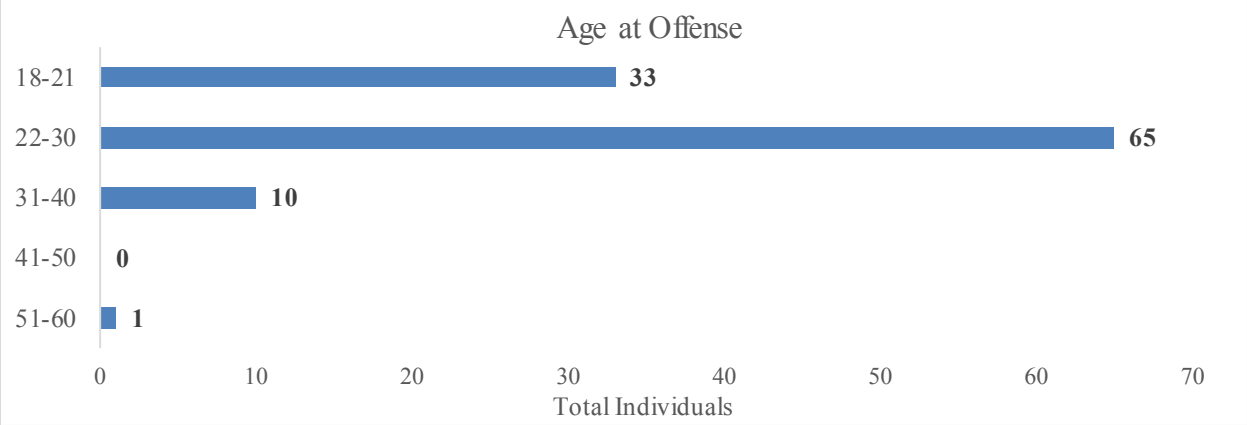
B. Demographics

The tables below identify the demographic trends among the indivduals arrested and charged with the anti-riot statute. Please note that one individual, recorded as a Jane Doe, has been omitted from the following demographic analysis as the demographic characteristics pertaining to that individual cannot be verified.

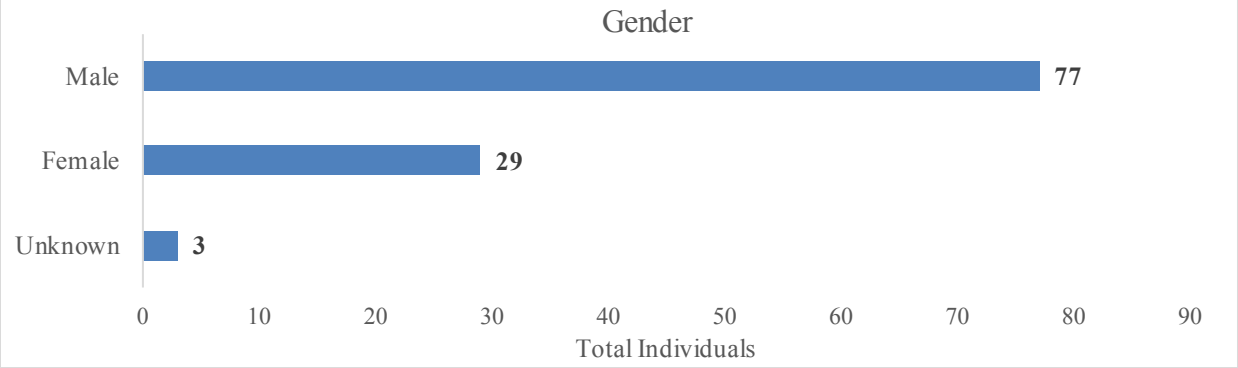
1. Race



2. Age at Offense



3. Gender



DC Council Judiciary and Public Safety Public Hearing

October 15, 2020 - Virtual Hearing 3 Min. Testimony

Good Evening Council,

Thank you for allowing me to provide my oral testimony today.

My name is Beverly Smith. I was born and raised in the District of Columbia. I am currently a Ward 8 resident.

I am glad to see that other kinds of unjust killings besides police shootings are being considered in the “Comprehensive Policing and Justice Reform Act of 2020” such as choke hold restraints, however, it isn’t comprehensive enough. The current legislation does not address the knee in the back. My 27 year old son, Alonzo Smith, who was unarmed and did not commit a crime, died in the custody of two Special Police Officers (SPO’s) at the Marbury Plaza apartment complex in the District of Columbia (DC), on November 1, 2015. His death was ruled a homicide, compression of the torso, which is knee in the back. No indictment for his murder.

I have been fighting hard for change over the past five years for police and special police reform. There have been several proposed legislations for SPO’s in DC after my son’s death by Mayor Bowser and Councilmember McDuffie, but like a lot of other proposals there were no final action and no meaningful change.

In 2018, a 36 year old Florida man, Timothy Coffman, died while in police custody from compression of the torso (knee in the back).

In January 2020, a 37 year old Illinois man, Eric Lurry, died in the custody of police after having a baton shoved in his mouth and pinching his nose.

Recently, in May 2020, 46 year old Minneapolis man, George Floyd, died in custody of the police from positional asphyxia restraint (knee pressed in his neck).

There are roughly 7,700 SPO’s in DC and about 4,500 are armed. They are regulated and licensed by the Metropolitan Police Department (MPD) with little to no oversight. Some are licensed to carry a firearm with only 40 hours of inadequate training in contrast to MPD who are required to have at least 28 weeks of training before being licensed to carry a firearm. There's a lack of quality and quantity of training for SPO’s which put DC residents at high risk of danger. Currently, they are only required to have 40 hours of limited inadequate training before assigned to a post.

Additionally, DC residents do not have any online mechanism to file a complaint against a SPO for excessive use of force or other complaints. Myself, along with Virginia Spatz has created a database for DC residents to report complaints against SPO's at Spodatadc.org.

I currently have a petition to "Disarm and Reform" SPO's in DC at dcjusticelab.org/justice4zo with the following four demands:

1. Disarming special police officers;
2. Increasing the quantity and quality of training required;
3. Passing the "Special Police Officer Amendment Act;" and
4. Prohibiting pursuit beyond property boundaries.

I demand that my legislation "Disarm and Reform" SPO's in DC be introduced without waiting for a consensus on every part of the bill.

Thank you for listening!

Testimony of

Virginia A. Spatz

Ward 6, DC Justice Lab Volunteer

to DC Council Committee on Judiciary and Public Safety
October 15, 2020

Thank you for this opportunity to testify on an issue that affects everyone who lives, works, worships, pursues entertainment, or otherwise visits in the District.

My name is Virginia Spatz. For more than 30 years, my husband and I have lived in Ward 6, in what has become Hill East, where we raised two children, now adults and living away from DC. The four of us are white.

In addition to living in the First and Fifth Police Districts, I have worked, worshipped, and/or protested in every DC police district -- including the Second, around the White House, and the Seventh, east of the river. These details matter because my family's skin-color has had an enormous impact on our interactions with police over the decades. So has the Police District of our surroundings.

FIRST AND FIFTH

When I first moved to DC, in 1988, I lived briefly on the campus of Gallaudet University. My not-yet-husband and I then moved together to an apartment near Eastern High School and to two other apartments in the area before buying a house in 1994. We originally lived in the Fifth District and then the First -- for a time the same address was Fifth District and then the borders shifted.

At that time, gun violence was at a historic high for the city as a whole. Many people I knew who lived in the First District, Black and white, were active in PSA meetings -- before electronic communications were common, folks had to show up at the meetings or otherwise engage in person -- walked with Orange Hats, and tried other forms of community engagement and community-involved policing. These opportunities were either lacking entirely or hidden so well as to be effectively non-existent in the Fifth District.

I participated in 1D activities, like walking with the Orange Hats, while living in 5D: The 1D officer who walked the Orange Hats, and generally saw folks back to their homes at the end of the evening, would have to radio into 5D before crossing Massachusetts to walk me back to my apartment, so as not to interfere with any on-going operations. That was a simple and sensible precaution, of course, but it also underlined the difference in attitude toward the neighborhoods between the two districts:

Broadly summarizing my different experiences back when I first lived here:

- **First District folks** (where white people were far more common), at least the white people and Black people who were active in community policing, were treated as clients -- I think they used to say "patrons" -- to be satisfied;
- **Fifth District folks** (which was overwhelmingly Black) were treated as potential, likely inevitable, victims of crime and/or potential dangers in themselves.

SECOND AND SEVENTH

Much later, but back when Cathy Lanier was still Chief, during Black Lives Matter protests (probably 2015), it happened that I was in the Seventh District for a BLM march one night, while friends were protesting in Northwest:

- **7D, officers RODE MOTORCYCLES INTO** the crowd of marchers -- not hitting anyone, but definitely moving beyond declaring their visibility or throwing around their weight;
- **In NW, police protected protesters** -- this was Lafayette Park and environs, involving both Park Police and MPD), and all was copacetic, even cheerful, I later learned.

OTHER DISTRICTS AND DIFFERENCES

- In the neighborhood, in their 20 years or so in what was primarily 1D, our children were never stopped or even spoken to by police unless they were walking with Black friends.
- In three years (2006-2009) at the soon to be renamed Ward 3 high school, one child saw students of color inside the school subject to all kinds of suspicion and violent treatment, which was rarely visited upon white students; outside, officers worked very hard to ensure that Black students -- assumed to be from outside Ward 3 -- moved along home at dismissal, while white students were told not to block the sidewalk but expected to mill about and enjoy freedom.
- In high school, one spent two years at School Without Walls (2007-2009) housed temporarily near Union Station and two years (2009-2011) at Walls in the new building on the GW campus, reporting vastly different treatment in Northeast and Northwest.
- In both locations, Walls was then -- maybe still is -- the only DCPS high school without metal-detectors and searches at the entrance, making for a VASTLY different experience than friends (and a sibling) at other schools.

Then and Now: A DEADLY DIFFERENCE?

Many years ago, probably 1994, we had just moved into our new home, on the edge of 1D and 5D. Shortly after moving in, our home was broken into. I did call 911 when I came home to find mayhem. But there was some -- very temporary as it turned out -- fiasco with 911, so that it was taking over an hour for calls to even reach dispatch. When officers finally showed up, I was told there was nothing that could be done except filing a report for insurance purposes, laughed at for asking if there was any chance of retrieving any items that were precious to us, and generally treated as an idiot who got what was coming: What could you expect moving into a neighborhood where crime was so rife?

> Flash forward 25 years: Same house; vastly changed neighborhood. I had Black-skinned guests who were going in and out of our front door for several reasons, and one visitor paused to sit on our stoop. Next thing I know there is pounding on the front door and shouts of "Police!"
>
> It turned out that a neighbor -- someone who has known us for decades, a Black man, as it happens, who might have been disgruntled with my guests or perhaps honestly believed I was in trouble -- had called police upon seeing strangers in our yard and our door ajar. Given that my guests were only with me a short time before police showed up, officers must have been dispatched instantly....
>
> ...I remember being very grateful that the sight lines were such that the Black man in my dining room was not visible from the door. I suggested he stay at the table out of sight and went to meet the officers. If I'd been wearing body camera, you would definitely see footage of police officers visibly relaxing when I appeared; if we had a Star Trek tri-corder, you would have a record of blood pressure and other measures of adrenalin dropping....
>
> I still have momentary panic-attacks envisioning what might have happened had officers, who must have been told this was a dire emergency, and were standing in bright sunlight, seen my guest at the end of our dim hallway.

My own experiences and much research suggest that effective police reform must address structural inequities across neighborhoods and demographics -- including age, skin color, gender, and other factors -- and reduce overall police encounters. Otherwise we are just tinkering with dimensions of a few bonfires, while the city burns; describing the fire, but not attempting to put it out.

I join with DC Justice Lab and others in calling for an end to jump outs -- by any name. I urge you to adopt DC Justice Lab proposals to limit search warrants, refine the Miranda doctrine especially as regards children, and eliminate consent searches, as well as reform of other systems that disproportionately impact some communities, bringing regular trauma and risk of physical injury, even death, to some while leaving others largely unscathed. I urge passage of these reforms, separate from this bill, if necessary to speed change.

Legislation must address accountability for officers and for those in command.

We must look beyond weaponry to prohibit para-military training and dismantle any unit or procedure -- including Gun Recovery and surveillance -- which disproportionately terrorizes some groups, without even reducing the homicide rate or otherwise improving District safety.

Demilitarizing weaponry and behavior is also key in protecting First Amendment rights and reducing trauma and injury, for locals and for visitors.

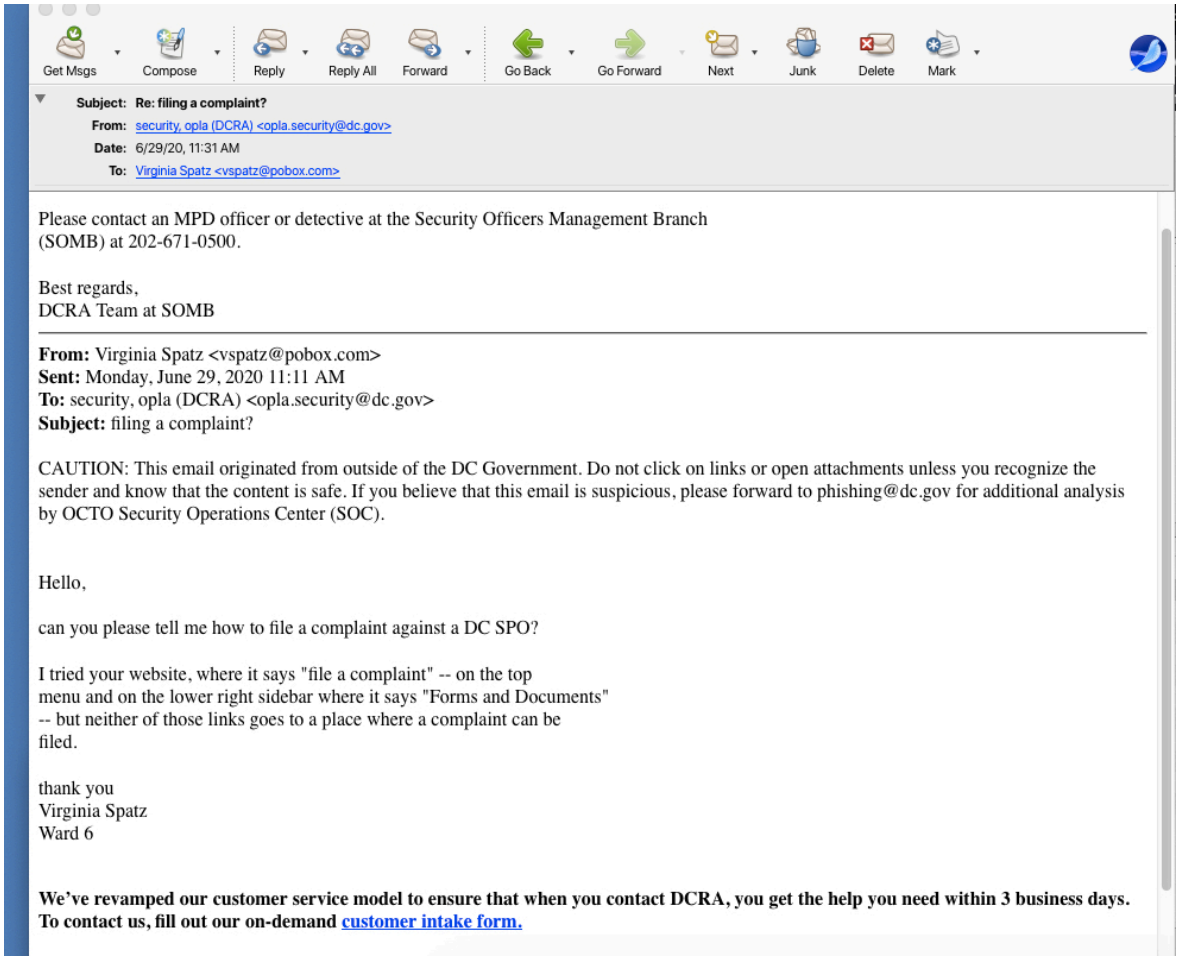
Finally, we need to disarm special police, and it is crucial to address the current dysfunction which makes filing a complaint against a special police officer nearly impossible.

What follows is an explanation of the current complaint-filing situation:

The video at this website shows how the buttons that claim one can "file a complaint" against a Special Police Officer lead to a page with no possibility of fulfilling that action. I made this little video just to show the situation -- https://spodatadc.org/2020/06/29/special-police-and-complaints/ -- that was back in June. I recently checked in October and nothing had changed.

I also inquired of the agencies involved back in June and was given the following answers.

This was the first --



Get Msgs | Compose | Reply | Reply All | Forward | Go Back | Go Forward | Next | Junk | Delete | Mark

Subject: Re: filing a complaint?
From: security, opla (DCRA) <opla.security@dc.gov>
Date: 6/29/20, 11:31 AM
To: Virginia Spatz <vspatz@pobox.com>

Please contact an MPD officer or detective at the Security Officers Management Branch (SOMB) at 202-671-0500.

Best regards,
DCRA Team at SOMB

From: Virginia Spatz <vspatz@pobox.com>
Sent: Monday, June 29, 2020 11:11 AM
To: security, opla (DCRA) <opla.security@dc.gov>
Subject: filing a complaint?

CAUTION: This email originated from outside of the DC Government. Do not click on links or open attachments unless you recognize the sender and know that the content is safe. If you believe that this email is suspicious, please forward to phishing@dc.gov for additional analysis by OCTO Security Operations Center (SOC).

Hello,

can you please tell me how to file a complaint against a DC SPO?

I tried your website, where it says "file a complaint" -- on the top menu and on the lower right sidebar where it says "Forms and Documents" -- but neither of those links goes to a place where a complaint can be filed.

thank you
Virginia Spatz
Ward 6

We've revamped our customer service model to ensure that when you contact DCRA, you get the help you need within 3 business days. To contact us, fill out our on-demand customer intake form.

About fifteen minutes later, another arrived (next page) --

Get Msgs | Compose | Reply | Reply All | Forward | Go Back | Go Forward | Next | Junk | Delete | Mark

Subject: **Re: filing a complaint?**
From: security, opla (DCRA) <opla.security@dc.gov>
Date: 6/29/20, 11:47 AM
To: Virginia Spatz <vspatz@pobox.com>

Good Day,

If there was a major offense call 911 otherwise please contact contact the security officers agency to report him first. Then you can call an MPD officer or detective at the Security Officers Management Branch (SOMB) 202-671-0500 for a second report.

DCRA Team at SOMB

From: Virginia Spatz <vspatz@pobox.com>
Sent: Monday, June 29, 2020 11:11 AM
To: security, opla (DCRA) <opla.security@dc.gov>
Subject: filing a complaint?

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filed.

thank you
Virginia Spatz
Ward 6

Neither response addresses the dysfunction of the website or the fact that the general public has no way to know what to do based on what information is provided.

Neither responses addresses what might have been the active trauma of someone who'd been abused by an SPO or witnessed such behavior. As it happens, I was just inquiring as part of a sort of research effort -- and maybe the writer could sense that this was not an emergency or a traumatic situation. But I doubt that. So much is in need of overhaul.

Beverly Smith, mother of Alonzo Smith, who was killed by Special Police Officers in the fall of 2015, and I worked together to try to make another portal for collecting information from those who cannot navigate this craziness and/or would not feel safe to report an SPO to MPD.

The fact that there is no way to file a complaint means there is also slim chance for any kind of accountability.

Thank you for the opportunity to testify. I am happy to answer further questions. And I urge the Committee to produce much stronger legislation. Soon.

-#-

Testimony by Diontre Davis
DC Justice Lab
https://dcjusticelab.org/police

To the Council of the District of Columbia, Judiciary Committee
Thursday, October 15, 2020 at 9:00 am John A. Wilson Building, Council Chamber 31350 Pennsylvania Avenue, N.W. Washington, D.C. 20004

On Bill B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"

Thank you, Chairman Allen, for allowing me to testify today. My name is Diontre Davis, and I am a volunteer for DC Justice Lab, a Washington, D.C. based non-profit organization of law and policy experts researching, organizing, and advocating for large-scale changes to the District's criminal legal system. In our report, "End Jump Outs," we provide evidence that the DC Metropolitan Police Department (MPD) have been illegally conducting jump-outs in primarily Black communities and have been intentionally covering this up for the last 3 years. As we know, this is most callous form of Stop-and-Frisks and it has already been outlawed by the DC Council, yet MPD has secretly operating in jump-out squads.

Community members in pre-dominantly black neighborhoods have stated specialized paramilitary units such as the Gun Recovery Unit ("GRU") in the Narcotics and Special Investigations Division ("NSID") conduct jump-out tactics. Wards 7 and 8 are the area that have been the most impacted by the jump-outs. These units drive around in unmarked cars, without their uniforms, and "jump out" on African American citizens, telling them to show their waistbands. If a person doesn't show their waist, officers will often accost them by rifling through their pockets and touching their body, looking for contraband.

The majority of MPD denies that these jump-outs are happening. However, community members revealed that officers in the GRU brag about using these practices and wear shirts with an insignia glorifying police violence with the slogan "vest up one in the chamber" and an image of a human skull with a bullet hole in the center. In 2017, the DC Police Chief Peter Newsham acknowledged the existence of these shirts and said they were "disturbing and disgraceful." In the beginning of this year, January 16th to be exact, sergeant Charlotte Djoussou revealed in a DC council hearing on public safety that the MPD are still conducting the jump-outs, targeting minority communities, and violating 4th Amendment rights. She specifically stated, and I quote, "Officers were targeting groups of minority males and violating 4th amendment rights, jumping out."

There is also video evidence of MPD conducting jump-outs. In the beginning of this year, a DC resident, Ryan Morgan submitted a video of an MPD officer demanding to see his waistband without probable cause. In the video, Morgan states he does not consent to any search, yet he is still harassed and intimidated into showing his waistband to prove he is not carrying a gun. I personally spoke with Mr. Morgan earlier this summer and he verified that the jump-outs have been a phenomenon that has been occurring for over 30 years!

Mr. Chairman, I believe that passing The Comprehensive Policing and Justice Reform Amendment Act of 2020 is necessary to resolve these issues. First, officers will be required to work in full uniform and operate in marked police cars as a means of promoting a transparency in appearance. A large component of the jump outs is that they are conducted in a way that brings terror to those harassed because they have no clue it appears a group of people are trying to harm and/or kidnap them.

However, before passing this bill, we believe there should be a slight revision concerning the statute requiring that an officer's justification for the search is based only on the person's consent. We urge the Council to improve upon the Comprehensive Policing and Justice Reform Amendment Act by eliminating consent searches. The reason for this is because the warning requirement does not adequately ensure consent searches are voluntary. In our report, Eliminate Consent Searches, we explain that the fear coercion is used on Black citizens as a psychological means of manipulating them to relinquish their rights. The fear of them already being stereotyped as criminals and the reputation that the police have with for punishing individuals who are uncooperative or not sufficiently submissive leaves Black citizens consenting to searches out of fear, not choice. Consent searches are not truly consensual. We urge the DC Council to revise this part of the bill to eliminate the primary mechanism police use to harass and racially profile Black Washingtonians. We recommend that consent searches are only allowed if the person who consents had an opportunity to speak to a lawyer. Using the assistance of an attorney helps the individual knowingly, intelligently, and voluntarily waive their rights.

Thank you and the rest of the DC Council for your time and consideration.

October 15, 2020

MORE THAN A PLAZA

DC JUSTICE LAB

Chairman Allen, and Members of the Committee, thank you for the opportunity to testify today.

I am a Law Student at the University of the District of Columbia, and a volunteer member of the Search Warrants Team at DC Justice Lab.[1]

I was a teenager the first time I learned about No Knock Warrants. It was in the aftermath of 9/11, and the invasion of privacy that followed on Arab-Americans impacted the way I viewed intelligence gathering and surveillance. I witnessed families in my Muslim community torn apart by FBI raids; innocent citizens were accused of terrorist activity and deported without due process. It left a chilling effect in my life.

Breonna Taylor died because of a No Knock Warrant. This practice has little to do with public safety, and instead has torn communities apart and taken many innocent Black and Brown lives.

<u>If the council is serious about reform in the District, it should amend D.C. Code § 23-522-524. I urge the Council to consider five things:</u>

First, The Council should narrow the probable cause standard for MPD officers requesting search warrants by requiring them to show "strong evidence based on reasonable due diligence." In DC, the probable cause standard under the Fourth Amendment requires only a showing of "*a fair probability that evidence of a crime would be found.*" Its' effect has resulted in MPD officers obtaining warrants for incorrect houses, arresting the wrong people, and often police recover no evidence. The Council must raise the bar.

Second, the Council should prohibit search warrants in cases of suspected drug activity or cases based solely on drug activity, because it will minimize the need for law enforcement to engage in drug raids.

[1] DC Justice Lab, *Limit Search Warrants* (September 2020), bit.ly/limit-search-warrants.

Third, the Council should ban no knock warrants. This practice is a legacy of the War on Drugs—a war on poor people and people of color. Adults are not the only ones harmed by no knock warrants—children are too. In 2013, during a nighttime execution of a warrant, MPD officers ransacked the home of Shandalyn Harrison searching for evidence of drug distribution. What they found was a grandmother watching TV with her young granddaughters in the living room. Officers then barged into the bathroom, opened the shower curtain on her 11 year old granddaughter while she stood naked, and pointed a gun at her. Like Breonna Taylor's case, the person they were looking for had not lived in the house for several years. The Council should just ban no knock warrants.

Fourth, the Council should prohibit MPD from handcuffing, pointing guns, and conducting warrantless bodily searches of individuals not subject to the search warrant.

And Finally, the Council should compensate victims for property damage and the unnecessary violence and trauma caused by MPD.

_____

I hope The Council will do the smart and right thing to amend D.C. Code § 23-522-524, with respect to the five reform goals.

Thank you.

MORE THAN A PLAZA

DC JUSTICE LAB +
GEORGETOWN JUVENILE JUSTICE INITIATIVE

DEMANDING A MORE MATURE MIRANDA FOR KIDS

October 2020

Katrina Jackson • Alexis Mayer

Demanding a More Mature *Miranda* for Kids

I. Introduction

In *Miranda v. Arizona*, the Supreme Court held that statements made by an adult during custodial interrogation are inadmissible unless law enforcement officers first administer warnings before questioning and the adult validly waives those rights.[1] Pursuant to the Fifth and Sixth Amendments, *Miranda* warnings inform individuals of: (1) the right to remain silent, (2) that any statement can be used against them, (3) the right to obtain an attorney and to have counsel present during questioning, and (4) the right to be appointed an attorney.[2] To waive these rights, a person must make a voluntary, knowing, and intelligent waiver based on the totality of the circumstances.[3] The Supreme Court emphasized that any statement or confession obtained through an uninformed, coerced, or compelled waiver of these rights must be excluded from any judicial proceeding.[4]

A year later, in *In re Gault*, the Supreme Court recognized that the procedural Constitutional safeguards outlined in *Miranda v. Arizona*, apply to children as well.[5] However, in deciding *Gault*, the Supreme Court extended *Miranda*'s adult framework to youth without the benefit of the wealth of adolescent development research that has been conducted since *Miranda* and *Gault* were decided.[6] As a result, the *Miranda* framework is not a robust, research-driven approach for protecting the rights of youth. Indeed, in *J.D.B. v. North Carolina*, the Supreme Court recognized this shortcoming and held that a child's age is relevant to *Miranda*'s custody analysis because children as a class are different than adults.[7] Notably, *Miranda*, *Gault*, and *J.D.B.* describe only the Constitutional floor of protections that must be afforded to youth in an interrogation context.

These bare minimum *Miranda* protections fail to fully protect children because they do not accommodate for a child's high susceptibility to pressure and limited cognitive ability. Furthermore, Black children are disproportionally affected by the grave insufficiencies of the *Miranda* Doctrine. The current Doctrine fails to consider the unique vulnerabilities of Black youth experience when interacting with the police. As residents, law students, attorneys, and members of the community, we respectfully urge the DC Council to protect children from *Miranda*'s shortcomings by requiring, prior to any custodial interrogation, that (1) law enforcement provide youth with expanded warnings; 2) youth be provided a reasonable opportunity to consult with counsel; and (3) waivers will only be valid if they are knowing, intelligent, voluntary, and made in the presence of counsel.

II. The Insufficiencies of the *Miranda* Doctrine

Although children only account for about 8.5% of arrests, nationally, they account for about one-third of false confessions.[8] This often leads to wrongful convictions and severe dispositions because those who falsely confess are treated harshly throughout the rest of the juvenile or criminal legal process.[9] Youth have difficulty understanding the *Miranda* rights, largely contributing to this high rate of wrongful convictions.

Because children's cognitive abilities are still developing, most children cannot meaningfully understand their *Miranda* rights.[10] More specifically, only 20% of youth adequately understand their *Miranda* rights.[11] Empirical evidence illustrates that adequately comprehending *Miranda* requires at least a tenth-grade reading level.[12] Moreover, understanding two of the *Miranda* warning

protections, the right to remain silent and the right to have an attorney present, requires a college or graduate reading ability.[13] As high as 85% of the youth in the juvenile legal system have disabilities, and children with disabilities inherently have difficulties in understanding the complexity of the *Miranda* doctrine.[14] Due to economic, social, and educational disparities, these necessary reading levels are far beyond the majority of individuals, including adults, who are targets of custodial interrogations.[15]

Furthermore, "[o]verwhelming empirical evidence shows that [youth] do not understand their Constitutional protection against self-incrimination or the consequence of waiving their rights."[16] In particular, many children do not understand that they will not incur consequences or court sanctions if they invoke their rights, such as the right to remain silent.[17] Due to no fault of their own, children do not understand the purpose of an attorney or that an attorney will support them even if they are guilty.[18] Additionally, many children often confuse the term, "interrogation," with an adjudication hearing and, therefore, do not understand that the right to have an attorney present during an interrogation means that they have the right to have an attorney present during questioning.[19] Thus, because youth do not understand *Miranda*'s protections, they cannot fully understand or appreciate the rights they are giving up when they waive them.[20]

In addition to not fully understanding their rights or the consequences of waiving them, children also "lack the psychosocial maturity and cognitive capacity to waive *Miranda* rights."[21] Because a child's prefrontal cortex has not yet matured,[22] children focus on short-term rather than long-term consequences,[23] especially in moments of stress.[24] Thus, children are especially at risk of waiving their rights without considering the consequences in the inherently stressful setting of an interrogation.[25] For example, when an officer tells a child that they can go home if they waive their *Miranda* rights and answer questions, the child is likely to waive their rights based on the short-term reward of going home.[26] Furthermore, even if they could consider the long-term consequences, youth "'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.'"[27] As a result, children as young as ten years old waive their *Miranda* rights about 90% of the time without understanding the rights they are giving up,[28] often leading to false confessions and wrongful convictions.[29]

III. Race Implications and Disproportionate Effects of the *Miranda* Doctrine

For decades, tensions have existed between the Black community and the police. In the District of Columbia, police disproportionately stop, search, and arrest Black youth. Black youth are "ten times more likely to get stopped than their white peers," and between July and December of 2019, police searched 738 Black youth and only four White youth.[30] In 2018, 98% of youth committed to the Department of Youth and Rehabilitation Services were Black.[31] In 2015, Black youth made up just under 70% of the District's youth population, but accounted for over 95% of those arrested in the District.[32] Black people continue to be disproportionally arrested, not just in heavily policed, predominantly Black neighborhoods, but also in areas with high concentrations of White people.[33] Furthermore, Black youth's view of the police is often learned and shaped at a very young age.[34] Therefore, "[d]istrust, fear, and even hostility between police and youth of color exacerbate the psychological atmosphere that undermines the voluntariness of Miranda waivers."[35]

Moreover, Black men are more likely than White men to feel anxiousness and fearfulness during police encounters and , as a result, engage self-regulatory behavior to counteract any formed stereotypes regarding their guilt.[36] For example, Black men are hyper aware to engage in eye-contact and remain mindful of their body language and word choice.[37] But, despite a Black man's true intentions, "these self-regulatory efforts are interpreted as suspicious by police." Researchers have referred to this phenomenon as "stereotype threat."[38] Although the study was limited to Black men, it can be reasonably inferred that Black youth engage in similar attempts to conform their behavior to the perceived expectations of the officer. As a result, Black youth experience substantially different interactions with the police than their White counterparts, which leaves greater exposed to the shortcomings of the *Miranda* Doctrine.

IV. The Impact on the District of Columbia

The involuntary waiver of *Miranda* rights remains an issue within Washington, D.C.'s juvenile legal system. In 2012, the Metropolitan Police Department ("MPD") arrested a 15-year old child and brought him to a police station, where an MPD detective questioned him around midnight.[39] During the interview, the child's foot was cuffed to the floor, so he was unable to move freely.[40] Before reading the child his *Miranda* rights, the detective said:

> "I know you know why you're up here, so I ain't gonna play the 'I don't know' crap, all right? I'm gonna give you an opportunity to give your version of what happened today, because ... I stand between you and the lions out there .... [W]e have a lot of things going on out there, and they're gonna try and say that you did it all. Okay? And I think what happened today was just a one-time thing. But before I came out here everybody said ... you did a whole bunch of stuff, but in order for us to have a conversation, I have to read you your rights and you have to waive your rights. If you answer no to any of the questions I ask you after I read you your rights, that's all, I mean, I can't have the interview, okay?"[41]

After the officer made these coercive statements to the child, he read the child his *Miranda* rights.[42] The child then waived his rights and confessed.[43] Because the officer's statements implied that invoking his *Miranda* rights would make the situation even worse, the officer made the boy feel helpless, as if he had no choice but to waive his *Miranda* rights and confess. [44] The District of Columbia Court of Appeals found that the officer's statements did not give the child a real choice and that his waiver was, therefore, involuntary.[45] This is just one of many examples that illustrates a child's susceptibility to waiving *Miranda* rights during an inherently coercive police interrogation.

V. A New Approach

To better protect children from the current inadequacies of the *Miranda* doctrine, the District of Columbia should make any statement made by a minor in a custodial interrogation inadmissible unless (1) the minor was advised of their rights by the interrogating law enforcement official,[46] (2) the minor was given an opportunity to confer with an attorney regarding the waiver of those rights, and (3) the minor knowingly, intelligently, and voluntarily waived those rights in the presence of counsel. D.C. should not permit any child to waive any *Miranda* right without assistance from counsel.

These protections would ensure that waivers are actually knowing, intelligent, and voluntary; prevent false confessions; and reduce wrongful convictions.

Other jurisdictions have already codified protections for youth in custodial interrogations, including (1) requiring children to consult with a counsel during police questioning, (2) not allowing children to waive *Miranda* rights without consulting with an attorney, and (3) making inadmissible any statement made outside the presence of counsel. Specifically, New Jersey requires the assistance of counsel before a child can waive any right, including a *Miranda* right.[47] Additionally, California recently passed legislation that requires all minors to consult with an attorney before waiving any *Miranda* right.[48] Furthermore, Illinois requires counsel at all custodial interrogations for children under 15 who are suspected of committing homicide or another serious offense.[49] Similarly, in West Virginia, statements made by children under 14 during custodial interrogations are not admissible in court unless counsel was present during the interrogation.[50]

States and cities across the United States continue to codify further protections for youth in custodial interrogations. For example, in New York, there is a bill that, if it becomes law, will mandate that children are only interrogated when necessary and only *after* consulting with an attorney.[51] Baltimore City has also taken steps to ensure that a child's constitutional rights are preserved. Specifically, the Maryland State's Attorney's Office has explicitly expressed its plans to develop policy that will make statements made by a minor outside the presence of counsel inadmissible.[52]

Although some states require parents to be present during custodial interrogations as a way to potentially guard against coerced waivers or confessions, this "protection" has proven to be inadequate. Instead, attorneys are best positioned to explain *Miranda* rights to children. Generally, parents do not have the necessary legal knowledge to represent their child's best interest.[53] In fact, "[i]n 24 out of 25 interrogations, the parents either did nothing or affirmatively aided the police" by advising their children to confess or to tell the truth.[54] One notable example of a case where children were wrongfully convicted based on false confessions is the Exonerated Five, where the children's parents encouraged the boys to waive their right to remain silent and further encouraged them to cooperate with the police.[55] The parents, like their children, felt helpless and powerless to resist police pressure during the interrogations. Thus, merely having a parental or custodial guardian present would not adequately preserve *Miranda*'s Constitutional protections.[56]

Moreover, providing minors a more expansive explanation of their *Miranda* rights alone would not be enough to protect youth from involuntarily waiving their rights. To create a fully comprehensive explanation of *Miranda*'s protections that most youth could factually and rationally understand would be both impractical and ineffective. For example, England and Wales created a comprehensive 44-page "easy read" letter of rights for people in custody.[57] However, because it is so unlikely that a child could understand and internalize such a lengthy document under the conditions often associated with custodial interrogation, England and Wales also requires counsel and an appropriate adult when youth are in police custody.[58] "On average, custodial suspects are expected to comprehend 146 words with a range from 49 to 547," and longer pieces are especially challenging.[59] Thus, a comprehensive resource would not effectively communicate the *Miranda* doctrine to youth and would, therefore, not adequately protect against involuntary waivers.

Providing further *Miranda* protections would not only protect youth from falsely confessing but also save the District money that could be allocated to social programs. Detaining a young person can cost upwards of $621 per day and $226,665 per year.[60] These numbers do not account for the long-term indirect costs of detaining youth, including less tax revenue, increased public assistance, and increased crime costs.[61] Additionally, "[b]etween lawsuits and state statutes that award fixed compensation for wrongful convictions, state and municipal governments have paid out $2.2 billion to exonerees."[62]

The District of Columbia should make any statement made to law enforcement officers by any person under eighteen years of age inadmissible in any court of the District of Columbia for any purpose, including impeachment, unless:

- **The child is advised of their rights by law enforcement;**
- **The child is given an opportunity to confer with an attorney; and**
- **The child knowingly, intelligently, and voluntarily waives their rights in the presence of counsel.**

References

[1] *See* 384 U.S. 436, 444 (1966).
[2] *See generally id*.
[3] *Miranda*, 384 U.S. at 444-45; *Fare v. Michael C.*, 442 U.S. 707, 725-26 (1979).
[4] *Miranda*, 384 U.S. at 462.
[5] 387 U.S. 1, 44-55 (1967).
[6] *Id.*
[7] *J.D.B. v. North Carolina*, 564 U.S. 261,272 (2011) (recognizing that "[t]ime and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to outside pressures than adults; and so on.")
[8] Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 920 (2017).
[9] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 920 (2004).
[10] Lapp, *supra* note 8, at 914.
[11] Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1152-53 (1980) (finding, in a study of 431 youth, only 20.9 percent of those youth adequately understood all four *Miranda* rights).
[12] Anthony J. Domanico et al., Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations, 49 IDAHO L. REV. 1,3 (2012). It is important to note that DC uses the same Miranda Rights Card with both adults and youth. *See* Metropolitan Police Department PD-47 form.
[13] *Id.*
[14] Taryn VanderPyl, *The Intersection of Disproportionality in Face, Disability, and Juvenile Justice*, 15 JUST. POL'Y J. 1, 2 (2018).
[15] *Id.*
[16] Lapp, *supra* note 8, at 914.
[17] Richard Rogers, et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 PSYCH., PUB. POL'Y, & L. 63, 67 (2008).
[18] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 11 (2006).
[19] Grisso, *supra* note 11, at 1154 (finding, in a study of 431 youth, only 20.9 percent of those youth adequately understood all four *Miranda* rights).
[20] Grisso, *supra* note 18, at 11.
[21] Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 431 (2006).
[22] Marco Luna, *Juvenile False Confessions: Juvenile Psychology, Police Interrogation Tactics, and Prosecutorial Discretion*, 18 NEV. L.J. 291, 297 (2017).
[23] Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL'Y 395, 405 - 06 (2013).
[24] Grisso, *supra* note 18, at 9.
[25] *J.D.B.*, 564 U.S. at 269 (quoting *Miranda*, 384 U.S. at 467); Grisso, *supra* note 18, at 9.
[26] Grisso, *supra* note 18, at 11. Oftentimes, when officers interrogate a child, they give the child two options: "(1) you did it and if you do not confess I cannot help you so you are going to be punished harshly, or (2) you did it and if you do confess, you are a good person and I can help you." Steven A. Drizin & Beth A. Colgan, *Interrogation Tactics Can Product Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 136 (G. Daniel Lassiter ed., 2004). Based on these limited options and the short-term reward of going home, children almost always waive their *Miranda* rights and confess even if they are innocent. *See generally id.* at 138.
[27] *J.D.B.* 564 U.S. at 272 (quoting *Bellotti v. Baird,* 443 U.S. 622, 635 (1979)).
[28] Lapp, *supra* note 8, at 914 (2017); Barry Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 12 (2013) (finding, in a study of 307 16 through 18-year olds, 92.8 percent of youth waived their *Miranda* rights)

[29] Elizabeth Vulaj, *From the Central Park 5 to the Exonerated 5: Can It Happen Again?*, N.Y. ST. B.J. (2019), at 24-25.
[30] ACLU-DC, RACIAL DISPARITIES IN STOPS BY THE D.C. METROPOLITAN POLICE DEPARTMENT: REVIEW OF FIVE MONTHS OF DATA 8 (2020), https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf (last visited Sept. 13, 2020).
[31] Youth Population Snapshot, DEP'T YOUTH REHABILITATION SERV.S, https://dyrs.dc.gov/page/youth-snapshot (last visited Sept. 2, 2020).
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[33] *Id.*
[34] Kristin Henning, Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. STATE L. J. ___ (expected December 2020).
[35] *Compare* Puzzanchera, C., Sladky, A. and Kang, W., "Easy Access to Juvenile Populations: 1990-2019," at https://www.ojjdp.gov/ojstatbb/ezapop/ (reporting 29,321 Black youth ages 10 to 17 and 42,234 total youth ages 10 -17) *with* MPD FOIA Request Response 2016-05463 (reporting 2928 arrests of Black youth out of 3073 total arrests in 2015) (on file with the Georgetown Juvenile Justice Initiative).
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *In re S.W.*, 124 A.3d 89, 93 (D.C. Ct. App. 2015).
[40] *Id.*
[41] *Id.* at 94.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id*. at 104-05.
[46] These rights include but are not limited to: (a) the right to remain silent, (b) anything they say can be used against them, (c) the right to an attorney, (d) the right to have someone else pay for the attorney, (e) the right to talk to an attorney *immediately* before continuing to answer questions, (f) the refusal to give a statement cannot be used as evidence of guilt, (g) making a statement does not mean they will be released from custody or that they will not be charged, (h) they can be held in pretrial detention for the most minor offenses, and (i) they can be committed until age 21 for the most minor offenses.
[47] N.J. STAT. ANN. § 2A:4A–39(b)(1).
[48] S. 203, 2020 (Cal.)
[49] 705 ILL. COMP. STAT. § 405 / 5-170.
[50] W. VA. CODE § 49-4-701(l).
[51] A6982B, 2019 Leg., Reg Sess. (N.Y. 2019). Emily Haney-Caron & Sydney Baker, *Protecting Youth from Interrogation*, NEW YORK DAILY NEWS, (Aug. 5, 2020), https://www.nydailynews.com/opinion/ny-oped-protecting-youth-from-unfair-interrogation-20200805-yzg33mie6vhkvkmmrfz7jagrwy-story.html, (last visited Sept. 27, 2020).
[52] Marilyn Mosby & Miriam Aroni Krinsky, *The Baltimore Exonerees' Cases Shed Light on the Need for Reforming Youth Interrogations*, WASH. POST (Nov. 27, 2019), https://www.washingtonpost.com/opinions/local-opinions/the-baltimore-exonerees-cases-shed-light-on-the-need-for-reforming-youth-interrogations/2019/11/27/e7e22570-1099-11ea-b0fc-62cc38411ebb_story.html; Jennifer Egan, *Baltimore State's Attorney Should Refuse to Use Child Confessions Taken Without an Attorney Present*, BALT. SUN, Dec. 6, 2019, https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-1208-mosby-kid-confession-20191206-jsdhcnsocrcrflo7m2hdkygzui-story.html.
[53] Hana M. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions (Winner of American Constitution Society's National Student Writing Competition)*, 20 U. PA. J. CONST. L. 1211, 1232 (2018).
[54] Molly Knefel, *'Making a Murderer,' and the Huge Problem of False Youth Confessions*, ROLLING STONE (Jan 8, 2016), https://www.rollingstone.com/tv/tv-news/making-a-murderer-and-the-huge-problem-of-false-youth-confessions-51948/, (last visited Sept. 27, 2020); Rogers, *supra* note 17, at 66.
[55] Drizin, *supra* note 9, at 896.
[56] Rogers, *supra* note 17, at 66.

[57] HERTFORDSHIRE CONSTABULARY, RIGHTS AND ENTITLEMENTS EASY READ BOOKLET (2009).
[58] *See* Rogers, *supra* note 17, at 185.
[59] *Id.* at 186.
[60] JUSTICE POLICY INSTITUTE, STICKER SHOCK 2020: THE COST OF YOUTH INCARCERATION 3 (2020).
[61] *Id.* at 1.
[62] Radley Balko, *Report: Wrongful Convictions Have Stolen at Least 20,000 years from Innocent Defendants*, WASH. POST: OPINIONS (June 10, 2019), https://www.washingtonpost.com/news/opinions/wp/2018/09/10/report-wrongful-convictions-have-stolen-at-least-20000-years-from-innocent-defendants/.

Appendix: Proposed Amendments

§ 16–2316. Conduct of hearings; evidence.

(g) A statement made by a person under 18 years of age to a law enforcement officer during a custodial interrogation shall be inadmissible for any purpose, including impeachment, in a transfer hearing pursuant to section 16-2307, in a dispositional hearing under this subchapter, or in a commitment proceeding under Chapter 5 or 11 of Title 21, unless the person under 18 years of age:

(1) Is advised by a law enforcement officer in a developmentally appropriate manner of:
    - (A) The person has the right to remain silent;
    - (B) Anything the person says can be used against them in court;
    - (C) Refusing to make a statement cannot be used as evidence that they were involved in a crime;
    - (D) Making a statement does not mean they will be released from custody or that they will not be charged with a crime;
    - (E) The person has the right to an attorney;
    - (F) The person has the right to have someone else pay for the attorney at no cost to them;
    - (G) The person has the right to privately speak with an attorney, immediately, before continuing to speak with a law enforcement officer;
    - (H) The person has the right to be advised by an attorney regardless of whether they committed a crime; and

(2) Is given a reasonable opportunity to confer privately and confidentially with an attorney; and

(3) Through an attorney, knowingly, intelligently, and voluntarily waives their right to remain silent.

Salim Adofo

Commissioner

Single Member District 8C07

Official Testimony to the Council of the District of Columbia

Committee on

Judiciary & Public Safety Public Hearing

Bill 23-882 Comprehensive Policing and Justice Reform

Amendment Act of 2020

October 15, 2020

Public safety is a very important issue for the residents of the District of Columbia. As the Commissioner of District 8C07, residents have expressed to me that it is one of their primary concerns. Realizing that the Metropolitan Police Department (MPD) is the primary agency dedicated to the physical security of the residents, it is critical that we understand the historical context of the police and its role in the community.

"How the U.S. Got Its Police Force" is the title of an article in the May 2017 issue of Time Magazine. The article states, "In the South, however, the economics that drove the creation of police forces were centered not on the protection of shipping interests but on the preservation of the slavery system. Some of the primary policing institutions there were the slave patrols tasked with chasing down runaways and preventing slave revolts, Potter says; the first formal slave patrol had been created in the Carolina colonies in 1704. During the Civil War, the military became the primary form of law enforcement in the South, but during Reconstruction, many local sheriffs functioned in a way analogous to the earlier slave patrols, enforcing segregation and the disenfranchisement of freed slaves."

It is important to provide context to the development of law enforcement because it gives an understanding of the origins and intent of the role of police. To be clear, the intent and origin of the police department were to protect the economic interests of White male landowners over the age of thirty - because of these origins, police, crime, and economics will be forever linked in

this society.

As we move into a space to correct historical wrongs, it is my main objective to ensure that MPD fulfills its commitment to the District of Columbia and that is protecting all of its residents and guests. Therefore, on behalf of the residents of District 8C07 I make the forthcoming recommendations on Bill 23-882 Comprehensive Policing and Justice Reform Amendment Act of 2020.

Statements Made by Minors

To better protect children from the current inadequacies of the Miranda doctrine, the District of Columbia should make any statement made by a minor in a custodial interrogation inadmissible unless:

(1) the minor was advised of their rights by the interrogating law enforcement official,

(2) the minor was given an opportunity to confer with an attorney regarding the waiver of those rights, and

(3) the minor knowingly, intelligently, and voluntarily waived those rights in the presence of counsel. D.C. should not permit any child to waive any Miranda right without assistance from counsel.

These protections would ensure that waivers are actually knowing, intelligent, and voluntary; prevent false confessions; and reduce wrongful convictions.

Stop and Frisk

The most callous example of stop-and-frisk in the District of Columbia is the Metropolitan Police Department's jump-out squads. Specialized paramilitary units such as the Gun Recovery Unit ("GRU") in the Narcotics and Special Investigations Division ("NSID") use tactics often referred to as "jump-outs" by community members because of how they operate in D.C.'s predominantly-Black neighborhoods: Officers jump out of unmarked cars to surround, stop, and search individuals without basis. These routine patrols drive around demanding that people who are doing nothing wrong stop, lift up their shirts, and display their waistbands to prove that they are not carrying firearms. Jump-outs often work in plainclothes with tactical vests, however, a similar tactic has also been observed from marked cars. This unlawful and discriminatory treatment undermines community trust in law enforcement and does not improve public safety. This tactic must be ended immediately to ensure the safety of our community members and to preserve the constitutionality of policing in D.C. MPD's paramilitary units jump-out tactics are in line with a larger culture of celebrating police violence and the idea that D.C. residents from certain neighborhoods should be treated as inherently dangerous. Although D.C. leadership

denies that jump-outs are still a pervasive aspect of Department culture, these units brag about the often-violent practice.

Therefore the District must:

1. Disband existing paramilitary units and reassign those officers.
2. Require officers to work in full uniform and marked police cars, unless they are conducting a justified and targeted undercover operation.
3. Prohibit officers from demanding to see a person's waistband without probable cause.
4. Suppress all evidence seized as a result of "jump outs" and other discriminatory stop and frisk tactics.
5. Disallow the following common pre-textual basis for reasonable articulable suspicion or probable cause:
    - Presence in a high-crime neighborhood;
    - Apparent nervousness around police officers;
    - So-called furtive gestures or movements or running;
    - A generic bulge in a person's clothing; and
    - Time of day.

Salim Adofo
Commissioner
District 8C07

Special Police

D.C. has the most police per capita of any large city. We have no need for armed guards patrolling the same communities that police already oversaturate. These officers lack the training and accountability to safely patrol properties and should be disarmed to protect the community. To solve this problem, it is recommended that D.C. Council:

• Disarm special police officers;

• Increase the quantity and quality of training required;

• Pass the Special Police Officer Oversight Amendment Act; and

• Disallow pursuit beyond property boundaries.

Salim Adofo
Commissioner
Single Member District 8C07
District of Columbia

Memorandum

TO: Councilmember Charles Allen, Chair, Committee on Judiciary and Public Safety, and Members of the D.C. Council

FROM: Cynthia Lee, Edward F. Howrey Professor of Law, The George Washington University Law School

RE: Written Testimony in Support of the Use of Deadly Force Provisions in B23-0882, The Comprehensive Policing and Justice Reform Amendment Act of 2020

DATE: October 23, 2020

Chairman Allen, Chairman Mendelson, and members of the D.C. Council, I have been a professor at the George Washington University Law School where I teach Criminal Law, Criminal Procedure, Adjudicatory Criminal Procedure, and Professional Responsibility, for the past 19 years. I am also an 18-year resident of Ward 4 in the District of Columbia. I and 1,548 others who have signed a Change.org petition available at http://chng.it/gkj56BvX[1] urge you to make permanent the use of deadly force provisions in the Comprehensive Policing and Justice Reform Amendment Act of 2020.

I respect the difficult and dangerous work that members of our Metropolitan Police Department and law enforcement officers across the nation do to protect our safety. I also recognize the pain and anger that many here in the District of Columbia and across the nation have felt over the deaths of George Floyd, Breonna Taylor, Rayshard Brooks, and others at the hands of police. I believe strong and fair laws that hold police accountable, in conjunction with other measures, have the potential to change the culture of policing and rebuild trust between community members and the police.

The use of deadly force provisions in the Comprehensive Act replicate a model statute I proposed in a 2018 law review article entitled, *Reforming the Law on Police Use of Deadly Force: De-escalation, Pre-seizure Conduct and Imperfect Self-Defense*, 2018 U. Ill. L. Rev. 629. In this written testimony, I explain why the use of

[1] I have provided a list of the individuals who have signed this petition to Councilmember Charles Allen's office.

force provisions in the Comprehensive Act should be made permanent. I also suggest a few ways these provisions can be improved.

Until this summer, Washington, D.C. was one of only ten jurisdictions without a use of force statute in its Criminal Code. By enacting the use of deadly force provisions in the Comprehensive Act, the District of Columbia became the first jurisdiction in the nation to require the beliefs *and actions* of an officer who uses deadly force to be reasonable. D.C.'s is also is the first use of force statute to require the jury to consider, as part of the totality of the circumstances, whether the officer engaged in de-escalation measures prior to using deadly force and whether any conduct by the officer increased the risk of a deadly confrontation.

Today, it is not the only jurisdiction to do so. On July 31, 2020, Connecticut became the first state in the nation to adopt these three key provisions from my model statute, *see* Connecticut HB 6004 (An Act Concerning Police Accountability) and Virginia is poised to become the second state to do so. *See* Virginia SB 5030.

Requiring Both the Officer's Beliefs *and Actions* to be Reasonable

In requiring a finding that both the officer's beliefs *and acts* must be reasonable, D.C.'s use of force statute is a modest change to the use of force law that exists in the vast majority of states where the sole focus is on whether the officer's *beliefs* were reasonable. The problem with focusing solely on beliefs is that once the officer testifies that he feared for his life, the jury will focus on the victim's actions – Was he resisting arrest? Was he reaching for his waistband? Was he attempting to flee?

Requiring the jury to find that the officer's *conduct* was reasonable reminds the jury that the officer, not the victim of his use of deadly force, is the one on trial and that the ultimate question is whether the officer's use of deadly force was justified.

Moreover, in requiring a finding that the officer's actions were reasonable, D.C.'s legislation simply makes explicit what is implicit in other use of force statutes. The ultimate question in cases where an officer is criminally prosecuted for his use of deadly force is whether the officer's use of deadly force was reasonable or excessive.

Finally, as stated in MPD's Executive Order 20-022 (effective July 30, 2020), the use of force provisions in the Comprehensive Act "are largely consistent with existing MPD policy." The provisions merely codify the requirements for the use of deadly force. Codification is important, however, since a violation of a police policy is not enforceable in a court of law.

Requiring the Jury to Consider Whether the Officer Engaged in De-escalation Measures Prior to Using Deadly Force

D.C.'s use of force statute provides more guidance to jurors than most use of force statutes by requiring the jury to consider whether the officer engaged in de-escalation measures and giving the jury some examples of de-escalation (taking cover, calling for backup, trying to calm the suspect, and using less deadly force before using deadly force).

By including de-escalation in the law, D.C.'s use of deadly force provision seeks to influence police behavior before an encounter gets to the point where it is a do-or-die situation. The de-escalation provision also ensures that the jury considers de-escalation when the jury might not think to do so on its own.

Importantly, the law does not direct the jury to find an officer either guilty if the officer failed to engage in de-escalation measures or not guilty if the officer did engage in de-escalation. The law recognizes that each case will present different facts and circumstances and leaves the ultimate decision as to whether the officer's use of deadly force was justified in the hands of the jury.

De-escalation is already required in the Metropolitan Police Department's regulations. MPD General Order RAR 901-07 (Nov. 3, 2017) provides:

> All members who encounter a situation where the possibility of violence or resistance to lawful arrest is present, shall, if possible, first attempt to defuse the situation through advice, warning, verbal persuasion, tactical communication, or other de-escalation techniques. Members shall attempt to defuse use of force situations with de-escalation techniques whenever feasible.

Having de-escalation in MPD regulations is good but not the same as having it in the law because an officer's violation of an internal policy or regulation is not enforceable in a court of law. Having de-escalation in the law is more likely to

encourage officers to engage in de-escalation than merely having it in a police regulation because officers will know that if their use deadly force ends up killing someone, the trier of fact (the jury or the judge) will consider whether they engaged in de-escalation measures prior to using deadly force.

Having de-escalation in D.C.'s use of force law can also benefit an accused officer who does engage in de-escalation measures. That officer will be able to argue in court that because he tried to diffuse the situation before using deadly force, the jury should find his actions reasonable.

Requiring the Jury to Consider Whether Any Conduct of the Officer Increased the Risk of a Deadly Confrontation

In addition to requiring the jury to consider whether the officer engaged in de-escalation measures prior to the use of deadly force, D.C.'s use of force statute requires the jury to consider whether any conduct of the officer increased the risk of a deadly confrontation. This is also an important provision.

Currently, there is a split in the lower federal courts over whether jurors in Section 1983 civil rights cases—where the issue often is the same as in criminal prosecutions of officers who used deadly force, i.e., whether the officer used reasonable or excessive force—should focus solely on the moments right before the officer used deadly force or whether the jury should be allowed to consider any pre-seizure conduct[2] of the officer that increased the risk of a deadly confrontation. The U.S. Supreme Court had a chance to resolve this split in 2017, but explicitly left the question open. *See County of Los Angeles v. Mendez*, 581 U.S. ___, n. * (2017) ("We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here").

D.C.'s use of force statute recognizes that conduct of the officer that increased the risk of a deadly confrontation is relevant to the reasonableness of the officer's use of force. Allowing the jury to consider such conduct of the officer makes sense for several reasons.

[2] Since a seizure of the person within the meaning of the Fourth Amendment occurs when an officer, by means by physical force or show of authority, has restrained the liberty of a citizen, California v.Hodari D., 499 U.S. 621 (1991), *pre-seizure* conduct refers to conduct of the officer that occurs prior to the moment that an officer uses deadly force against an individual and thereby restrains that individual's freedom of action.

First, in officer-involved shooting cases, the jury is allowed to consider the actions of the *victim* that increased the risk of a deadly confrontation. If the jury is allowed to consider the victim's actions, it should be allowed to consider the officer's actions as well as a matter of fundamental fairness.

Second, when a civilian uses deadly force and claims self-defense, the jury is allowed to consider the civilian-defendant's actions prior to the moments right before the civilian-defendant pulled the trigger. Since an officer's claim of justifiable force is akin to a civilian's claim of self-defense or defense of others, it makes sense to allow the jury to consider the officer-defendant's actions prior to moments right before the officer pulled the trigger.

Moreover, conduct of the officer that increased the risk of a deadly confrontation is simply part of the totality of the circumstances. It doesn't make sense to exclude such relevant conduct from the jury's consideration when the jury is being told to assess the reasonableness of an officer's beliefs and actions under the totality of the circumstances.

Importantly, D.C.'s use of force statute does not direct the jury to find the officer guilty if the officer's conduct contributed to the risk of a deadly confrontation. An officer's conduct could have increased the risk of a deadly confrontation in some ways and yet the officer's use of deadly force could be deemed reasonable. The law allows the jury to weigh all the facts and circumstances and come to its own conclusion about whether the officer's use of deadly force was or was not justified.

Why the Law Should Not Require Absolute Necessity

Some may be pushing the D.C. Council to change the use of force provisions that the D.C. Council approved this past summer to require absolute necessity rather than reasonable necessity. In other words, they may be asking that the law require the officer to be correct in his or her assessment of the threat. Under their view, if the officer is incorrect, then the officer should go to prison.

The current legislation does not require the officer to be correct in his or her assessment of the threat. If an officer believed the victim was armed and it turns out the victim was unarmed, this does not necessarily mean the officer was unjustified in using deadly force. The legislation requires a finding that the

officer's beliefs and actions were reasonable, not that the officer was right. This makes sense because law enforcement officers are human beings and human beings are fallible. They are not omniscient or all-knowing. An officer facing an individual with a gun in hand who waits until the individual raises his arm and starts to pull the trigger is likely to get shot. This is because there is a time lag between perception of a threat and one's ability to act on that threat.

No other use of force statute of which I am aware requires absolute necessity. Even California's recently enacted use of force statute, which was publicized before and upon its passage in 2019 as requiring necessity as opposed to reasonableness for police use of deadly force, see Jorge L. Ortiz, *New California law tightens rules for police use of force to only when necessary*, USA Today (Aug. 19, 2019) ("Gov. Gavin Newsom on Monday signed Assembly Bill 392, which changes the standard for police officers' justified use of deadly force from instances when it's "reasonable'' to when it's "necessary''), does not require absolute necessity.

If one looks at California's use of force statute in Section 835a(a)(2) of the California Penal Code, the preface provides that "it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life," but later in subsection (c) where the actual requirements for the use of deadly force are set forth, the statute provides:

> Notwithstanding subdivision (b), a peace officer is justified in using deadly force upon another person only when the officer *reasonably believes*, based on the totality of the circumstances, that *such force is necessary* for either of the following reasons:
>
> (A) to defend against an imminent threat of death or serious bodily injury to the officer or to another person.
>
> (B) to apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer *reasonably believes* that the person will cause death or serious bodily injury to another unless immediately apprehended. . . . (emphasis added).

In other words, California's use of force statute, like the vast majority of use of force statutes in the states that have a use of force statute, requires only a

reasonable belief that deadly force was necessary, not that the officer was correct in his or her assessment of the threat. The legislative intent is for officers to only use force when necessary, but the requirements for the use of force turn on a reasonable belief standard.

The Justice in Policing Act introduced by the U.S. House of Representatives (the Democrats' policing bill) this summer is another example of police reform legislation that has been advertised as requiring absolute necessity but does not actually require necessity. Page 4 of the Explanatory Addendum to the Act prepared by Chair Karen Bass and Senators Cory Booker, Kamala Harris and Jerrold Nadler, states that under Section 364 - Police Exercising Absolute Care with Everyone Act ("PEACE Act"): "The bill would change the use of force standard from reasonableness to only when necessary to prevent death or serious bodily harm," which leads the reader to believe that the bill would require actual necessity. However, if one goes to Section 364 in the Justice in Policing Act, the word "necessary" is defined in such a way that requires a reasonable belief that the force used was necessary. The word "necessary" is defined as follows: "The term 'necessary' means that another reasonable Federal law enforcement officer would objectively conclude, under the totality of the circumstances, that there was no reasonable alternative to the use of force." In other words, even the Justice in Policing Act does not require necessity rather than reasonableness even though it has been promoted as requiring necessity. Given the definition of necessity is Section (b) (1) (E) on page 69 of the Act, the Act only requires that a reasonable law enforcement officer would objectively conclude that the force used was necessary, not that the officer who used the force was in fact correct about the need to use force. I would be happy to provide copies of these two documents upon request.

Recommended Changes to the Use of Force Provisions

While I wholly support the use of deadly force provisions in the Comprehensive Act, I would recommend just a few changes to improve these provisions:

1. On page 22, line 509, after "the law enforcement officer," I would insert the words "honestly and" before "reasonably believes that deadly force is immediately necessary . . ."

Rationale: Requiring that the officer honesty and reasonably believed ensures that an officer who does not actually believe he needs to immediately use deadly force to protect himself or another from the threat of death or serious bodily injury is not allowed to escape criminal liability.

Say, for example, a very confident officer shoots and kills a civilian and later boasts to another officer that he intentionally killed the person simply because he didn't like the person and not because he felt his life was threatened. If that officer were to be charged with murder and could show that the average officer in his shoes would have feared for his or her life, under the use of force provisions as currently written, that officer could be found not guilty.

While the Supreme Court has often said the subjective motivations of the officer are irrelevant in Fourth Amendment law, *see, e.g., Whren v. United States*, 517 U.S. 806 (1996), this has had the detrimental effect of allowing pretextual stops to serve as a cover for racial profiling. Individual states and the District of Columbia can and should go further than the minimum baseline provided by the Supreme Court. Requiring an officer to *honestly and reasonably believe* it was immediately necessary before using deadly force protects the residents of the District of Columbia more than simply requiring a reasonable belief.

2. On page 23, line 527, I would insert the words "if feasible" after "or using non-deadly force prior to the use of deadly force" so the clause would read "or using non-deadly force prior to the use of deadly force, if feasible."

Rationale: Sometimes it will not be feasible for the officer to use non-deadly force prior to using deadly force. The law should remind the jury to take this into consideration. D.C.'s use of force statute does this where it states that a law enforcement officer shall not use deadly force unless all other options have been exhausted *or do not reasonably lend themselves to the circumstances*, but it does not do so in this section where it provides examples of de-escalation. In order to be fair to the officer who faces criminal charges in the use of deadly force, it is important to remind the jury that using non-deadly force prior to using deadly force is something we would expect a law enforcement to do only if it was feasible to do so.

Without “if feasible” language added to this section, a jury might impose criminal liability on an officer who failed to use non-deadly force prior to using deadly force even if it really wasn’t feasible for the officer to do so. For example, an officer could come across an armed individual suspected of criminal activity involving violence. A person holding a gun can—within mere seconds—shoot and kill with that gun. If the officer were to try using less deadly force, e.g. his baton or a taser, prior to using deadly force in such a situation, that officer might get shot and killed.

3. On page 22, line 526, I would insert “calling for mental health service workers to assist if the officer knows or has reason to believe the subject is mentally impaired” in between “taking cover” and “waiting for back-up.”

Rationale: This is an important example of how an officer can engage in de-escalation that the jury might not think of on its own.

4. On page 22, lines 520-524, I would delete the text at lines 520-524 which require the jury to consider whether the injured or deceased person had or appeared to have a deadly weapon and refused a lawful order by the officer to drop it.

Rationale: This is an obviously relevant factor. The jury in an officer-involved shooting case is likely, on its own and without such direction, to consider whether the victim had or appeared to have a deadly weapon and refused to drop it. To streamline the legislation and make it as simple as possible for the jury, I recommend including only two factors that the jury must consider: (1) whether the officer engaged in de-escalation measures, and (2) whether any conduct of the officer increased the risk of a deadly confrontation. These two factors are factors that the jury would not think to consider on its own. The jury can consider any facts and circumstances it deems relevant. The statute simply tells the jury that it *must* consider the listed factors.

For all of the foregoing reasons, I believe D.C.’s use of force legislation is sound policy and should be made permanent law. Please make these comments part of the hearing record.

Thank you for your consideration.

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Testimony of Qubilah Huddleston, Education Policy Analyst
at the Hearing on the
Comprehensive Policing and Justice Reform Amendment Act of 2020
Committee on the Judiciary and Public Safety
October 15, 2020

Chairperson Allen and other members of the committee, thank you for the opportunity to testify. My name is Qubilah Huddleston and I am a Policy Analyst at the DC Fiscal Policy Institute (DCFPI). DCFPI is a nonprofit organization that promotes budget choices to address DC's racial and economic inequities through independent research and policy recommendations.

I'm here today to highlight how the police free schools movement directly relates to the DC Council's efforts to reform or reimagine policing. **I'm recommending that this committee amend the Comprehensive Policing and Justice Reform Amendment Act of 2020 to include the elimination of the School Safety Division within the Metropolitan Police Department (MPD) and realign the division's funds to increase mental health and other school-based alternatives that support positive student behavior and healthy school climates.**

First, however, I would like to thank Chairperson Allen for introducing the Comprehensive Policing and Justice Reform Amendment Act of 2020 as an effort to answer community advocates' calls to make DC residents safer and the District more just. It is an important first step to curtailing the disproportionate harm that current policing policies and practices have on Black residents. Still, the DC Council should pass future legislation and budgets that dismantle long-standing systems of oppression and promote reparative justice and healing.

Police Presence in Schools Causes More Harm Than Good

Black residents and communities deserve to feel safe and respected, not overpoliced—this includes Black children who make up two-thirds of the public school population in DC. Although school resource officers (SROs) have been lauded as keeping students and schools safe, the presence of police in schools has resulted in Black students and students with disabilities being disproportionately harmed by their presence. In DC, 92 percent of school-based arrests in the 2018-19 school year were Black students; 31 percent were students with disabilities.[1]

Existing national research on the effectiveness of school police has often relied solely on self-reported measures from students, educators, and officers rather than rigorous research methods.[2] DC policymakers recently passed a budget that includes $14 million to fund 127 SROs across the city—a 22 percent increase over the fiscal year 2020 budget (adjusted for inflation). It is concerning that policymakers continue to fund a "student safety" model that is generally supported by weak or conflicting evidence while underfunding evidence-based and community-preferred alternatives such as school social workers and violence interrupters.

Racist History of Policing Should Compel Policymakers to Reconsider Approach to Student Safety

If this committee and the council as a whole are serious about anti-racist policymaking and closing the racial gap in student learning outcomes, you all must seriously acknowledge the racist roots of policing and the fact that Black people in this country have a rightfully fraught relationship with the police. The very first public police forces in this country were slave patrols—organizations of white men paid to capture Black people who fled

from enslavement and who used terror and corporal punishment to deter revolt and maintain order and discipline on plantations. What kind of message is the District sending to Black children in the 21st century when policymakers and education officials prioritize policing and policing infrastructure in schools while failing to adequately or equitably fund resources that actually make students feel safe and help them thrive, such as transformative justice programs and mental health supports?

The Black Burden of the Health Pandemic and Protests Against Police Violence Require Radical Changes to Student Safety—Starting with Eliminating the School Safety Division

The unequal burden of coronavirus on Black residents coupled with life-saving disruptions to students' academic and social lives means that Black children are at an even higher risk of exposure to stress and traumatic experiences compared to their non-Black peers. Further, Black children are facing greater race-based trauma as videos of Black people being murdered by police officers and the violent reactions from police to protests against this violence have become a part of our regular news cycle and social media feeds.

And, despite the long-held, anti-Black beliefs that in order for Black children to learn and "act right" they must be surveilled, policed, and punished—research and Black folks' lived experiences shows us that what is truly needed is empathy and resources that help not harm; and root causes addressed, rather than symptoms. Eliminating the School Safety Division in favor of a community-driven process to reallocate funding and staffing away from school policing is a great and necessary place for policymakers to begin adequately promoting Black students' safety and healing.

Thank you for the opportunity to testify and I am happy to answer any questions.

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[1] Office of the State Superintendent of Education, "2019 DC School Report Card," 2019.
[2] Barbara Raymond, "Assigning Police Officers to Schools," U.S. Department of Justice, Office of Community Oriented Policing Services, *Problem-Oriented Guides for Police Response Guides Series No. 10,* April 2010.

Council of the District of Columbia

Committee on Judiciary and Public Safety

Councilmember Charles Allen, Chairperson

B23-0882 - the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

October 15th, 2020

Testimony of:

Dawn Dalton – Deputy Director

DC Coalition Against Domestic Violence

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The DC Coalition Against Domestic Violence (DCCADV/ The Coalition) would like to thank Councilmember Allen and members of the Committee on the Judiciary and Public Safety for the opportunity to provide testimony regarding the Comprehensive Policing and Justice Reform Bill.

The Coalition is the federally-recognized statewide coalition of domestic violence service providers in the District of Columbia. DCCADV's members include domestic violence housing providers, legal service, and culturally specific organizations serving: African-American; Latino; Asian and Pacific Islander; Immigrant; and LGBTQ survivors of domestic violence. Our members also serve teens, youth, and survivors who are Deaf and Hard of Hearing.

The following organizations have read and signed on to this testimony: Amara Legal Center, Ayuda, Community Family Life Services (CFLS), DC SAFE, House of Ruth, Network for Victim Recovery of DC (NVRDC), and Safe Sisters Circle. Our testimony and recommendations reflect years of experience as domestic violence service providers listening to and supporting survivors, as well as the lived experiences of advocates at these organizations who identify as people of color. For many of the survivors that we serve, safety is defined as a safe home and for others it means to be with family and friends who love them. However, we have heard that systems' intervention, because of their disparate impact on marginalized communities, can and has been harmful. In short, Black and Brown

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survivors of domestic violence have consistently reported a hesitancy to contact law enforcement and other systems, even at the expense of their own safety.

While the temporary policing and justice reform bill was passed in response to the horrific murder of George Floyd, this bill is just a start at an attempt to correct one piece of our nation's history of brutal violence and deliberate discriminatory policies that were implemented to dehumanize and control Black and Brown communities. Whether it's police policies, or discriminatory housing or employment practices, this country has never reckoned with its racist origins and continues to double-down on its assault on Black and Brown bodies.

For many Black and Brown survivors, the physical, mental, financial, emotional and psychological abuse from their partners is just a continuation of the many injustices they face daily in this country. Most of the survivors that our member programs and partner organizations serve are living in communities that are surveilled, targeted, and over-policed. While seeking safety in their own homes, these survivors are also then forced to depend on systems that have historically mistreated victims; minimized the harm they experience; not believed them; branded them as angry or hostile; and/or victimized them. Sometimes it is easier for survivors to choose not to engage.

Even before the DC Council passed the temporary police reform bill in June, the Domestic Violence community had listened to survivors share about their interactions with local law enforcement and we continued to have those conversations over the summer.[1] While some survivors stated that they felt safe with the police and commended MPD for doing a good job, some survivors

[1] Between July and September, DCCADV held four listening sessions with domestic violence survivors to discuss their interactions and experiences with MPD and law enforcement in the District.

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discussed the pain and shock they felt after turning to the police following a domestic violence incident. Some were called liars, threatened with deportation, given inaccurate information, ridiculed and some even assaulted, and their experiences and recommendations have informed this testimony.

Because of this treatment, many Black and Brown women fear involving systems, even at the expense of their own safety. According to a 2015 study on Intimate Partner Violence, 53.8% of Black women had experienced psychological abuse, while 41.2% of Black women had experienced physical abuse.[2] However, these survivors remain reluctant to call the police because they are afraid of the law enforcement response. We acknowledge the complexity of these discussions as domestic violence is a serious crime that, at times, requires police intervention. Yet, survivors continuously state that it is critical for them to have options that support their safety and do not require that they engage with systems that, in the end, may add harm to an already dangerous reality.

This new bill will only work if MPD and law enforcement agencies are truly held accountable when violation of these policies occur. Performative politics and empty promises do nothing for communities who live in constant fear of deportation, retaliation, stop and frisk, over-policing, and surveillance. Real reform means actively engaging Black and Brown communities in decisions and policies which have impact on their lives. Additionally, we must dismantle the structures that were built to keep certain communities connected to abusive systems.

[2] https://www.ncjrs.gov/ovc_archives/ncvrw/2017/images/en_artwork/Fact_Sheets/2017NCVRW_IPV_508.pdf

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In partnership with the domestic violence community, the Coalition has developed the following recommendations for the bill and added additional considerations as this committee moves forward with additional reforms:

Subtitle B – Improving Access to Body Worn Cameras: Any additional Body Worn Camera measures should ensure that survivors are aware of their rights and that their privacy and confidentiality under Federal law will be maintained throughout the process.

Subtitle C – Office of Police Complaints: In expanding OPC's power to investigate MPD violations, there needs to be more clarity around the process. Many survivors are afraid to involve the police and have stated that involving the police only made the situation worse. Survivors should be informed regarding any OPC investigations and should be not be forced or coerced to participate in investigations.

Subtitle F – limits on consent searches: While the bill states that MPD must provide interpretation services, we have heard, and previously testified, that MPD currently violates this policy. In addition to providing interpretation services, there needs to be additional oversight in place to ensure that professional and qualified interpretation services are actually being provided.

Subtitle K – Amending minimum standards for police officers: In addition to the requirements proposed in the bill, if an applicant has been convicted of an Intrafamily offense (IFO), or a comparable domestic violence offense in another jurisdiction, this would make that individual ineligible from being a sworn officer for the District. For current sworn officers, there should be standards put into place for officers who choose violence in their homes. (See links for research and

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data on domestic violence within law enforcement communities).[3] Thus, this subtitle should also bar current officers who have been convicted of an IFO in the District or comparable domestic violence offenses since becoming sworn MPD officers.

Additional recommendations:

- We recommend that the city fund the development of a multi-pronged plan that includes both short and long-term strategies to address systemic racism.
- We recommend putting more money into housing and services that specifically help survivors.
- We recommend the immediate revision of policies that require survivors of domestic violence survivors to report and/or certify their victimization with law enforcement and other governmental systems in order to gain access to financial and housing resources.
- Invest in community-based or violence prevention programs that are run and led by survivors.
- Invest in culturally-specific programming that is by and for Black and Brown communities and centers the unique realities of the communities they represent.
- Remove MPD officers from DC Public Schools and shift resources to fully fund the School Safety Act.
- Shift from investing in paramilitary style policing to community intervention and violence prevention programming – which include anti-domestic violence, sexual assault, and trafficking programs.

Thank you for the opportunity to testify and we welcome any questions from the Committee.

[3] https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/; https://www.nytimes.com/projects/2013/police-domestic-abuse/index.html

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Testimony of Samantha P. Davis, Executive Director
Comprehensive Policing and Justice Reform Amendment Act of 2020
Committee on the Judiciary and Public Safety

October 15, 2020

Good morning Councilmember Allen and members of the committee. I am Samantha Davis, the Founder and Executive Director of the Black Swan Academy (BSA). BSA is a racial justice and advocacy organization building a pipeline of Black youth civic leaders, committed to improving themselves and their communities through advocacy and organizing. We unapologetically lead with racial equity, fight for systemic change, and trust and invest in youth leadership.

While the council is deliberating what policing and justice looks like in D.C., I charge you all to move with greater urgency to address the unique ways in which Black youth experience policing and criminalization. For if the recent months, leading up to the murder of 18 year old, Deon Kay, has proved anything - it is that delayed action has harmful, life altering and fatal consequences. We know that the same police in our communities that handcuff Black and Brown children, harass, and kill Black youth, use fear tactics to silence the voices of young people exercising their right to protest- are the same police in our schools. That is why among other much needed youth justice reforms, I stand with thousands of D.C students, parents, educators, and organizers in demanding Police-Free Schools.

Our demand is that you amend this legislation to include the elimination of the School Safety Division of the Metropolitan Police Department and redirect funds in true harm reduction, violence prevention initiatives like community violence interrupters and to bringing in experts who can address the trauma our Black youth are holding and the equitable resources necessary for all youth to learn.

We deeply believe that Black youth deserve to be protected from harm, that Black youth deserve dignity and love. We believe that Black youth deserve to learn in an environment that doesn't assume they are criminals, that doesn't rely on invoking fear or trauma through the presence of police. We believe that Black youth deserve us to challenge the status quo and the systemic racism that keeps us from investing fully in their humanity, in their development, their health and well-being. The continued investment in policing youth is contradictory to this belief and keeps us from achieving this vision of a new, safer, healthier and more equitable world.

The actions of Black youth that we often rely on police for, tend to be acts of survival, normal expressions of adolescent behavior or responses to trauma. The difference is in white affluent schools those same actions are met with resources versus cops. Schools with a majority Black student population, are three times more likely than majority white schools to have more

security staff than mental health personnel. This focus on policing vs equitable resources means schools are forced to rely on police for incidence of sexual violence, when services for students with special needs are unavailable, when students are having a bad day and need to met with love not harm. Our reliance on police in our schools, compounds the fear, violence and trauma that Black youth experience every day. “Instead of maintaining a good environment for kids, they make us scared and escalate situations. Students spend so much of their time in school, they deserve to be comfortable and not afraid." - Tamika, 14

The presence of police in schools puts youth who are at the margins of the margins in harms way and drastically impedes on their ability to thrive. We must acknowledge the reality of our undocumented youth, homeless youth, systems-involved youth. According to recent data, this past school year, in the midst of a pandemic, there were nearly 70 school-based arrest. Of those arrest the second most common offense were for “release violations/fugitive arrests”. While this council has taken steps to address the school to prison pipeline, that work is for naught if our most marginalized youth are being deterred from even entering the building for fear of encountering police. Schools should be a place of sanctuary, not an easy target to surveille, interrogate or arrest students. "Police in schools create the bridge from the school to the prison pipeline. That's an experience that no child should have." - Raven, 18 years old. When police are in our schools, students of color are more likely to be pushed out, arrested and experience violence. We cannot end the school to prison pipeline without burning the bridge between schools and prisons.

This demand is not solely about reducing the role & power of police in our schools and society more broadly. It is an invitation to challenge the status quo that has consistently failed us and a call for us to invest in true safety. The pandemic places us in a unique position to do this, given that our schools are forced to reimagine every aspect of their operation. Conversations around reopen that are rooted in the safety and well-being of students and educators as it pertains to the fear of contracting COVID-19, must also include the very real fear and trauma that police presence invokes for young people- especially now with the heightened visibility of racial injustice. Viral videos of police killing Black people is traumatic and our young people have been consumed with those images. Research has shown that this exposure is detrimental to the mental health of Black youth- especially Black girls, resulting in increased levels of Post-Traumatic Stress Disorder (PTSD) and depressive symptoms. Just as advocates have argued that fear and trauma brought on by covid-19 negatively impacts cognition, the same is true in regard to the fear and trauma brought on by police presence. In this moment, we must move forward, not backwards. That progression includes:

1. The elimination of the schools and safety division and have a community-driven process to reallocate funding and staffing away from school policing and towards educational resources.
2. Prohibit police officer from carrying weapons if called to schools’ grounds
3. Disarm special police officers
4. Prohibit officers from making arrests on school grounds (especially for non-school related offenses)

5. Reform consent searches for youth and Miranda policy
6. Create a non-police crisis response system

Thank you.

For further information:
https://www.blackswanacademy.org/policefree-schools

Samantha Paige Davis
Executive Director
Black Swan Academy

Testimony of Eduardo R. Ferrer
Policy Director, Georgetown Juvenile Justice Initiative*
Visiting Professor, Georgetown Juvenile Justice Clinic*
***Titles and organizational affiliation for identification purposes only.**

Committee on the Judiciary and Public Safety Public Hearing on on Bill 23-0723, the "Rioting Modernization Amendment Act of 2020"; Bill 23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020"; and Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

Thursday, October 15, 2020

Good morning, Chairman Allen and members of the Committee on the Judiciary and Public Safety. My name is Eduardo Ferrer. I am a Ward 5 resident and, for identification purposes, the Policy Director at the Georgetown Juvenile Justice Initiative and a Visiting Professor in the Georgetown Juvenile Justice Clinic. The views expressed are based on my research and experience and not given on behalf of Georgetown University. Thank you for the opportunity to testify today.

I would like to start by commending Chairperson Allen for his continued leadership on justice reform issues in the District. Given the breadth of the three bills, this testimony will focus specifically on the area of youth justice reform. Unfortunately, while this bill proposes many important reforms that would apply equally to youth and adults alike, the bill does not propose any reforms specific to the manner in which youth are policed in the District. This is not an oversight of the Committee, but the result of the fact that so much of criminal procedure – particularly concerning 4th and 5th amendment jurisprudence, which forms the backbone for many of the constraints on police power – is based upon the constitutional floors set by the Courts, not by optimal, developmentally-responsive social policy. As a result, the courts have often developed one-size-fits-all policies that fail to account for the evidence-based and common-sense material differences between youth and adults. To remedy this failure, the Committee should make two amendments to the Comprehensive Policing and Justice Reform Amendment Act prior to mark up. First, as others have also proposed, the Committee should amend DC Code to create a more mature *Miranda* policy for the District that guarantees youth the right to consult with counsel prior to waiving their right to remain silent. Second, the Committee should go further than requiring *Miranda*-like warnings prior to a "consent" search of an individual under the age of 18 and make inadmissible the fruits of any such "consent" search involving a youth.

Additionally, making policing fairer and more developmentally-appropriate alone will not remedy the fact that our Black youth are over-policed in the first place. As a result, we recommend that this legislation also eliminate the School Safety Division at the Metropolitan Police Department. Now that DCPS will be resuming control of the management of its school security, the need for this unit is significantly lower and the money currently allocated to this unit can be better invested at the school level to ensure the adoption and implementation of a holistic approach to safety in our schools and communities.

<u>The Need for a More Mature Miranda Policy</u>

The District's approach to youth interrogations is one example where policing is out of step with adolescent development, social science, and fundamental fairness. Although most people probably could not describe any of the facts of *Miranda v. Arizona* from TV shows and movies, many people would recognize the warnings that police are supposed to give someone before they start interrogating them.[1] The point of these now-familiar warnings is to inform someone that they have certain rights before they talk to the police.[2] However, merely informing someone of their rights does not mean they actually understand those rights, understand the implications of waiving those rights, or feel like they can actually avail themselves of those rights. This is particularly true when it comes to young people being interrogated by police. It is here where DC is failing to provide for the youth of DC, and why it is time to enact a more mature *Miranda* policy in the District.

The *Miranda* framework of reading a suspect his or her *Miranda* rights and asking for a waiver was designed with *adults* in mind. To understand standard *Miranda* warnings someone must have the working memory capable of holding all the warnings in his or her mind at once, processing their meaning, and also formulating a response.[3] He or she has to understand what an attorney is, what kinds of questions the police will be expected to ask, and what it means to have their responses "used" against them (which further requires general knowledge of the criminal legal system).[4] Studies have found that some warnings, such as the right to be appointed an attorney and the right to silence, require a post-high school reading ability in order to read and comprehend.[5] In order to make a knowing, intelligent, and voluntary waiver, someone has to possess the requisite cognitive ability (if they are under 16 years old), knowledge base, and psycho-social maturity.

In DC, MPD officers are supposed to read to all suspects a standard set of Miranda warnings before interrogating them, whether they are an adult or a child. But this ignores advancements in our understanding of adolescent development, which have demonstrated that young people as a class cannot effectively waive their *Miranda* rights just by being informed of them by the police. In the decades since 1965, when *Miranda* was decided, study after study has confirmed what we have long intuitively understood about children: they are different than adults. The research shows that youth undergo dramatic changes during adolescence. Indeed, we now know that adolescence is the second-most important period of brain development, after the first three years of life.[6] For instance, in adolescence, pathways of the brain that are not used as

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[1] *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

[2] *See id.* at 445.

[3] *See* Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 432 (2006).

[4] *See id.* at 432–33.

[5] Anthony J. Domanico, Michael D. Cicchini & Lawrence T. White, *Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations*, 49 IDAHO L. REV. 1, 14 (2012).

[6] *See* Kerstin Konrad, et al., *Brain Development During Adolescence*, 110(25) DEUTSCHES ARZTEBLATT INT'L 425, 426–27.

often are pruned back while the pathways of the brain that are being used are reinforced, resulting in a period of increased malleability and capacity for change.[7] Additionally, the limbic system – the part of the brain that controls emotions – develops during the earlier part of adolescence whereas the prefrontal cortex – which is situated at the front of the brain and controls reasoning, decision-making, and impulse control – does not fully develop until the end of adolescence.[8]

As a result of this differential in the timing of development of the different parts of the brain, youth as a class lack the psycho-social maturity that adults possess. Specifically, adolescents are not as capable in making well-reasoned decisions, especially under intense stress or fear such as in an interrogation setting.[9] Moreover, adolescents tend to focus on short-term rewards rather than long-term risks, which makes them especially vulnerable to waiving their *Miranda* rights without considering the long-term consequences.[10] For example, if an officer tells an adolescent during interrogation that if they waive their rights they can go home, the short-term reward of going home can induce an adolescent to waive their *Miranda* rights no matter what the long-term consequences may be.[11] Youth still lack the tools to truly evaluate the impact of that choice on the rest of their life.[12] Thus, the current *Miranda* framework is ineffectual for youth as it less likely that they can execute a truly knowing, intelligent, and voluntary waiver under the circumstances typical to most custodial interrogation situations.

In addition to adolescents' psycho-social immaturity, there is also the fact that adolescents may lack the cognitive ability to even understand the *Miranda* warnings. In one study, a researcher asked 400 delinquent youth and 200 criminally and non-criminally involved adults a series of questions designed to gauge the participant's understanding of *Miranda* rights. Controlling for age, IQ, and other variables, what he found was that *fifty-five percent* of youths clearly misunderstood one or more of the *Miranda* warnings, compared to just twenty-three percent of adults.[13] Youths in this study misunderstood that the right to remain silent meant they could choose to not speak with the police officer, which was at odds with their experience that they need to talk to adults if asked.[14] Some youths understood that if they have an attorney the attorney is supposed to be "on their side," but believed that the attorney will help them only if they are innocent.[15] Even though after age 15 adolescents generally have the same cognitive

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[7] *See id.*

[8] *See* Jennifer Woolard, *Adolescent Development*, 19.

[9] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 9 (2006).

[10] *Id.* at 8–9.

[11] Steven A. Drizin & Beth A. Colgan, *Interrogation Tactics Can Product Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 136 (G. Daniel Lassiter ed., 2004).

[12] *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011).

[13] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 10 (2006).

[14] *Id.*

[15] *Id* at 11.

abilities as adults,[16] because of their lack of familiarity with the *Miranda* rights and psycho-social maturity they still "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[17]

Demanding a more mature *Miranda* policy for the District is also critical as a matter of racial justice. Black youths have their views of police officers and law enforcement shaped by historical police violence and contemporary coverage of police brutality against Black people.[18] Their views are also shaped by their own experiences of police harassment with police officers, as well as those of their friends and families.[19] Too often, Black youth feel compelled to be deferential to police officers to avoid risking more severe harassment, injury, or death.[20] The backdrop of police violence against Black people, their own experiences of police harassment, and the developmental immaturity of youth previously describe create a powerful force undermining the voluntariness of any *Miranda* waiver Black youths may make. They may waive their *Miranda* rights just so they could get out of the interrogation room. In this respect, for Black youth *Miranda* warnings do not serve as an effective deterrent against the coerciveness of police interrogation.

To illustrate the futility of the current *Miranda* doctrine as it applies to DC youth, consider the following recent case. This young man was taken into the police station and read his *Miranda* rights. When asked if he wanted an attorney, he said that he already had an attorney and that he would like to talk to her. The police told him that this meant they would have to leave, which was true. They then remained in the room, staring at him, until he said he would talk to them. The police continued reading him his rights, and he again said he wanted an attorney. They stopped again and waited again until he had agreed to talk to them. Then, upon being read his *Miranda* rights and invoking his right to silence, he was told by the detective that he marked the wrong box. While on paper, this whole charade may have observed the niceties of the *Miranda* warning and waiver system, in no way could this be a model of justice. This is not just a fault of the police officers that day, but of the system that did not take into consideration the developmental stage of the youth being interrogated and how that affected any waiver he could give.

Miranda represents the bare minimum of what is required under the Constitution to advise a child of their rights; but that does not make it sound policy. It is time that DC goes beyond the bare minimum, uses the advances in adolescent development research over the last 30 years, and creates a legal framework that is developmentally appropriate when it comes to adolescents being interrogated by police officers. The way to do this is change the law so that statements in custodial interrogation made by youth under 18 are inadmissible unless 1) the youth is read their *Miranda* rights by a law enforcement officer in a developmentally appropriate

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[16] *Id.* at 11–12.

[17] *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

[18] Kristin Henning & Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. STATE L. J. ___ (forthcoming December 2020).

[19] *Id.*

[20] *Id.*

manner; 2) the youth has the opportunity to consult with counsel before making a waiver; 3) and, in the presence of their attorney, the youth makes a knowing, intelligent, and voluntary waiver of their rights.[21] Studies show that having the opportunity to consult with counsel before making any decision about waiving *Miranda* rights helps adolescents make a more informed choice, even if they are particularly young or have poor cognitive abilities otherwise.[22] A more mature *Miranda* doctrine for youths in DC that includes the right to counsel before they make a waiver decision preserves the rights of children, cuts down on coerced confessions, and protects the purpose that animated *Miranda* in the first place.

Recommendation 1: Statements made by youth under 18 during custodial interrogation should be inadmissible unless 1) the youth is read their *Miranda* rights by a law enforcement officer in a developmentally appropriate manner; 2) the youth has the opportunity to consult with counsel before making a waiver; 3) and, in the presence of their attorney, the youth makes a knowing, intelligent, and voluntary waiver of their rights.

The Need for Consent Search Reform for Youth in Particular

The District's approach to "consent" searches of youth is another example where policing is out of step with adolescent development, social science, and fundamental fairness. While we applaud the important step taken by the proposed legislation to provide *Miranda*-like warnings prior to "consent" searches, these warnings will not be sufficient to protect youth from the effects of police coercion (and may not be sufficient to protect adults either). Requiring law enforcement officials to deliver *Miranda*-like warnings to individuals before they consent to a search represents an improvement from a baseline of no protections for adults. However, expecting these *Miranda*-like warnings to improve a youth's ability to consent to be searched invokes the same issues as expecting the current *Miranda* doctrine to protect youth from the coercive atmosphere of custodial interrogation.[23] Holding youth and adults to the same standard ignores decades of research confirming what experience and common sense tell us[24] – that the differences between children and adults in experience, susceptibility to peer pressure, and perception of authority[25] require different treatment under law. It further ignores that children are conditioned to obey adults, particularly adults in positions of authority, and that children of color are often taught by their parents to comply with the demands of police officers to avoid being the next child whose death or disability is caught on camera.[26] Thus, as the proposed legislation

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[21] Katrina Jackson & Alexis Mayer, Demanding a More Mature Miranda for Kids, D.C. Justice Lab & Georgetown Juvenile Justice Initiative, at bit.ly/mature-miranda.

[22] Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29(6) LAW AND HUMAN BEHAVIOR 723, 737 (2005).

[23] *See J.D.B.*, 564 U.S. at 273.

[24] *Id.* at 272.

[25] *Id.* at 273.

[26] *See, e.g.* Sam Sanders & Kenya Young, A Black Mother Reflects On Giving Her 3 Sons 'The Talk' ... Again And Again, NATIONAL PUBLIC RADIO (June 28, 2020), https://www.npr.org/2020/06/28/882383372/a-black-mother-reflects-on-giving-her-3-sons-the-talk-again-and-again.

recognizes, unconstrained "consent" searches may be constitutional, but they are not good policy given their inherent power imbalance and the reasonable fear that many people of color have of the police.[27] For youth, this imbalance cannot be corrected with warnings alone. Therefore, we suggest that the final legislation prohibit the fruits of *any* "consent" searches of youth from being introduced as evidence against them in a criminal or delinquency matter.

The legal standard for consent invites the consideration of age in both its objective and subjective analyses. Consent must be "freely given," meaning that it is not valid if it's the result of express or implied coercion, or if the person searched did not know they could refuse.[28] The government must prove that the person's consent was valid under the totality of the circumstances, analyzing both objective and subjective factors.[29] More than the facts of the incident, the consent analysis requires the court to consider the facts of the person, their knowledge of their rights, and their personal and cultural experiences with law enforcement.

The importance of considering age is rooted in precedent such as *Roper* and its progeny, which held that children are less culpable for their actions and choices due to the decades of research which show that they are less mature and capable of making informed decisions.[30] From this research, we know adolescents are more impulsive, sensation-seeking, likely to make decisions based on "immediate" rather than "long-term" consequences, and sensitive to social pressure than adults.[31] Adolescents are also less aware of their "legal rights" than adults.[32] These factors create the perfect storm for consent searches predicated on implicit coercion. Youth are both more likely not to know that there are no legal consequences for refusing to be searched, and more sensitive to extralegal, short-term consequences.[33] They are also more likely to answer the officer impulsively and change their answer in response to cues in the officer's body language, tone, and demeanor.[34]

Other factors affecting youth such as race and personal and cultural experience with policing intensify our concerns with the proposed remedy to the fundamental power imbalance in consent searches. A study on the effects of police interactions on adolescents found that youth with more exposure to law enforcement officials report more emotional distress after each

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[27] *See, e.g. Dozier v. United States,* 220 A.3d 933*,* 944 (D.C. 2019) ("An African-American man facing armed policemen would reasonably be especially apprehensive… fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police is relevant to whether there was [consent]")

[28] *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2048 (1973).

[29] *Id.* at 229.

[30] *See Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 1195 (2005)

[31] Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop'*, 64 AM. PSYCHOL. 583, 592 (2009).

[32] Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 Am. U. L. Rev. 1513, 1536-1537 (2018).

[33] *See id.* at 1537.

[34] *See id.*

interaction.[35] This trauma is aggravated if the encounter took place in public due to feelings of "embarrassment" and "stigmatization,"[36] and if the youth is African American or Latino/a.[37] Similarly, African American youth who live in neighborhoods with a greater police presence report more trauma and anxiety symptoms.[38] The severity of these symptoms is associated with the number and intrusiveness of their interactions with police.[39] Young Black males living in highly-policed areas who have watched friends, family members, or even complete strangers get searched by police officers report symptoms consistent with secondary trauma.[40] Exposure to these incidents on social media had a similar effect.[41] Further studies have found that these feelings of fear, embarrassment, and helplessness affect how young people develop into young adulthood; injuring their self-concept and permanently damaging their trust in law enforcement.[42]

Informing a young person that they can refuse to be searched with no legal consequences will not address these concerns. The proposed policy asks youth to weigh the type of long-term consequences they have the most difficulty judging, particularly when under stressful conditions, and does not address the short-term concerns that inform their decisions. It also tests a youth's attention and ability to learn a legal concept in a high-stress situation that adults find difficult to navigate. For African American and Latino/a children, it contradicts the warnings of their parents not to resist the requests of police officers and often their lived experience that saying no to them is dangerous and futile.[43]

In the District of Columbia, consent searches are the second most common type of search by MPD's NSID.[44] Although the number of consent searches was tracked along with the number

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[35] *See* Dylan B. Jackson et. al, *Police Stops Among At-Risk Youth: Repercussions for Mental Health*, 65 Journal of Adolescent Health 627, 629,

[36] *Id.*

[37] Dylan B. Jackson et. al, *Low self-control and the adolescent police stop: Intrusiveness, emotional response, and psychological well-being*, 66 Journal of Criminal Justice, 2020, at 1, 8.

[38] Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 Am. Journal of Pub. Health 2321, 2324 (2014).

[39] *Id.*

[40] Nikki Jones, "The Regular Routine": Proactive Policing and Adolescent Development Among Young, Poor Black Men, *in* Pathways to Adulthood for disconnected young men in low-income communities. New Directions in Child and Adolescent Development, 33, 45 (K. Roy & N. Jones 2014).

[41] B.M. Tynes et al., Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color, 65 Journal of Adolescent Health 371, 376 (2019).

[42] Jones, *supra* at 52.

[43] *See, e.g.* Ben Crump (@AttorneyCrump), TWITTER (October 6, 2020), https://twitter.com/attorneycrump/status/1313681956870205441?s=21, Virginia Bridges, *City council members 'disturbed' by video of NC police officer searching Black teen*," THE NEWS & OBSERVER (July 28, 2020), https://www.newsobserver.com/news/local/counties/durham-county/article244437062.html, and *The Guardian, Exclusive: police fail in attempt to tase Ahmaud Arbery during 2017 incident*, YOUTUBE (May 18, 2020), https://www.youtube.com/watch?v=1v7o_6uI9R0&ab_channel=GuardianNews.

[44] National Police Foundation, Metropolitan Police Department Narcotics and Specialized Investigations Division: A Limited Assessment of Data and Compliance from August 1, 2019 - January 31, 2020, 17 (2020).

of stops after the implementation of the NEAR Act, the reasons for those consent searches have not been as closely analyzed. We do know that between July and December 2019, 90% of the people and 89% of the adolescents searched by police officers in the District were African American.[45] And our African American clients report the same feelings of fear and powerlessness when interacting with the police as documented on a national scale.[46] In fact, our clients have reported that they will often lift up their shirts and display their waistbands unprompted when they see an officer to avoid harassment. Police officers have literally conditioned them to "consent" without even being asked. This conditioning is something that an officer in the Seventh District bragged about on a t-shirt just a few years ago.[47]

As the legislation recognizes by proposing Miranda-like warnings prior to "consent" searches, the current legal framework for "consent" is merely a constitutional floor. D.C. can and should implement a policy that further protects adults and youth from police coercion in the "consent" search context. For youth, the protection should make any evidence seized as the result of the consent search of any individual under the age of eighteen inadmissible in criminal or delinquency proceedings. Excluding evidence obtained through searches justified by the consent of a minor in court would also address the reality acknowledged by the Supreme Court and operationalized by jurisdictions such as California and West Virginia[48] that minors "lack the experience, perspective and judgment,"[49] to interact with the criminal justice system as adults and therefore require special legal protections.

Recommendation 2: Any evidence seized as a result of a search is inadmissible in any criminal or delinquency proceedings against the individual from whom the evidence was seized if: 1) the subject of the search is an individual under the age of 18; 2) the justification for a search by sworn members of a District of Columbia law enforcement agency is consent; and 3) the search is not executed pursuant to a warrant or another exception to the warrant requirement. The foregoing should apply even when law enforcement officers did not know the age of the individual when they searched.

The Need for Police Free Schools & Realignment of DC Resources

For Fiscal Year 2021, the budget for the School Safety Division of the Metropolitan Police Department is nearly $14 million dollars.[50] This budget is meant to support 127 FTEs in the Division for FY2021, which represents an increase from 24.7 in FY2019 and 110 in

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[45] Katrina Jackson & Alexis Mayer, Demanding a More Mature Miranda for Kids, D.C. Justice Lab & Georgetown Juvenile Justice Initiative, at bit.ly/mature-miranda.

[46] ACLU-DC & ACLU Analytics, *supra* at 8.

[47] Monique Judge, *DC Cop Under Investigation for Wearing Shirt With KKK Symbol While on Duty*, THE ROOT (July 28, 2017), https://www.theroot.com/d-c-cop-under-investigation-for-wearing-a-shirt-with-a-1797354445

[48] Henning & Omer, *supra*.

[49] *J.D.B.*, 564 U.S. at 273 (2011) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

[50] Metropolitan Police Department, FY2021 Approved Budget, at https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/fa_mpd_chapter_2021a.pdf.

FY2020.[51] This increase comes despite the fact that MPD is no longer responsible for managing the security contract for DCPS and the absence of evidence that a floating patrol of school resource officers makes youth or schools safer. Indeed, the District is spending this money despite research demonstrating that the harms caused by the presence of school resources officers[52] and the over-policing of youth.[53] This money would be better invested at the school or community level to keep schools safe, provide additional support services proven to reduce "juvenile victimization" and "delinquent behaviors."[54]

Recommendation 3: Eliminate the School Safety Division at the Metropolitan Police Department and reallocate that money for use in developing and implementing a more holistic approach to school safety and youth development in the District.

Conclusion

As we consider policing reform in the District, it is critical that we account for the differences between youth and adults in our new policies and practices. As a result, the Committee should make three amendments to the Comprehensive Policing and Justice Reform Amendment Act prior to mark up. First, the Committee should amend DC Code to create a more mature *Miranda* policy for the District that guarantees youth the right to consult with counsel prior to waiving their right to remain silent. Second, the Committee should make inadmissible the fruits of any such "consent" search involving a youth. Third, to ensure that we end the over-policing of Black youth in the District, the Committee should amend DC Code to eliminate the School Safety Division at the Metropolitan Police Department. The $14 million budgeted for this division should instead be invested in the adoption and implementation of a holistic, public health approach to safety in our schools and communities.

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[51] *Id*.

[52] *See The Presence of School Resource Officers (SROs) in America's Schools*, The Justice Policy Institute, July 9, 2020.

[53] *See* Juan Del Toro et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent black and Latino Boys*, 116 PNAS, 8261 (2019) (finding that adolescent black and Latino boys who were stopped by police reported more frequent engagement in delinquent behavior six, twelve, and eighteen months later than boys who were not stopped by the police (independent of prior delinquency).

[54] MPD describes the purpose of the School Safety Division as "safeguard[ing] and provid[ing] services to students and staff at District of Columbia Public Schools and Public Charter Schools [as well as] striv[ing] to reduce juvenile victimization and delinquent behavior through a variety of programs." MPD, FY2021 Approved Budget, at https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/fa_mpd_chapter_2021a.pdf

MORE THAN A PLAZA

DC JUSTICE LAB +
GEORGETOWN JUVENILE JUSTICE INITIATIVE

DEMANDING A MORE MATURE MIRANDA FOR KIDS

October 2020

Katrina Jackson • Alexis Mayer

Demanding a More Mature *Miranda* for Kids

I. Introduction

In *Miranda v. Arizona*, the Supreme Court held that statements made by an adult during custodial interrogation are inadmissible unless law enforcement officers first administer warnings before questioning and the adult validly waives those rights.[1] Pursuant to the Fifth and Sixth Amendments, *Miranda* warnings inform individuals of: (1) the right to remain silent, (2) that any statement can be used against them, (3) the right to obtain an attorney and to have counsel present during questioning, and (4) the right to be appointed an attorney.[2] To waive these rights, a person must make a voluntary, knowing, and intelligent waiver based on the totality of the circumstances.[3] The Supreme Court emphasized that any statement or confession obtained through an uninformed, coerced, or compelled waiver of these rights must be excluded from any judicial proceeding.[4]

A year later, in *In re Gault*, the Supreme Court recognized that the procedural Constitutional safeguards outlined in *Miranda v. Arizona*, apply to children as well.[5] However, in deciding *Gault*, the Supreme Court extended *Miranda*'s adult framework to youth without the benefit of the wealth of adolescent development research that has been conducted since *Miranda* and *Gault* were decided.[6] As a result, the *Miranda* framework is not a robust, research-driven approach for protecting the rights of youth. Indeed, in *J.D.B. v. North Carolina*, the Supreme Court recognized this shortcoming and held that a child's age is relevant to *Miranda*'s custody analysis because children as a class are different than adults.[7] Notably, *Miranda*, *Gault*, and *J.D.B.* describe only the Constitutional floor of protections that must be afforded to youth in an interrogation context.

These bare minimum *Miranda* protections fail to fully protect children because they do not accommodate for a child's high susceptibility to pressure and limited cognitive ability. Furthermore, Black children are disproportionally affected by the grave insufficiencies of the *Miranda* Doctrine. The current Doctrine fails to consider the unique vulnerabilities of Black youth experience when interacting with the police. As residents, law students, attorneys, and members of the community, we respectfully urge the DC Council to protect children from *Miranda*'s shortcomings by requiring, prior to any custodial interrogation, that (1) law enforcement provide youth with expanded warnings; 2) youth be provided a reasonable opportunity to consult with counsel; and (3) waivers will only be valid if they are knowing, intelligent, voluntary, and made in the presence of counsel.

II. The Insufficiencies of the *Miranda* Doctrine

Although children only account for about 8.5% of arrests, nationally, they account for about one-third of false confessions.[8] This often leads to wrongful convictions and severe dispositions because those who falsely confess are treated harshly throughout the rest of the juvenile or criminal legal process.[9] Youth have difficulty understanding the *Miranda* rights, largely contributing to this high rate of wrongful convictions.

Because children's cognitive abilities are still developing, most children cannot meaningfully understand their *Miranda* rights.[10] More specifically, only 20% of youth adequately understand their *Miranda* rights.[11] Empirical evidence illustrates that adequately comprehending *Miranda* requires at least a tenth-grade reading level.[12] Moreover, understanding two of the *Miranda* warning

protections, the right to remain silent and the right to have an attorney present, requires a college or graduate reading ability.[13] As high as 85% of the youth in the juvenile legal system have disabilities, and children with disabilities inherently have difficulties in understanding the complexity of the *Miranda* doctrine.[14] Due to economic, social, and educational disparities, these necessary reading levels are far beyond the majority of individuals, including adults, who are targets of custodial interrogations.[15]

Furthermore, "[o]verwhelming empirical evidence shows that [youth] do not understand their Constitutional protection against self-incrimination or the consequence of waiving their rights."[16] In particular, many children do not understand that they will not incur consequences or court sanctions if they invoke their rights, such as the right to remain silent.[17] Due to no fault of their own, children do not understand the purpose of an attorney or that an attorney will support them even if they are guilty.[18] Additionally, many children often confuse the term, "interrogation," with an adjudication hearing and, therefore, do not understand that the right to have an attorney present during an interrogation means that they have the right to have an attorney present during questioning.[19] Thus, because youth do not understand *Miranda*'s protections, they cannot fully understand or appreciate the rights they are giving up when they waive them.[20]

In addition to not fully understanding their rights or the consequences of waiving them, children also "lack the psychosocial maturity and cognitive capacity to waive *Miranda* rights."[21] Because a child's prefrontal cortex has not yet matured,[22] children focus on short-term rather than long-term consequences,[23] especially in moments of stress.[24] Thus, children are especially at risk of waiving their rights without considering the consequences in the inherently stressful setting of an interrogation.[25] For example, when an officer tells a child that they can go home if they waive their *Miranda* rights and answer questions, the child is likely to waive their rights based on the short-term reward of going home.[26] Furthermore, even if they could consider the long-term consequences, youth "'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.'"[27] As a result, children as young as ten years old waive their *Miranda* rights about 90% of the time without understanding the rights they are giving up,[28] often leading to false confessions and wrongful convictions.[29]

III. Race Implications and Disproportionate Effects of the *Miranda* Doctrine

For decades, tensions have existed between the Black community and the police. In the District of Columbia, police disproportionately stop, search, and arrest Black youth. Black youth are "ten times more likely to get stopped than their white peers," and between July and December of 2019, police searched 738 Black youth and only four White youth.[30] In 2018, 98% of youth committed to the Department of Youth and Rehabilitation Services were Black.[31] In 2015, Black youth made up just under 70% of the District's youth population, but accounted for over 95% of those arrested in the District.[32] Black people continue to be disproportionally arrested, not just in heavily policed, predominantly Black neighborhoods, but also in areas with high concentrations of White people.[33] Furthermore, Black youth's view of the police is often learned and shaped at a very young age.[34] Therefore, "[d]istrust, fear, and even hostility between police and youth of color exacerbate the psychological atmosphere that undermines the voluntariness of Miranda waivers."[35]

Moreover, Black men are more likely than White men to feel anxiousness and fearfulness during police encounters and , as a result, engage self-regulatory behavior to counteract any formed stereotypes regarding their guilt.[36] For example, Black men are hyper aware to engage in eye-contact and remain mindful of their body language and word choice.[37] But, despite a Black man's true intentions, "these self-regulatory efforts are interpreted as suspicious by police." Researchers have referred to this phenomenon as "stereotype threat."[38] Although the study was limited to Black men, it can be reasonably inferred that Black youth engage in similar attempts to conform their behavior to the perceived expectations of the officer. As a result, Black youth experience substantially different interactions with the police than their White counterparts, which leaves greater exposed to the shortcomings of the *Miranda* Doctrine.

IV. The Impact on the District of Columbia

The involuntary waiver of *Miranda* rights remains an issue within Washington, D.C.'s juvenile legal system. In 2012, the Metropolitan Police Department ("MPD") arrested a 15-year old child and brought him to a police station, where an MPD detective questioned him around midnight.[39] During the interview, the child's foot was cuffed to the floor, so he was unable to move freely.[40] Before reading the child his *Miranda* rights, the detective said:

> "I know you know why you're up here, so I ain't gonna play the 'I don't know' crap, all right? I'm gonna give you an opportunity to give your version of what happened today, because ... I stand between you and the lions out there .... [W]e have a lot of things going on out there, and they're gonna try and say that you did it all. Okay? And I think what happened today was just a one-time thing. But before I came out here everybody said ... you did a whole bunch of stuff, but in order for us to have a conversation, I have to read you your rights and you have to waive your rights. If you answer no to any of the questions I ask you after I read you your rights, that's all, I mean, I can't have the interview, okay?"[41]

After the officer made these coercive statements to the child, he read the child his *Miranda* rights.[42] The child then waived his rights and confessed.[43] Because the officer's statements implied that invoking his *Miranda* rights would make the situation even worse, the officer made the boy feel helpless, as if he had no choice but to waive his *Miranda* rights and confess. [44] The District of Columbia Court of Appeals found that the officer's statements did not give the child a real choice and that his waiver was, therefore, involuntary.[45] This is just one of many examples that illustrates a child's susceptibility to waiving *Miranda* rights during an inherently coercive police interrogation.

V. A New Approach

To better protect children from the current inadequacies of the *Miranda* doctrine, the District of Columbia should make any statement made by a minor in a custodial interrogation inadmissible unless (1) the minor was advised of their rights by the interrogating law enforcement official,[46] (2) the minor was given an opportunity to confer with an attorney regarding the waiver of those rights, and (3) the minor knowingly, intelligently, and voluntarily waived those rights in the presence of counsel. D.C. should not permit any child to waive any *Miranda* right without assistance from counsel.

These protections would ensure that waivers are actually knowing, intelligent, and voluntary; prevent false confessions; and reduce wrongful convictions.

Other jurisdictions have already codified protections for youth in custodial interrogations, including (1) requiring children to consult with a counsel during police questioning, (2) not allowing children to waive *Miranda* rights without consulting with an attorney, and (3) making inadmissible any statement made outside the presence of counsel. Specifically, New Jersey requires the assistance of counsel before a child can waive any right, including a *Miranda* right.[47] Additionally, California recently passed legislation that requires all minors to consult with an attorney before waiving any *Miranda* right.[48] Furthermore, Illinois requires counsel at all custodial interrogations for children under 15 who are suspected of committing homicide or another serious offense.[49] Similarly, in West Virginia, statements made by children under 14 during custodial interrogations are not admissible in court unless counsel was present during the interrogation.[50]

States and cities across the United States continue to codify further protections for youth in custodial interrogations. For example, in New York, there is a bill that, if it becomes law, will mandate that children are only interrogated when necessary and only *after* consulting with an attorney.[51] Baltimore City has also taken steps to ensure that a child's constitutional rights are preserved. Specifically, the Maryland State's Attorney's Office has explicitly expressed its plans to develop policy that will make statements made by a minor outside the presence of counsel inadmissible.[52]

Although some states require parents to be present during custodial interrogations as a way to potentially guard against coerced waivers or confessions, this "protection" has proven to be inadequate. Instead, attorneys are best positioned to explain *Miranda* rights to children. Generally, parents do not have the necessary legal knowledge to represent their child's best interest.[53] In fact, "[i]n 24 out of 25 interrogations, the parents either did nothing or affirmatively aided the police" by advising their children to confess or to tell the truth.[54] One notable example of a case where children were wrongfully convicted based on false confessions is the Exonerated Five, where the children's parents encouraged the boys to waive their right to remain silent and further encouraged them to cooperate with the police.[55] The parents, like their children, felt helpless and powerless to resist police pressure during the interrogations. Thus, merely having a parental or custodial guardian present would not adequately preserve *Miranda*'s Constitutional protections.[56]

Moreover, providing minors a more expansive explanation of their *Miranda* rights alone would not be enough to protect youth from involuntarily waiving their rights. To create a fully comprehensive explanation of *Miranda*'s protections that most youth could factually and rationally understand would be both impractical and ineffective. For example, England and Wales created a comprehensive 44-page "easy read" letter of rights for people in custody.[57] However, because it is so unlikely that a child could understand and internalize such a lengthy document under the conditions often associated with custodial interrogation, England and Wales also requires counsel and an appropriate adult when youth are in police custody.[58] "On average, custodial suspects are expected to comprehend 146 words with a range from 49 to 547," and longer pieces are especially challenging.[59] Thus, a comprehensive resource would not effectively communicate the *Miranda* doctrine to youth and would, therefore, not adequately protect against involuntary waivers.

Providing further *Miranda* protections would not only protect youth from falsely confessing but also save the District money that could be allocated to social programs. Detaining a young person can cost upwards of $621 per day and $226,665 per year.[60] These numbers do not account for the long-term indirect costs of detaining youth, including less tax revenue, increased public assistance, and increased crime costs.[61] Additionally, "[b]etween lawsuits and state statutes that award fixed compensation for wrongful convictions, state and municipal governments have paid out $2.2 billion to exonerees."[62]

The District of Columbia should make any statement made to law enforcement officers by any person under eighteen years of age inadmissible in any court of the District of Columbia for any purpose, including impeachment, unless:

- **The child is advised of their rights by law enforcement;**
- **The child is given an opportunity to confer with an attorney; and**
- **The child knowingly, intelligently, and voluntarily waives their rights in the presence of counsel.**

References

[1] *See* 384 U.S. 436, 444 (1966).
[2] *See generally id*.
[3] *Miranda*, 384 U.S. at 444-45; *Fare v. Michael C.*, 442 U.S. 707, 725-26 (1979).
[4] *Miranda*, 384 U.S. at 462.
[5] 387 U.S. 1, 44-55 (1967).
[6] *Id.*
[7] *J.D.B. v. North Carolina*, 564 U.S. 261,272 (2011) (recognizing that "[t]ime and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to outside pressures than adults; and so on.")
[8] Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 920 (2017).
[9] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 920 (2004).
[10] Lapp, *supra* note 8, at 914.
[11] Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1152-53 (1980) (finding, in a study of 431 youth, only 20.9 percent of those youth adequately understood all four *Miranda* rights).
[12] Anthony J. Domanico et al., Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations, 49 IDAHO L. REV. 1,3 (2012). It is important to note that DC uses the same Miranda Rights Card with both adults and youth. *See* Metropolitan Police Department PD-47 form.
[13] *Id.*
[14] Taryn VanderPyl, *The Intersection of Disproportionality in Face, Disability, and Juvenile Justice*, 15 JUST. POL'Y J. 1, 2 (2018).
[15] *Id.*
[16] Lapp, *supra* note 8, at 914.
[17] Richard Rogers, et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 PSYCH., PUB. POL'Y, & L. 63, 67 (2008).
[18] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 11 (2006).
[19] Grisso, *supra* note 11, at 1154 (finding, in a study of 431 youth, only 20.9 percent of those youth adequately understood all four *Miranda* rights).
[20] Grisso, *supra* note 18, at 11.
[21] Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 431 (2006).
[22] Marco Luna, *Juvenile False Confessions: Juvenile Psychology, Police Interrogation Tactics, and Prosecutorial Discretion*, 18 NEV. L.J. 291, 297 (2017).
[23] Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL'Y 395, 405 - 06 (2013).
[24] Grisso, *supra* note 18, at 9.
[25] *J.D.B.*, 564 U.S. at 269 (quoting *Miranda*, 384 U.S. at 467); Grisso, *supra* note 18, at 9.
[26] Grisso, *supra* note 18, at 11. Oftentimes, when officers interrogate a child, they give the child two options: "(1) you did it and if you do not confess I cannot help you so you are going to be punished harshly, or (2) you did it and if you do confess, you are a good person and I can help you." Steven A. Drizin & Beth A. Colgan, *Interrogation Tactics Can Product Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 136 (G. Daniel Lassiter ed., 2004). Based on these limited options and the short-term reward of going home, children almost always waive their *Miranda* rights and confess even if they are innocent. *See generally id.* at 138.
[27] *J.D.B.* 564 U.S. at 272 (quoting *Bellotti v. Baird,* 443 U.S. 622, 635 (1979)).
[28] Lapp, *supra* note 8, at 914 (2017); Barry Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 12 (2013) (finding, in a study of 307 16 through 18-year olds, 92.8 percent of youth waived their *Miranda* rights)

[29] Elizabeth Vulaj, *From the Central Park 5 to the Exonerated 5: Can It Happen Again?*, N.Y. ST. B.J. (2019), at 24-25.
[30] ACLU-DC, RACIAL DISPARITIES IN STOPS BY THE D.C. METROPOLITAN POLICE DEPARTMENT: REVIEW OF FIVE MONTHS OF DATA 8 (2020), https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf (last visited Sept. 13, 2020).
[31] Youth Population Snapshot, DEP'T YOUTH REHABILITATION SERV.S, https://dyrs.dc.gov/page/youth-snapshot (last visited Sept. 2, 2020).
[32] *Racial Disparities in D.C. Policing: Descriptive Evidence from 2013-2017*, ACLU DISTRICT OF COLUMBIA, https://www.acludc.org/en/racial-disparities-dc-policing-descriptive-evidence-2013-2017 (last visited Sept. 13, 2020).
[33] *Id.*
[34] Kristin Henning, Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. STATE L. J. ___ (expected December 2020).
[35] *Compare* Puzzanchera, C., Sladky, A. and Kang, W., "Easy Access to Juvenile Populations: 1990-2019," at https://www.ojjdp.gov/ojstatbb/ezapop/ (reporting 29,321 Black youth ages 10 to 17 and 42,234 total youth ages 10 -17) *with* MPD FOIA Request Response 2016-05463 (reporting 2928 arrests of Black youth out of 3073 total arrests in 2015) (on file with the Georgetown Juvenile Justice Initiative).
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *In re S.W.*, 124 A.3d 89, 93 (D.C. Ct. App. 2015).
[40] *Id.*
[41] *Id.* at 94.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id*. at 104-05.
[46] These rights include but are not limited to: (a) the right to remain silent, (b) anything they say can be used against them, (c) the right to an attorney, (d) the right to have someone else pay for the attorney, (e) the right to talk to an attorney *immediately* before continuing to answer questions, (f) the refusal to give a statement cannot be used as evidence of guilt, (g) making a statement does not mean they will be released from custody or that they will not be charged, (h) they can be held in pretrial detention for the most minor offenses, and (i) they can be committed until age 21 for the most minor offenses.
[47] N.J. STAT. ANN. § 2A:4A–39(b)(1).
[48] S. 203, 2020 (Cal.)
[49] 705 ILL. COMP. STAT. § 405 / 5-170.
[50] W. VA. CODE § 49-4-701(l).
[51] A6982B, 2019 Leg., Reg Sess. (N.Y. 2019). Emily Haney-Caron & Sydney Baker, *Protecting Youth from Interrogation*, NEW YORK DAILY NEWS, (Aug. 5, 2020), https://www.nydailynews.com/opinion/ny-oped-protecting-youth-from-unfair-interrogation-20200805-yzg33mie6vhkvkmmrfz7jagrwy-story.html, (last visited Sept. 27, 2020).
[52] Marilyn Mosby & Miriam Aroni Krinsky, *The Baltimore Exonerees' Cases Shed Light on the Need for Reforming Youth Interrogations*, WASH. POST (Nov. 27, 2019), https://www.washingtonpost.com/opinions/local-opinions/the-baltimore-exonerees-cases-shed-light-on-the-need-for-reforming-youth-interrogations/2019/11/27/e7e22570-1099-11ea-b0fc-62cc38411ebb_story.html; Jennifer Egan, *Baltimore State's Attorney Should Refuse to Use Child Confessions Taken Without an Attorney Present*, BALT. SUN, Dec. 6, 2019, https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-1208-mosby-kid-confession-20191206-jsdhcnsocrcrflo7m2hdkygzui-story.html.
[53] Hana M. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions (Winner of American Constitution Society's National Student Writing Competition)*, 20 U. PA. J. CONST. L. 1211, 1232 (2018).
[54] Molly Knefel, *'Making a Murderer,' and the Huge Problem of False Youth Confessions*, ROLLING STONE (Jan 8, 2016), https://www.rollingstone.com/tv/tv-news/making-a-murderer-and-the-huge-problem-of-false-youth-confessions-51948/, (last visited Sept. 27, 2020); Rogers, *supra* note 17, at 66.
[55] Drizin, *supra* note 9, at 896.
[56] Rogers, *supra* note 17, at 66.

[57] HERTFORDSHIRE CONSTABULARY, RIGHTS AND ENTITLEMENTS EASY READ BOOKLET (2009).
[58] *See* Rogers, *supra* note 17, at 185.
[59] *Id.* at 186.
[60] JUSTICE POLICY INSTITUTE, STICKER SHOCK 2020: THE COST OF YOUTH INCARCERATION 3 (2020).
[61] *Id.* at 1.
[62] Radley Balko, *Report: Wrongful Convictions Have Stolen at Least 20,000 years from Innocent Defendants*, WASH. POST: OPINIONS (June 10, 2019), https://www.washingtonpost.com/news/opinions/wp/2018/09/10/report-wrongful-convictions-have-stolen-at-least-20000-years-from-innocent-defendants/.

Appendix: Proposed Amendments

§ 16–2316. Conduct of hearings; evidence.

(g) A statement made by a person under 18 years of age to a law enforcement officer during a custodial interrogation shall be inadmissible for any purpose, including impeachment, in a transfer hearing pursuant to section 16-2307, in a dispositional hearing under this subchapter, or in a commitment proceeding under Chapter 5 or 11 of Title 21, unless the person under 18 years of age:

(1) Is advised by a law enforcement officer in a developmentally appropriate manner of:
    - (A) The person has the right to remain silent;
    - (B) Anything the person says can be used against them in court;
    - (C) Refusing to make a statement cannot be used as evidence that they were involved in a crime;
    - (D) Making a statement does not mean they will be released from custody or that they will not be charged with a crime;
    - (E) The person has the right to an attorney;
    - (F) The person has the right to have someone else pay for the attorney at no cost to them;
    - (G) The person has the right to privately speak with an attorney, immediately, before continuing to speak with a law enforcement officer;
    - (H) The person has the right to be advised by an attorney regardless of whether they committed a crime; and

(2) Is given a reasonable opportunity to confer privately and confidentially with an attorney; and

(3) Through an attorney, knowingly, intelligently, and voluntarily waives their right to remain silent.

Committee on the Judiciary and Public Safety
Public Hearing on
Rioting Modernization Amendment Act of 2020 (B23-0723)
Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020 (B23-0771)
Comprehensive Policing and Justice Reform Amendment Act of 2020 (B23-0882)

Hi, my name is Lauren Spokane, I'm a DC resident and homeowner in Ward 4. I live in Petworth with my husband and 9 month old son. I serve on the board of Jews United for Justice, and I'm also the board chair of the New Synagogue Project, a justice-centered Jewish community in DC.

Like my JUFJ colleagues and the coalition of Black organizers and allies leading the fight to end racist police violence in DC and to defund MPD, I support the recommendations put forward by ACLU-DC, Black Lives Matter DC, DC Justice Lab, DC Working Families Party, Defender Impact Initiative, HIPS, Metro DC DSA, and others, and I strongly urge the Council to adopt them. As such, I support the reforms being put forward in the bills today, but feel they must go much further to get closer to justice and safety in our city. The bills should include measures such as eliminating stop and frisk, banning no-knock search warrants, banning the use of military weapons and harmful surveillance methods, along with the other recommendations made by the coalition.

As I look ahead to the years to come as my son Jacob grows up, I imagine lots of possibilities for him, and lots of rich learning from growing up in a diverse city and neighborhood. I will teach him not to call the police, because of the impact it may have on our Black and Brown neighbors when police arrive. I will be grateful that I don't have to have a different talk with him, about how to behave in front of police, or just when walking down the street or driving a car or on a bike, to try to avoid being harassed or far worse. But no one should have to have that talk with their children. We need more accountability, yes, but we also need public safety practices and structures that actually create safety, not that criminalize our Black and Brown residents and perpetuate violence.

We are one of the most heavily policed cities in America, and it's not making us safer. I support defund asks popularized by Stop Police Terror Project DC, Black Swan Academy, and other groups in DC's Movement for Black Lives, such as reallocating funding from the MPD budget to pay for medical and mental health professionals and social workers to respond to emergency calls, and moving funding for school resource police officers to pay for mental health care and trauma-informed services. Money should be reallocated from MPD's budget to cover essential human needs and interventions that make us healthier and safer.

Real safety comes from building a society - and a city - where everyone has the resources they need to live in health and wholeness, not from policing its residents. Violence in our city has risen and fallen over the years while the number of police in DC has held relatively steady, reinforcing what decades of research shows - violence is a result of failures to invest in and support communities by making sure people's needs are met. Safe and secure housing, quality childcare

and education, reliable healthcare, access to food, and well paying jobs are and will always be more important in preventing violence and building safe and thriving communities than policing.

I call on all of you as leaders of our city to take bold action not just to reform policing practices, but to invest in alternatives to policing that have far greater potential to result in true public safety. The bills being discussed today are a good first step, and they must go further.

Thank you for the opportunity to testify today.

JEWS UNITED FOR JUSTICE

Committee on the Judiciary and Public Safety
Public Hearing on
Rioting Modernization Amendment Act of 2020 (B23-0723)
Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020 (B23-0771)
Comprehensive Policing and Justice Reform Amendment Act of 2020 (B23-0882)

Sarah Novick, JUFJ DC Senior Organizer
October 15, 2020

Thank you Councilmember Allen for holding this hearing. My name is Sarah Novick and I'm the DC Senior Organizer with Jews United for Justice, a community of thousands of Jews and allies committed to advancing social, racial, and economic justice in DC. In the midst of an uprising led by Black organizers against systemic racism and following the killing of Deon Kay by the DC police, we ask that members of the DC Council do everything in your power to end the police violence against Black residents, hold police accountable, bring urgently needed transparency to police processes, and defund the MPD.

Jewish tradition teaches that destroying one single life, the killing of just one person, is akin to destroying a whole world. In DC, as around the country, police violence has destroyed worlds. And yet, too many of our laws protect police rather than our residents. That is why JUFJ is following the lead of and supporting the recommendations put forward by ACLU-DC, Black Lives Matter DC, DC Justice Lab, DC Working Families Party, Defender Impact Initiative, HIPS, Metro DC DSA, and others, and strongly urges the Council to adopt them.

The bills being discussed today are a critical step in the direction of police reform and JUFJ supports them. For example, we support the prohibition of the use of neck restraints, expanding the role and reach of the Office of Police Complaints, increasing the number of people on the Police Complaints Board while removing the seats held by law enforcement, and enfranchising eligible District residents incarcerated for felony convictions. All of these are important steps toward police accountability and increased rights for civilians.

That said, DC can and must do so much more to keep Black and Brown people from being terrorized and killed by the police. The DC Council should ban the use of stop and frisk,

no-knock search warrants, and military weapons, and end qualified immunity and qualified privilege for police officers. The public should have expanded access to body-worn camera footage. Police disciplinary processes should be strengthened and moved completely outside of MPD. Each of these changes, and others like them, will help end the inequitable policing that has been taking place in DC for far too long.

JUFJ also supports the recommendations to remove policing from the District's public safety practices, and instead replace policing with trauma-informed approaches. Educating individual police officers on racism and white supremacy as this legislation calls for is necessary, but far from sufficient to address the institutional racism of a deeply flawed system. This is even more so when it comes to our city's young people. Following the lead of Black Swan Academy, the Council should remove police from our schools. Research shows that placing police in schools does not increase safety, but leads to the criminalization of ordinary student behavior, especially targeting Black students and students with disabilities - thus destroying the worlds of many children of color. We also support the call for creating a crisis response system that does not involve police, expanding the role of violence interruption programs, and overhauling the District's criminal code to decrease penalties and decriminalize offenses.

We must couple these changes with a transition away from a reliance on police. Following the lead of BLM, Stop Police Terror Project, and the Defund MPD movement, JUFJ supports the call to defund the police in order to increase investments in Black and Brown communities and alternatives to policing. There are nearly 4,000 MPD officers as well as thousands of additional officers from other law enforcement agencies in DC. Violence in DC has risen and fallen over the years while the number of police has held relatively steady, reinforcing what decades of research shows: violence is a result of failures to invest in and support communities by making sure people's needs are met. To have safe and thriving communities we need secure housing, quality childcare and education, reliable healthcare, access to food, and well paying jobs rather than a reliance on police.

As a white person, I can't know or understand the terror and pain my Black friends, colleagues, and neighbors have experienced at the hands of the police. But I hear them, and I trust them. The Comprehensive Policing and Justice Reform Amendment Act must go further to protect the very lives of our community members. The recommendations being made by advocates and activists and people directly impacted by these policing practices are critical steps toward

dismantling entrenched racism and preserving life in our city. Thank you for the opportunity to submit testimony.

Committee on the Judiciary & Public Safety
October 15, 2020
Alana Eichner, Ward 1

My name is Alana Eichner and I live in Ward 1. I am a member of Jews United for Justice, which works to advance social, racial, and economic justice in DC.

Part of why I organize with Jews United for Justice is because my faith informs my commitment to fight for a more just world. Jewish communities often talk about tikkun olam, which is the value of repairing our broken world. If that value is to be real, remaining silent in the face of injustice is not an option. There is far too much injustice occurring at the hands of police in the District of Columbia. We won't have a repaired world until all of us are able to live free from fear and violence.

Today I am asking that the DC Council take decisive action to protect DC residents by holding police accountable, creating transparent policing processes, and divesting from police and investing in true safety for our communities.

Thanks to the work of Black organizers, since May our nation and city have increasingly grappled with the long history and present reality of violence toward Black communities at the hands of police. I urge the DC Council to seize this moment as an opportunity for transformative policy change. I support the recommendations made by Black Lives Matter DC, ACLU-DC, DC Justice Lab, DC Working Families Party, HIPS, Metro DC DSA, Defender Impact Initiative, and others, and urge the Council to adopt them.

As a white woman, I have not experienced police harassment or terror at the hands of the police. This matters to me because no one should be harassed and terrorized, especially by agents of their own government. Many times I've encountered someone on the street who, it appeared, might benefit from help or support. But I have been unsure about what to do or who to call, knowing it is not safe to call the police because too often that ends in violence toward Black individuals. I have repeatedly seen Metropolitan Police Department (MPD) officers mistreat Black teenagers on the streets of DC in the neighborhood where I live. It's shameful that it's nearly impossible to live in most parts of DC and not have witnessed or experienced this.

The three bills being discussed today, the Rioting Modernization Act of 2020, the Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020, and the Comprehensive Policing and Justice Reform Amendment Act of 2020 are meaningful steps in the right direction but they do not go far enough.

One additional necessary reform is for MPD to change its approach to gun recovery. Deon Kay, who was shot and killed by an MPD officer last month, will not have the opportunity to build his future because of DC's failed approach to gun recovery. What we have now is an approach that escalates violence in Black communities and is ineffective at finding weapons. Instead, we need solutions that address the underlying roots of community violence that do not involve the police. MPD's current use of overly aggressive, blunt-force tactics are only leading to more fear, more shootings, more death, and more trauma.

This trauma also exists in our schools, where the presence of police officers leads to Black students being arrested at disturbingly high rates. Creating an environment that criminalizes the normal behavior of young people and teenagers makes our entire community less safe. I urge you to follow the recommendation popularized by Black Swan Academy to remove police officers from schools, which is a necessary step to creating a supportive learning environment for all students in DC.

While these reforms are urgent and necessary, we know that reform alone is insufficient. In cities across the country, some of the reforms proposed today have been in place and still Black people have been murdered by police. I want to echo the call to defund MPD, which is being led by Black Lives Matter DC, Stop Police Terror Project DC and other groups in the Defund MPD Coalition. We must re-prioritize our money by decreasing funding allocated to the police department and instead use that money to meet human needs -- by investing in safe housing, quality child care, direct financial assistance and healthcare access. This is what real safety looks like.

Thank you Councilmember Allen and members of the committee for your time and the opportunity to present my testimony. I urge the Council to listen to the voices you have heard today and take meaningful steps to ensure the safety and dignity of all of the District's residents.

Committee on the Judiciary and Public Safety
October 15, 2020 Public Hearing
Rebecca Ennen, Ward 4

My name is Rebecca Ennen and I live in Petworth in Ward 4. I have been involved in DC local issues since I moved here in 2010 through Jews United for Justice, both on staff and as a volunteer. I have watched for the last decade as this city has struggled to be a city for all its residents, not just the wealthy. In particular I have watched the Council and Mayor, every year, go through a budget process where various programs that are critical to the well-being of our residents were defunded and only sometimes refunded. In all those years our budget for policing has grown steadily with no hint of change.

I support the recommendations made by Black Lives Matter DC, ACLU-DC, DC Justice Lab, DC Working Families Party, HIPS, Metro DC DSA, Defender Impact Initiative, and others, and urge the Council to adopt them. I specifically thank Stop Police Terror Project and Black Swan Academy for their detailed and visionary work. I am not an expert and can only add my voice to theirs.

I am an upper middle class white woman. I have two children, one a DCPS student and one a baby. I want what my neighbors across this city want, whether we're Black, white, or brown: to have a vibrant, generous, connected community where everyone is safe and cared for. The police who are entrusted to serve and protect us all, are not doing that. They target, detain, harass, and kill Black residents. Meanwhile, people like me are fed a lie: that we are unsafe without police. Specifically, the subtext is that we are not safe from Black people without police.

I reject this lie and I see through it to the people earning money off white fear and the brutalization of Black people and communities: the private prison profiteers, the sellers of military weapons and surveillance technology, and the politicians and government officials they buddy up with to keep our tax dollars flowing to their pockets. They are relying on white people like me to believe that Black people are inherently dangerous and should be brutally controlled by police. I'm not buying it and I will not be divided from my multiracial family, community, and city. Instead, I want to talk about the joyful, connected, safe future we can all have in our city - that you as elected officials and your hard-working staffers have the power to lead us towards.

Like many of you I am a religious person. I believe that every person is made in God's image, uniquely precious and deserving of full respect and dignity. My tradition calls me to believe in and work for a just and loving society. The prophet Micah speaks of this vision of peace and

abundance, when he says that we shall beat our swords into plowshares, no one will be afraid, and each person sit under her own vine and fig tree. Every person's safety is precious and it is inextricably linked to their freedom from fear and from deprivation. We absolutely must stop and defund policing that harms the unique, wonderful people of this city. Beating swords into plowshares means defunding the police and funding the housing, childcare, schools, health, food, and more, that our residents need.

Near where I live, on 14th Street, there is a span of several blocks where you can go any day and see what deprivation and despair look like. There are about two dozen people who seem to have substance abuse and/or mental health issues, who are regularly hanging out, using alcohol and drugs, panhandling, or passed out on the sidewalk. Almost all of them are Black and brown, victims of decades and centuries of policies that treat them and their families as expendable and unworthy of opportunity or care. They are my neighbors, and most of the time they are friendly and have kind words for my kids and me.

When I regularly see police on 14th Street I am deeply afraid for my neighbors' safety. Many times I've waited down the block or across the street while police questioned or detained these neighbors. I'm not even sure why I hang around - to be a witness? To act as a check on police violence, implying by my mere presence that someone who's white and middle class cares about the safety of my neighbors? I am afraid to call 911 when I see someone clearly in need of medical help. I am afraid that one day someone will get shot by a cop.

We need to get police out of public safety and crisis response. There should be someone that our neighborhood could call on for help - someone that would show up with resources and care, not the implicit threat of a gun. I believe that every one of these people deserves a good life and help with their serious struggles - not to be punished and criminalized.

Imagine a city where schools taught and practiced restorative justice, instead of in-school police harassing Black and brown children and funneling them into the prison industrial system. Imagine a city where people with drug issues or in crisis could get help. Let's stop putting money into policing and controlling Black and brown people, find ways to deal with violence and crisis that do not further harm and traumatize people, and make sure that every single person in our city has their needs met. I know that the elected leaders here today would like to see our city leading the way towards that future, away from the cycles of fear and violence that terrorize Black and brown communities and line the pockets of the corporations that profit from our spending on police, weapons, and jails.

We are coming together across our city to demand liberty and justice for all. Let's stop buying swords, and start planting vines and fig trees.

Dear DC Council Judiciary Committee,

Thank you, and thank you for this hearing.
My name is Hannah Weilbacher and I'm a Ward 1 resident. I am testifying today because Black lives matter.

I'm a member of Jews United for Justice, a community of thousands of Jews and allies committed to advancing social, racial, and economic justice in DC. As our city grapples with the systemic and institutional racism recently highlighted by the uprising this summer and the killing of Deon Kay, I also ask that the DC Council do everything in your power to protect Washington residents, to hold police accountable, create transparent police processes, and defund MPD and instead invest in programs, policies, and practices that *truly* keep people safe. The Council should implement the common sense recommendations being made by community-led institutions such as ACLU-DC, Black Lives Matter DC, and DC Justice Lab.

I'm in support of the bills on the table today, as they are important pieces of legislation to increase community safety by limiting police powers, but they need to go further. I appreciate the addition of Black Lives Matter DC and other community representatives to the Police Reform Commission. I also support the ask to ban no-knock warrants, and to ban jump outs. Proposed changes to the Police Complaints Board and the Standards Board are important, if incomplete, changes, but there is more to be done in reallocating responsibilities away from MPD and towards other essential services that address the root causes of crime. Police reform is not the end; I am also asking that MPD be defunded. **I support the call to divest from the police because the MPD continues to inflict harm, and instead invest in human needs and violence prevention that will actually make all of us safer.**

I worked with the Paid Family Leave campaign which passed the Universal Paid Leave Act in 2016 which, Councilmembers, you know well and Councilmember Allen you helped champion. This July, finally, we have seen people now able to take paid time away to be with their family during the most intensive times in their lives.

As members of the Council know well, the primary, coordinated, corporate-backed opposition from frankly right-wing opponents even within the Democratic party was: "DC cannot afford a paid family and medical leave program." Considering the $600 million budget of the District's dangerous, unchecked, racist police force, it's clear that there was and is *always* money to support DC families, but the precious resource lacking is political will.

Today, as you listen to many testimonies from your Washington, DC neighbors who are bringing forward specific, researched, data-driven recommendations, I hope that each Councilmember sees that the hard work of researching and proposing viable options has been done, and the political will -- your action -- is what's needed.

MPD's budget hovers around $600 million, and we are one of the most heavily policed cities in America. Money should be reallocated from MPD's budget to cover essential human needs. I

echo the asks highlighted today by Stop Police Terror Project DC, Black Swan Academy, and other groups in DC's Movement for Black Lives, such as reallocating funding from the MPD budget to pay for medical and mental health professionals and social workers to respond to emergency calls, and moving funding for school resource police officers to pay for mental health care and trauma-informed services.

Safe and secure housing, quality childcare and education, reliable healthcare, access to food, and well paying jobs are and will always be more important in preventing violence and building safe and thriving communities than the absence or presence of police.

Real safety comes from building a society where everyone has the resources they need to live in health and wholeness, not from policing its residents. There are nearly 4,000 MPD officers as well as several dozen other law enforcement agencies making up thousands of additional officers in DC. Violence has risen and fallen over the years while the number of police has held relatively steady, reinforcing what decades of research shows- violence is a result of failures to invest in and support communities by making sure people's needs are met.

So, I ask the Council to show true leadership in the DC government by fighting for common-sense policies that can directly address the racism and violence we see today:

1. Maintaining and **increasing** funding for the Office of Neighborhood and Safety Engagement and violence interrupter programs.
2. Reallocating funding from the MPD budget to pay for medical and mental health professionals and social workers to respond to emergency calls.
3. Cutting funding for school resource officers and reallocating that funding to pay for mental health care and trauma-informed services in DC public schools, along with technological support for remote learning.
4. Increased services for formerly incarcerated DC residents including housing, education, and job assistance.
5. Maintaining a permanent budget item for public housing repairs. This year, the council should put $60 million to repair public housing.
6. Increasing the availability of high-quality childcare.
7. Maintaining and increasing funding for vital nutrition and food access programs.
8. Suspending rent and mortgage payments in DC until the COVID-19 crisis is over
9. Providing COVID-19 relief funding to all DC residents, including undocumented residents.

Thank you for this hearing and for listening to our testimonies. I sincerely hope the testimonies of many DC residents — particularly those most threatened by policing — will persuade the Council that our communities want and need non-police resources to keep each other safe.

Sincerely,
Hannah Weilbacher, Ward 1

WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

Testimony of the Washington Lawyers' Committee for Civil Rights and Urban Affairs[1]

Concerning

B23-0882, The Comprehensive Policing And Justice Reform Amendment Act of 2020

October 15, 2020

The Comprehensive Policing and Justice Reform Amendment Act of 2020 is an important step to address injustice in our system of policing, but it is only one-step. Enactment of this legislation will make permanent critical reforms that the Council enacted earlier this year.

This Council has in recent years demonstrated a commitment to addressing the inequity and injustice of policing practices in the District. Long before the economic crisis created by COVID-19 and the public attention to policing that was brought about by the national uprising in response to the in-custody deaths of George Floyd and others, the Council enacted the Neighborhood Engagement Achieves Results Act and engaged in serious oversight of the Metropolitan Police Department.

While these reforms are important, they are by themselves insufficient and leave unaddressed fundamental injustices. This bill is an important milestone in re-envisioning policing in the District but should not be the end of the journey. In coming months, the Council will receive recommendations from the Police Reform Task Force, the Task Force on Justice and Jails, and the Criminal Code Review Commission. We urge that those recommendations serve as the basis for further comprehensive action by the Council.

The Washington Lawyers' Committee Supports this Legislation

The Washington Lawyers' Committee supports this bill. There are, however, several provisions that should be strengthened. A brief discussion of those provisions is set forth below:

Body-worn camera policy: We support the proposal to improve access to body-worn camera recordings. Body-worn cameras provide transparency and give the community a view into how MPD polices its community.

For years, community members voiced concerns about the difficulty in gaining access to body-worn camera footage. In 2019, this Council passed a law granting family members who

[1] The Washington Lawyers' Committee was founded in 1968 to address racial and economic injustice through litigation and other advocacy. The Committee has a long history of working to address discrimination in housing, employment, criminal justice, education, public accommodation and against persons with disabilities. We work closely with the private bar to bring litigation and pursue policy initiatives.

lost loved ones to law enforcement access to body-worn camera footage. However, family members continue to have issues with the program. Family members are not given the opportunity to view all the footage prior to its release, nor were they given adequate notice of the release of the footage. In order to strengthen the body-worn camera policy and improve transparency, we recommend the following provisions.

- Within 48 hours after a police involved shooting or serious use of force incident, MPD will ensure that the next of kin has had the opportunity to view all unedited footage the department plans to be released.

- Within 48 hours after family members view the footage, a representative from the City should call the next of kin informing them of the release date and time. The representative would ask the family members consent to release.

- In the interest of transparency, the Chief of Police should be required to consult with a community advocacy group or civil rights group on the release of footage of shootings or uses of force that have resulted in media coverage, protest, or raised concerns by community leaders.

- When the MPD declines to release footage, including videos of significant public interest, MPD should provide a written justification for denial within seven days.

- Additional accountability measures must be put in place for failure to adhere to the policy.

Consent Searches: The Washington Lawyers' Committee urges the Council to prohibit all consent searches. The uneven power between officers and residents is inherently coercive.[2] Stops are stressful experiences, and individuals who have been stopped have a reasonable anxiety for their safety and the consequences of declining to agree to be searched.[3]

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[2] *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (Consent is determined by an examination of the "totality of circumstances.")

[3] Legal commentators have called into question whether the "totality of circumstances" analysis articulated by the Supreme Court for determining whether consent is freely given fairly accounts for the coercive effect of police encounters. See, e.g., B. Sutherland, Whether Consent To Search Was Given Voluntarily: A Statistical Analysis Of Factors That Predict The Suppression Rulings Of The Federal District Courts, New York University Law Review (2006); https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-81-6-Sutherland.pdf.

If the Council does not prohibit consent searches outright, in order to protect the critical constitutional right to be free from unreasonable searches and seizures, we recommend additional provisions:

- The detention to request a consent search can last no longer than the time that it takes to provide the advisements required by law and receive an answer from the person being detained. Overly long detentions or repeated requests should vitiate the consent.[4]

- Given the inherently coercive quality of stops and detention and the high value in ensuring the consent is freely given, if the consent is not in writing or on body-worn camera video, the presumption of inadmissibility should be irrebuttable.

- Officers should be required to complete a report on every consent search or request to conduct a consent search that includes a narrative describing the justification for seeking to conduct the search. Officers should be required to provide a justification that is specific and individualized to the circumstances, and canned or form language should be prohibited.

- We would favor requiring officers to obtain the permission of a supervisor before seeking to conduct a consent search. The requirement that officers justify the search to a supervisor before seeking consent will reduce searches that are pretextual or motivated by bias.

- The Department should be required to report on a quarterly basis the number of consent searches sought, the number conducted, the location of each consent search sought, the location of each consent search conducted, and the age, gender, and race of the person searched or sought to be searched.

Training and the Police Officers Standards and Training Board: The proposal to increase and mandate additional training on bias-free policing is important. While there is some dispute on the effectiveness of implicit bias training,[5] that may have more to do with the course delivered than the concepts involved. In order to make bias free policing training effective, we strongly recommend that the bill require that the City engage people and organizations from

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[4] *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015)(Police cannot extend a traffic stop longer than necessary to write the ticket in order to conduct a search in the absence of probable cause that would justify the additional detention and search).
[5]https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior

impacted communities in the development and delivery of the training to officers, including people of color, people living in poverty, youth, LGBT persons, persons with disabilities, returning citizens, non- and limited-English speakers, and others.

Organizations led by people most likely to be policed should be compensated to be part of the design and delivery of training. Compensation of these participants will not only appropriately recognize their expertise, but will ensure that their contributions are valued.

In addition, this section of the bill requires training for officers on the obligation to report misconduct by other officers. This is a critical step, but it should be strengthened. We strongly encourage the Council to mandate that the City adopt a formal bystander intervention program by expanding the Active Bystander for Law Enforcement Project that is currently being piloted by MPD.[6]

Deadly Force: The proposed changes to use of force practices in the pending legislation are important but incomplete. Critical omissions are the requirement that officers avoid force when possible and that de-escalation is mandatory. This can be accomplished by strengthening Sections 119 (b)(2) & (3) and (c)(2)(B) & (C). De-escalation should not be just a "factor," but mandatory. Moreover, this section should be expanded to all uses of force, not just deadly force.

Police officers are among the few public officials authorized to use force, including deadly force, in their official capacity. The execution of stops and arrests "necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it."[7] The authority to use force, while broad, is not unlimited. The Fourth Amendment establishes the right of "people to be secure in their persons" and to be protected from "unreasonable searches and seizures."[8] It has long been understood that the Fourth Amendment places limits on the use of force by law enforcement. Force, to be constitutional, must be objectively reasonable.[9] Objective reasonableness is determined by a series of factors, including: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[10]

The legal standard sets a very low bar. Even when the force used is constitutional, it can be contrary to the values of the community or the policies of a department, and even a small percentage of unnecessary or excessive uses of force can undermine trust and legitimacy. There

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[6] https://www.msn.com/en-us/news/us/we-have-to-police-ourselves-dc-program-trains-officers-to-intervene-and-prevent-harm/ar-BB1a11z8. *See also*, Ethical Policing is Courageous program in New Orleans, http://epic.nola.gov/home/.
[7] *Terry v. Ohio*, 392 U.S. 1, 22 (1968).
[8] U.S. Const. amend. IV.
[9] *Graham v. Connor*, 490 US 386 (1989).
[10] *Id.* at 396.

is often a very large gap between what is "lawful" and what is "right" in the use of force. Therefore, community members, and this Council, should expect that police officers will make every effort to avoid and minimize the use of force.[11]

Forward looking police departments have included the LEED Model (Listen and Explain with Equity and Dignity) in their policies to ensure that force avoidance and de-escalation become part of the policing culture. The LEED model is described in Principles of Procedurally Just Policing from the Justice Collaborative at Yale Law School as follows: [12]

> Principle 30:
>
> De-escalation tactics—whether verbal or physical—should be used where possible.
>
> - In order to de-escalate a situation, officers should attempt to use one or more of the following techniques, in addition to any other techniques, words, or actions reasonably intended to slow down an encounter and engage the individual(s) in the encounter:
>
> **Verbal de-escalation**:
> Use the Listen and Explain with Equity and Dignity (LEED) framework:
>
> - *Listen*—allow people to give their side of the story; give them voice
> - *Explain*—officers should explain what they are doing, what the individual can do, and what will happen
> - *Equity*—officers should explain why they are taking action; the reason should be fair and show that the individual's statements and input were taken into account
> - *Dignity*—officers should act with dignity and leave the individual with their dignity
> - Echo back the individual's statements to show that the officer is listening
> - Communicate using verbal persuasion, including advisements
>
> **Physical de-escalation**:

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[11] See e.g., Mourtgos & Adams, Assessing Public Perception of Police Use-of-Force: Legal Reasonableness and Community Standards, Justice Quarterly (October 2019), https://www.tandfonline.com/doi/abs/10.1080/07418825.2019.1679864.

[12] https://law.yale.edu/sites/default/files/area/center/justice/principles_of_procedurally_just_policing_report.pdf:

- Avoid physical confrontation, unless immediately necessary to prevent direct harm to others or to stop behavior that may result in serious harm to others
- Use physical de-escalation techniques, including:
    - moving temporarily to a safer position
    - communicating from a safe position
    - decreasing exposure to potential threat using distance or cover

In addition, officers should be given significantly more guidance on when and how to exercise discretion not to engage in an enforcement action. There are many occasions when an officer may have the authority to take someone into custody, but circumstances dictate that there is little or no public safety benefit to doing so and the safer and better course is to withdraw. This is especially true in the context of minor offenses that do not threaten public safety.[13]

While de-escalation and force avoidance could be addressed in policy, given the seriousness of these issues and the record of conduct of the MPD, it is important that they be codified in law.

Provisions Regarding Police Response to First Amendment Activity: The proposed limitations on the use of force and other responses to First Amendment activity are important, but the exception to use riot gear for an "immediate risk to officers of significant bodily injury" is overbroad and subject to interpretation. The use of riot gear is perceived by demonstrators as oppressive, rather than defensive, and as a consequence it has a significantly escalating effect.[14] The role of police should be to facilitate First Amendment exercise and not engage in tactics that are intimidating or appear to be retaliatory.

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[13] *See*, for example, the policy of the Saint Paul Minnesota Police Department. https://www.stpaul.gov/books/40400-tactical-disengagement.

[14] *See, e.g.*, after action of response to Ferguson demonstrations. https://www.policefoundation.org/wp-content/uploads/2018/08/After-Action-Assessment-of-the-Police-Response-to-the-August-2014-Demonstrations-in-Ferguson-Missouri.pdf.

> FINDING 17. Many community members perceived law enforcement using the standard protective equipment worn by officers, such as helmets, external vests, and shields, for offensive and not defensive measures... Officers wearing defensive and tactical equipment should be staged out of sight during peaceful demonstrations.

It is telling that this section addresses the "deployment" of officers in riot gear, which by definition is a planned event, even if the period of planning is brief. We urge that the section be modified to require prior notification, except in exigent circumstances, to the Deputy Mayor for Public Safety, the Chair of the City Council and the Chair of the Council's Judiciary Committee. The notifications should contain a detailed description of the conditions that justify the use of riot gear.

In addition, we recommend that the Council define "riot gear." Leaving this term open may create varying interpretations inconsistent with the Council's intent. Moreover, "First Amendment" activity may be too narrow to capture all of the contexts that the Council is seeking to address. A term like "mass gatherings" might be more effective.

Metro police: We strongly support the recommendation to create civilian oversight of the WMATA Police Department, but it is not enough. We urge that the bill be amended to require that Metro Police be:

- Subject to open records laws;
- Required to publish its policies on line; and
- Required to comply with the policies of the MPD.

Although Metro Police is a public agency, it is extremely difficult to learn anything about how it operates. It makes almost nothing public. Beyond daily crime reports that show the time and location of arrests, reports and citations, it does not post any data on its website. It also does not post any of its policies. In short, Metro Police is incredibly opaque.

There is no other police jurisdiction in this region that is subject to such limited oversight or for which there is such limited transparency. The Metro Police has a critical impact on the community and should be subject to the same rules as MPD.

The Need to Continue to Address Policing Beyond this Bill

The reforms in this Bill are important. However, the issues concerning policing in the District run deep and require a re-examining of fundamental questions about the role and function of law enforcement. As the Council moves forward with further reform efforts, and engages in the discussion of re-imagining policing, we urge you to keep the following principles in mind:

First, transforming policing requires that race equity be at the core of every consideration. Involvement with the criminal legal system is a major driver of inequality in the District of Columbia. The District has a high rate of incarceration that disproportionately affects African American men, women and families. Ninety percent of the District's prison population is

African American and only four per cent is white despite that the City is almost half white and half Black. The District has one of the highest rates of incarceration in the nation.

The disparities in the District's criminal system involvement cannot be explained by the often asserted canard that there are behavior differences between whites and African Americans. Police enforce the laws one way in white communities and a different way in Black communities - Black people get arrested when white people do not for the same conduct.[15] Systemic racism is built into the structure and practices of policing.

Second, the over policing and underserving of Black and Brown communities not only create racial disparity in criminal legal system involvement but also are dangerous and contrary to public safety. Every unnecessary encounter is dangerous, and that danger compounds. Philando Castile is a far too common experience. He had been stopped 49 times for minor traffic and equipment violations before he was shot and killed by a Minnesota police officer.[16]

Urgent steps to reduce police interaction are essential. The Council should build on the practices implemented during COVID to reduce custodial arrests and make those practices permanent. Additional strategies should be employed by expanding violence interrupter programs, strengthening restorative justice models, and supporting community-based, impacted community led organizations.

The safety of Black and Brown communities are undermined, not served by many police practices, as Judge Schiendlin wrote in the New York stop and frisk litigation:

> [I]t is important to recognize the human toll of unconstitutional stops. While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are

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[15] Among the many studies belying the assertion of higher rates of "criminality" in the Black community is a report of the United States Department of Health and Human Services, which found "significantly higher likelihood of having ever been arrested among blacks, when compared to whites, even after accounting for a range of delinquent behaviors. Importantly, after controlling for racial composition of the neighborhood, these disparities were no longer present, suggesting the importance of neighborhood context in influencing racial/ethnic disparities in arrests." Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School and Community Characteristics; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5509345/.

[16] https://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html.

> overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police.[17]

These issues are just as urgent in the District as in New York, Minnesota and across the nation. In a study conducted by the Consortium of Legal Services Providers of 590 District residents living under 200% of poverty, 27.8% reported being stopped by the police for no reason, 15.1% reported that police did not take them seriously when they called for assistance, another 14.3% reported that police responding to a call made them feel at fault for the crime that had victimized them, and more than 10% reported police asking them inappropriate questions. The majority of those surveyed felt that the police were indifferent, at best, to the issues in their community.[18]

The ACLU recently released a study analyzing MPD's stop data that validated the experience reported by District residents. The data showed that Black people made up 72 percent of MPD's stops despite only making up 46.5 percent of the D.C. population. These disparities suggest a racial bias in MPD's stop practice. Even more alarming, nearly 90 percent of the stops and searches that resulted in no warning, ticket, or arrest were Black people.[19] Despite claims from MPD that jumpouts, a stop and frisk tactic where plainclothes officers come out of unmarked vehicles to randomly pat-down pedestrians, do not exist, residents in Ward 7 and 8 report the fear they feel when officers jump out cars to search them.

We cannot conflate arrests and patrols with public safety and we must look beyond policing. Reimagining policing requires a holistic look at what police do and how they do it as well as other factors that render communities unsafe. Police violence is not the only form of violence meted out on communities of color in the District. Inequity in education, lack of opportunity for safe and affordable housing, food insecurity, inadequate wages and employment, unequal access to recreation and culture are all forms of violence. Addressing these concerns is a public safety imperative.

Third, fundamental to addressing the issues in policing is changing police culture. Fundamental to culture change is meaningful internal and external accountability based in policy, law, and the values of the community. External accountability builds trust and

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[17] *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).
[18] Report of the Community Listening Project; https://www.lawhelp.org/dc/resource/community-listening-project.
[19] https://www.aclu.org/press-releases/aclu-analysis-dc-stop-and-frisk-data-reveals-ineffective-policing-troubling-racialcite.

transparency with the community. The Council should create an independent civil rights inspector general for MPD. The inspector general would be given staff and resources to review both incidents of potential civil rights violations and current and future policies, procedures, practices, and tactics of the department.

In addition to external mechanisms, the Council should improve the department's internal investigation process. In 2016, the Office of District of Columbia Auditor conducted a review of MPD's policies and practices related to use of force. That report found serious issues with the quality of Internal Affairs investigations. The report found that use of force investigators were insufficiently trained, conducted inadequate use of force investigations, and produced unsatisfactory investigative reports.[20]

Fourth, changing policing is not enough. While police are often the face of the criminal legal system, inequity is a product of the criminal laws, prosecutorial decisions, prison and jail conditions, and discrimination against those convicted of a crime. Truly comprehensive reform legislation would look at the spectrum of systems actors.

Fifth, the Council must remove police from our schools. Transferring the function from MPD to the school system is not enough. Instead, the City should make significant investments in non-law enforcement programs that improve school safety and promote the learning environment.

The presence of police in schools means that Black students are more likely to be arrested. In DC, 92% of school-based arrests are of Black youth.[21] Higher discipline rates for Black youth are not due to higher rates of misbehavior.[22] Rather, Black students are more likely to be arrested because they are more likely to encounter police and because those police view their normal, adolescent behavior as more criminal than the same behavior in white students.[23]

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[20] http://dcauditor.org/reports/durability-police-reform-metropolitan-police-department-and-use-force-2008-2015.

[21] 2019 School Report Card indicates that there were 338 total arrests of students across the District – 312 of the arrests were of Black students and 26 of the arrests were of Latino students. (104 of the arrests were for students with disabilities).

[22] *See, e.g.*, Russell J. Skiba, et al. "The Color of Discipline: Sources of racial and gender disproportionality in school punishment." Urban Review, 34, 317-342 (2002).

[23] *See, e.g.,* Goff, P.A., Jackson, et.al. "The Essence of Innocence: Consequences of Dehumanizing Black Children," Journal of Personality and Social Psychology (February 2014); Epstein, Rebecca, Jamilia J. Black & Thalia Gonzalez. "Girlhood Interrupted: The erasure of Black Girls' Childhood," Georgetown Law Center on Poverty and Inequality (2012), available at http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/girlhood-interrupted.pdf.

In addition to furthering the gross racial disparities in the criminal legal system and in academic achievement, school police are ineffective and expensive. Over the last school year, our city spent about $25 million dollars a year on school security within DCPS alone, and about another $10 million on MPD officers to patrol DCPS and charter schools.[24] There is no clear empirical research that school police reduce crime or increase safety in schools.[25] In fact, some studies suggest the opposite. Students are less likely to misbehave, including engaging in criminal behavior, in schools where they feel valued, respected, and listened to – in other words, where the students are part of a community.[26] DC's students deserve investment in programs that help them thrive and not in those designed to criminalize. At this moment, in particular, we must strengthen our mental health infrastructure and ensure our young people have increased access to mental health professionals to address the trauma caused by COVID-19, police violence, and racism.

Conclusion

Thank you for moving this legislation and for this hearing. We look forward to working with the Council to continue to help make the District of Columbia a more just place for all to live and work.

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[24] DC Public Schools Responses to FY2019 Performance Oversight Questions, Q11, at https://dccouncil.us/wp-content/uploads/2020/02/dcps_Part1.pdf("The DCPS school security contract for security officer personnel in FY2020 is projected to be $23,458,808.27. The non-personnel costs in FY2020 are projected to be $1,619,061.00"); MPD FY2021 Proposed Budget Plan, Table FA-04, Division 2300. Total budget for that division is for FY2020 was $34 million but approx. $23 million is the DCPS security contract.

[25] ACLU Pennsylvania, "Summit on School Policing: Research on the Impact of School Policing," https://www.endzerotolerance.org/schoolpolicingsummit (July 2019). *See also* Matt Barnum, "Do police keep schools safe? Fuel the school-to-prison pipeline? Here's what research says," Chalkbeat (June 23, 2020), https://www.chalkbeat.org/2020/6/23/21299743/police-schools-research.

[26] ACLU Pennsylvania, "Summit on School Policing: Research on the Impact of School Policing," https://www.endzerotolerance.org/schoolpolicingsummit (July 2019).

To: Committee on the Judiciary and Public Safety, Council of the District of Columbia

From: Yasmin Vafa and Rebecca Burney

Re: Rights4Girls Comments on the Comprehensive Policing and Justice Reform Amendment Act of 2020

Date: October 23, 2020

Rights4Girls is a human rights organization dedicated to defending the rights of marginalized young women and girls in the U.S. Based in Washington, D.C., we work at the intersection of racial justice, juvenile justice, and violence against women and girls at the federal, state, and local levels, and engage in youth development, coalition-building, public awareness campaigns, research, and training and technical assistance. Over the past several years, we have been actively involved in the passage of multiple federal laws aimed at reforming systems to improve our response to marginalized girls and providing increased funding and services to survivors of sexual violence and exploitation. We have also worked at the national and local levels to shed light on the widespread criminalization of girls of color through the publication of reports like *The Sexual Abuse to Prison Pipeline: The Girls' Story* and *Beyond the Walls: A Look Inside D.C.'s Juvenile Justice System*.

We are committed to promoting youth engagement and advocacy through our series of youth workshops and sit on a number of local coalitions including the Youth Justice Project coalition, the D.C. Coalition to End Sexual Violence, the Advisory Board of the Young Women's Initiative, and we co-lead the D.C. Girls Coalition with our partners at Black Swan Academy. In addition, in 2011, we co-founded the Girls at the Margin National Alliance—a coalition of over 200 national, state, and local organizations working across systems and disciplines to center the voices and experiences of marginalized young women and girls in policy conversations at the local, state, and federal levels.

In 2018, we published a report in partnership with the Georgetown Juvenile Justice Initiative entitled, *Beyond the Walls: A Look at Girls in D.C.'s Juvenile Justice System*, that discusses the gendered pathways leading D.C. girls into the juvenile justice system and highlights the disproportionate impact our policies have on girls of color in the District. Some of the major findings in that report were: i) Girls' arrests in D.C. have increased 87% over the past decade; ii) 97% of girls committed to the Department of Youth Rehabilitative Services (DYRS) custody are Black; iii) 86% of arrests of girls in D.C. are for non-violent, non-weapons offenses; and iv)

60% of girls arrested in D.C. are under age 15.[1]

Today, we submit this testimony to urge you to amend Bill 23-0882, the *Comprehensive Policing and Justice Reform Amendment Act of 2020* (the "Act") to include provisions that directly address the manner in which youth are policed in the District. While the Act includes many essential reforms that will benefit both youth and adults, it does not propose any specific reforms that take into consideration youth development or the unique needs of girls. This is particularly concerning due to countless stories we have heard from youth about being harassed, intimidated and at times physically harmed by members of the Metropolitan Police Department (MPD). As such, we recommend the following amendments to the Act that we believe will be more developmentally responsive to the needs of young people.

First, we recommend expanding MPD's continuing education requirements beyond the proposed new topics to include training on gender bias, trafficking, youth development and trauma. Second, in order to address the over-policing of youth of color in D.C., we recommend that this legislation also eliminate the School Safety Division at the Metropolitan Police Department. Finally, we join with our juvenile justice colleagues in the recommendation put forth to amend the D.C. Code to create a more mature *Miranda* policy for the District that guarantees youth the right to consult with counsel prior to waiving their right to remain silent.

1. **In addition to requiring additional police training on racism, white supremacy, limiting the use of force, and de-escalation techniques, it is vital that MPD also receive continuing education on gender bias, trafficking, youth development and trauma.**

We have worked extensively with girls of color in the District to help elevate their experiences and make sure that their needs are represented in policy decisions, while also providing the tools necessary for them to be their own advocates for change. The number one point that trafficking survivors have expressed to us is that the police need culturally competent, survivor-led trainings about trafficking as well as training to address the racism, sexism, and implicit bias in the police department. Washington, D.C. has one of the largest disproportionate rates of incarcerated Black people. According to a report from the ACLU, from 2013 to 2017, Black individuals composed 47% of D.C.'s population, but 86% of its arrestees, and were arrested at 10 times the rate of white people.[2] The racial disparities are even more troubling when you look at the youth population. In D.C., Black girls are arrested at rates 30 times that of white girls and white boys.[3]

Both nationally and locally, girls are overwhelmingly involved in the juvenile justice system through non-violent and misdemeanor offenses.[4] Those arrests make up 86% of girls in the D.C. juvenile justice system.[5] Girls are far more likely than boys to be arrested for status offenses such

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[1] Yasmin Vafa, Eduardo Ferrer, et. al, Beyond the Walls: A Look at Girls in D.C.'s Juvenile Justice System, Rights4Girls & Georgetown Law Juvenile Justice Initiative (2018).
[2] *Racial Disparities in D.C. Policing: Descriptive Evidence from 2013-2017*, ACLU District of Columbia (May 2019).
[3] Vafa, *supra* note 1.
[4] *Id.*
[5] *Id.* at 27.

as truancy and running away.[6] Often, these behaviors are in response to traumatic experiences, home instability, or feeling unsafe at school. Many of these issues derive from sexual exploitation or abuse.[7] In one study, three fourths of justice-involved girls reported that their first instance of abuse was at age 13,[8] making it unsurprising though alarming that arrests of 13 to 15-year-olds is a primary driver of girls into D.C.'s juvenile justice system.[9]

Girls involved in the juvenile justice system experience adverse childhood experiences or ACEs at incredibly high rates. Further, system-involved girls experience more of these issues than their male counterparts with 45% of girls experiencing five or more ACEs.[10] Black girls, who represented 97% of newly committed youth to DYRS between 2007 and 2015, reported the highest rates of single and multiple ACEs.[11] Seventy-three percent of girls who end up in courts have histories of physical or sexual violence.[12] Girls in the juvenile justice system are more than four times more likely than boys to have been sexually abused.[13] Given the tremendous amount of trauma that girls who are interacting with MPD have experienced, it is not surprising that police officers are ill-equipped to handle their significant mental health needs and would benefit from additional training.

When asked about their experiences with MPD officers, one youth said that she "hasn't had any positive experiences since she turned 18." Another young girl described an instance where MPD officers handled her so aggressively at school that they dislocated her shoulder. Trafficked youth and especially girls have told us that police often do not understand the dynamics and trauma associated with trafficking and especially familial trafficking. Youth report that MPD are rarely sympathetic to those over 18 who are engaged in the sex trade even if they are being exploited. As one young woman said, police are "not understanding that trauma makes youth not trusting or reluctant to cooperate." All of the youth we work with described numerous negative experiences with police ranging from harassment to physical assault, and felt that police should be required to have regular trainings to help address this behavior.

In addition to training, there need to be more meaningful accountability measures for police officers who use excessive use of force even if their actions do not result in arrest, death, or serious bodily harm. Several young people said "Police use too much force on children" and that they "restrain children too aggressively." This problem is clearly illustrated through an incident one survivor had with a police officer when she was in 8th grade. She vividly described how a police officer tripped her so that she fell to the ground and then handcuffed her while she was face down in the dirt. Even though she was restrained, the officer then threatened to use a taser if she attempted to get up off of the ground. What was her crime? She was a 13-year-old trafficking survivor who ran away from an abusive home.

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[6] *Id*. at 7.
[7] Malika Saada Saar, Rebecca Epstein, et. al, *The Sexual Abuse to Prison Pipeline: The Girls' Story*, Rights4Girls, Georgetown Law Center on Poverty and Inequality, & Ms. Foundation (2015), p. 4.
[8] *Id*. at 7.
[9] Vafa, *supra* note 1, at 31.
[10] *Id*. at 35.
[11] *Id*. at 36.
[12] Francine T. Sherman, *Pathways to Juvenile Justice Reform: Detention Reform and Girls Challenges and Solutions*, Annie E. Casey Foundation (2005).
[13] Saar, *supra* note 7, at 8.

The interactions between the MPD officers and trafficking survivors demonstrate how vulnerable young people are often subjected to appalling, dehumanizing, and sometimes exploitative treatment by police officers due to stigma and victim blaming of those in the sex trade. Sadly, this is a common trend throughout the country. A recent Nevada study on the interactions between police and commercially sexually exploited youth found that most of the survivors were arrested and transported to juvenile detention for processing rather than given services afforded to victims of a crime.[14] Numerous young people in the study experienced violence and threats from arresting officers and results of the study suggest that an officer's perception of the youth influenced how they were treated, with those who did not fit the narrative of a "perfect victim" experiencing far more negative police interactions.[15] Several studies have identified the need for regular survivor-centered and trauma informed police officer trainings on trafficking, and we encourage the Council require these important trainings in addition to continuing education on racism and white supremacy.

2. **Eliminate the School Safety Division at the Metropolitan Police Department and reallocate that money for use in developing and implementing a more holistic approach to school safety in the District.**

Police reform and additional trainings will not remedy the fact that our Black youth are over-policed in the first place. As a result, we also recommend that this legislation eliminate the School Safety Division at the Metropolitan Police Department and reallocate that money for use in developing and implementing additional support services proven to reduce violence as well as innovative programming to ensure youth safety in our schools and communities. Now that DCPS will be resuming control of the management of its school security, the need for this unit is significantly lower.[16] The money currently allocated to this unit should be invested in our most vulnerable young people and we must focus our efforts and funding on scaling up community-based programs and services for youth that are gender responsive, trauma-informed, culturally competent and developmentally appropriate.

Girls are often overlooked in critical conversations around the school-to-prison pipeline and the racial achievement gap in education. However, girls of color suffer from many of the same problems as boys of color and struggle with sexism, systemic poverty, racial bias, gender violence, and trauma. In particular, Black girls[17] are increasingly being referred to the juvenile justice system as a result of school discipline policies that criminalize them for normal

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[14] Alexa Bejinariu , M. Alexis Kennedy & Andrea N. Cimino, *"They said they were going to help us get through this …": documenting interactions between police and commercially sexually exploited youth*, Journal of Crime and Justice (2020), p.12.

[15] *Id*.

[16] For Fiscal Year 2021, the budget for the School Safety Division of the Metropolitan Police Department is nearly $14 million dollars despite the fact that MPD is no longer responsible for managing the security contract between DCPS and an outside vendor.
https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/fa_mpd_chapter_2021a.pdf

[17] According to the 2018-2019 report on school discipline by OSSE, among those who were expelled, Black/African-American students make up 95 percent of the population even though they are only 67 percent of the entire student population. Thus, it is essential to look at the racial dynamics in D.C. and the impact disciplinary procedures have on Black girls. *State of Discipline: 2018-2019 School Year*, D.C. Office of the State Superintendent of Education, p. 1.

adolescent behavior, for expressing themselves,[18] or for minor misbehaviors that could be addressed within the school system. Girls of color and especially Black girls are often disciplined for dress code or behavior violations that result from implicit and explicit gender bias on the part of teachers, administrators, and school resource officers.[19] They are also affected by additional factors such as sexual harassment and violence at or on the way to or from school, pregnancy, caretaking responsibilities, and undiagnosed learning disabilities that all contribute to truancy and school pushout.[20] Because schools can act as an important protective buffer for youth, exclusionary discipline renders girls especially vulnerable to abuse, sexual exploitation, and juvenile justice involvement.[21]

Police officers are not trained to handle trauma experienced by youth in D.C. and their involvement in altercations and routine disciplinary measures often escalate the situation. Youth need more counselors and social workers in schools who can help them work through any challenges they may be experiencing, not more police. Police officers in schools can also make schools feel unsafe and unwelcoming for girls and can contribute to truancy. It is essential that we invest in the well-being and continued development of D.C. educators to practice social-emotional learning and shift from a reliance on police officers to a transformative justice approach. We must also invest in our most vulnerable young people and focus our efforts and funding on scaling up community-based programs and services for youth that are gender responsive, trauma-informed, culturally competent and developmentally appropriate.

We support youth leaders across the city who have called for Police Free Schools and believe that we need to move away from a culture that criminalizes youth of color for normal adolescent behavior and shift to a culture that promotes accountability, safety and youth agency. Studies have shown that police in schools do not make Black youth feel safer.[22] Rather than fund the School Safety Division, MPD should commit to working with students, teachers, school leaders, and parents to improve police interactions with youth in the community and move towards creating Police Free Schools.

3. **Amend the D.C. Code to create a more mature *Miranda* policy for the District that guarantees youth the right to consult with counsel prior to waiving their right to remain silent.**

Youth interrogations by police is another area in which the District has failed to account for the impact that systemic racism, trauma, and limited cognitive development has on young people. In *Miranda v. Arizona*, the Supreme Court held that statements made during a custodial

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[18] *Dress Coded: Black girls, bodies, and bias in D.C. schools*, National Women's Law Center (2018).

[19] Monique Morris, *Pushout: The Criminalization of Black Girls in Schools* (The New Press, 2015), pp. 120-32.

[20] *Id*. at 49; Karen Schulman, Kayla Patrick, & Neena Chaudhry, *Let Her Learn: Stopping School Pushout for Girls with Disabilities*, National Women's Law Center (2017), p. 1; Kelli Garcia & Neena Chaudhry, *Let Her Learn: Stopping School Pushout for Girls who are Pregnant or Parenting*, National Women's Law Center (2017), p. 1.

[21] Morris, *supra* note 19, at 101; Francine T. Sherman & Annie Balck, *Gender Injustice: System Level Juvenile Justice Reform for Girls* (2015), p. 16; Kimberlé Crenshaw, Priscilla Ocen & Jyoti Nanda, *Black Girls Matter: Pushed Out, Overpoliced, and Underprotected*, African American Policy Forum and Center for Intersectionality and Social Policy Studies (2014), pp. 10, 24.

[22] Claire Bryan, *Police don't make most black students feel safer, survey shows*, Chalkbeat (Jun. 8, 2020).

interrogation are inadmissible unless law enforcement officers administer warnings prior to questioning and the adult validly waives those rights. These warnings include the right to remain silent, that any statement made can be used against them, the right to have an attorney present during questioning, and the right to be appointed an attorney.[23] However, it is well documented that children cannot meaningfully understand their *Miranda* rights because their cognitive abilities are still developing. One study found that only 20% of youth adequately understood their *Miranda* rights and empirical evidence shows that sufficiently comprehending *Miranda* requires at least a tenth-grade reading level.[24] Thus, we join with our juvenile justice colleagues in urging the D.C. Council to adopt a more mature *Miranda* policy.

The inability of children to fully comprehend their *Miranda* rights has disastrous consequences and often leads to wrongful convictions and severe dispositions. Nationally, children account for only 8.5% of arrests but account for nearly one-third of false confessions.[25] In D.C., where Black youth are disproportionately stopped, searched, and arrested by police, our current *Miranda* policy has racial justice implications as well. Decades of racialized policing, contemporary media coverage of police brutality against Black people, and personal experiences of police harassment and violence, shapes the views that Black youth have towards police. As a result, this "distrust, fear, and even hostility between police and youth of color exacerbate the psychological atmosphere that undermines the voluntariness of *Miranda* waivers."[26] Youth may waive *Miranda* simply to get out of the interrogation room or to end interactions with a police officer. Thus, *Miranda* warnings alone are not effective in limiting the coerciveness of a police interrogation.

Girls in particular would benefit from a more mature *Miranda* policy due to the excessive amount of trauma most have experienced prior to arrest and interrogation. As described previously, girls involved in the juvenile justice system experience adverse childhood experiences or ACEs at incredibly high rates. Research has shown that when a child faces repetitive trauma and toxic stress, their brain develops behaviors necessary for survival. Over time, these behaviors biologically alter the brain and the parts controlling fear and anxiety grow while the parts controlling logic and critical thinking shrink.[27] Trauma not only makes youth more susceptible to health problems such as asthma, but it impairs cognitive development and the capacity to fully understand one's *Miranda* rights. Additionally, the coercive and aggressive nature of police interrogations can be triggering for girls who have experienced significant trauma or suffer from Post-Traumatic Stress Disorder (PTSD).

While there are limited studies on how girls are impacted by police interrogations and the likelihood of waiving *Miranda*, most of the research found no differences between males and females' understanding and/or appreciation of their *Miranda* rights.[28] However, justice personnel

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[23] *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).
[24] Katrina Jackson & Alexis Mayer, *Demanding a More Mature Miranda for Kids*, D.C. Justice Lab & Georgetown Juvenile Justice Initiative (2020), p.1.
[25] *Id*.
[26] *Id*. at 2.
[27] Nadine Burke Harris, *The Deepest Well: Healing the Long-term Effects of Childhood Adversity,* (Houghton Mifflin Harcourt Publishing Company, 2018); Deborah Lee Oh, et. al., *Systematic review of pediatric health outcomes associated with childhood adversity*, BMC Pediatrics (2018) 18:83.
[28] Barry C. Feld, *Questioning Gender: Police Interrogation of Delinquent Girls*, 49 WAKE FOREST L. REV.

describe significant gender differences while in the interrogation room. In one Minnesota study, police often described girls as "more likely to talk, less likely to invoke their rights."[29] One officer even stated that, "I don't think I've ever had a female refuse to talk to me. They always want to say something, even if it's a denial."[30] Police officers often ascribe negative attributes to girls in the juvenile justice system and view them as emotional, confrontational, manipulative, and verbally aggressive.[31] Trafficking survivors also report that officers refer to them using offensive language and racial slurs. Given the hostility girls in the justice system face, it is not surprising that they often have a greater likelihood to talk due to the presence of an authority figure and the power dynamics at play. These coercive factors make them less likely to invoke their *Miranda* rights as they try to cooperate with police officers.[32]

We encourage the D.C. Council to go beyond the bare minimum requirements of *Miranda* and institute a policy for police interrogations that incorporates research on adolescent brain development and the impact of trauma on cognitive development. One way to achieve this is to change the law so that statements made by youth under 18 during custodial interrogation are inadmissible unless 1) the youth is read their *Miranda* rights by a law enforcement officer in a developmentally appropriate manner prior to interrogation; 2) the youth has the opportunity to consult with counsel before making a waiver; 3) and, in the presence of their attorney, the youth makes a knowing, intelligent, and voluntary waiver of their rights.[33] These recommendations are in line with the codified protections that other jurisdictions have provided for youth in custodial interrogations. For example, New Jersey requires the assistance of counsel before a child can waive any right, including a *Miranda* right, and California passed legislation requiring all minors to consult with an attorney before waiving any *Miranda* right.[34] Adopting a more mature *Miranda* doctrine in the District of Columbia will help preserve the rights of children, cut down on coerced confessions, and account for the unique vulnerabilities of Black youth, and girls in particular, when interacting with police.

At Rights4Girls, we believe it is imperative to address the specific needs of girls and survivors in the community who often come in contact with the MPD in order to best support them. As the Council makes difficult decisions about how to create meaningful police reform, we encourage you to center the voices of youth in the District who have called for additional training of law enforcement, Police Free Schools, and help understanding and affirming their *Miranda* rights during police interrogations. We thank the Committee on the Judiciary and Public Safety for its commitment to supporting our city's most vulnerable youth and we look forward to continuing to work with the Committee to serve D.C.'s girls and survivors. Should members of the Committee have any questions regarding this testimony, please contact Yasmin Vafa, Executive Director, Rights4Girls at yasmin@rights4girls.org.

105(2014), p. 1087.
[29] *Id*. at 1100.
[30] *Id*. at 1095.
[31] *Id*. at 1104.
[32] *Id*. at 1100.
[33] Jackson, *supra* note 24, at 1.
[34] *Id*. at 4.

Written Testimony of Harlan Yu
Executive Director, Upturn

Council of the District of Columbia
Committee on the Judiciary & Public Safety

Public Hearing on
B23-0723, The Rioting Modernization Amendment Act of 2020
B23-0881, The Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020
B23-0882, The Comprehensive Policing and Justice Reform Amendment Act of 2020

October 23, 2020

Dear Chairman Allen and Members of the Committee on the Judiciary & Public Safety,

Thank you for the opportunity to offer written testimony on these important bills.

My name is Harlan Yu, and I'm the Executive Director of Upturn, a civil rights and technology research and advocacy nonprofit based here in DC. I'm a Ward 4 resident and I'm concerned about our city's approach to public safety, and the safety and wellbeing of my family and all of our neighbors in the District. I'm particularly concerned about the rampant use of surveillance technologies by the Metropolitan Police Department (MPD) and other District agencies.

As behalf of Upturn, I'm urging the Committee to amend Subtitle F of the Comprehensive Policing and Justice Reform Amendment Act of 2020 to *at least* ban police consent searches of mobile phones, if not all consent searches outright. Police consent searches in any context are troubling, but given how much information is stored on people's phones today and the invasive extraction and search capabilities of mobile device forensic tools (MDFTs), we believe the Council should, at minimum, move to ban consent searches of cellphones in DC.

Earlier this week, Upturn released a major report (*attached*) on law enforcement's use of mobile device forensic tools[1] — the tools that MPD uses to search people's cellphones, typically upon arrest. These tools give law enforcement access to all of someone's

[1] Upturn, *Mass Extraction: The Widespread Power of U.S. Law Enforcement to Search Mobile Phones* (October 2020), https://www.upturn.org/reports/2020/mass-extraction.

contacts, texts, photos, and location history, which matters not only to the owner of the phone, but to all of their friends and family, who are at risk of increased police contact. Our research shows that both MPD and the Department of Forensic Sciences use these tools.

We also know that, across the country, these tools have often been used to investigate minor cases that have no clear connection to a person's cellphone, including cases involving graffiti, shoplifting, prostitution, vandalism, petty theft, and the full gamut of minor drug-related offenses. Together with racist policing practices, it's more than likely that these technologies disparately affect and are used against our communities of color. Given the amount of sensitive information stored on smartphones today, we believe that these tools represent a dangerous expansion of police power with little public oversight.

Critically, our research has found that many police departments often rely on people's consent as the legal basis to search cellphones — instead of a warrant. In these cases, that means no judicial oversight or legal limitations on the scope of the search, or how the data is later used. Police consent searches in any context are troubling, but the power and information asymmetries of cellphone consent searches are egregious and unfixable. There are at least three reasons why.

The first reason is that the doctrine underlying "consent searches" is essentially a legal fiction.[2] Courts pretend that "consent searches" are voluntary, when they are effectively coerced. While the Supreme Court has held that the legality of a consent search depends on whether a "reasonable person would understand that he or she is free to refuse,"[3] the so-called "reasonable person" standard fails to account for the important racial differences in how individuals interact with law enforcement.[4] As one scholar noted, "many African Americans, and undoubtedly other people of color, know that refusing to accede to the authority of the police, and even seemingly polite requests—can have deadly consequences."[5] While the Supreme Court has held that consent cannot be "coerced, by

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[2] Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 Ind. L. J. 773, 775 (2005) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.")

[3] United States v. Drayton, 536 U.S. 194, 197 (2002).

[4] Tracey Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Val. U. L. Rev.. 243, 248 (1991). ("Instead of acknowledging the reality that exists on the street, the Court hides behind a legal fiction. The Court constructs Fourth Amendment principles assuming that there is an average, hypothetical person who interacts with the police officers. This notion . . . ignores the real world that police officers and black men live in.")

[5] Marcy Strauss, Reconstructing Consent, 92 J. Crim. L. & Criminology 211, 242-243 (2001). ("Given this sad history, it can be presumed that at least for some persons of color, any police request for consent to search will be viewed as an unequivocal demand to search that is disobeyed or challenged only at significant risk of bodily harm.") Indeed, as another scholar argued, the "consent search doctrine is the handmaiden of racial profiling." *See* George C. Thomas III, T*errorism, Race and a New Approach to Consent Searches*, 73 Miss. L. J. 525, 542 (2003).

explicit or implicit means,"[6] the notion that someone can actually feel free to walk away from an interaction with police has an "air of unreality" about it.[7] Given the extreme power asymmetries, it's a "simple truism that many people, if not most, will always feel coerced by police 'requests' to search."[8]

A recent study designed "specifically to examine the psychology of consent searches" highlights the problems in relying on a so-called "reasonable person" to adjudicate consent searches.[9] Participants were brought into a lab and presented with "a highly invasive request: to allow an experimenter unsupervised access to their unlocked smartphone."[10] More than 97% of participants handed over their phone to be searched when requested to, even though only 14.1% of a separate group of observers said that a reasonable person would hand over their phone. The study reveals that there is a "systematic bias whereby *neutral third parties view consent as more voluntary, and refusal easier, than actors experience it to be.*"[11] While there are plausible arguments that the lab-setting studies overestimate compliance rates in police searches, there are stronger arguments that they actually underestimate them.[12]

Second, someone consenting to a search of their phone likely doesn't even have a rough idea of what's really about to happen to their phone. The Fifth Circuit Court of Appeals recently held that a reasonable owner of a cellphone would functionally understand that a "complete" cellphone search "refers not just to a physical examination of the phone, but further contemplates an inspection of the phone's 'complete' content."[13] But, given the lack of public discussion of MDFTs, many people would likely be surprised by the power of the tools that law enforcement use to extract and analyze data from a phone.

Finally, law enforcement can do almost anything with data extracted from a cellphone after someone consents. In many jurisdictions across the country, there's no limit on when

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[6] Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).
[7] United States v. Drayton, 536 U.S. 194, 208 (2002) (Souter, J., dissenting).
[8] Marcy Strauss, *Reconstructing Consent*, 92 J.Crim. L. & Criminology 211, 221.(2001.)
[9] Roseanna Sommers, Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L. J. (2019).
[10] *Id.,* 1980.
[11] *Id.,* 2019.
[12] *Id.,* 2007. ("First, police officers convey more authority than our experimenters likely did; our experimenters were college-aged peers dressed in street clothes, whereas police officers are government agents who wear badges and carry weap-ons. Second, in the policing context, citizens might feel that they are admitting guilt or acting suspiciously if they refuse a police officer's request. It is not clear that our participants would have felt it was self-incriminating to refuse the experimenter's request. Third, to the extent our participants were aware of the pol-icies regulating university research, they would have known that their participa-tion was completely voluntary and that they were free to quit at any time. Most people stopped by the police, by contrast, do not believe they can just walk away.")
[13] United States of America v. Cristofer Jose Gallegos-Espinal, (No. 19-20427) (5th. Cir. 2020), at 10.

law enforcement could re-examine a cellphone extraction.[14] Absent specific prohibitions, law enforcement could copy data from someone's phone — say, their contact list — and add that information into a far-reaching police surveillance database. For instance, it's easy to imagine law enforcement seeing data extracted from mobile phones as providing valuable "leads" for "gang databases," given the low bar for individuals and their information to be added to such databases.

Banning consent searches is not a new suggestion.[15] Nor is it a perfect solution, as it's easy for law enforcement to obtain a search warrant. But banning consent searches of cellphones can help limit police discretion, limit the coercive power of police, and minimize the amount of information that can be collected from people under investigation. **Accordingly, the Council should — at minimum — ban the use of consent searches of cellphones, if not all consent searches outright.**

[14] United States of America v. Cristofer Jose Gallegos-Espinal, (No. 19-20427) (5th. Cir. 2020).

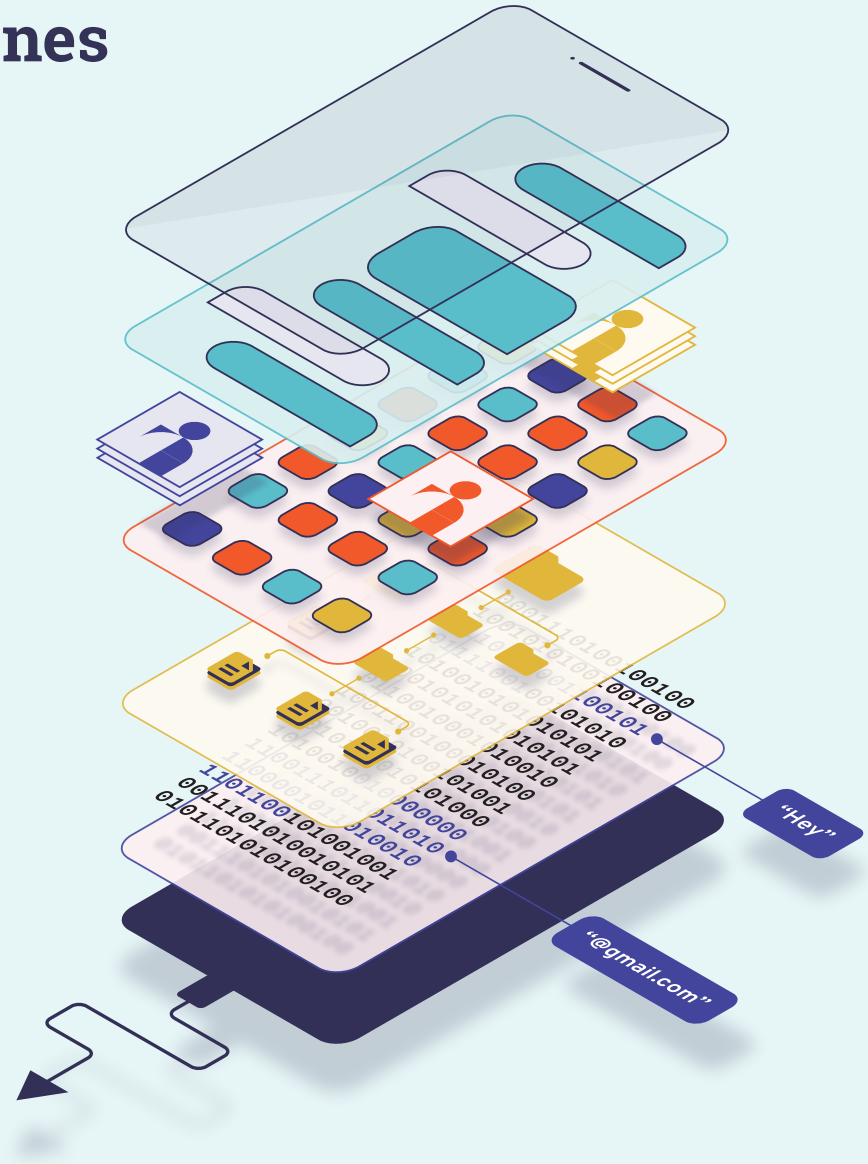
[15] For example, the New Jersey Supreme Court outlawed consent searches during traffic stops where no reasonable suspicion exists. The California Highway Patrol banned its use of consent searches as part of a broader class action lawsuit brought because of racial profiling. And in Rhode Island, by law, "[n]o operator or owner-passenger of a motor vehicle shall be requested to consent to a search by a law enforcement officer of his or her motor vehicle, that is stopped solely for a traffic violation, unless there exists reasonable suspicion or probable cause of criminal activity."

Upturn
Toward Justice in Technology

October 2020

Mass Extraction:

The Widespread Power of U.S. Law Enforcement to Search Mobile Phones



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About Upturn
Upturn is a 501(c)(3) nonprofit organization that advances equity and justice in the design, governance, and use of digital technology. For more information, see https://www.upturn.org.

Upturn
Toward Justice in Technology

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Executive Summary

Every day, law enforcement agencies across the country search thousands of cellphones, typically incident to arrest. To search phones, law enforcement agencies use mobile device forensic tools (MDFTs), a powerful technology that allows police to extract a full copy of data from a cellphone — all emails, texts, photos, location, app data, and more — which can then be programmatically searched. As one expert puts it, with the amount of sensitive information stored on smartphones today, the tools provide a "window into the soul."

This report documents the widespread adoption of MDFTs by law enforcement in the United States. Based on 110 public records requests to state and local law enforcement agencies across the country, our research documents more than 2,000 agencies that have purchased these tools, in all 50 states and the District of Columbia. We found that state and local law enforcement agencies have performed hundreds of thousands of cellphone extractions since 2015, often without a warrant. To our knowledge, this is the first time that such records have been widely disclosed.

Every American is at risk of having their phone forensically searched by law enforcement.

Law enforcement use these tools to investigate not only cases involving major harm, but also for graffiti, shoplifting, marijuana possession, prostitution, vandalism, car crashes, parole violations, petty theft, public intoxication, and the full gamut of drug-related offenses. Given how routine these searches are today, together with racist policing policies and practices, it's more than likely that these technologies disparately affect and are used against communities of color.

The emergence of these tools represents a dangerous expansion in law enforcement's investigatory powers. In 2011, only 35% of Americans owned a smartphone. Today, it's at least 81% of Americans. Moreover, many Americans — especially people of color and people with lower incomes — rely solely on their cellphones to connect to the internet. For law enforcement, "[m]obile phones remain the most frequently used and most important digital source for investigation."

We believe that MDFTs are simply too powerful in the hands of law enforcement and should not be used. But recognizing that MDFTs are already in widespread use across the country, we offer a set of preliminary recommendations that we believe can, in the short-term, help reduce the use of MDFTs. These include:

- banning the use of consent searches of mobile devices,
- abolishing the plain view exception for digital searches,
- requiring easy-to-understand audit logs,
- enacting robust data deletion and sealing requirements, and
- requiring clear public logging of law enforcement use.

Of course, these recommendations are only the first steps in a broader effort to minimize the scope of policing, and to confront and reckon with the role of police in the United States. This report seeks to not only better inform the public regarding law enforcement access to mobile phone data, but also to recenter the conversation on how law enforcement's use of these tools entrenches police power and exacerbates racial inequities in policing.

1. Introduction

"We just want to check your phone to see if you were there."

You know you weren't at the 7-Eleven — you hadn't been there in two weeks. You don't want the cops to search your phone, but you feel immense pressure. "If you don't give us your consent, we'll just go to a judge to get a search warrant — do you really want to make us handle this the hard way?" You relent, knowing that they aren't going to find anything. You quickly sign a form, and the police officers take your phone.

What happens next, in a backroom of the police department, is secretive. Within a few hours, the police have traced almost everywhere you've been, looked at all of your text messages, videos, and photos, searched through your Google search history, and have built a highly detailed profile of who you are. This report seeks to illuminate what happens in those police backrooms.[1]

Every day, law enforcement agencies across the country search thousands of cellphones, typically incident to arrest. Often, these searches are done against people's wills or without meaningful consent. To search phones, law enforcement agencies use **mobile device forensic tools (MDFTs)**, a powerful technology that allows police to extract a full copy of data from a cellphone — all emails, texts, photos, locations, app data, and more — which can then be programmatically searched.[2] By physically connecting a cellphone to a forensic tool, law enforcement can extract,

1 As of the publication of this report, we are suing the NYPD for records concerning the department's use of mobile device forensic technology. Upturn is represented on a pro bono basis by Shearman & Sterling, LLP and the Surveillance Technology Oversight Project (S.T.O.P.). The NYPD argues that they "should not be required to actively harm its investigative capabilities in responding to [Upturn's] FOIL Request," that "seeking information that, if disclosed, would harm those vendors' continued business activity," and that "confirming that the potential scope of Upturn's demand would overwhelm NYPD's FOIL response capacity." *See* NYPD Memorandum of Law in Support of its Verified Answer and Objections in Points of Law, September 4, 2020, Index No. 162380/2019 Doc. 21.

2 We borrow the umbrella term "mobile device forensic tools," from the National Institute of Standards and Technology. Others have used different terms, such as "mobile phone extraction tools," "mobile device acquisition tools," "mobile phone hacking tools," and "mobile phone cracking tools." We use "mobile device forensic tools" as we believe it's the most accurate terminology. *See* NIST, *Mobile Security and Forensics*, available at https://csrc.nist.gov/Projects/Mobile-Security-and-Forensics/Mobile-Forensics. ("When mobile devices are involved in a crime or other incident, forensic specialists require tools that allow the proper retrieval and speedy examination of information present on the device. A number of existing commercial off-the-shelf (COTS) and open-source products provide forensics specialists with such capabilities.")

analyze, and present data that's stored on the phone.[3] As one expert puts it, with the amount of sensitive information stored on smartphones today, MDFTs provide a "window into the soul."[4]

Law enforcement agencies of all sizes across the United States have already purchased tens of millions of dollars worth of mobile device forensic tools. The mobile device forensic tools that law enforcement use have three key features. First, the tools empower law enforcement to access and extract vast amounts of information from cellphones. Second, the tools organize extracted data in an easily navigable and digestible format for law enforcement to more efficiently analyze and explore the data. Third, the tools help law enforcement circumvent most security features in order to copy data.

The proliferation and development of mobile device forensic tools in large part mirrors the adoption of smartphones across the United States. In 2011, only 35% of Americans owned a smartphone.[5] Today, it's at least 81% of Americans.[6] Moreover, many Americans — especially people of color and people with lower incomes — rely solely on their cellphones to connect to the internet.[7] For law enforcement, "[m]obile phones remain the most frequently used and most important digital source for investigation."[8] In many ways, mobile device forensic tools have helped to vastly expand police power in ways that are rarely apparent to communities.

In 2014, the Supreme Court decided *Riley v. California*, holding that the warrantless search of a cellphone incident to an arrest was unconstitutional.[9] As a result, today law enforcement need a warrant to search a cellphone.[10] Since this landmark decision, the public debate surrounding

3 There are a surprisingly large range of tools that can serve these purposes: some work to get easily accessible data on all popular phones, and some are tailored to specific systems or phones; some can be purchased and used as much as police want, and others cost per-use or can only be used so many times.

4 C.M. "Mike" Adams, "Digital Forensics: Window Into the Soul," Forensic, June 10, 2019, available at https://www.forensicmag.com/518341-Digital-Forensics-Window-Into-the-Soul/.

5 Pew Research Center, "Mobile Fact Sheet," June 12, 2019, available at https://www.pewresearch.org/internet/fact-sheet/mobile/.

6 *Id.* (Noting 96% own a cellphone of some kind.)

7 Camille Ryan, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau, "Computer and Internet Use in the United States: 2016," American Community Survey Reports, August 2018; Jamie M. Lewis, *Handheld Device Ownership: Reducing the Digital Divide?*, March 2017, https://www.census.gov/library/working-papers/2017/demo/SEHSD-WP2017-04.html.

8 Cellebrite Annual Industry Trend Survey 2019: Law Enforcement, at 3.

9 Riley v. California, 573 U.S. 373 (2014). In this case, police searched two individuals' cellphones after they had been arrested: David Riley in August 2009 for driving with expired registration tags, and Brima Wurie in September 2007 for allegedly making a drug sale. In both cases, police officers at first manually examined the phones at the police station — scrolling through contact lists, and looking through videos and pictures. Police did not obtain a warrant to search either phone. *See* People v. Riley, D059840 (Cal. Ct. App. Feb. 8, 2013) https://casetext.com/case/people-v-riley-263; United States v. Wurie, 728 F.3d 1 (1st Cir. 2013) https://casetext.com/case/united-states-v-wurie-4.

10 Riley v. California, 573 US 373 (2014).

evidence on mobile phones has largely focused on the rare cases when law enforcement can't access the contents of a phone, due to encryption. For example, after the high-profile San Bernardino shooting in 2015[11] and, more recently, after a deadly shooting at Naval Air Station Pensacola.[12]

However, substantial public attention to these rare, high-profile cases in which law enforcement *cannot* access the contents of a phone overshadows a more significant change: the rise in law enforcement's ability to search the thousands of phones that they can access in a wide range of cases, and the power this gives to the police when it has routine and easy access to people's most sensitive data.

Throughout 2019 and 2020, Upturn filed more than 110 public records requests with state and local law enforcement agencies to determine which agencies have access to mobile device forensic tools, and how they use them. Some have suggested that technologies "to extract data from mobile phones . . . are things that few state and local police departments can afford,"[13] or that this technology is "cost prohibitive, however, for all but a handful of local law enforcement agencies."[14]

But our research tells a different story. Our records show that at least 2,000 agencies have purchased a range of products and services offered by mobile device forensic tool vendors. Law enforcement agencies in all 50 states and the District of Columbia have these tools. Each of the largest 50 police departments have purchased or have easy access to mobile device forensic tools. Dozens of district attorneys' and sheriff's offices have also purchased them. Many have done so through a variety of federal grant programs. Even if a department hasn't purchased the technology itself, most, if not all, have easy access thanks to partnerships, kiosk programs, and sharing agreements with larger law enforcement agencies, including the FBI.

11 The Department of Justice sought to compel (and a federal court ordered) Apple to provide technical assistance in unlocking an iPhone used by the gunman. *In The Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, Order Compelling Apple, Inc. to Assist Agents in Search, February 16, 2016, *available at* https://assets.documentcloud.org/documents/2714001/SB-Shooter-Order-Compelling-Apple-Asst-iPhone.pdf.

12 Attorney General William Barr publicly called on Apple to help unlock two phones used by the gunman. See Katie Benner, "Barr Asks Apple to Unlock Pensacola Killer's Phones, Setting Up Clash," The New York Times, Jan. 13, 2020, *available at* https://www.nytimes.com/2020/01/13/us/politics/pensacola-shooting-iphones.html. The Department of Justice also recently held a symposium regarding access to evidence on digital devices, entitled "Lawless Spaces: Warrant-Proof Encryption and Its Impact on Child Exploitation Cases." *See* https://www.justice.gov/olp/lawless-spaces-warrant-proof-encryption-and-its-impact-child-exploitation-cases.

13 William, Carter, Jennifer Daskal, *Low Hanging Fruit: Evidence-Based Solutions to the Digital Evidence Challenge*, Center for Strategic & International Studies, July 2018, 12.

14 New York County District Attorney Cyrus R. Vance, Jr., Written Testimony for the United States Senate Committee on the Judiciary on Smartphone Encryption and Public Safety, "Smartphone Encryption and Public Safety," Washington, D.C. December 10, 2019, https://www.judiciary.senate.gov/imo/media/doc/Vance%20Testimony.pdf.

Despite the widespread proliferation of these tools, there is almost no public accounting of how often or in what kinds of cases law enforcement use these tools. The under-the-radar adoption of these tools also means that there has been little public debate about the risks of these tools and how they shift power to the police.

The records we obtained through our public records requests demonstrate that law enforcement use mobile device forensic tools as an all-purpose investigative tool for a wide array of cases. Law enforcement use these tools to investigate not only cases involving major harm, but also for graffiti, shoplifting, marijuana possession, prostitution, vandalism, car crashes, parole violations, petty theft, public intoxication, and the full gamut of drug-related offenses. Few departments have detailed policies governing how and when officers can use this technology. Most either have boilerplate policies that accomplish little, or have no policies in place at all.

This report proceeds as follows. In Section 2, we describe the precise technical capabilities of mobile device forensic tools. With that technical background, in Section 3, we then trace the widespread proliferation of mobile device forensic tools throughout local law enforcement agencies nationwide. Next, in Section 4, we show how agencies routinely use these tools, even for the most mundane cases. In Section 5, we explain the unconstrained nature of these uses, especially as most agencies have no specific policies in place. Finally, we offer policy recommendations for state and local policymakers in Section 6.

This report seeks to not only better inform the public regarding law enforcement access to mobile phone data, but also to recenter the conversation on how law enforcement's use of these tools entrenches police power and exacerbates racial inequities in policing.

2. Technical Capabilities of Mobile Device Forensic Tools

We begin with a basic primer on how mobile device forensic tools (MDFTs) work and explain their capabilities with respect to **data extraction**, **data analysis**, and **security circumvention**.[15] Our technical analysis surfaces three key points:

- **MDFTs are designed to copy all of the data commonly found on a cellphone.** Mobile device forensic tools are designed to extract the maximum amount of information possible. This includes data like your contacts, photos, videos, saved passwords, GPS records, phone usage records, and even "deleted" data.
- **MDFTs make it easy for law enforcement to analyze and search data copied from phones.** A range of features help law enforcement quickly sift through gigabytes of data — a task that would otherwise require significantly more labor. This includes mapping where someone has been through GPS data, searching specific keywords, and searching images using image classification tools.
- **While security features like device encryption have received significant public attention, MDFTs can circumvent most security features in order to copy data.** Challenges to access can often be surmounted, because of the wide range of phones with security vulnerabilities or design flaws. Even in instances where full forensic access is difficult due to security features, mobile device forensic tools can often still extract meaningful data from phones.

MDFTs provide sweeping access to personal information on a phone, enabling "an extent of surveillance that in earlier times would have been prohibitively expensive."[16] In many circumstances, this access can be disproportionately invasive compared to the scope of evidence being sought and poses an alarming challenge to existing Fourth Amendment protections. **Our findings suggest that today's mobile device forensic tools can extract data from most phones and represent a dangerous expansion in law enforcement's investigatory powers.**

15 Little public research has explored the precise technical capabilities of mobile device forensic tools that allow law enforcement to search thousands of phones in a wide range of everyday cases. To the extent there has been a public debate on mobile device forensic tools, it has centered on the rare cases when law enforcement cannot access the contents of a phone, due to encryption.

16 United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007).

A Primer

Mobile device forensics is typically a two-step process: data extraction, then analysis. MDFTs help law enforcement accomplish both.[17] An MDFT is a computer program and its supplemental equipment (*e.g.*, cables, external storage) that can copy and analyze data from a cellphone or other mobile device.[18] The software can run on a regular desktop computer, or on a dedicated device like a tablet or a "kiosk" computer. These tools are sold by a range of companies, including Cellebrite, Grayshift, MSAB, Magnet Forensics, and AccessData.

The investigator initiates the extraction process by plugging the phone into the computer or tablet. With Cellebrite software (which is similar to other tools), once the tool recognizes the phone,[19] it will prompt the investigator to choose the kind of extraction to be performed, and, sometimes, the categories and time range of data to be extracted, as shown in Figures 2.1 and 2.2.[20] Often, in order to extract data, tools may bypass a phone's security features by taking advantage of security flaws or built-in diagnostic or development tools.

In essence, to extract data from a device, some methods work with the phone's built-in features, while others work around them. Circumventing the phone's built-in features usually entails more data access, but any extraction method can be invasive because of how much data people store on their phones.[21]

17 In order to assess the technical capabilities of current mobile device forensic tools, we reviewed technical manuals, examined software release notes, marketing materials, webinars, and digital forensics blog posts and forums. We also visited the office of one of the few public defenders in the US with these forensic tools (and forensic staff) in-house.

18 We borrow the umbrella term "mobile device forensic tools," from the National Institute of Standards and Technology. *See* NIST, *Mobile Security and Forensics*, *available at* https://csrc.nist.gov/Projects/Mobile-Security-and-Forensics/Mobile-Forensics. ("When mobile devices are involved in a crime or other incident, forensic specialists require tools that allow the proper retrieval and speedy examination of information present on the device. A number of existing commercial off-the-shelf (COTS) and open-source products provide forensics specialists with such capabilities.")

19 Typically, the tools either detect what kind of phone has been connected, or allow law enforcement to look up the kind of phone by its brand or model number. Some rarer phones running Android, Windows, and other operating systems may not be supported, but the vast majority of phones used in the US are.

20 Display of the categories and time range of data is highly fact-specific, dependent on phone make, model, operating system version, settings of the device, and extraction type. This feature is sometimes available, but not always.

21 We make these distinctions to give a sense of how the tools work and to explain how searches can technically be limited in scope based on the physical state of data when it is copied.

Figure 2.1

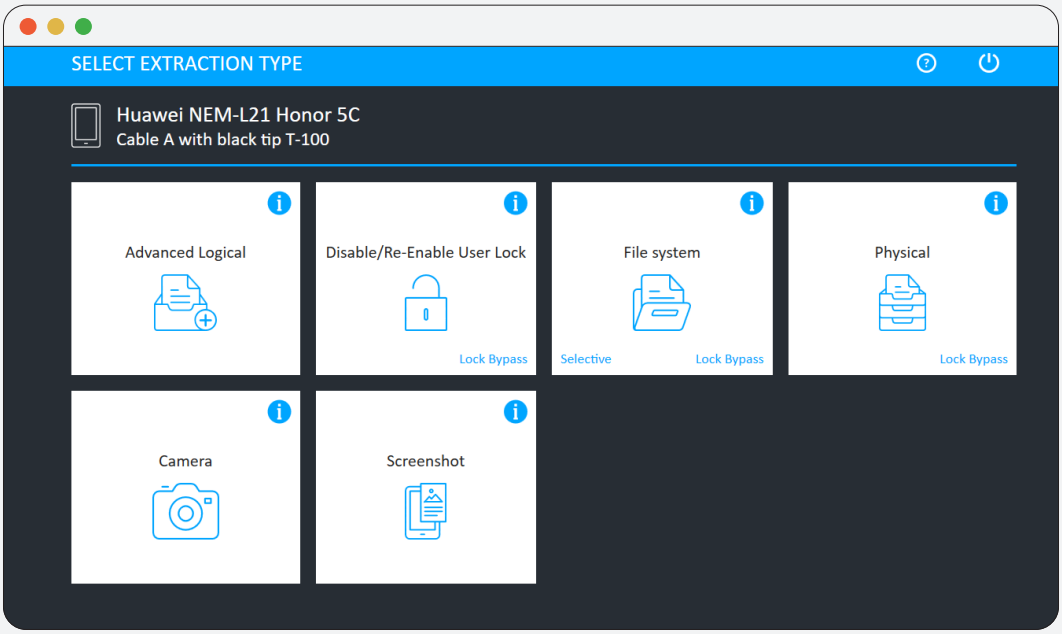


Figure 2.1 *shows one of the initial user interface screens of Cellebrite Universal Forensic Extraction Device (UFED). The "Select Extraction Type" screen offers various options for type of extraction and device unlocking.*[22]

After extraction, law enforcement use MDFTs to efficiently analyze the data — after all, the ability to copy gigabytes of phone data is not worth much if it can't be effectively searched. For example, law enforcement can sort data by the time and date of its creation, by location, by file or media type, or by source application. They can also search for key terms across the entire phone, just like you might use Google to search the web. This means police can take data extracted from different apps on the phone and view them together as a chronological series of events. It also means they can pull all pictures from the phone to view in one place, regardless of how they are organized on the phone.[23]

22 Paul Lorentz and Heather Mahalik, Cellebrite Blog, "Android Data Acquisition Simplified," July 20, 2020, *available at* https://www.cellebrite.com/en/blog/android-acquisition-simplified/.

23 When you take a photo with your phone's camera app, it's stored in a different folder than photos taken using other apps, like Instagram or Whatsapp. With just direct access to the phone's file system, someone may have to manually navigate in and out of levels of folders to find all of the images on a phone. But because images have predictable file extensions, MDFTs like Cellebrite's UFED can automate the process of looking for image files on the phone and aggregate them in one place.

Figure 2.2

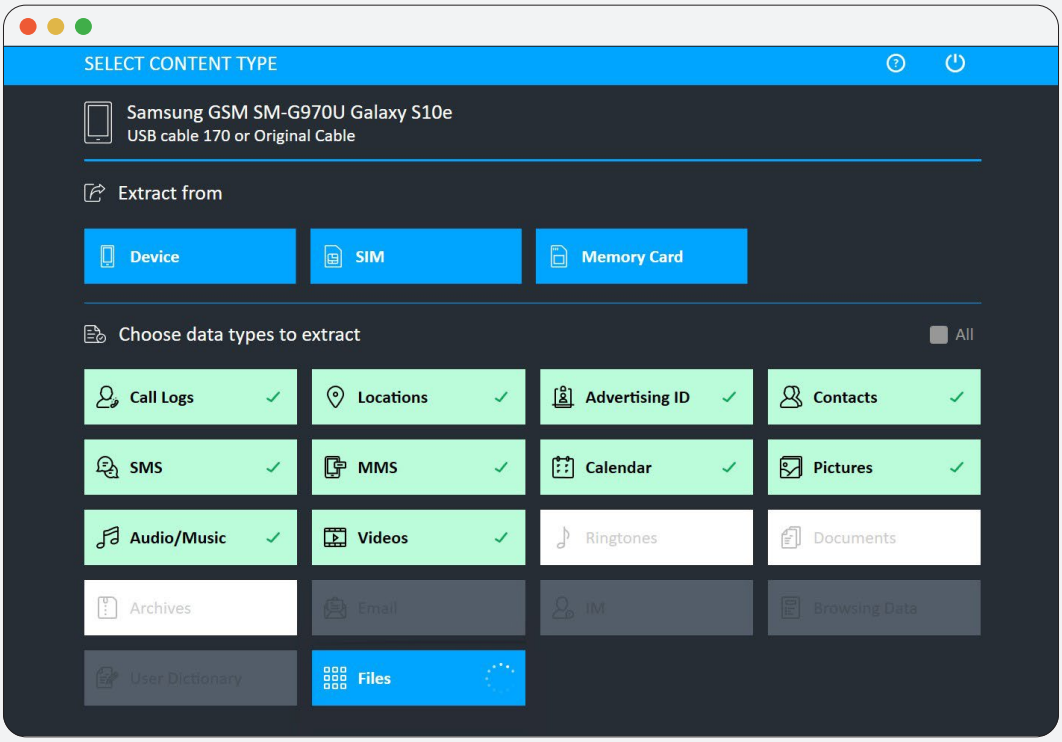


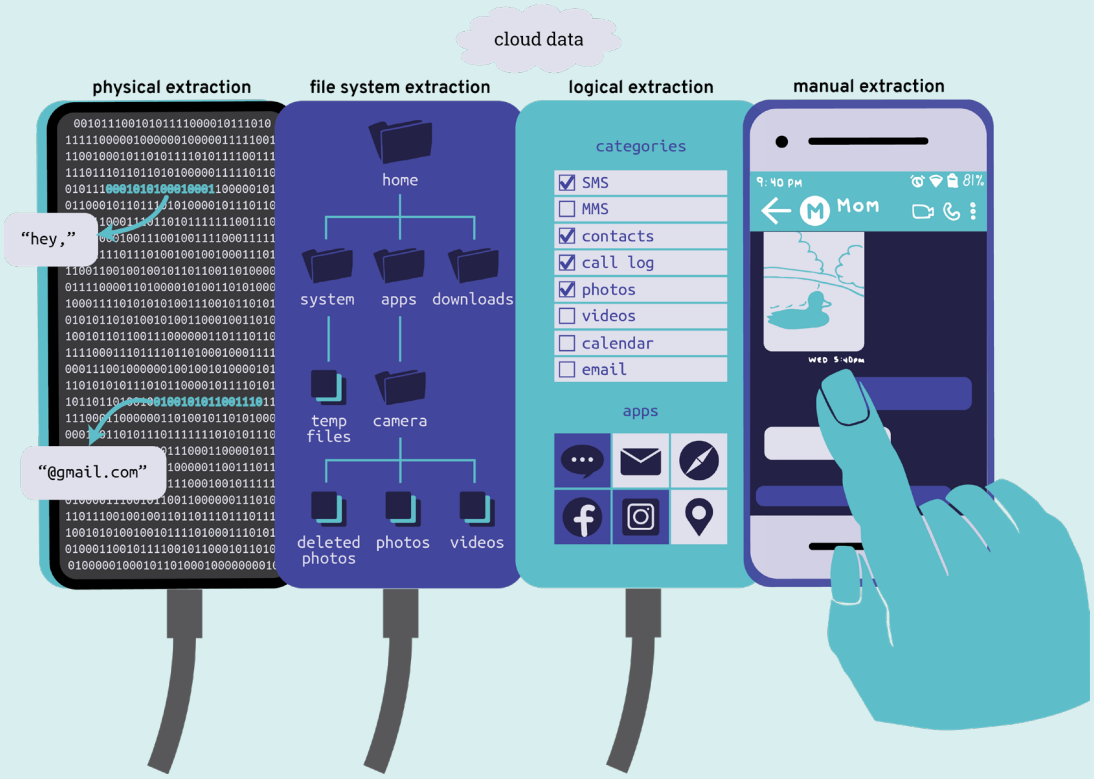
Figure 2.2 *shows the "Select Content Type" screen of the Cellebrite UFED user interface, where the user can select the categories of data they want to extract from the phone's internal storage, SIM card, and/or memory card. There is a convenient option to select "All" categories.*[24]

Device Extraction

Modern cellphones are a convenient combination of many tools: they're phones, cameras, notebooks, diaries, navigation devices, web browsers, and more. Smartphones centralize patterns of life on a single device with seemingly endless storage. MDFTs allow law enforcement to access all of this data and more, whether or not people knowingly store that information on their phones.

24 Paul Lorentz and Heather Mahalik, Cellebrite Blog, "Android Data Acquisition Simplified," July 20, 2020, *available at* https://www.cellebrite.com/en/blog/android-acquisition-simplified/.

EXTRACTION METHODS



There are a few distinct methods for copying data from phones.[25]

Manual Extraction

Manual extraction refers to when an investigator views a phone's contents like a normal user of the phone. Typically, investigators will take photographs or screenshots of the screen, email data to themselves from the phone, or videotape their exploration of a phone's contents, to prove that data was actually found on the phone. This process can compromise data integrity, as it may leave new artifacts of use on the phone.[26]

25 The mobile device forensics industry has its own labels for these methods, but often uses them imprecisely, or for marketing purposes.

26 This can create issues with forensic integrity, as a later forensic extraction would show records of these interactions. Forensic integrity refers to the assurance that police or other parties didn't interfere with or modify the data on the phone. For instance, a photo's metadata contains the last time it was accessed by the user, such that records of a police officer manually scrolling through and opening photos on a phone could show up when software is assembling a timeline of records from an extraction.

Logical Extraction

Logical extraction automates what can be done through manual extraction. In other words, it automatically extracts data that's presented on the phone to the user, using the device's application programming interface (API).[27] A logical extraction is like ordering food from a restaurant: what you can get is limited to menu items, and the waitstaff (the API) is in charge of their delivery and organization.[28]

File System Extraction

File system extraction is similar to logical extraction, but it copies even more data — such as files or other data (like internal databases) that a phone doesn't typically display to users. Continuing the restaurant analogy, this is akin to asking the chef for specific secret dishes outside of the menu, which is possible at some restaurants, but not others.

Physical Extraction

Physical extraction copies data as it's physically stored on the phone's hardware — in other words, copying data bit-by-bit, instead of as distinct files. This data has to be restructured into files for anyone to make sense of it. A physical extraction is like going to a restaurant and sneaking into the kitchen to take the food directly, as it exists in the kitchen — menu items that are waiting to be brought out, the ingredients used to prepare them, and even what's in the trash — without mediation from the waitstaff.

27 18F, "What are APIs? - Anecdotes and Metaphors," *available at* https://18f.github.io/API-All-the-X/pages/what_are_APIs-anecdotes_and_metaphors/. ("APIs are like the world's best retriever. You say, 'Fido - go fetch me X' and he brings you back X.")

28 A logical extraction tends to be the quickest method of extracting mobile phone data, because it does not copy every single piece of data on the phone, and can easily be limited in scope to certain apps or types of files (for example, only texts, calls, and contacts). Although logical extractions are usually faster, file system or physical extractions are often more desirable, because those methods can retrieve richer data, like app usage logs, and can often discover deleted data.

Smartphone photography is a prime illustration of how invasive MDFTs can be. No longer limited by physical prints, people casually accumulate thousands of photos on their phones. In 2017, an estimated 85% of all pictures taken were captured on smartphones, and the number of pictures taken each year worldwide has doubled from 660 billion in 2013 to 1.2 trillion in 2017.[29] MDFTs also extract the embedded metadata from each image file, such as the GPS coordinates of where a photo was taken, and the time and date it was taken.[30] Not only do people carry with them orders of magnitude more photos than they would without a smartphone, but they may also unwittingly carry with them a geographic record of their movements.

MDFTs extract gigabytes of data that are both casually accumulated and unexpectedly revealing. Their core utility is to extract call logs, contacts, text conversations, and photos. However, there is much more stored on phones than these obvious categories. Data from online accounts, third-party apps, "deleted" data, and even people's precise interactions with the device itself all leave behind artifacts, which MDFTs can find. Through this "gold mine of information,"[31] "the sum of an individual's private life can be reconstructed."[32]

Application Data

Virtually every app on a smartphone stores user information, from mobile web browsing history to health tracker data, mobile wallet payments, dating app conversations, and more. MDFTs can copy data for the most popular apps, and are constantly updated to support a wide range of apps. For example, Cellebrite's tools can extract and interpret data from at least 181 apps on Android's operating system, and at least 148 apps on Apple iPhones. These apps span from Google apps like Google Maps, Gmail, and Google Photos, to dating apps like Tinder, Grindr, and OkCupid, to Nike+ Run Club, to social media apps like Facebook, Instagram, Twitter, and Snapchat,

29 Felix Richter, "Smartphones Cause Photography Boom," August 31, 2017, Statista, https://www.statista.com/chart/10913/number-of-photos-taken-worldwide/.

30 Exchangeable Image File Format (EXIF) data is embedded into files, documenting, among other things, the date and time the picture was taken, camera settings like shutter speed, type of camera used, and the GPS coordinates of where a picture was taken. See "Pic2Map Photo Location Viewer" *available at* https://www.pic2map.com/. *See also* "Exif Tool" available at https://exiftool.org/.

31 Thomas Germain, "How a Photo's Hidden 'Exif' Data Exposes Your Personal Information," Dec. 6, 2019, Consumer Reports, *available at* https://www.consumerreports.org/privacy/what-can-you-tell-from-photo-exif-data/.

32 Riley v. California, 573 U.S. 373, 394 (2014).

web browsers like Chrome and Firefox, and even encrypted messenger apps like Signal and Telegram.[33] Because user-installed apps from third parties usually store data in predictable ways, it can be very easy for MDFTs to copy and parse data from them.[34]

Account-Based Cloud Data

Not all of the app data on phones are stored on the phone itself. Many apps are account-based, meaning the data in the account is synced to the cloud so that it can be accessed remotely. This means that data created elsewhere on the account may end up existing on the phone, data from the phone may be backed up remotely, and remote data may be viewable from the phone. MDFTs account for each of these possibilities, and many vendors even offer specific features or products to extract cloud backups and other remote account information. For example, Cellebrite offers a UFED Cloud product specifically for these purposes.[35]

One way that MDFTs access account-based information is by copying the account credentials that the phone stores in order to remain logged in, essentially pretending to be the user's phone. This gives investigators access to any cloud data that the user has access to from their phone, like social media data, emails, or backups of photos and other data. For the most part, this data is not encrypted. For example, an MDFT may be able to pull a remote backup of the phone from Apple's iCloud service by copying information it finds in the phone's password management system.[36] And because many services allow users to download all of their data (*e.g.*, Google's Takeout), MDFTs can access even more sources of data, some of which are shown in Figure 2.3. Figures 2.4 to 2.6 show the process of retrieving account-based cloud data in Magnet's AXIOM software.

33 Cellebrite, "Cellebrite Physical Analyzer, Cellebrite Logical Analyzer, UFED Cloud and Cellebrite Reader v7.35," Release Notes, June 2020, *available at* https://cf-media.cellebrite.com/wp-content/uploads/2020/06/ReleaseNotes_UFEDPA_735_web.pdf. Data from apps that aren't supported by an MDFT vendor may nevertheless still be extracted, but likely will not be parsed out. As a result, it would still be possible to examine this data, but it would take more time and skill.

34 Through all of these applications, mobile device forensic tools can access fairly precise location information, in-app communications, and in-app photos. Searches on the web from a browser app are also easily accessible — revealing personal interests, hobbies, fears and worries, and even medical conditions. See, e.g., Proper searching in Physical Analyzer can help you identify location data of interest," Cellebrite, *available at* https://www.youtube.com/watch?v=0byyzAO4akE; Jason Bays, Umit Karabiyik, "Forensic Analysis of Third Party Location Applications in Android and iOS," *available at* https://arxiv.org/pdf/1907.00074.pdf; Barak Goldberg, "How Health App Data Improves Location Accuracy and Activity Identification for Investigations," October 24, 2019, *available at* https://www.cellebrite.com/en/blog/how-health-app-data-improves-location-accuracy-and-activity-identification-for-investigations/; Heather Mahalik, "How to View Chat Conversations in Cellebrite Physical Analyzer," June 1, 2020, *available at* https://www.cellebrite.com/en/ask-the-expert/how-to-view-chat-conversations-in-cellebrite-physical-analyzer/; Ryan Philips, "Infant death case heading back to grand jury," May 8, 2019, Starkville Daily News, *available at* https://www.starkvilledailynews.com/infant-death-case-heading-back-to-grand-jury/article_cf99bcb0-71cc-11e9-963a-eb5dc5052c92.html. (Internet search histories, from law enforcement's point of view, give investigators a supposed map to your intent, mental state, or motives. In this case, Latice Fisher's internet search results gave law enforcement a "motive" — if she wanted to be pregnant, why was she looking up medication abortion?).

35 Cellebrite UFED Cloud, https://www.cellebrite.com/en/ufed-cloud.

36 This can also be accomplished via a warrant to the holding company itself, *e.g.*, Apple. This method is legally dubious and would require a second warrant in most instances, but MDFTs are also built for internal corporate investigations where employers have more control over their employee's accounts.

Figure 2.3

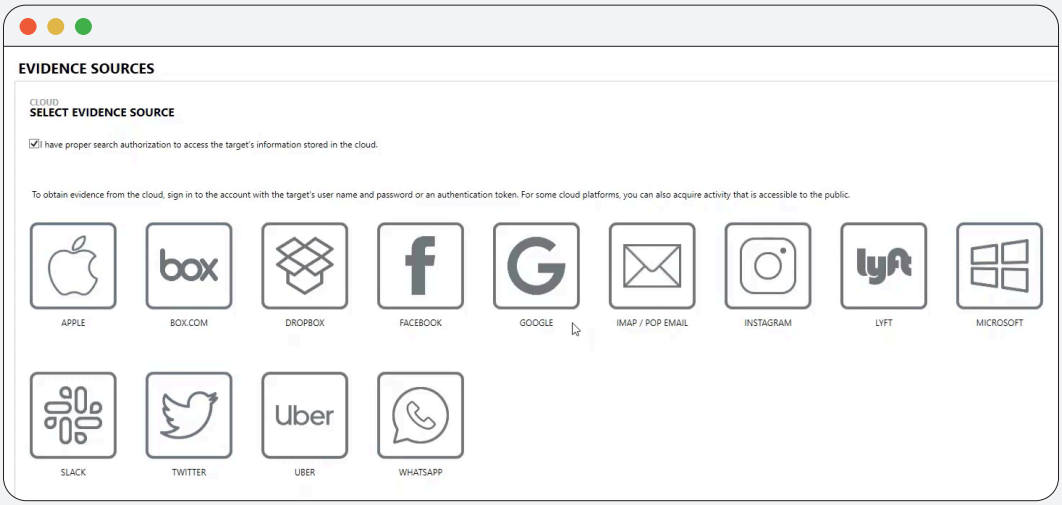


Figure 2.3 *shows the user interface of Magnet AXIOM, displaying options to extract remote data from various internet-based accounts.*[37]

Figure 2.4

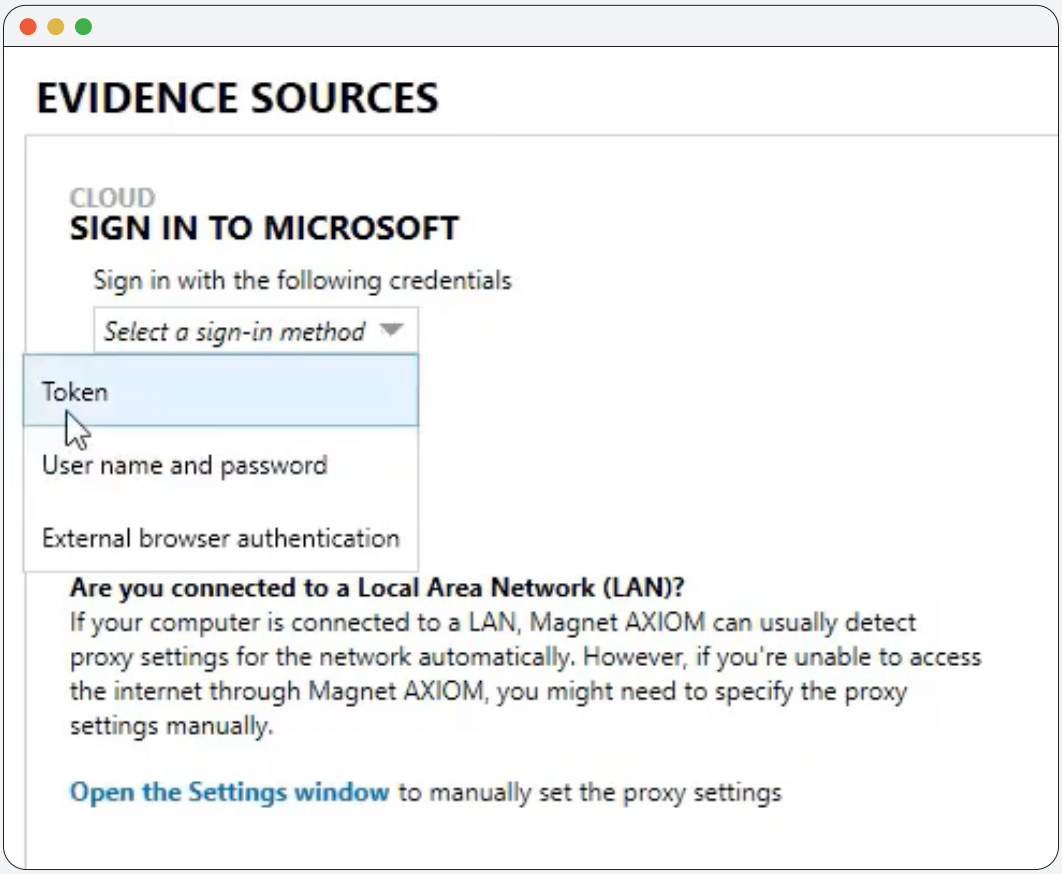


Figure 2.4 *shows how Magnet AXIOM allows investigators to use extracted authentication tokens to sign into the device owner's Microsoft account*[38]

37 Magnet Forensics, "Cloud Forensics For Law Enforcement: A Search Warrant is Great But Not Always Needed For Cloud Data," May 19, 2020, *available at* https://www.youtube.com/watch?v=q8pqZ8N4zd8.

38 Magnet Forensics, "Cloud Forensics For Law Enforcement: A Search Warrant is Great But Not Always Needed For Cloud Data," May 19, 2020, *available at* https://www.youtube.com/watch?v=q8pqZ8N4zd8.

Figure 2.5

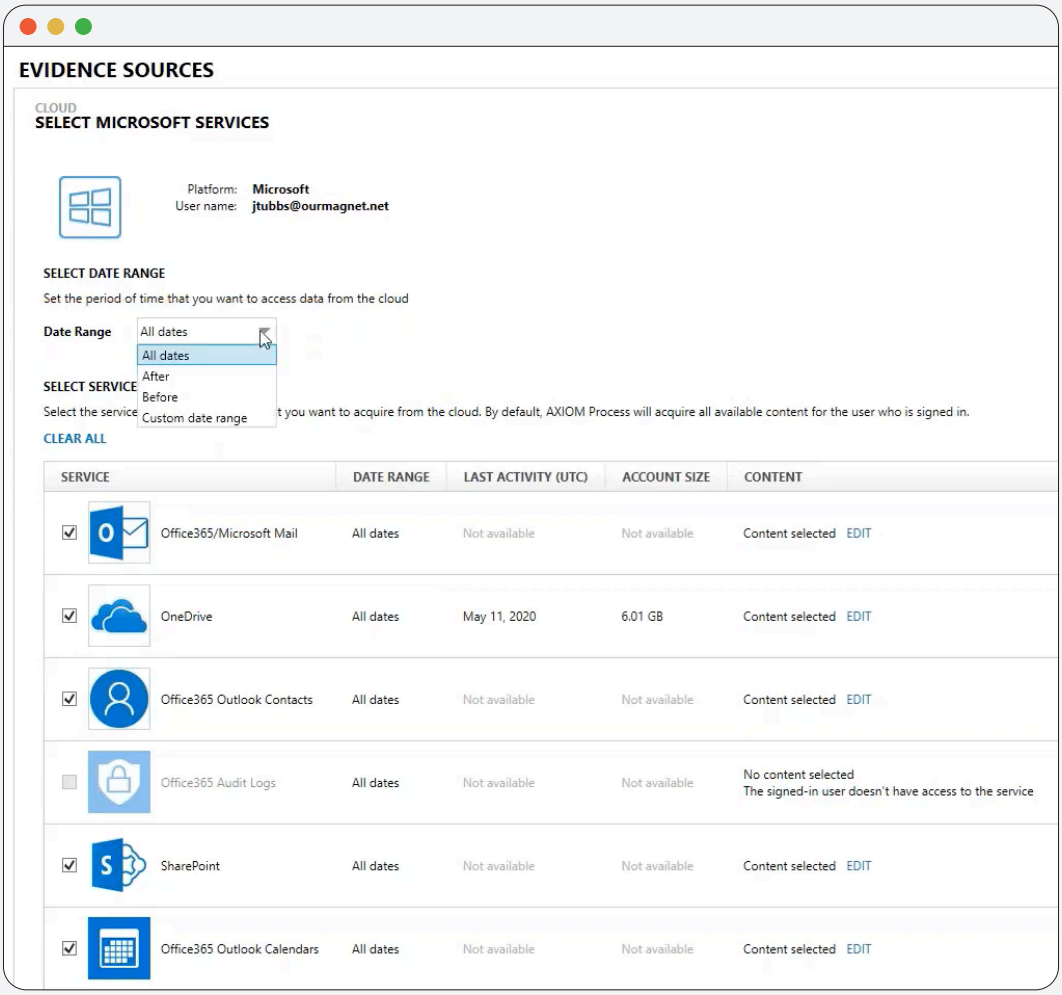


Figure 2.5 *shows the Microsoft services that Magnet AXIOM can extract remotely, like Microsoft OneDrive or Office365.*[39]

39 Magnet Forensics, "Cloud Forensics For Law Enforcement: A Search Warrant is Great But Not Always Needed For Cloud Data," May 19, 2020, *available at* https://www.youtube.com/watch?v=q8pqZ8N4zd8.

Figure 2.6

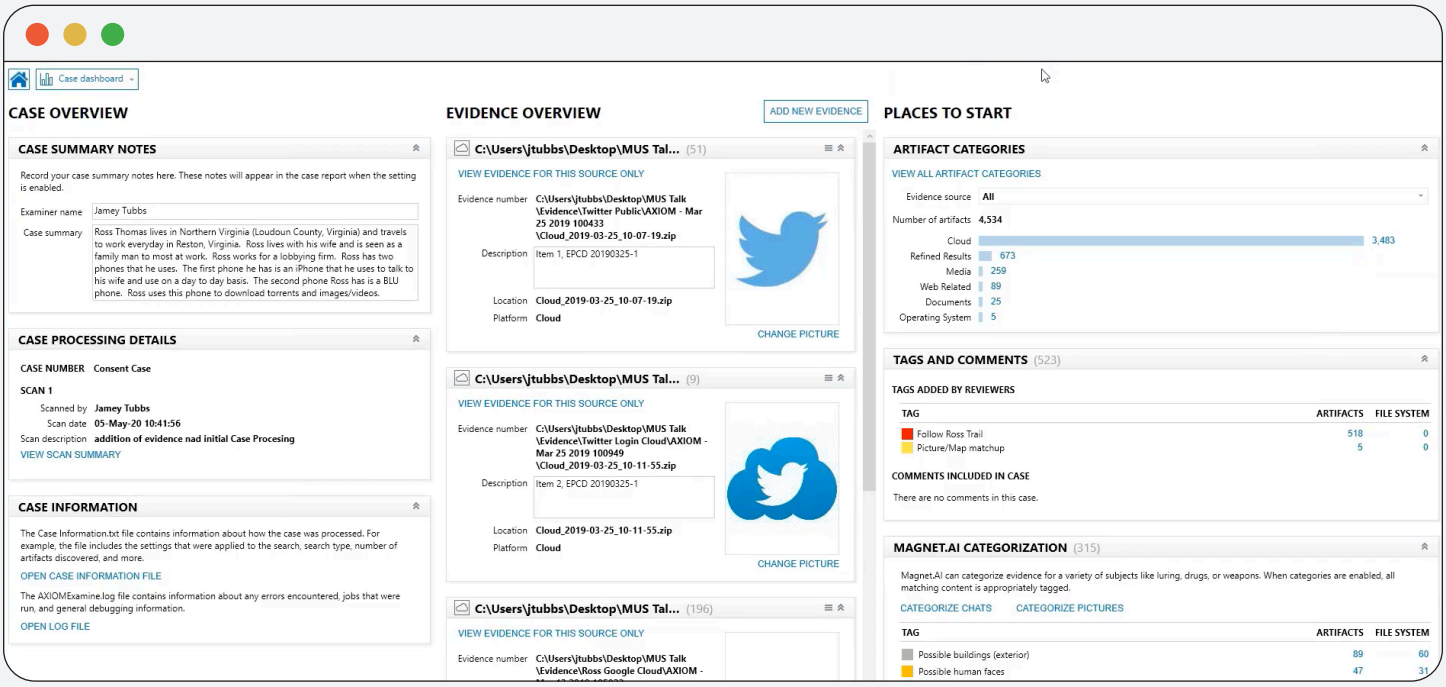


***Figure 2.6** shows the dashboard interface of Magnet AXIOM, showing access to Google and Twitter account data, along with other available data called "artifacts." There are also options to search by image content ("Magnet.AI Categorization") as well as "Keyword Matches" and "Passwords and Tokens."*[40]

One major source of information is Google's Location History. Any user with their location history turned on in their Google account will have records of their location stored online in their Google account. These location records are precise and can span years, and many users do not realize this data is being stored. In fact, Google stores this information even when the user is not doing anything that uses the phone's location. If law enforcement has physical access to a phone, they can use an MDFT to log into the user's Google account and extract this location history, which can be displayed as a timeline or map, shown in Figure 2.7.

40 Magnet Forensics, "Cloud Forensics For Law Enforcement: A Search Warrant is Great But Not Always Needed For Cloud Data," May 19, 2020, *available at* https://www.youtube.com/watch?v=q8pqZ8N4zd8.

41 Marc Knoll, trendblog.net, "Can't remember last night? Google's Location History can tell where you were," November 28, 2016, *available at* https://trendblog.net/cant-remember-last-night-google-location-history-can-help-you/.

Figure 2.7

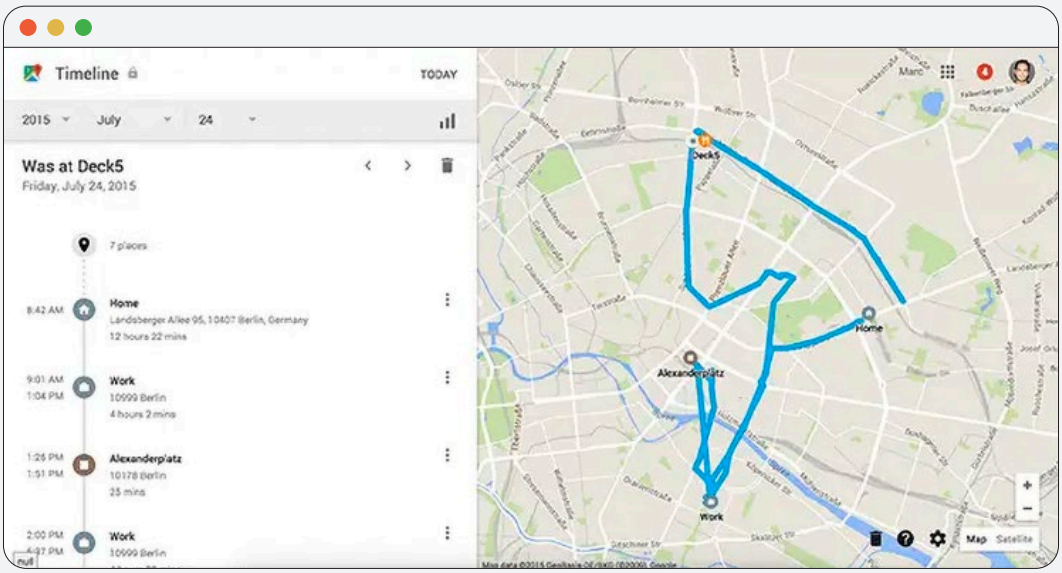


Figure 2.7 *shows a user's Google location history as a timeline and also on a map. The timeline can show how long a user stayed at a particular location.*[41]

"Deleted" Data

Mobile device forensic tools can sometimes access "deleted" data from phones.[42] Often, deleting a file on a phone isn't permanent, and the file can be recovered — similar to how most computers have a "recycling bin" for getting rid of files. Deleting a file from the phone itself often doesn't delete it from a user's cloud backup, or the variety of other places it may have been redundantly stored at some point. Even "permanently deleted" files can sometimes be recovered with the

42 There is a difference between deleting a file from the phone's operating system and physically clearing the bits from the device's hardware. Traditionally, when an electronic device permanently deletes a file, this means that the operating system declares the space where the file was stored as "free" to be overwritten, and removes the file from the file system. However, newer storage hardware must clear an entire block of space before writing to any part of that block, and many devices routinely clear space immediately after a file is deleted from the device interface in order to quicken this process. Another factor is that encryption can prevent permanently deleted files from being recovered. That means, for some newer models of phones, "deleted data" is more likely to actually be cleared.

For example, since iPhones encrypt each file on the phone individually with its own key, files deleted from the device are essentially impossible to recover because they are encrypted and the key is deleted. So even if the data itself remains, it's completely unintelligible. On the other hand, non-permanent deletion is very common in digital devices because users often accidentally delete files and want to retrieve them. An example is when you drag a file over to your computer's recycling bin — the space where it is physically stored is not actually marked as "free" to be overwritten, and the file sticks around until it's either permanently deleted or restored. Also, cloud-based storage may keep track of deleted files, such that they are permanently deleted from the device but remain tracked elsewhere. iCloud keeps track of deleted files for 30 days and can recover them at the request of the user, unless they are also permanently deleted from iCloud. This means that if a user syncs files on their phone to their iCloud account, and then deletes the files from their phone, the files can likely be recovered by looking for them in iCloud as opposed to on the device's storage.

right tools, because data isn't always physically wiped from storage when it's deleted — it's just marked as "free space" until it's overwritten by other data. However, access to deleted data depends on a range of factors, including phone hardware,[43] encryption design,[44] and extraction method.[45]

Other Data on a Phone

Phones also record vast amounts of data about how people interact with their devices — data that's considered a "digital forensics goldmine."[46] For example, MDFTs can recover logs showing when applications were installed, used, and deleted, as well as how often someone used an application. Other data includes when a device was locked or unlocked, when a message was viewed, when a Bluetooth device was connected, words added to a user's dictionary, notification contents, as well as past "spotlight searches" on iPhones, a search function that combines on-device and web results. Phones can even store screenshots of apps as they're brought out of focus so users can see all of the apps they have open.[47] These "behind the scenes" data are stored to improve the phone's performance, but they leave incredibly detailed artifacts that MDFTs can later analyze.[48]

43 For example, some storage devices must physically clear entire blocks of data before they can write to any part of it, meaning data is more likely to be wiped within a short period of time. *See* "What is trim and active garbage collection?," Crucial Blog, *available at* https://www.crucial.com/articles/about-ssd/what-is-trim. ("Flash memory, which is what SSDs are made of, cannot overwrite existing data the way a hard disk drive can. Instead, solid state drives need to erase the now invalid data. The problem is that a larger unit of the memory, a block, must be erased before a smaller unit, a page, can be written.")

44 Similarly, in cases where the phone encrypts each file individually (like on iOS), deleting a file that's not backed up in the cloud also gets rid of the corresponding key. So although deleted data might stick around on the hardware, it is likely encrypted and without any key to decrypt it — therefore useless. *See* Oleg Alfonin, "The iPhone Data Recovery Myth: What You Can and Cannot Recover," July 10, 2020, Elcomsoft Blog, *available at* https://blog.elcomsoft.com/2020/07/the-iphone-data-recovery-myth-what-you-can-and-cannot-recover/. ("In the iPhone, almost every user file is stored encrypted. The file system employs file-based encryption with separate, unique encryption keys for every file. Once a file is deleted, the encryption key is [also] destroyed, making it impossible to "undelete" or recover that file.")

45 To attempt to recover permanently deleted data directly from the device, law enforcement must perform a physical extraction, which copies the data bit-by-bit as it's stored on the phone.

46 Mati Goldberg, "How a Suspect's Pattern-of-life Analysis is Enhanced with KnowledgeC Data," Cellebrite, June 13, 2019, *available at* https://www.cellebrite.com/en/blog/how-a-suspects-pattern-of-life-analysis-is-enhanced-with-knowledgec-data/.

47 Cellebrite, "UFED, UFED Physical Analyzer, UFED Logical Analyzer, & Cellebrite Reader v7.28," Release Notes, January 2020, *available at* https://cf-media.cellebrite.com/wp-content/uploads/2020/01/ReleaseNotes_PA-7.28_A4.pdf. ("[W]hen a user swipes up on the screen while using an application in an iOS device, or presses the home button, or if they receive a call while using an application, the active application is sent to the background. A 'snapshot' of the current screen is taken in order to provide a smooth visual transition while changing screens. UFED Physical Analyzer can now recover all these snapshots under images data files. You can also filter by this file format."), at 4.

48 *Id.*

Figure 2.8

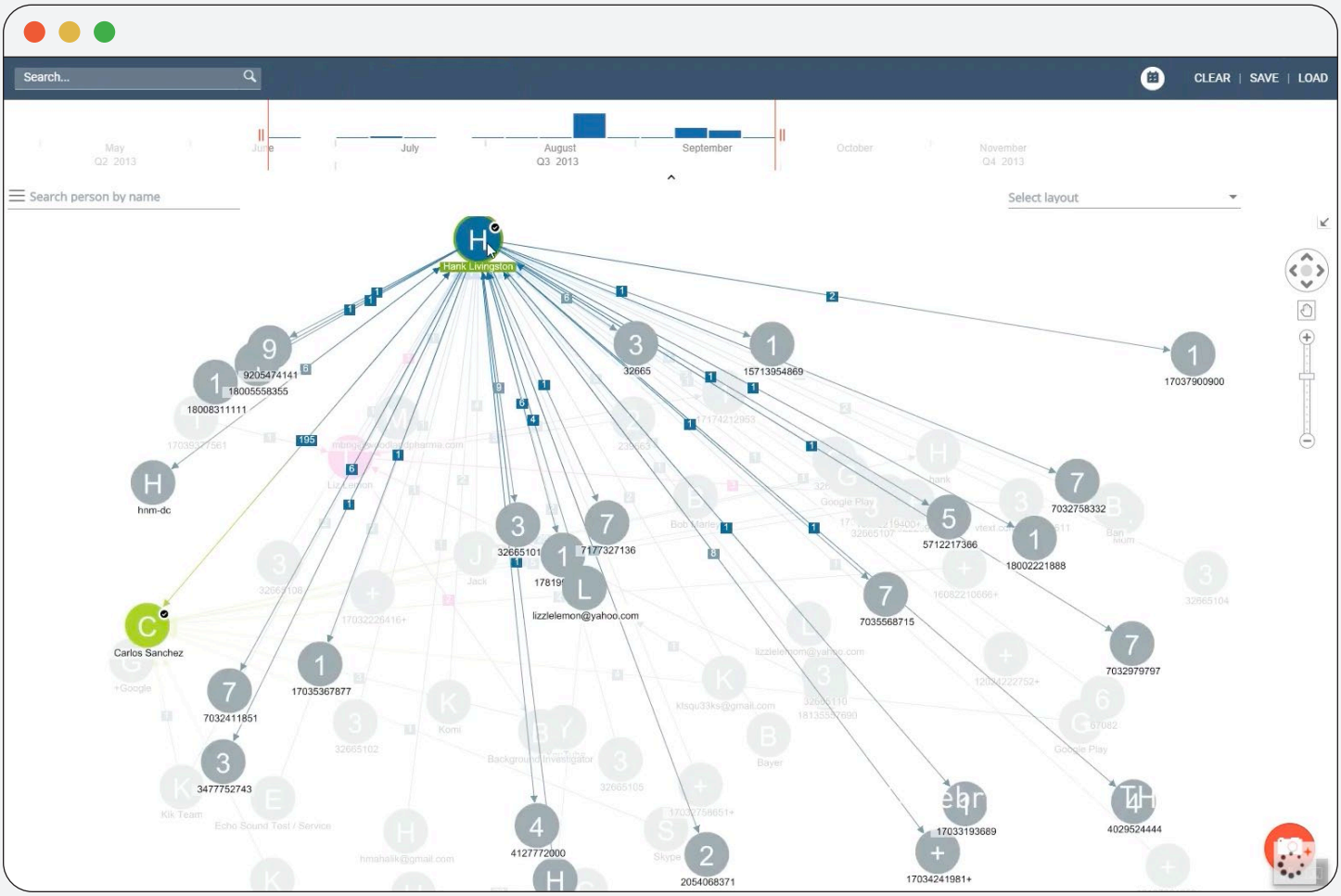


Figure 2.8 *shows a screenshot of Cellebrite Analytics, now called Cellebrite Pathfinder, which infers a social graph based on communication events. This graph shows the participants of communications extracted from the phone, as well as a histogram of communication volume over time.*[49]

Ultimately, MDFTs offer law enforcement a powerful window into almost all data stored on — or accessible from — a cellphone, as well as substantial amounts of data that users cannot see. These tools are invasive, especially for people who depend on their phone for internet access because they do not have a computer or broadband.

49 Heather Mahalik, Cellebrite Blog, "When Data Overwhelms You, Cellebrite Pathfinder Empowers You With Actionable Insights," March 19, 2020, *available at* https://www.cellebrite.com/en/ask-the-expert/when-data-overwhelms-you-analytics-empowers-you-with-actionable-insights/.

Device Analysis

Once data is extracted, MDFTs accelerate data analysis with powerful visualization tools. For example, law enforcement can view full text conversations as a chat instead of individual messages in a database; trace a user's actions on a map or chronological timeline using "patterns of life" metadata; sort data by file type regardless of its location on the phone (*e.g.*, all of the images on the phone, whether they came from the camera app or an email attachment); or create network graphs, like in Figure 2.8, to infer social relationships using contact data.

Search features also help law enforcement quickly navigate extracted data. These features include basic keyword searches, as well as more advanced techniques. Some mobile device forensic tools now use machine learning-based text and image classification to categorize file contents, including individual frames in a video.[50] For instance, as shown in Figure 2.9, Cellebrite offers a "search by face" function, whereby law enforcement can compare an image of a face to all other images of faces found on the phone. Cellebrite also allows law enforcement to define new image categories by feeding its software a small set of example images to search for (for example, searching for hotel rooms by giving the software a set of five images of hotel rooms that were taken from Google images). As another example, Magnet Forensics' AXIOM can employ text classification models in attempts to detect "sexual conversations,"[51] or to filter conversations by topics ranging from family, drugs, money, and police.[52] Tools also allow law enforcement to search for a specific address on a map and view all "location related" events surrounding a point of interest.

50 Christa Miller, "Industry Roundup: Image Recognition And Categorization," Forensic Focus, July 8, 2019, *available at* https://www.forensicfocus.com/articles/industry-roundup-image-recognition-and-categorization/. ("Thanks to developments in machine learning and artificial intelligence, a number of vendor products have been able to incorporate rapid recognition or categorization tools into their software.")

51 Magnet Forensics, "Taking Magnet.AI Up a Notch in AXIOM 2.0," April 25, 2018, *available at* https://www.magnetforensics.com/blog/taking-magnet-ai-up-a-notch-in-axiom-2-0/. ("With the launch of AXIOM 2.0, the Magnet.AI module now identifies images that may contain depictions of child sexual abuse, nudity, weapons, and drugs. We've also expanded our text classification model to detect potential sexual conversations in addition to child luring (both in the English language).")

52 Cellebrite, "Cellebrite Pathfinder 8.2: Cutting edge textual analysis takes the edge off searching through conversations," February 20, 2020, *available at* https://www.cellebrite.com/en/productupdates/analytics-desktop-8-2-cutting-edge-textual-analysis-takes-the-edge-off-searching-through-conversations/. ("Cellebrite Pathfinder v8.2 introduces cutting edge textual analysis. Building on Text Analytics and NLP (Natural Language Processing), Topic Identification allows investigators to focus on the interesting communications with utmost ease and speed.")

Figure 2.9

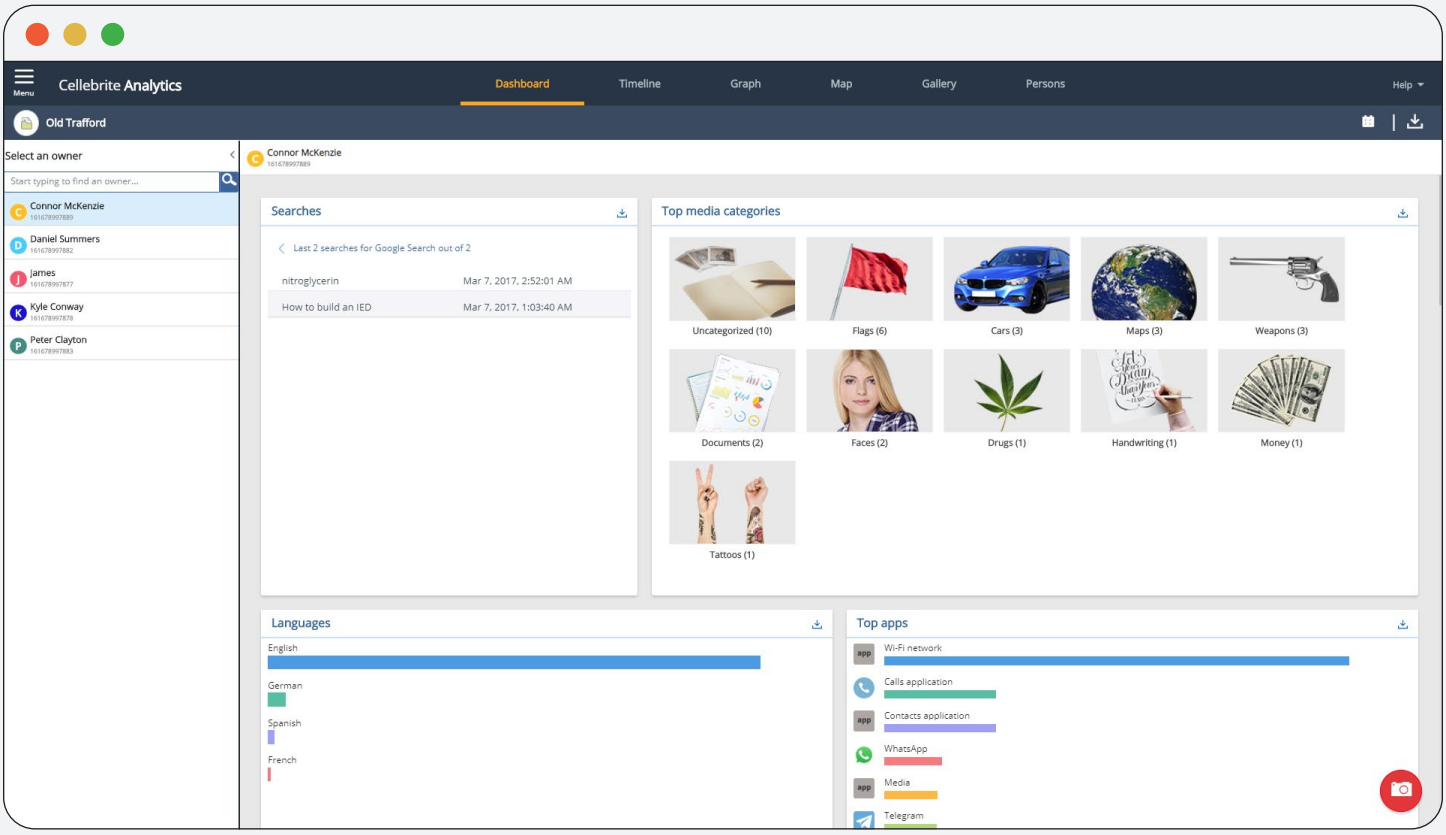


Figure 2.9 *sshows Cellebrite Pathfinder, which allows investigators to perform an image-based search using pre-generated filters, like "Flags," "Faces," "Drugs," "Weapons," or "Tattoos." The software also has features, shown at the top, such as "Timeline" (for viewing events on the phone chronologically), "Graph" (to make a social network graph of contacts and communications), "Map" (to display all phone events and media with location data on a map), "Gallery" (to view all media like photos and videos in one place regardless of source), and "Persons" (to view profiles of discrete users on the phone).*[53]

MDFTs can also apply these visualization features to data from multiple phones or other data sources together, to find links across the devices, like common contacts, call or text records, or account information. They can even look for common geolocation or purchase data between phones, to show that the phones were at some point near each other, say, to buy things at the same place and time. What might otherwise take weeks to do manually can be done automatically.

53 Cellebrite, "Cellebrite Pathfinder," *available at* https://www.cellebrite.com/en/pathfinder/.

Security Circumvention

Phone manufacturers like Apple, Samsung, Google, and others have built sophisticated security features designed to protect user information in case, for example, a phone is lost or stolen. Manufacturers design these features to balance[54] user convenience with security and privacy.[55] This balancing act can lead to design flaws, software bugs, or other vulnerabilities that law enforcement can then exploit.

MDFTs can often circumvent the security features built into phones in order to extract user data. In response, phone manufacturers continuously patch known security vulnerabilities and develop even more advanced security features, seeking to thwart unwelcome access, including by MDFTs. This "cat-and-mouse game" has evolved over years and continues to this day. MDFTs use numerous tactics to gain access to users' data on phones, such as guessing a password, exploiting a vulnerability or developer tool, or even installing spyware. With rare exception, MDFTs can nearly always access and extract some, if not all, data from phones.

MDFTs Can Extract Data From Nearly All Popular Phones

Many of the phones that law enforcement seize can be extracted with off-the-shelf tools. Departments often purchase tools from multiple vendors to increase the likelihood that any given phone can be extracted. Large MDFT vendors, like Cellebrite and Magnet Forensics, support extraction for thousands of phones. For example, in March 2016, Cellebrite supported logical extractions for 8,393 devices, and physical extractions for 4,254 devices. Since then, out of the five major phone manufacturers, Cellebrite added the most physical extraction support for Samsung (346 devices). Crucially, Cellebrite has also added lock-bypass support (*e.g.*, by exploiting a vulnerability to force the phone to skip the passcode-checking step when it turns on) for about 1,500 devices since March 2016. However, as of 2017, 28% of smartphone users did not even have screen lock enabled on their phones.[56]

54 IBM's study found that many people would still be willing to trade security for convenience if it would save them even a few seconds. Young adults are particularly likely to demand a more convenient experience, with nearly half of those under the age of 35 saying they would use a less secure method if it would save them between 1 and 10 seconds. See "Beyond Passwords," *The Atlantic*, *available at* https://www.theatlantic.com/sponsored/ibm-2018/beyond-passwords/1859/.

55 Manufacturers deploy these security features for a variety of reasons. For example, Apple has argued that "information needs to be protected from hackers and criminals who want to access it, steal it, and use it without our knowledge or permission," and also because it believes privacy is a fundamental human right. See Apple, "Introduction to Apple platform security" *available at* https://support.apple.com/guide/security/introduction-seccd5016d31/web.

56 Aaron Smith, "Americans, Passwords, and Mobile Security," January 26, 2017, Pew Research, https://www.pewresearch.org/internet/2017/01/26/2-password-management-and-mobile-security/.

MDFT vendors add support for new devices and software at a rapid pace, especially for popular devices. For example, about 45% of U.S. smartphone users have iPhones.[57] iOS 13 was released on September 19, 2019,[58] and Cellebrite announced support for Apple devices running iOS 13 less than three weeks later.[59]

Although iPhones encrypt data by default, there are many phones that still do not support encryption, or have easily surpassed encryption schemes, like lower-end Android phones.[60] Other common targets are phone chipsets or developer tools, which tend to be consistent across brands, meaning a single exploit or method can be successfully reused for a large number of devices. For example, independent researchers recently released the "checkm8" exploit, which takes advantage of a permanent[61] vulnerability in all but the newest iPhone chipsets, providing an opportunity for MDFTs to extract data without knowing the passcode.[62]

MDFTs Can Often Bypass Security Measures

Sometimes, MDFTs cannot immediately extract data from a phone due to encryption and other security features. In those cases, MDFTs often turn to another strategy: repeatedly trying random passwords until guessing the correct one, which then allows the MDFT to decrypt the phone's contents. MDFTs can also look for unencrypted data on a phone when its password is difficult to guess.

For many phones, the decryption key is generated from the password, so the strength of the protection that encryption provides is directly related to the length and complexity of the user's password. Shorter or common passcodes are easier to guess. In April 2018, Professor Matthew Green estimated that brute-forcing a passcode on an iPhone would take no more than 13 minutes

57 S. O'Dea, "Share of smartphone users that use an Apple iPhone in the United States from 2014 to 2021," February 27, 2020, Statista, https://www.statista.com/statistics/236550/percentage-of-us-population-that-own-a-iphone-smartphone/.

58 "iOS 13," 9TO5Mac, https://9to5mac.com/guides/ios-13/.

59 Cellebrite, "UFED Ultimate and UFED InField v7.24 Release Notes," October 2019, https://cf-media.cellebrite.com/wp-content/uploads/2019/10/ReleaseNotes_UFED_v7.24.pdf.

60 For example, some do not have hardware-enforced security features, making it easy for mobile device forensic tools to get past locks to copy data. Some Android phones have decryption keys that are simply generated from the phrase "default_password" instead of the user's password. Others have lock screens that are only visual, and don't prevent data transfer with MDFTs. Some even have leaked signed firmware that allows tools to use the manufacturer's proprietary decrypting data reading tools, with no password needed. See Oleg Alfonin, "Demystifying Android Physical Acquisition," May 29, 2018, Elcomsoft Blog, *available at* https://blog.elcomsoft.com/2018/05/demystifying-android-physical-acquisition/.

61 The bug is in read-only (as opposed to writeable) memory, such that there are physically enforced protections against patching it.

62 Dan Goodin, "Developer of Checkm8 explains why iDevice jailbreak exploit is a game changer," Ars Technica, September 28, 2019, *available at* https://arstechnica.com/information-technology/2019/09/developer-of-checkm8-explains-why-idevice-jailbreak-exploit-is-a-game-changer/.

for a 4-digit passcode, 22 hours for 6 digits, and 92 days for 8 digits. The default length prompted by iOS is 6 digits.[63] For an advanced off-the-shelf tool like GrayKey or Cellebrite Premium, this can mean guessing passcodes in under a day.

However, since the release of the iPhone XS, XR, and XS Max in 2018, which are no longer vulnerable to the major hardware flaw in previous iPhones, the rate of password guessing is much more limited, making them more difficult to access. Nonetheless, the September 2020 Cellebrite Advanced Services information sheet says that they can "determine locks and perform a full file system extraction of all iPhone devices from iPhone 4S to the latest iPhone 11 / 11 Pro / Max running the latest iOS versions up to the latest 13.4.1."[64]

Separately, without even needing to guess the password, MDFTs can take advantage of the fact that, in order to balance convenience and security, phones don't actually encrypt all data on a device.[65] Most people still want to receive calls and texts and hear alarms after their phone restarts but before they've unlocked it. Accordingly, certain data is unencrypted upon startup, including some account information that is needed to receive notifications. For example, Cellebrite's UFED Premium claims it can extract data even on locked iPhones.[66] The data that appears "before first unlock" (BFU) even includes parts of Apple's password manager.[67] Once the iPhone is unlocked after being powered on — "after first unlock" (AFU) — even more unencrypted data becomes available. Vendors like Oxygen Forensics and Grayshift advertise their ability to find and extract these unencrypted data. Figure 2.10 shows all the artifacts exacted from

63 Matthew Green (matthew_d_green), "Guide to iOS estimated passcode cracking times (assumes random decimal passcode + an exploit that breaks SEP throttling): 4 digits: ~13min worst (~6.5avg) 6 digits: ~22.2hrs worst (~11.1avg) 8 digits: ~92.5days worst (~46avg) 10 digits: ~9259days worst (~4629avg)," 10:17am, Apr 16, 2018, https://twitter.com/matthew_d_green/status/985885001542782978.

64 Cellebrite, "Cellebrite Advanced Services," September 2020, https://cf-media.cellebrite.com/wp-content/uploads/2020/09/SolutionOverview_CAS_2020.pdf.

65 The exception to this is Android's Secure Startup, which, when enabled by the user, prevents the phone from fully booting until the user password is entered and keeps all data encrypted. This means users can't receive notifications or alarms without entering their password, which most people would not casually opt into doing for its inconvenience. However, vendors like Cellebrite have advertised their ability to circumvent this for some phones with Secure Startup enabled. See Joanna Shemesh, "Cellebrite Advanced Services Solves the Toughest Encryption Problems for Apple and Android Devices," September 24, 2019, *available at* https://www.cellebrite.com/en/blog/cellebrite-advanced-services-solves-the-toughest-encryption-problems-for-apple-and-android-devices/. ("Take, for example, Secure Startup, which is an encryption mode. Two years ago, we were the first in the world to offer support for that feature. To this day, no other vendor has managed to support it.")

66 Cellebrite, "Premium access to all end-high iOS and Android Devices," May 2020, *available at* https://cf-media.cellebrite.com/wp-content/uploads/2020/05/ProductOverview_CellebritePremium_A4_web.pdf.

67 This data includes account information like usernames, which can provide leads to law enforcement for other sources of evidence.

a BFU extraction by Oxygen Forensic Detective.[68] There are thousands of files available, and as one software reviewer highlights: "Yes, all this data is from BFU extraction. Pay attention to the 'Image Categorization' – this [is] the new built-in feature . . . that allows [you] to detect, analyze, and categorize images from twelve different categories, such as weapon, drugs, child abuse, extremism and more."[69]

Figure 2.10

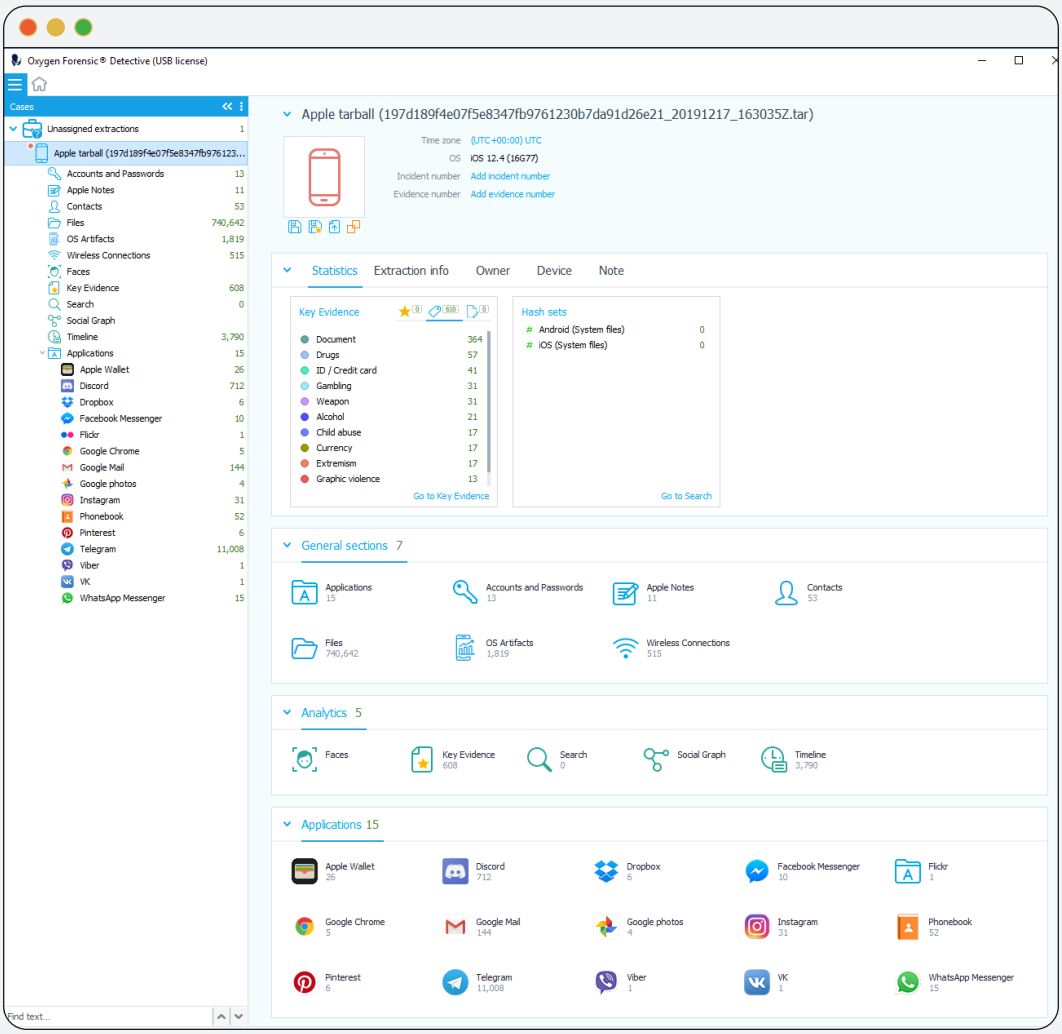


Figure 2.10 *shows the result of a "Before First Unlock" extraction by Oxygen Forensics Detective on an Apple iPhone running iOS 12.4. The software detects thousands of files, including 11,000 Telegram files, 712 Discord files, 11 Apple Notes files, 53 Contacts files, 144 files from Google Mail, 26 files from Apple Wallet, and 13 files marked as "Accounts and Passwords."*[70]

68 Vladimir Katalov, "BFU Extraction: Forensic Analysis of Locked and Disabled iPhones," December 20th, 2019, Elcomsoft Blog, https://blog.elcomsoft.com/2019/12/bfu-extraction-forensic-analysis-of-locked-and-disabled-iphones/.

69 *Id.*

70 Vladimir Katalov, Elcomsoft Blog, "BFU Extraction: Forensic Analysis of Locked and Disabled iPhones," December 20, 2019, *available at* https://blog.elcomsoft.com/2019/12/bfu-extraction-forensic-analysis-of-locked-and-disabled-iphones/.

When password guessing fails, and BFU or AFU extractions are not workable, MDFTs provide yet other tactics to gain access. For example, Grayshift offers a tool called HideUI, which is essentially spyware that law enforcement installs on a phone in order to record future password entries to eventually access the phone.[71]

Of course, there are even more basic approaches. Law enforcement often seek "consent" to search a person's phone, but that consent is often not as voluntary as one may assume. People being arrested likely do not understand how much information they are giving away when they consent to a search, even when they presume that information will be exculpatory — yet consent searches happen frequently. We highlight the problems with consent searches in Sections 4 and 6 below.

When All Else Fails, Vendors Offer "Advanced Services"

Although we've previously described how the majority of phones can be partially or completely searched, there are some phones that might take specialized effort. For example, one investigator describes being able to get extractions from 25 of 33 (76%) of phones in his cases using just Cellebrite UFED and GrayKey in his lab.[72] To cover the remaining portion of phones, Cellebrite offers "Advanced Services," which, according to their website, can unlock iOS devices including iPhone 11, 11 Pro/Max, and Android devices including newer Samsung phones.[73]

According to our public records research, the base cost of unlocking and extracting data from a phone using Advanced Services is $1,950, though they can be cheaper in bulk. In 2018, the Seattle PD purchased 20 "actions" for $33,000,[74] and email records show them using Cellebrite to unlock various iPhones within days or weeks.[75] For example, Seattle PD sent Cellebrite an

71 Olivia Solon, "iPhone spyware lets police log suspects' passcodes when cracking doesn't work," NBC News, May 18, 2020, *available at* https://www.nbcnews.com/tech/security/iphone-spyware-lets-cops-log-suspects-passcodes-when-cracking-doesn-n1209296.

72 "Possible Alternatives to Cellebrite," November 29, 2018, Reddit "/r/computerforensics," *available at* http://web.archive.org/web/20200625164840/https://www.reddit.com/r/computerforensics/comments/a1j43j/possible_alternatives_to_cellebrite/.

73 Cellebrite, "Cellebrite Advanced Services: Comprehensive Services to Access Inaccessible Data," May 2020, *available at* http://web.archive.org/web/20200626143910/https://cf-media.cellebrite.com/wp-content/uploads/2020/05/Cellebrite_Services_CAS_A4_2020_web.pdf

74 See Seattle Police Department Purchase & Supply Request, https://beta.documentcloud.org/documents/20394507-installment_101.

75 *See* Seattle Police Department, Cellebrite Advanced Services emails, https://beta.documentcloud.org/documents/20394508-installment_51.

iPhone X with an unknown 6-digit passcode in August 2018: Cellebrite received it on August 24, began processing on August 28, finished processing on September 12, and shipped it back the same day. Today, Cellebrite Premium allows law enforcement to bring these advanced unlocking capabilities in-house for $75,000 to $150,000, based on the frequency of use.[76]

3. Widespread Law Enforcement Adoption Across the United States

To date, most public reporting on law enforcement use of mobile device forensic tools has focused on law enforcement authorities with the most resources, like the Federal Bureau of Investigation, U.S. Immigration and Customs Enforcement,[77] the Drug Enforcement Administration,[78] and Customs and Border Protection,[79] or on state law enforcement agencies.[80] Much less is publicly known about the availability of these tools to the thousands of local law enforcement agencies across the United States.[81] To find out, we filed more than 110 public records requests to law enforcement agencies across the country, and searched a variety of databases on government spending and grantmaking.[82]

76 Cellebrite, "Premium access to all iOS and high-end Android devices," *available at* https://cf-media.cellebrite.com/wp-content/uploads/2020/07/ProductOverview_CellebritePremium.pdf.

77 Thomas Brewster, "Immigration Cops Just Spent A Record $1 Million On The World's Most Advanced iPhone Hacking Tech," Forbes, May 8, 2019, *available at* https://www.forbes.com/sites/thomasbrewster/2019/05/08/immigration-just-spent-a-record-1-million-on-the-worlds-most-advanced-iphone-hacking-tech/#7d8860a85a0a.

78 Joseph Cox, "The DEA Says It Wants That New iPhone Unlocking Tool 'GrayKey,'" Vice, March 28, 2018, *available at* https://www.vice.com/en_us/article/mbxba4/graykey-grayshift-dea-iphone-hack.

79 See, e.g., U.S. Customs and Border Protection Purchase Orders, Federal Procurement Data System, https://www.fpds.gov/ezsearch/fpdsportal?indexName=awardfull&templateName=1.5.1&s=FPDS.GOV&q=grayshift+customs+and+border&x=0&y=0.

80 Joseph Cox, "US State Police Have Spent Millions on Israeli Phone Cracking Tech," Vice, December 21, 2016, *available at* https://www.vice.com/en_us/article/aekqkj/us-state-police-have-spent-millions-on-israeli-phone-cracking-tech-cellebritea.

81 Some information is known about the largest local law enforcement agencies. *See* George Joseph, "Cellphone Spy Tools Have Flooded Local Police Departments," February 8, 2017, CityLab, *available at* https://www.bloomberg.com/news/articles/2017-02-08/cellphone-surveillance-gear-floods-u-s-cities.

82 For more details on our methodology and our data, see Appendix A and Appendix B. Appendix C is a table that provides total amounts each agency has spent on MDFTs since 2015 based on agency responses to our public records requests. These figures represent lower bounds on the amounts actually spent, since records responses may be incomplete.

Mobile device forensic tools can cost thousands of dollars for law enforcement agencies. Some have argued that these tools are "cost prohibitive . . . for all but a handful of local law enforcement agencies,"[83] or "are things that few state and local police departments can afford."[84] The Manhattan District Attorney's Office has claimed:

> *Faced with growing backlogs of encrypted devices, some law enforcement agencies have begun working with private-sector partners to attempt to develop workarounds to obtain contents from otherwise "warrant-proof" Apple and Android phones. This office, with our relatively considerable resources, is one of the few local agencies that can afford to pursue this kind of solution. Other offices lack such resources, which creates an unequal system in which access to justice depends on a particular jurisdiction's financial capacity.*[85]

Our research indicates that this is not the case. **Rather, we found widespread adoption of mobile device forensic tools by law enforcement in all fifty states and the District of Columbia. In all, we documented more than 2,000 agencies across the United States that have purchased a range of products and services offered by mobile device forensic tool vendors.[86] Every American is at risk of having their phone forensically searched by law enforcement.**

Almost every kind of law enforcement actor is represented in the data we collected: Local police departments, sheriffs, district attorneys, forensic labs, prisons, housing authorities, public schools, statewide agencies, and more.

Many agencies purchase MDFTs from multiple vendors, including Cellebrite, Magnet Forensics, Grayshift, MSAB, AccessData, and Oxygen Forensics.[87] A single GrayKey unit — which is

83 Written Testimony of New York County District Attorney Cyrus R. Vance, Jr. Before the United States Senate Committee on the Judiciary, "Smartphone Encryption and Public Safety," Washington, D.C., December 10, 2019 https://www.judiciary.senate.gov/imo/media/doc/Vance%20Testimony.pdf.

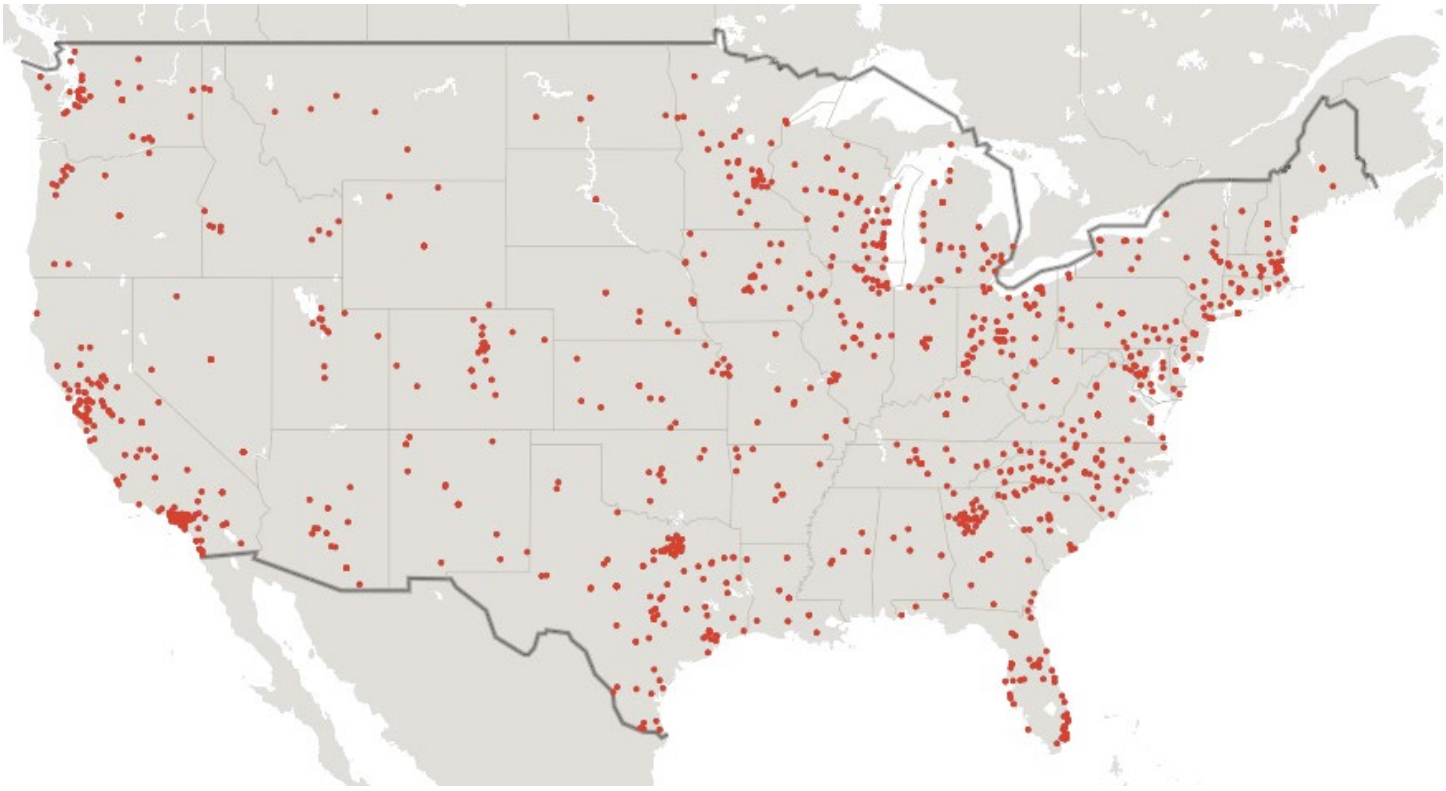
84 William, Carter, Jennifer Daskal, *Low Hanging Fruit: Evidence-Based Solutions to the Digital Evidence Challenge*, Center for Strategic & International Studies, July 2018, 12.

85 Third Report of the Manhattan District Attorney's Office on Smartphone encryption and Public Safety, November 2017, at 8, https://www.manhattanda.org/wp-content/themes/dany/files/2017%20Report%20of%20the%20Manhattan%20District%20Attorney%27s%20Office%20on%20Smartphone%20Encryption.pdf.

86 This number represents a floor — many agencies do not upload their information to GovSpend, and we have documented multiple instances of such agencies purchasing MDFTs.

87 This aligns with a recommendation from a National Institute of Standards and Technologies report, which notes that "it is advisable to have multiple tools available . . . to switch to another if difficulties occur with the initial tool." *See*, Rick Ayers, Sam Brothers, Wayne Jansen, *Guidelines on Mobile Device Forensics*, NIST Special Publication 800-101, Revision 1, National Institute of Standards and Technology, May 2014, 41, *available at* https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-101r1.pdf.

Map 1

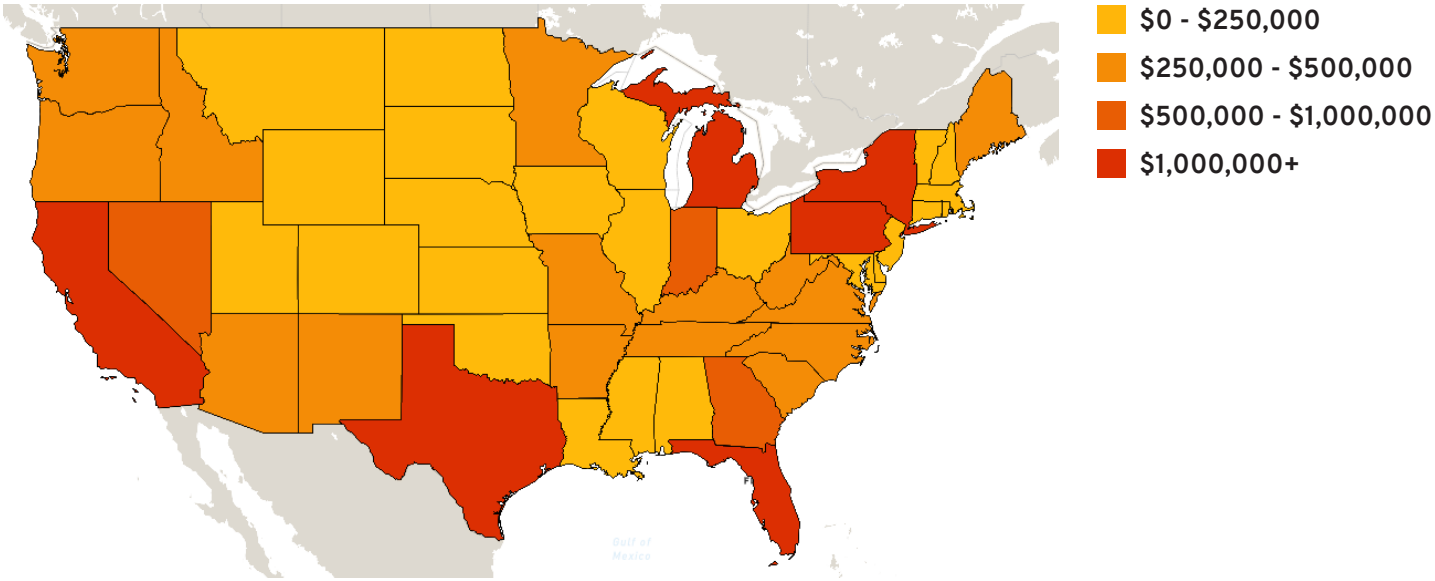


Map 1 *shows the proliferation of MDFTs across agencies in the United States. Each dot represents an agency that has purchased at least one MDFT based on our records. We believe many more agencies in the U.S. have purchased MDFTs than the ones we were able to identify.*

considered the most advanced iPhone extraction device — costs between $15,000 and $30,000.[88] Cellebrite products vary in cost, but a UFED product costs about $10,000, with a $3,000 to $4,000 annual license fee. The level of spending documented below would allow a law enforcement agency to buy dozens of licenses for different kinds of MDFTs each year, such that they could extract data from numerous phones every day.

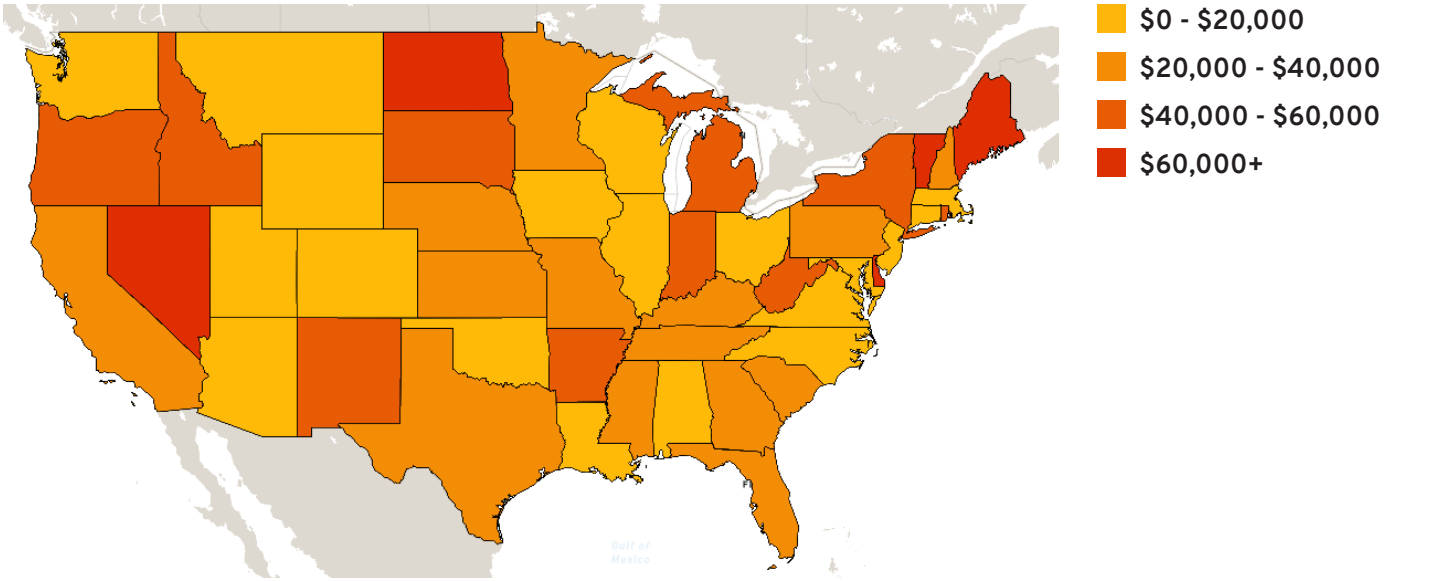
88 The $15,000 unit is an "online" version, which permits 300 uses. The $30,000 "offline" version permits unlimited use.

Map 2.1



Map 2.1 *shows the total amount of money spent on MDFTs in each state since 2015. Total amounts come from our records requests and from financial transparency websites that states offer. Given this, the total amounts we calculated are likely underestimates.*

Map 2.2



Map 2.2 *shows the total amount of money spent on MDFTs in each state per 1,000 sworn officers.*

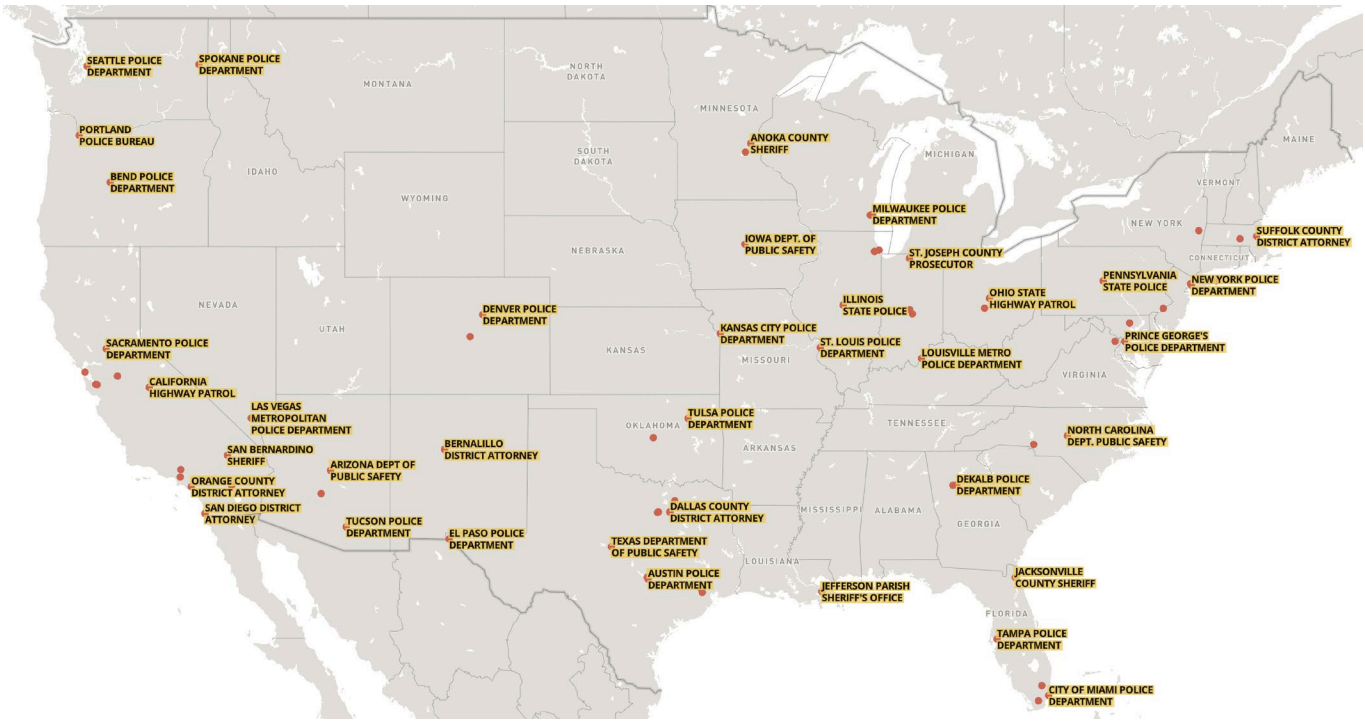
Almost Every Major Law Enforcement Agency Has These Tools

From documents we've obtained, it is clear that the vast majority of large U.S. law enforcement agencies have purchased or used a range of MDFTs. They include:

- Every one of the 50 largest local police departments,
- State law enforcement agencies in all 50 states,
- At least 25 of the 50 largest sheriff's offices and,
- At least 16 out of the 25 largest district or prosecuting attorneys' offices.

These departments have spent hundreds of thousands of dollars on these tools. For example, the Las Vegas Metropolitan Police Department has spent at least $640,000 on MDFTs, the Miami-Dade Police Department has spent at least $330,000, the San Diego Police Department has spent

Map 3



***Map 3** displays the total amount of money that law enforcement agencies that responded to our public records requests have spent on MDFTs since 2015. Some agency amounts are "unknown" if their response indicated they purchased MDFTs, but did not share with us specific purchase orders or invoices. Appendix C contains the full data underlying this map.*

at least $230,000, the Charlotte-Mecklenburg Police Department has spent at least $160,000, the Tucson Police Department has spent at least $125,000, and the Columbus Police Department has spent at least $114,000. Between 2018 and 2019, the Georgia Bureau of Investigation spent over $610,000 on MDFTs. Since 2018, state agencies in Michigan have spent more than $1.1 million, and the Indiana State Police have spent at least $510,000 on MDFTs since 2015.

Similarly, sheriff's offices and district attorneys' offices have also spent hundreds of thousands on MDFTs: the Broward County (FL) Sheriff's Office spent at least $560,000, the San Bernardino (CA) Sheriff's Office has spent at least $270,000, the Santa Clara (CA) District Attorney's Office has spent at least $250,000, and the Harris County (TX) Sheriff's Office has spent at least $175,000.

Many Smaller Agencies Can Afford Them

It may be unsurprising that many of the largest law enforcement agencies in the United States have the resources to acquire these tools. **But our research clearly shows that MDFTs are prevalent even among smaller law enforcement agencies.** Many are willing to spend a surprisingly large amount of money to acquire these capabilities.

A range of police departments that serve cities of fewer than 100,000 residents have spent tens of thousands of dollars. For example, the Buckeye (AZ) Police Department has spent at least $80,000, the Alpharetta (GA) Police Department has spent at least $66,000, the Bend (OR) Police Department has spent at least $62,000, and the Asheville (NC) Police Department has spent at least $49,000.[89]

Similarly, GovSpend and city data indicate that a range of cities have purchased MDFTs.[90] For example, the City of Shaker Heights (OH) spent at least $136,134, the City of Mansfield (OH) has spent at least $75,000, the City of Superior (WI) has spent at least $61,259, and the City of Walla Walla (WA) has spent at least $59,000. Each of these cities have populations of 25,000 to 50,000.[91] A range of smaller cities, counties, and towns, like the city of Papillion (NE),[92] the

89 Population estimates derived from Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2019 Population: April 1, 2010 to July 1, 2019, based off of 2018 data. Bend, Oregon: 97,620; Buckeye, Arizona: 74,339; Asheville, North Carolina: 92,630; Alpharetta, Georgia: 66,257.

90 For these particular cities, it is not listed that a law enforcement agency purchased mobile device forensic technology. We believe this is an appropriate and fair inference, nevertheless, given all of our data.

91 Population estimates derived from Annual Estimates of the Resident Population for Incorporated Places: April 1, 2010 to July 1, 2019, based on 2018 data. Mansfield has an estimated population of 46,538, Superior has an estimated population of 26,064, Shaker has an estimated population of 27,215, and Walla Walla has an estimated population of 32,893.

92 City of Papillion, Nebraska, City Council Minute Records, October 15, 2019, *available at* https://www.papillion.org/Agenda-Center/ViewFile/Minutes/_10152019-205.

town of Whitestown (IN),[93] Jackson Township (NJ),[94] the city of Richland (WA),[95] Glynn County (GA),[96] and the city of Lompoc (CA),[97] have all purchased Grayshift's GrayKey. Budget documents indicate places like the city of Allen (TX)[98] and the city of Pearland (TX) are planning to purchase GrayKey soon.[99]

These examples underscore how accessible and affordable these tools can be, even for agencies with smaller budgets.

Federal Grants Drive Acquisition

A wide variety of federal grants help law enforcement agencies of all sizes acquire MDFTs. In fact, law enforcement agencies "regar[d] assistance from both federal and state governments as critical to success in digital evidence processing," especially for smaller agencies, "given [their] more limited potential budgets compared with large agencies."[100] But even larger departments and agencies have estimated that "95 percent of our [mobile device forensic] equipment" comes from outside funding.[101]

Grants from the Edward Byrne Memorial Justice Assistance Grant (JAG) Program have helped a variety of agencies in particular acquire Cellebrite products — such as police in Salt Lake City

93 Town of Whitestown, Indiana, Check Register History, Town Council Claims for February 2020, *available at* https://whitestown.in.gov/vertical/sites/%7BB8BE8AC3-9DE8-4247-BCB0-1173F48CC7C3%7D/uploads/February_2020_Disbursements.pdf.

94 Jackson Township, New Jersey, Board of Trustees Meeting, Record of Proceedings, February 11, 2020, *available at* http://www.jacksontwp.com/Downloads/Feb%2011%2020%20Mtg.pdf.

95 City of Richland, Washington, City Council Regular Meeting, December 18, 2018, *available at* https://richlandwa.civicclerk.com/Web/UserControls/DocPreview.aspx?p=1&aoid=2310.

96 Glynn County, Georgia, County Board of Commissioners, Agenda for Regular Meeting, October 1, 2020, *available at* https://www.glynncounty.org/DocumentCenter/View/68006/100120.

97 City of Lompoc, California, Regular Meeting of the Lompoc City Council, December 4, 2018, https://www.cityoflompoc.com/Home/ShowDocument?id=7151.

98 City of Allen, Texas, Proposed Annual Budget, Fiscal Year 2020-2021, 181, *available at* https://www.cityofallen.org/DocumentCenter/View/5398/Proposed-Budget-Document.

99 City of Pearland, Texas, FY21 Proposed Budget "Resilience in Uncertainty," Special Revenue Funds, Page 12, *available at* https://www.pearlandtx.gov/home/showdocument?id=28457.

100 Sean E. Goodison, Robert C. Davis, and Brian A. Jackson, Digital Evidence and the U.S. Criminal Justice System: Identifying Technology and Other Needs to More Effectively Acquire and Utilize Digital Evidence, 2015, 16 *available at* https://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR890/RAND_RR890.pdf.

101 *Id.*

(UT), Burlington (NC), Sumter (SC), and the Marathon County (WI) Sheriff's Department. As of this year, the Miami-Dade Police Department is looking to use $283,000 of JAG grant money to buy Cellebrite tools.[102]

The Internet Crimes Against Children (ICAC) task force, a program run by the Department of Justice's (DOJ) Office of Juvenile Justice and Delinquency Prevention, is a particularly large source of funding for local acquisition of MDFTs. For example, the Arizona Department of Public Safety purchased two GrayKey units with the funds, the Phoenix Police Department used the funds to "complete a project to supply, across the State of Arizona, Cellebrite mobile forensic products,"[103] and police departments from Las Vegas, to Dallas, to DeKalb County (GA) used ICAC money to purchase a variety of MDFTs.

Similarly, the DOJ's Paul Coverdell Forensic Science Improvement Grants Program has provided significant local funding. For example, the Bronx County (NY) District Attorney used the grant money to purchase Cellebrite products.[104] The Charleston (SC) Police Department was funded to purchase two new Cellebrite UFEDs because their digital evidence unit "witnessed a dramatic increase in mobile device submissions."[105] The Alameda County (CA) Sheriff used funds to purchase two GrayKey units,[106] as did forensic science laboratories in Kansas.[107]

102 *See*, Miami-Dade Board of County Commissioners, Office of the Commission Auditor, Public Safety and Rehabilitation Committee Meeting, June 9, 2020, *available at* https://www.miamidade.gov/auditor/library/2020-06-09-psr-meeting.pdf; Memorandum from the Mayor to the Board of County Commissioners, "Request for Additional Expenditure Authority to Contract SS9737-1/23-1, Cellebrite Forensic System, Service and Maintenance," July 8, 2020, *available at* http://www.miamidade.gov/govaction/legistarfiles/MinMatters/Y2020/201021min.pdf.

103 Department of Justice, Office of Juvenile Justice and Delinquency Prevention, "FY 2012 Internet Crimes Against Children Task Force Continuation Program," Award Number: 2012-MC-FX-K008, Awardee: Phoenix police Department, *available at* https://ojjdp.ojp.gov/funding/awards/2012-mc-fx-k008.

104 Department of Justice, National Institute of Justice, "Bronx Coverdell Digital Forensic Science Laboratory," Award Number: 2019-CD-BX-0075, Awardee: Office of the Bronx County District Attorney, *available at* https://nij.ojp.gov/funding/awards/2019-cd-bx-0075.

105 Department of Justice, National Institute of Justice, "City of Charleston Police Department's Forensic Services Division-Maintaining Quality Digital Examinations," Award Number: 2017-CD-BX-0060, Awardee: City of Charleston, *available at* https://nij.ojp.gov/funding/awards/2017-cd-bx-0060.

106 Memorandum, Alameda County Sheriff's Office, "Accept the 2018 Paul Coverdell Forensic Science Improvement Grant, July 9, 2019, *available at* http://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_07_09_19/PUBLIC%20PROTECTION/Regular%20Calendar/Sheriff_281959.pdf.

107 Department of Justice, National Institute of Justice, "Kansas Federal NIJ FY 19 Paul Coverdell Forensic Science Improvement Grants Program," Award Number: 2019-CD-BX-0028, Awardee: Executive Office of the State of Kansas. https://nij.ojp.gov/funding/awards/2019-cd-bx-0028.

Agencies Share Their Tools With One Another

Even if a law enforcement agency has not purchased MDFTs themselves, many — if not all — have fairly easy access. One option is to form partnerships with other, larger departments. For example, many larger local law enforcement agencies conduct extractions at the request of smaller nearby agencies.[108] Another option is to turn to state-wide agencies — ranging from the offices of Attorneys General, to state departments of forensics or crime labs — that accept requests to perform examinations of digital devices from local agencies.[109]

Yet another common option is to visit labs run by the Federal Bureau of Investigation (FBI). The FBI maintains 17 Regional Computer Forensic Laboratories with broad capabilities to assist local law enforcement.[110] There are at least 84 locations where "cellphone investigative kiosks" (CPIKs) are available, which allow law enforcement "to extract data from a cellphone, put it into a report, and burn the report to a CD or DVD in as little as 30 minutes."[111]

From publicly available data, law enforcement used the cellphone investigative kiosks and virtual cellphone investigative kiosks at least 31,000 times between fiscal years 2013 and 2016.[112]

108 *See, e.g.*, Ft. Worth Police Department, Request Log Redacted, https://beta.documentcloud.org/documents/20390983-2018-request-log-redacted1; also see Boone County Sheriff's Department, "Law Enforcement Portal," available at http://bcsdcybercrimes.com/leportal.html.

109 *See, e.g.*, Virginia Department of Forensic Sciences, "Frequently Asked Questions," https://www.dfs.virginia.gov/faq/; Ohio Attorney General, "Unlocking digital evidence: BCI's Cyber Crimes Unit helps law enforcement access, preserve valuable data," On the Job: Criminal Justice update, September 28, 2017, https://www.ohioattorneygeneral.gov/Media/Newsletters/Criminal-Justice-Update/Fall-2017/Unlocking-digital-evidence-BCI%E2%80%99s-Cyber-Crimes-Uni.

110 The Service Areas are: Chicago, Greater Houston, Heart of America, Intermountain West, Kentucky, New England, New Jersey, New Mexico, North Texas, Northwest, Orange County, Philadelphia, Rocky Mountain, San Diego, Silicon Valley, Tennessee Valley, and Western New York.

111 Regional Computer Forensics Laboratory, Service Offerings, https://www.rcfl.gov/services.

112 See U.S. Department of Justice, Regional Computer Forensics Laboratory Annual Report For Fiscal Year 2015, at 13; also see, U.S. Department of Justice, Regional Computer Forensics Laboratory Annual Report For Fiscal Year 2016, at 13. The FY 2017 and FY 2018 reports unfortunately do not report CPIK or VCPK usage numbers.

4. A Pervasive Tool for Even the Most Common Offenses

Our public records requests asked law enforcement agencies for logs of use that identified, among other things, how often and in what kinds of cases law enforcement used MDFTs.[113] The records we've obtained can at best tell an incomplete story, as we did not receive records of use from every department we sent records requests to. Only 44 agencies disclosed usage records, and their form varied greatly.[114]

But here is the story they do tell: **Law enforcement use mobile device forensic tools tens of thousands of times, as an all-purpose investigative tool, for an astonishingly broad array of offenses, often without a warrant. And their use is growing.**

These records challenge two prominent, connected narratives surrounding the use of this technology. The first narrative focuses on the rare instances in which law enforcement cannot access the contents of a phone in a high-profile case. The records we obtained document frequent, seemingly routine, everyday instances in which law enforcement do gain access. The second, connected narrative is that these tools are only (or in large part only) used in cases involving serious harm. They are certainly used in those cases — and in some jurisdictions the majority of MDFT use is for cases of serious harm. But such a framing not only misses the dominant uses of these tools, but also completely ignores racially biased policing policies and practices.

113 In particular, our request sought "records reflecting the department's *aggregate* use of MDFTs. For example, monthly reports that reflect the total number of MDFT cases for each month, broken down by type of crime, and number and type of phones, and number and type of other devices." *See* Appendix B.

114 Some departments, like the Arizona Department of Public Safety, provided us with presentations documenting yearly numbers of cellphone extractions. Others, like the Seattle Police Department, provided us hundreds of cellphone extraction request forms. Some, like the San Francisco, Atlanta, and Fort Worth Police Departments provided spreadsheets that logged a range of information — like the kind of offense, the make and model of the phone, the relevant legal authority with specific search warrant numbers, and whether or not the extraction was successful. Some were handwritten. Some were Excel spreadsheets. Much of the documentation we received is haphazard, or otherwise incomplete. For example, in the Gwinnett County District Attorney's Office response to our records request, they noted that "[o]nly one employee maintains a log of his use of MDFTs."

Tens of Thousands of Device Extractions Each Year

The records of use we've assembled from 44 law enforcement agencies represent at least 50,000 extractions of cellphones between 2015 and 2019.[115] To our knowledge, this is the first time that such records have been widely disclosed.[116]

Importantly, *this number represents a severe undercount* of the actual number of cellphone extractions performed by state and local law enforcement since 2015 for many reasons. First, this number only captures usage by 44 agencies, while we know that at least 2,000 agencies have these tools, out of more than 18,000 agencies nationwide. Second, some departments that did disclose usage logs did not start tracking their use of MDFTs until recently. Third, many departments that responded indicated that while they possess MDFTs, they do not track or collect how often they use them. Finally, many of the largest local police departments — such as New York City, Chicago, Washington DC, Baltimore, and Boston — have either denied or did not respond to our requests.

Combining all the information we've gathered,[117] it's safe to say that state and local law enforcement agencies collectively have performed hundreds of thousands of cellphone extractions since 2015.

115 As we sent many of our public records requests in early 2019, many agencies responded with records up to that chronological point. For example, if we sent a public records request in February 2019, we would receive records documenting use of MDFTs up to February 2019, even if a department responded in March 2020.

116 We found one prior public records project that asked for "utilization logs," but only two departments responded to those requests. Neither of the responses provided details about the underlying offenses. https://www.muckrock.com/search/?page=1&per_page=25&q=Mobile+Phone+Forensics+Tools.

117 *See*, *e.g.*, U.S. Department of Justice, Regional Computer Forensics Laboratory Annual Report For Fiscal Year 2015, at 13; also see, U.S. Department of Justice, Regional Computer Forensics Laboratory Annual Report For Fiscal Year 2016, at 13; Essex County Prosecutor's Office, Forensic Analysis and Cyber Tech Services Unit, http://www.njecpo.org/?page_id=2550 ("In 2018, the FACTS Unit conducted over 1,000 cellphone extractions and analysis."); George Woolston, "Inside the special law enforcement unit that brings down child predators," Echo-Pilot, August 7, 2020, *available at* https://www.echo-pilot.com/news/20200807/inside-special-law-enforcement-unit-that-brings-down-child-predators (noting that Burlington County Prosecutor's Office High-Tech Crimes Unit "do somewhere in the neighborhood of 500 phones a year."); Curtis Waltman, "Police are getting a lot of use out of cellphone extraction tech," Muckrock, June 5, 2017, *available at* https://www.muckrock.com/news/archives/2017/jun/05/tulsa-tucson-cellebrite/. For comparison's sake, Customs and Border Protection officers conducted several thousand "advanced" searches of electronic devices from FY2012-FY2018. Of course, this data doesn't disaggregate between "electronic devices." *See* Statement of Undisputed Material Facts, *Alasaad v. McAleenan*, No. 17-cv-11730-DJC, at 10. Dkt. 90-2.

Graffiti, Shoplifting, Drugs, and Other Minor Cases

The records we've obtained demonstrate that some law enforcement agencies use MDFTs as an all-purpose investigative tool for a broad array of offenses.

Some law enforcement agencies frequently point to the need to investigate serious offenses like homicide, child exploitation, and sexual violence to justify their use of these tools. And it is certainly true that in some instances, the most common offenses logged in records of use are things like murder or child sexual abuse material — instances where substantial harm has allegedly occurred.

But the records we've obtained also tell a different story: that law enforcement also use these tools to investigate cases involving graffiti, shoplifting, marijuana possession, prostitution, vandalism, car crashes, parole violations, petty theft, public intoxication, and the full gamut of drug-related offenses.

Many logged offenses appear to have little to no relationship to a mobile device, nor are the offenses digital in nature. In fact, for many of these alleged offenses, it's difficult to understand why such an invasive investigative technique would be necessary, other than mere speculation that evidence could be found on the phone.

To better understand law enforcement's use of these tools, we began seeking out search warrants that law enforcement obtained to search phones. As part of a search warrant, law enforcement submit affidavits — written statements of alleged facts from an agent's point of view — to a judicial authority. The affidavit must establish probable cause for a search, in this case, of a mobile phone.[118] By examining warrant affidavits, we can begin to understand the routine use of these tools.

These records are imperfect, as search warrant affidavits only provide a law enforcement officer's perspective on an alleged incident. Nevertheless, these documents can help paint a picture of what allegedly went on prior to law enforcement's seizure of a phone, and why there is supposedly probable cause to search the phone. A sample of some these incidents include:

118 The probable cause standard means there's a reasonable basis to believe a crime may have been committed and that the target of suspicion committed the crime, or that evidence of the crime is present and in the place to be searched. It's a low standard to begin with. See Illinois v. Gates, 462 U. S. 213, 232, 243-244, n. 13 (1983) (probable cause "is not readily, or even usefully, reduced to a neat set of legal rules" and "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.") *See also* Kaley v. United States, 571 U. S. 320, 338. (2014) ("Probable cause, we have often told litigants, is not a high bar.")

- After an undercover purchase of $220 worth of marijuana, officers sought to search two phones for evidence of narcotics sales and "other criminal offenses."[119]
- An off-duty officer witnessed what they thought was shoplifting at a Dick's Sporting Goods Store and said the individuals had left in a Honda Accord. Another officer initiated a vehicle pursuit. Five individuals were arrested and four phones seized. After speaking to the five individuals, officers learned they "had been communicating, via cellphone, throughout the night and were allegedly going to sell the stolen clothing to 'their regulars.'" Officers sought to search the phones for "plans and correspondence regarding these thefts and the organized crime," and "[t]he identity of 'their regulars.'"[120]
- Officers witnessed "suspicious behavior" in a Whole Foods grocery store parking lot that they believed to be a "controlled substance exchange" between occupants in a Lexus and a Buick. After the Lexus drove by the unmarked police car, one of the officers "reported the smell the odor [sic] of Marijuana coming through his open window seemingly from the Lexus." The officers stopped the Lexus because they "did not have a front license plate which is an equipment violation." Upon searching the car, officers found a small amount of what appeared to be cocaine and marijuana and a black scale. Officers sought to search a subject's phone for "further evidence of the nature of the suspected controlled substance exchange," and for evidence "on the knowledge of possession and/or sales of the controlled substances found . . . in [the] vehicle."[121]
- Officers were dispatched to a dispute at a McDonald's. After arriving, they learned that the dispute appeared to be over $70 that was owed. Apparently, the person who was owed money was "forcing" the person who owed money "to remove his clothing and forcefully removed it as some sort of collateral." One individual was arrested for charges of simple robbery. Four phones were ultimately seized and officers sought to search them "to further this investigation."[122]
- A plain clothes DEA Task Force Officer was "making consensual contacts" with individuals at the Dallas/Fort Worth International Airport. After asking a traveler "if he had any large sums of US Currency with him," the officer received consent to search his backpack, and found a large sum of U.S. currency. At this point the subject said he "had used this backpack to store marijuana inside of it before." Officers then saw a WhatsApp message displayed on the subject's phone that said "This flower is so good by far one of my fav strands ever." Officers sought to search the phone for evidence of narcotics sales and money laundering.[123]

119 *See* Tarrant County Search Warrant SW38982, https://beta.documentcloud.org/documents/20394694-sw_38982.

120 *See* Tarrant County Search Warrant SW40465, https://beta.documentcloud.org/documents/20394702-sw_40465.

121 *See* Anoka County Search Warrant 18-108859, https://beta.documentcloud.org/documents/20394762-18-108859.

122 *See* Anoka County Search Warrant 17015643, https://beta.documentcloud.org/documents/20394763-17015643.

123 *See* Tarrant County Search Warrant SW39468, https://beta.documentcloud.org/documents/20394695-sw_39468.

- A patrol car stopped a vehicle for a "left lane violation." "Due to nervousness observed and inconsistent stories, a free air sniff was conducted by a . . . K9 with a positive alert to narcotics." A search of the car revealed several shrink-wrapped bags of suspected marijuana and marijuana wax. Officers seized eight phones from the car's occupants, and sought to find "evidence of drug transactions, which would provide further evidence with intent to distribute."[124]
- An officer stopped a "white minivan . . . for speeding and traveling in the left lane when prohibited." The driver was "nervous upon contact." After denying a consent search of the car, a K9 sniff of the car led to the discovery of marijuana. A search of the car revealed several bags of suspected marijuana. After seizing two phones from the car, officers sought to search the phones for "evidence of drug transactions that will provide further evidence with intent to distribute."[125]
- In a particularly egregious case, officers shot and killed a man after he "ran from the driver's side of the vehicle" during a traffic stop. Police ultimately discovered a small orange prescription pill container next to the victim. Tests of the pills revealed they were a mix of acetaminophen and fentanyl. After a subsequent search of the victim's vehicle, officers discovered a phone. Officers sought to search the phone for evidence related to "counterfeit Oxycodone," "evidence relating to . . . motives for fleeing from the police," and evidence "relating to the stolen Smith & Wesson SD9 Handgun."[126]
- During an eviction with an "uncooperative" individual, officers shot the individual 15 times after he apparently reached under a blanket for what officers saw as a rifle. Officers seized several cellphones and sought to search them for "any information which would reveal [the individual's] mindset and motivation at the time of the shooting."[127]
- Officers were looking for a juvenile who allegedly violated the terms of his electronic home monitoring. Officers eventually located the individual and, after a "short foot pursuit . . . he threw several items to the ground," including a phone. Officers located the phone and sought to search it for evidence of escape in the second degree.[128]

124 *See* Colorado State Patrol Search Warrant ST170049-4A170155, https://beta.documentcloud.org/documents/20394714-st1700494a170155-search-warrant.

125 *See* Colorado State Patrol Search Warrant ST170210-17-SW-380, https://beta.documentcloud.org/documents/20394713-st170210-redacted.

126 *See* King County Search Warrant 19-272, https://beta.documentcloud.org/documents/20394722-affidavit-19-272.

127 *See* Spokane Search Warrant 2018-10032539, https://beta.documentcloud.org/documents/20394723-warrant-5_-closed_2018-10032539.

128 *See* King County Search Warrant 19-527, https://beta.documentcloud.org/documents/20394724-affidavit-19-5271.

Some departments use MDFTs by and large to investigate drug-related offenses. For example, the vast majority of logged cellphone extractions by the Colorado State Patrol and Baltimore County Police Department are for drug-related offenses. Logs from the Dallas Police Department indicated that drug-related offenses were the second most common offense in which MDFTs were used, behind murder.

For other law enforcement agencies, drug-related offenses are often in the top three or five most common offenses listed in logs we obtained. For example, 20% of phones the Suffolk County (NY) Police Department forensically examined in 2018 were narcotics cases. A log of outside agency cellphone extraction requests to the Santa Clara County (CA) District Attorney's Office appears to show that drug-related offenses are in the top three most common offenses listed. The same is true of the San Bernardino (CA) Sheriff's Office. And while drug-related offenses didn't constitute many cellphone extractions by the Fort Worth Police Department before 2017, they ballooned in 2018 and 2019 to be the third most common offense.

The prominence of drug-related offenses in cellphone extraction logs is especially worrisome given the extreme racial disparities in drug arrests,[129] the disproportionate severity of drug sentences, and the role drug arrests play in deportations.[130] Although none of the extraction logs we received maintained data on race or ethnicity, given this disparity, it's highly likely that these cellphone extractions disproportionately affect Black and Latinx people.

129 Human Rights Watch, ACLU, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, October 2016; also see, Joseph E Kennedy, Isaac Unah, Kasi Wahlers, *Sharks and Minnows in the War on Drugs: A Study of Quantity*, Race and Drug Type in Drug Arrests, 52 U.C. Davis L. Rev. 729, 746 (2018) ("Overall, marijuana dominates all other types of drugs in terms of arrests. Blacks and Hispanics are arrested disproportionately in terms of their share of the overall population. The racial disparities involved are not as great as those present among arrests for hard drugs. Whites dominate heroin and meth/amphetamine arrests, but those drugs account for relatively few hard drug arrests overall. Blacks, in contrast, dominate crack cocaine arrests and are disproportionately represented in powder cocaine arrests. One racial disparity in drug arrests overall may, then, be at least partially driven by what drugs we arrest people for, with Black overrepresentation driven by crack cocaine arrests and White underrepresentation driven by the relatively low levels of heroin and meth/amphetamine arrests."); also see Ojmarrh Mitchell, Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 Justice Quarterly 288, (2013) ("For example, holding all other variables constant, at ages 17, 22, and 27 African-Americans' odds of drug arrest are approximately 13, 83, and 235% greater than whites, respectively.")

130 Drug Policy Alliance, *The Drug War and Mass Deportation*, February 2016.

131 *See, e.g.*, Tarrant County Search Warrant SW41310 https://beta.documentcloud.org/documents/20394768-sw_41301; Colorado State Patrol Search Warrant ST170210-17-SW-379, https://beta.documentcloud.org/documents/20394713-st170210-redacted. ("individuals engaged in narcotic sales send/receive text messages regarding narcotic sales, make/receive phone calls regarding narcotic sales and take photographs/video of themselves possessing narcotics," and that data the phone that will likely either "contain evidence of drug transactions that will provide further evidence with intent to distribute.")

Almost universally, the search warrants we obtained for drug-related offenses rely on the logic that boils down to a claim that drug dealers use cellphones.[131] An affidavit from a Fort Worth (TX) officer provides a prototypical example:

> *it is a common practice for individuals involved in the drug trade, to store, keep or conceal contact names, phone numbers, addresses, address books, and contact list of associates, inside cellular telephones, along with logs of incoming and outgoing calls, text messages, e-mails, direct connect data, SIM cards, voice mail messages, logs of accessing and downloading information from the internet, photographs, moving video, audio files, dates, appointments, and other information on personal calendars, Global position system (GPS) data, and telephone memory cards.*[132]

For many of the cases in which law enforcement turn to MDFTs, it's often difficult to assess why such an invasive technique would be necessary at all. Of course, there are some allegations where the connection between the data on a phone and the alleged conduct make it easier for law enforcement to establish probable cause. But there are plenty of cases where the nexus between a phone's contents and data and the alleged offense is tenuous at best.[133] The use of an MDFT in these cases seems like a drastic investigative overreach.

Officers Often Rely on Consent, Not Warrants

In 2015, the Supreme Court held in Riley that in order to search a cellphone, police must get a warrant. However, "consent searches" have long been understood to be an exception to the Fourth Amendment's warrant requirement. Our records show that, for some agencies, law enforcement regularly rely on a person's consent as the legal basis to search cellphones.

Of the 1,583 cellphone extractions that the Harris County (TX) Sheriff's Office performed from August 2015 to July 2019, only 47% of phones were extracted subject to a search warrant — the other 53% were consent searches, or searches of phones that were "abandoned/deceased." Of the 437 cellphones that the Denver Police Department extracted from March 2018 to early April 2019,

132 See Tarrant County Search Warrant SW40869, https://beta.documentcloud.org/documents/20394764-sw_40869.

133 For example, a recent DC Court of Appeals decision centered on a first-degree murder investigation. There, law enforcement's original search warrant for the suspect's cellphone allowed the police to search for "[a]ll records and "any evidence" related to the alleged offense, and law enforcement used a Cellebrite machine to extract all data off the phone. But, as the Court of Appeals held, while law enforcement had probable cause to search a phone for text messages between two individuals on one specific day, and the relevant GPS data from the phone on two specific days, "beyond those discrete items, the affidavits stated no facts that even arguably provided a reason to believe that any other information or data on the phones had any nexus to the investigation of [the victim's] death." See Eugene Burns v. United States, District of Columbia Court of Appeals 17-CF-1347, Dec. 2019.

nearly half were searched pursuant to a search warrant. Approximately one third of the phones the Seattle Police Department sought to extract data from were consent searches.

Of the 497 cellphone extractions that the Anoka County (MN) Sheriff's Office performed from early 2017 to May 2019, 38% were consent searches of some kind. For the Atlanta Police Department, of the at least 985 cellphone extractions performed from 2017 to early April 2019, about 10% were pursuant to a consent to search form. And for the Broward County (FL) Sheriff's Office, at least 18% of extractions were based on consent.

Given the broad prevalence of consent searches in other criminal legal contexts,[134] it is perhaps unsurprising that consent searches play a decent role in the searches of mobile phones. We address the problems with consent searches for mobile phones in particular in Section 6.

A Routine and Growing Practice

The records we've obtained clearly indicate that law enforcement agencies are using MDFTs for an ever-expanding array of offenses. **Given that racial disparities in arrest rates are one of the defining aspects of the American criminal legal system, it's likely that cellphone extractions already mirror these disparities.**[135]

In documents we obtained, law enforcement readily admit that these tools are regularly used and internally understood as a standard investigatory tool: "[R]equests for cellphone analysis has become the standard for phones involved in all types of criminal investigation;"[136] "it is used on a daily basis;"[137] "[our department] relies heavily on Cellebrite . . . tools."[138] In a recent D.C. court

134 Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 Ind. L. J. 773 (2005) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.")

135 Megan Stevenson, Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. Rev. 731, 769-770 (2018) (Finding that Black people are arrested at higher rates compared to their similarly situated white counterparts for a large number of misdemeanors offenses, a decades long, consistent disparity. In particular finding "that black people are arrested at more than twice the rate of white people for nine of twelve likely-misdemeanor offenses: vagrancy, prostitution, gambling, drug possession, simple assault, theft, disorderly conduct, vandalism, and 'other offenses.'")

136 Dallas Police Department Purchase Authorization Request, December 3, 2019, https://beta.documentcloud.org/documents/20390026-d004755-021319_r.

137 Illinois State Police Procurement Justification Form in June 2016, https://beta.documentcloud.org/documents/20391543-cellebrite-an17-0107_marked_redacted.

138 San Diego Police Department, "Critical Data Extraction Tool Upgrades," April 30, 2018, Memorandum, https://beta.documentcloud.org/documents/20392573-sole-source-cellebrite-mod-3778-052118.

opinion, the court noted that "search warrant requests seeking access to cellphone data have become a common feature of law enforcement investigations."[139]

Statistics on use, where available, help demonstrate that law enforcement use of these tools is growing. For example, the Las Vegas Metropolitan Police Department examined 260% more cellphones in fiscal years 2018-2019 compared to 2015-2016 (from 222 in FY15-16 to 800 in FY18-19). Louisville's Metropolitan Police Department examined 236% more phones between 2017 and 2018 (from 88 phones to 296). Arizona's Department of Public Safety use grew 50% from 2015 to 2018 (from 796 phones in 2015 to 1,198 phones in 2018). Honolulu's Police Department used MDFTs 568% more in 2018 than 2015 (from 25 in 2016 to 167 in 2018). And Dallas' Police Department noted a 25% increase in cellphone extractions from 2018 to 2019.[140]

5. Few Constraints and Little Oversight

Despite how invasive MDFTs are, few departments have detailed internal policies that clearly restrict how or when they are used. In our public records requests, we asked each department for any policies or guidelines that would control MDFT use.[141]

Many departments have no policies at all — despite using these tools for years. Nearly half of the departments that responded to our records requests (40 out of 81) indicated they had no policies in place. Even when policies exist, they are often remarkably vague, for instance, by giving general guidance to officers to obtain a search warrant. Among the policies we did receive, we rarely saw any detailed guidance on concerns related to digital searches, such as the scope and particularity of searches, and the retention and use of extracted data. Unsurprisingly, agencies almost always acquire these tools with no public oversight. From our research, we found scant evidence of any community discussion or debate regarding the adoption of these tools.

139 Eugene Burns v. United States, District of Columbia Court of Appeals 17-CF-1347, Dec. 2019, 4.

140 To be certain, some departments' usage of MDFTs fluctuates somewhat between years — like the Fort Worth Police Department, St. Louis Metropolitan Police Department, San Francisco Police Department, or Harris County Sheriff's Office. Generally speaking, however, these departments were already regularly using the tools several hundred times per year as of 2015 or 2016.

141 Our request noted that these policies and guidelines included, but were not limited to the following "training materials regarding their operation, restrictions on when they may be used, limitations on retention and use of collected data, security measures taken to protect stored and in-transit data, guidance on when a warrant or other legal process must be obtained, and guidance on when the existence and use of MDFTs may be revealed to the public, criminal defendants, or judges." *See* Appendix B.

Many Agencies Have No Specific Policies in Place

Many agencies simply have no policies in place to govern how MDFTs are used. Among the 81 law enforcement agencies that responded to our public records requests, at least 40 of them indicated that they did not have any policies.

Of the 41 policies we received, only nine are detailed enough to provide meaningful guidance to officers. Combined, this means that nearly 90% of the departments that responded to our records requests give their officers wide discretion to use MDFTs and the phone data they collect.

Even very large agencies like the Los Angeles Police Department (LAPD) had no specific policies in place for MDFTs, even though the LAPD has spent hundreds of thousands of dollars on these tools and has used them thousands of times. Other major departments that have no policies include the Houston (TX) Police Department and the Nassau County (NY) Police Department.[142] State law enforcement agencies and county sheriff's offices are similarly lacking.[143]

Many of the country's largest and most prominent district attorneys' offices also use these tools without specific policies, including offices in Manhattan (NY), Cook County (IL), Tarrant County (TX), Philadelphia (PA), Suffolk County (MA), and Dallas County (TX). In their responses to our public records requests, some offices simply noted that they follow applicable case law governing the use of MDFTs. For example, the Manhattan District Attorney's Office responded that their office "strictly follows and adheres to all applicable federal and state constitutional laws, New York criminal procedure laws, and search and seizure case law in the utilization of this [technology] on a case by case basis."[144]

142 In addition, many mid-size and smaller police departments, like the Portland (OR) Police Bureau, Sacramento (CA) Police Department, the Bend (WA) Police Department, and the West Allis (WI) Police Department also have no specific policies in place. The Tulsa (OK) Police Department similarly had no policy in place, but indicated they "follow best practices," without indicating what those best practices are or who had designated them.

143 Of the 13 state law enforcement agencies that responded to our request, five indicated they had no relevant policies — the Arizona Department of Public Safety, the California Highway Patrol, the Indiana State Police, the Pennsylvania State Police, and the Washington State Patrol. Days before publication, the New York State Police sent responsive records to our request but did not include any policies in their response. Of the ten sheriff's offices that responded, four indicated they had no policies. The Broward County Sheriff Office noted that their office was in the process of drafting policies "as part of the department's restructuring."

144 *See* New York County District Attorney FOIL Response, https://beta.documentcloud.org/documents/20394637-upturn-foil_da-response2.

The policies we did receive varied substantially in length and detail. Some were nearly 40 pages long; others were barely a paragraph. Some were clearly in the process of being developed; others were boilerplate policies that were too broad to be meaningful. Of course, detailed policies won't by themselves ensure that people's rights will be respected. But without them, mobile device searches will expand the power of the police in an even less constrained way. We highlight a few acute problems below.

Overbroad Searches and the Lack of Particularity

The Fourth Amendment to the United States Constitution requires warrants to describe with particularity the places to be searched and the things to be seized.[145] This "particularity requirement" was designed to protect against "general warrants," such that law enforcement could not indiscriminately rummage through a person's property. In addition, the warrant application must identify the specific offense for which law enforcement has established probable cause. To be certain, almost every department policy acknowledges the need to have a sound legal basis to search a phone, whether it's a search warrant, verbal or written consent, or some other basis, like abandonment or exigent circumstances. But few departments provide much more clarity or direction beyond this general acknowledgement.

Some departments vaguely allude to the need for particularized searches. For example, the Las Vegas Metropolitan Police Department's Digital Forensics Lab policy notes that "searches that constitute a 'fishing expedition' . . . will not be conducted," but does not add any more detail.[146] Similarly, the Kansas City Police Department's policy mentions that an examiner "conducting the data extraction will adhere to the details and limitations regarding allowable data extraction and retention as specified in the warrant" — but does not further elaborate on what those limitations can or should be.[147]

In fact, some policies, like the Illinois State Police's, encourage broad search warrants, noting that "[a]ll computer hardware and software should be included [in search warrant applications], keeping in mind the entire system is necessary to replicate the suspect's use of it and to enable forensic examination of the system."[148]

145 U.S. Const. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized*.")

146 *See* Las Vegas Metropolitan Police Department, Digital Investigations Bureau, https://beta.documentcloud.org/documents/20392915-logan-koepke-190403-20-lvmpd-digital-investigations-bureau-policies.

147 *See* Kansas City Missouri Police Department Examination of Electronic Data Storage Devices, https://beta.documentcloud.org/documents/20392850-4316_001.

148 *See* Illinois State Police, Collecting and Packaging Computer and Digital/Multimedia Forensic Evidence, https://beta.documentcloud.org/documents/20391527-ops-202-dir.

Other policies ask officers to seek broad search authority from the courts, and only to narrow their search when making internal requests to forensic examiners. For example, the Indianapolis Metropolitan Police Department directs officers requesting forensic analysis to describe "the evidence you expect to recover from the exam. Be specific as to what information the examiner should search for, such as 'Evidence of Dealing Narcotics' . . . [d]on't list types of data (e.g. call log, text, email, etc. . . .) as *your search warrant should cover all data*."[149] Similarly, the Jacksonville Sheriff's Office policy notes that failing to provide "details of the investigation and what detailed information the detection seeks from a forensic analysis . . . will greatly increase the processing and analysis time."[150] In other words, to the extent that law enforcement policies do speak to narrow forensic searches, they do so with reference to productivity and efficiency, not legal authority or constitutional protections.

Relatedly, few policies provide guidance on what examiners should do if they encounter potential evidence of another crime that is not detailed in the initial search warrant. Using a search warrant to look for digital evidence of one potential crime, only to then search for digital evidence of a completely separate crime, raises serious constitutional questions. This practice and limitation is crucial, because without it, law enforcement could go on a "fishing expedition" in search of evidence of any crime, far beyond the original justification for a search. We observed only two policies that provided any guidance on this point.[151]

The risk of overbroad searches is especially worrying given the fact that it's nearly impossible for those outside of law enforcement — such as a defense lawyer — to repeat the steps that a forensic examiner took and to audit the scope of a search.[152] A handful of agency policies do require examiners to document how a search was conducted, but the level of documentation required is still unlikely to allow a defense lawyer to meaningfully audit a search.

149 *See* Indianapolis Metropolitan Police Department, Request Form for Mobile Device Forensics, https://beta.documentcloud.org/documents/20391585-mobile_forensics_request_form_02-20-2019. (emphasis added)

150 *See* Jacksonville Sheriff's Office, Computer Forensic Investigations, Order 392, https://beta.documentcloud.org/documents/20392554-redacted_upm_392_computer_forensic_investigations_.

151 For example, the Santa Clara District Attorney's Office advises that if an "[e]xaminer discovers evidence of another crime(s) that is outside the scope of the submitted search warrant, the Examiner may continue the examination for items named in the warrant. The Examiner should contact the submitting agency and/or the prosecutor handling the case for guidance before conducting any searches for evidence not named in the original warrant." *See* Santa Clara District Attorney's Office, Santa Clara County Crime Laboratory Computer Forensic Standard Operating Procedures, https://beta.documentcloud.org/documents/20394644-2019-08-19-pra-resp-email-att-standard-operating-procedures-rev-26-112820181. As another example, the San Diego Police Department says that if "an examiner discovers evidence of another crime(s) that is outside the scope of the submitted legal authority, the examiner will notify the assigned prosecutor and/or submitting investigator of the discovery and nature of any evidence of other crime(s) outside the scope of the original search warrant." *See* San Diego Police Department, Forensic Technology Unit Manual, https://beta.documentcloud.org/documents/20392583-forensic-technology-unit-manual-082218-current.

152 Repeatability refers to obtaining the same results when using the same method on identical test items in the same laboratory by the same operator using the same equipment within short intervals of time. Reproducibility refers to obtaining the same results being obtained when using the same method on identical test items in different laboratories with different operators utilizing different equipment.

One policy from the Massachusetts State Police states that "[f]ull documentation of all procedures performed and software used should be recorded for every examination and added to the case file."[153] The Tucson Police Department's Forensic Electronic Media Unit's Quality Manual notes that "[n]otes should be taken contemporaneous to the examination or as close as possible."[154] And the Texas Department of Public Safety's Computer Information Technology and Electronic Crimes Unit Standard Operating Procedure requires the unit to establish a "peer review process where 20% of all forensic analysis completed will be reviewed,"[155] but they did not provide an example.

There are longstanding legal debates over how to properly govern digital searches: Legal scholars and courts have wrestled with the problems of overbroad digital searches for decades.[156] These arguments are incredibly important, and we surface only some of them in Section 6. Suffice it to say that it's especially striking, given the prominence of these legal debates, that law enforcement agencies have largely allowed officers and forensic examiners to search mobile phones without detailed policies and with few constraints.

153 *See* Massachusetts State Police Forensic Services Group Digital Evidence and Media Section, Technical Manual, https://beta.documentcloud.org/documents/20393038-4708_001.

154 *See* Tucson Police Department, Forensic Electronic Media Unit Quality Manual, https://beta.documentcloud.org/documents/20390047-femu-qa-manual-final-rev-27.

155 This peer review process is supposed to evaluate and document the following: Whether proper evidence intake procedures were followed (legal authority, chain of custody, and handling of evidence); Whether appropriate forensic acquisition methods were followed (write protection, CMOS date/time captured, sterilization procedures, and validating DDE integrity); Whether appropriate forensic examination procedures were followed; Whether appropriate information was identified in the Digital Forensics Report and CID Case Management Report; Whether dissemination procedures were completed properly; Upon review of post-examination evidence, whether archival procedures were properly followed. See Texas Department of Public Safety, Computer Information Technology & Electronic Crimes (CITEC) Unit Standard Operating Procedures, January 2019, https://beta.documentcloud.org/documents/20393187-citec-sop.

156 *See, e.g.*, Paul Ohm, *Massive Hard Drives, General Warrants, and the Power of Magistrate Judges*, 97 VA. L. Rev In Brief 1 (2011); James Saylor, *Computers As Castles: Preventing the Plain View Doctrine From Becoming a Vehicle for Overbroad Digital Searches*, 79. Ford. L. Rev. 2809 (2011); Eric Yeager, *Looking for Trouble: An Exploration of How to Regulate Digital Searches*, 66 Vand. L. Rev. 685 (2013); Andrew D. Huynh, *What Comes after Get a Warrant: Balancing Particularity and Practicality in Mobile Search Warrants Post-Riley*, 101 Cornell L. Rev. 187 (2015); Adam Gershowitz, *The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 Vand. L. Rev. 585 (2016); Michael Mestitz, *Unpacking Digital Containers: Extending Riley's Reasoning to Digital Files and Subfolders*, 69 Stan. L. Rev. 321 (2017); Sara J. Dennis, *Regulating Search Warrant Execution Procedure for Stored Electronic Communications*, 86 Ford. L. Rev. 2993 (2018); Laura Donohue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 Yale L. J. Forum 961 (2019).

Police Databases and Unrelated Investigations

After law enforcement extracts data from a phone and prepares a forensic report, what happens to the underlying data and how might it be used later? Few policies we received mention any limits on how long extracted data may be retained, or how that data may be used beyond the scope of an immediate investigation.

Absent specific prohibitions, law enforcement could copy data from someone's phone — say, their contact list — and add that information into a far-reaching police surveillance database. For instance, it's easy to imagine law enforcement seeing data extracted from mobile phones as providing valuable "leads" for "gang databases," given the low bar for individuals and their information to be added to such databases. "Gang databases" are notorious, in part, for the loose standards and criteria upon which law enforcement rely to enter people into the databases. Factors can include things like "pictures of the individual displaying perceived gang signals on social media,"[157] "association with known gang members,"[158] "frequenting gang areas,"[159] and other indicators fabricated by law enforcement.[160] This discretion has led to extreme racial disparities in gang databases.[161] Critically, these designations can have profound effects on peoples' lives: it can "immediately make people ineligible for jobs and housing, subject to increased bail and enhanced charges, and more likely to get deported."[162] For law enforcement who operate gang databases, data extracted from a phone, like contacts, photos and videos, messages, location history, and more, would be of immediate interest.

Furthermore, forensic analysis tools make it easy for law enforcement to reexamine the contents of a previously extracted phone — it's as simple as opening a file on a computer. Absent specific policies or laws that require notifying someone that their phone has been searched,[163] it would

157 City of Chicago Office of Inspector General, *Review of the Chicago Police Department's "Gang Database,"* April 11, 2019, *available at* https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf.

158 Josmar Trujillo, Alex Vitale, *Gang Takedowns in the De Blasio Era: The Dangers of 'Precision Policing,'* The Policing and Social Justice Project at Brooklyn College, December 2019, *available at* https://static1.squarespace.com/static/5de981188ae1bf14a94410f5/t/5df14904887d561d6cc9455e/1576093963895/2019+New+York+City+Gang+Policing+Report+-+FINAL%29.pdf.

159 California State Auditor, The CalGang Criminal Intelligence System, Report 2015-130, August 2016, *available at* https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf.

160 Stefano Bloch, "Are You in a Gang Database?" New York Times, February 3, 2020, *available at* https://www.nytimes.com/2020/02/03/opinion/los-angeles-gang-database.html.

161 Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 Cardozo L. Rev. 991 http://cardozolawreview.com/wp-content/uploads/2019/01/Stephan.40.2.9..pdf

162 *Id.*, 1018-1019.

163 For example, the New Mexico Electronic Communications Privacy Act requires notifications to the subject of an investigation contemporaneously with the execution of a warrant.

be impossible for those under investigation to know of — let alone challenge — situations where law enforcement continues to rifle through previously extracted data for new or unrelated investigations.

There are a small handful of state laws that do prescribe evidence retention periods specifically for digital evidence obtained from cellphones. For example, New Mexico's recently enacted Electronic Communications Privacy Act requires that "any information obtained through the execution of the warrant that is unrelated to the objective of the warrant be destroyed within thirty days after the information is seized and be not subject to further review, use or disclosure."[164] However, such laws are far from the norm, and most Americans are currently not protected by these types of data deletion or sealing requirements.

Expanding Searches From a Phone Into the Cloud

Digital forensics practitioners consider cloud data to be "a virtual goldmine of potential evidence."[165] A recent report from Cellebrite indicated that "one in every two cases requires access to cloud-based data."[166] As previously discussed in Section 2, major vendors like Cellebrite now sell tools that specifically help law enforcement parlay access to data stored on a phone into further access to data held in the cloud. These tools could, for instance, allow law enforcement to siphon and collect all data from an iCloud account, or all emails from a Gmail account. Or they could allow the police to impersonate the individual. These "cloud analyzer" tools, which are relatively new, represent an immense expansion of law enforcement investigatory powers.

Yet no agency turned over any policies that specifically control the use of cloud data extraction tools.

In theory, unless cloud-based data is specifically detailed in a search warrant for a mobile device, law enforcement should not be able to extract data from the cloud. Cloud extraction poses further challenges: collecting data after execution of a search should require a wiretap order. Search warrants allow for police to get data as of the time of the search warrant's issuance. But if data keeps coming in, this future collection should be treated like a wiretap.

164 *See* https://nmlegis.gov/Sessions/19%20Regular/final/SB0199.pdf. Similarly, California's Electronic Communications Privacy Act allows judges to, at their discretion, "require that any information obtained through the execution of the warrant or order that is unrelated to the objective of the warrant be destroyed as soon as feasible after the termination of the current investigation and any related investigations or proceedings." *See* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB178.

165 Ben Rossi, "CSI in the cloud: how cloud data is accelerating forensic investigations," Information Age, May 12, 2015, *available at* https://www.information-age.com/csi-cloud-how-cloud-data-accelerating-forensic-investigations-123459485/.

166 Cellebrite, 2020 Digital Intelligence Industry Benchmark Report: The top trends redefining Law Enforcement, *available at* https://www.cellebrite.com/en/insights/industry-report/.

The National Institute of Standards and Technology's Guidelines on Mobile Device Forensics advises law enforcement that "[r]etrieval and analysis of cloud based data should follow agency specific guidelines on cloud forensics."[167] But our research did not find any local agency policy that provided guidance on or control over cloud data extraction.

Rare Public Oversight

The adoption of mobile device forensic tools is almost always a secretive, obscured process.[168] Community engagement on the tools, like other surveillance technologies, is the very rare exception — and in some cases, dissenting voices are deliberately excluded from public discussion.[169] Where it does occur, it is substantially hindered by law enforcement secrecy. Even where existing governance structures ought to facilitate public debate regarding law enforcement use of these tools, these processes are skewed towards law enforcement.

167 Rick Ayers, Sam Brothers, Wayne Jansen, *Guidelines on Mobile Device Forensics*, NIST Special Publication 800-101, Revision 1, National Institute of Standards and Technology, May 2014, 47, *available at* https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-101r1.pdf.

168 To find evidence of community engagement and debate, we searched for news articles, opinion pieces, and editorials featured in local newspapers, and trawled through agendas of city councils and county commissions. For the most part, we were unable to locate much news coverage. To the extent we could find coverage, most local reporting we could identify simply reported the fact that a local law enforcement agency had already acquired a new mobile device forensic tool. Headlines like "Police can now access your iPhone without your help," "Local law enforcement using mysterious new tool to unlock cellphones," and "Charlottesville police buy equipment to crack locked iPhones" were common. Most news articles that address concerns with the technology only do so when reporting on objections raised by a third-party, like an ACLU lawsuit, or when journalists are prevented from accessing information. For example, in San Diego, NBC 7 recently published a story with the headline "Spy Games? Civil Rights Advocate Calls out San Diego PD's Covert Use of iPhone Spyware." See Brooks Jarosz, "Police can now access your iPhone without your help," KTVU Fox 2, July 19, 2018, *available at* https://www.ktvu.com/news/police-can-now-access-your-iphone-without-your-help; Jim Otte, "Local law enforcement using mysterious new tool to unlock cellphones," WHIO TV 7, November 22, 2018, *available at* https://www.whio.com/news/local/local-law-enforcement-using-mysterious-new-tool-unlock-cell-phones/W9zAfzQXrFsJmOJjO04TJK/; Bryan McKenzie, "City police purchase equipment to crack locked iPhones," The Daily Progress, November 2, 2018, *available at* https://www.dailyprogress.com/news/local/city-police-purchase-equipment-to-crack-locked-iphones/article_1299d766-df01-11e8-bb6e-8fafe6b93387.html; Ryan Poe, "The 901: This is why people don't trust Memphis police," Memphis Commercial Appeal, January 22, 2020, *available at* https://www.commercialappeal.com/story/news/local/the-901/2020/01/22/memphis-police-use-cellebrite-tool-but-wont-answer-questions-901/4533550002/; Dorian Hargorve, Mari Payton, Tom Jones, "Spy Games? Civil Rights Advocate Calls out San Diego PD's Covert Use of iPhone Spyware," NBC 7, August 18, 2020, *available at* https://www.nbcsandiego.com/news/investigations/spy-games-civil-rights-advocate-calls-out-san-diego-police-departments-covert-use-of-iphone-spyware/2387761/. Similarly, most of what we could identify from city councils and county commissioners or board or county supervisors resembled pro forma approval of budgets and resolutions that included mobile device forensic tools.

169 David Thomas, "City Council considers use of 'Textalyzer' technology," *Chicago Daily Law Bulletin*, January 12, 2018, https://www.chicagolawbulletin.com/archives/2018/01/12/city-council-reviews-textalyzer-tech-1-12-18.

There were a few notable exceptions, but public debate rarely translated into limits on law enforcement use of these tools. For example, the city council of Rochester, New York recently debated an ordinance to allow the Rochester Police Department to purchase a GrayKey.[170] During the city council meeting, the Chief of the Rochester Police Department claimed that the GrayKey would only be "used for solving the most violent crimes we have in Rochester, such as homicide or serious assaults." In response, one council member asked what the mechanism would be "to ensure that this [technology] is not used for things like a low-level drug offense?" The police chief indicated that "it has to be a certain level of criteria for a judge [to sign off] . . . so it can never be used for a traffic stop, for a marijuana violation." This claim is, at best, misleading.[171]

Every person who submitted comments to the city council urged the city council to vote no on the Rochester Police Department's request to purchase GrayKey. One person told the city council that "with the increasing concentration of highly personal information in electronic devices, information not historically available in any form under any type of seizure, tools like GrayKey constitute an unacceptable threat to Fourth Amendment protections."[172] Another person said that the tool should not be purchased "without explicit policies concerning its implementation, that would include the means to restrict which information is stored, shared, or which information is accessed." Yet another noted that "devices like this set a precedent for surveillance that more than often directly impacts marginalized communities, specifically black and brown communities." Ultimately, the city council voted unanimously to authorize the Rochester Police Department to purchase a GrayKey.[173]

Limited community engagement occurred in a handful of other jurisdictions. For example, Davis (CA) and Santa Clara County (CA) both enacted surveillance ordinances that are designed to "ensure residents, through local city councils are empowered to decide if and how surveillance technologies are used."[174] In both Davis and Santa Clara County, law enforcement had acquired

170 Rochester City Council Meeting, May 12, 2020, *available at* https://www.youtube.com/watch?v=xvLGo4XAI_E.

171 True, a judge must find probable cause exists to authorize a search warrant. Perhaps this is what the chief meant by "a certain level of criteria for a judge [to sign off]." But no law or policy restrictions prohibit a judge from issuing a search warrant to search a phone as a result of a traffic stop or marijuana violation.

172 Rochester City Council Meeting, Public Comment, https://www.youtube.com/watch?v=LJDHh2GARio.

173 City of Rochester, Ordinance No. 2020-146, May 13, 2020, *available at* https://www.cityofrochester.gov/WorkArea/DownloadAsset.aspx?id=21474844360; Gino Fanelli, "City Council greenlights GrayKey iPhone hacking tool for police," Rochester City Newspaper, May 12, 2020, *available at* https://www.rochestercitynewspaper.com/rochester/city-council-greenlights-graykey-iphone-hacking-tool-for-police/Content?oid=11779733.

174 These ordinances are part of a broader Community Control Over Police Surveillance (CCOPS) effort, which usually requires law enforcement to develop a surveillance technology use policy and a surveillance impact report before they can acquire new surveillance technology. *See* ACLU, "Community Control Over Police Surveillance," https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance.

MDFTs before the surveillance ordinances took effect. Nevertheless, the city council and county board of supervisors, respectively, still had to approve surveillance use policies for the tools. In Davis, community members voiced opposition to the use of MDFTs.[175] During an October 2018 public hearing, one commenter noted that "I can only see [this technology] being used to harm marginalized people and to harm people that are fighting [law enforcement] abuse."[176] Others noted the importance of making statistics on police use of technologies like MDFTs publicly available. Throughout the MDFT surveillance use policy approval process in Santa Clara, there was only one public comment. In both instances, the surveillance use policies were unanimously approved.

Our review of the processes in Davis and Santa Clara indicate that while surveillance ordinances could theoretically play an important role in governing surveillance technologies like MDFTs, their impact has limitations in practice. One reason is that, despite a dedicated process for community oversight, law enforcement agencies were still not forthright with information. For example, the Santa Clara County District Attorney withheld the make and model of its MDFTs from its surveillance use policy to "promote officer safety and maximize the benefits to be derived from the use of data extraction/examination forensic tools and software."[177] Similarly, the Davis Police Department's annual surveillance report on its use of Cellebrite UFED provides little helpful information. The report mentions that the tool was "used to serve criminal search warrants on 33 devices for 13 felony investigations,"[178] but provides no more detail. Further, in response to a standard request for "information, including crime statistics, that help the City Council assess whether the surveillance technology has been effective at achieving its identified purposes," the Davis PD merely responded that "use of the device is still the most effective way to access electronic information on a cellphone."[179]

175 City of Davis, City Council Meeting, Item 4.M, July 10, 2018 https://davis.granicus.com/player/clip/868?view_id=6.

176 *Id.*

177 County of Santa Clara, Office of the District Attorney Surveillance Use Policy, "Data Extraction/Examination Forensic Tools and Software," November 2018, at 1, FN 1, *available at* http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=4&ID=180351&MeetingID=9769.

178 City of Davis, California, Memo to City Council, Surveillance Technology – 2019 Annual Surveillance Report, Cellebrite Universal Forensic Extraction Device, June 18, 2019, at 2, http://documents.cityofdavis.org/Media/Default/Documents/PDF/CityCouncil/CouncilMeetings/Agendas/20190618/08D-Surveillance-Tech-PD-Cellebrite.pdf.

179 *Id.*, 8.

6. Policy Recommendations

We envision a society where systems of policing and incarceration are obsolete.[180] We therefore reject the necessity of both law enforcement and their investigatory tools. Based on our research, we believe that MDFTs are simply too powerful in the hands of law enforcement and should not be used.

Below, we offer a set of recommendations that we believe can bring us closer to this vision.[181] Recognizing that MDFTs are already in widespread use across the country, we offer a set of preliminary recommendations that we believe can, in the short-term, help reduce the use of MDFTs. At the margin, further increases in the already formidable tools and data available to law enforcement stand to amplify mass incarceration and worsen racial and other disparities. Therefore, we recommend policy steps that would reduce the tools and data available to law enforcement.

As we considered potential recommendations, we weighed whether or not each would likely reduce the scale of policing, whether it would reduce the tools and data available to law enforcement, and whether it would help challenge narratives that assume law enforcement will increase public safety.[182] We believe that the recommendations we make can limit the power of

180 Mariame Kaba, "Yes, We Mean Literally Abolish the Police," New York Times, June 12, 2020, *available at* https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html.

181 There were a number of recommendations we considered that we ultimately did not include because they did not fit within this framework: 1) *Implementing an offense-based restriction to the use of MDFTs to the most serious cases of harm*. This recommendation could significantly limit the number of cases where MDFTs are used. However, offense-based restrictions on surveillance technology have proven to be porous over time. Consider the Wiretap Act. In 1968, "twenty-four categories of offenses listed in Title III had a clear relationship to national security or organized crime." Since Title III's passage, "Congress has amended 18 U.S.C. §2516—the section of Title III that enumerates wiretap-worthy offenses—thirty-one times." Where gambling offenses made up the predominate number of wiretaps in the 1970s, drug-related offenses have taken over, " making up roughly 50 to 80 percent of intercept orders and applications from 1987 to the present." See Jennifer S. Granick et al., *Mission Creep and Wiretap Act 'Super Warrants': A Cautionary Tale*, 52 Loy. L.A. L. Rev. 431, 446-447 (2019). Moreover, offense-based restrictions implicitly concede that there are a category of certain offenses that justify the role of the police and their investigatory powers which we do not support. 2) *Reciprocal funding for public defenders to have mobile device forensic tools from existing grants*. Although this could benefit low-income defendants, and although public defenders are severely under-resourced, this kind of recommendation would further legitimize the use of these tools and overall increase their prevalence. We also believe that such a recommendation could have the perverse effect of starting an "arms race" in attempts to purchase these tools. 3) *Law enforcement agencies should adopt robust internal use policies*. We do not believe that law enforcement can or should be responsible for enforcing their own accountability or transparency.

182 We ask these questions based on the work of Critical Resistance. See Critical Resistance, "Reformist reforms vs. abolitionist steps in policing," http://criticalresistance.org/abolish-policing/.

the police, while not further entrenching the practices that remain. We also recognize that these recommendations are only the first steps in a broader strategy to minimize the scope of policing and reduce the options that police have to bring people into the criminal legal system.

Ban the Use of Consent Searches of Mobile Devices

Police consent searches in any context are troubling, but the power and information asymmetries of cellphone consent searches are egregious and unfixable. Accordingly, policymakers should ban the use of consent searches of cellphones. There are at least three reasons why.

The first reason is that the doctrine underlying "consent searches" is essentially a legal fiction.[183] Courts pretend that "consent searches" are voluntary, when they are effectively coerced. While the Supreme Court has held that the legality of a consent search depends on whether a "reasonable person would understand that he or she is free to refuse,"[184] the so-called "reasonable person" standard fails to account for the important racial differences in how individuals interact with law enforcement.[185] As one scholar noted, "many African Americans, and undoubtedly other people of color, know that refusing to accede to the authority of the police, and even seemingly polite requests—can have deadly consequences."[186] While the Supreme Court has held that consent cannot be "coerced, by explicit or implicit means,"[187] the notion that someone can actually feel free to walk away from an interaction with police has an "air of unreality" about it.[188] Given the extreme power asymmetries, it's a "simple truism that many people, if not most, will always feel coerced by police 'requests' to search."[189]

183 Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 Ind. L. J. 773, 775 (2005) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.")

184 United States v. Drayton, 536 U.S. 194, 197 (2002).

185 Tracey Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Val. U. L. Rev. 243, 248 (1991). ("Instead of acknowledging the reality that exists on the street, the Court hides behind a legal fiction. The Court constructs Fourth Amendment principles assuming that there is an average, hypothetical person who interacts with the police officers. This notion . . . ignores the real world that police officers and black men live in.")

186 Marcy Strauss, Reconstructing Consent, 92 J. Crim. L. & Criminology 211, 242-243 (2001). ("Given this sad history, it can be presumed that at least for some persons of color, any police request for consent to search will be viewed as an unequivocal demand to search that is disobeyed or challenged only at significant risk of bodily harm.") Indeed, as another scholar argued, the "consent search doctrine is the handmaiden of racial profiling." *See* George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 Miss L. J. 525, 542 (2003).

187 Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

188 United States v. Drayton, 536 U.S. 194, 208 (2002)(Souter, J., dissenting).

189 Marcy Strauss, *Reconstructing Consent*, 92 J.Crim. L. & Criminology 211, 221.(2001.)

A recent study designed "specifically to examine the psychology of consent searches" highlights the problems in relying on a so-called "reasonable person" to adjudicate consent searches.[190] Participants were brought into a lab and presented with "a highly invasive request: to allow an experimenter unsupervised access to their unlocked smartphone."[191] More than 97% of participants handed over their phone to be searched when requested to, even though only 14.1% of a separate group of observers said that a reasonable person would hand over their phone. The study reveals that there is a "systematic bias whereby *neutral third parties view consent as more voluntary, and refusal easier, than actors experience it to be*."[192] While there are plausible arguments that the lab-setting studies overestimate compliance rates in police searches, there are stronger arguments that they actually underestimate them.[193]

Second, someone consenting to a search of their phone likely doesn't even have a rough idea of what's really about to happen to their phone. The Fifth Circuit Court of Appeals recently held that a reasonable owner of a cellphone would functionally understand that a "complete" cellphone search "refers not just to a physical examination of the phone, but further contemplates an inspection of the phone's 'complete' content."[194] But, given the lack of public discussion of MDFTs, many people would likely be surprised by the power of the tools that law enforcement use to extract and analyze data from a phone. Further, most of the consent to search forms we obtained from law enforcement agencies don't clearly specify how they will search the phone, the tools they'll use, or the extent of the search.[195]

190 Roseanna Sommers, Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L. J. (2019).

191 *Id*., 1980.

192 *Id*., 2019.

193 *Id*., 2007. ("First, police officers convey more authority than our experimenters likely did; our experimenters were college-aged peers dressed in street clothes, whereas police officers are government agents who wear badges and carry weap-ons. Second, in the policing context, citizens might feel that they are admitting guilt or acting suspiciously if they refuse a police officer's request. It is not clear that our participants would have felt it was self-incriminating to refuse the experimenter's request. Third, to the extent our participants were aware of the pol-icies regulating university research, they would have known that their participa-tion was completely voluntary and that they were free to quit at any time. Most people stopped by the police, by contrast, do not believe they can just walk away.")

194 United States of America v. Cristofer Jose Gallegos-Espinal, (No. 19-20427) (5th. Cir. 2020), at 10.

195 The Denver Police Department's consent form mentions that devices may be submitted "to the computer forensic laboratory for copying and examination." *See* https://beta.documentcloud.org/documents/20390003-consent-for-search-of-cell-phone-tablet. The Tampa Police Department's mentions that "this search may require the temporary utilization of software and/or hardware." *See* https://beta.documentcloud.org/documents/20393153-tpd-form-142-e-consent-to-search-electronic-media-devices-english. The Colorado State Patrol's consent form mentions that they can "submit the electronic device described below to a computer/electronic forensic examiner . . . who has specialized training necessary to conduct such an examination." *See* https://beta.documentcloud.org/documents/20391059-csp-343-consent-to-search-electronic-device. The Illinois State Police's consent to search form mentions that their search "may include the duplication/imaging and complete forensic analysis of any data contained within the internal, external, andlor removable storage media of this device." *See* https://beta.documentcloud.org/documents/20391550-img_0001.

Finally, law enforcement can do almost anything with data extracted from a cellphone after someone consents. At least one case appears to suggest that, so long as a consent form is written broadly enough, there's no limit on when law enforcement could re-examine a cellphone extraction.[196] The consent form at issue in that case and the consent forms we obtained are strikingly similar. One form from the Indianapolis Metropolitan Police Department says that "said search may take an extended period of time, however this time normally does not exceed sixty (60) days from the time of consent." The U.S. Border Patrol claims they can store data extracted from phones searched at the border for 75 years.[197]

Banning consent searches is not a new suggestion.[198] Nor is it a perfect solution, as it's easy for law enforcement to obtain a search warrant. But banning consent searches of cellphones can help limit police discretion, limit the coercive power of police, and minimize the amount of information that can be collected from people under investigation. State and local policymakers should ban consent searches of cellphones.

Abolish the Plain View Exception for Digital Searches

The plain view exception for digital searches should be eliminated. In a digital search, forensic analysis software can far too easily expose data unrelated to the immediate search, unrestricted by where the data physically resides on the phone. The idea that digital evidence can exist "in plain view" in the way that physical evidence can, when considering how software can display and sort over-seized data, is incoherent.

For physical searches, the plain view exception to the warrant standard allows law enforcement to seize evidence in plain view of any place they are lawfully permitted to be, if the incriminating character of the evidence is immediately apparent.[199] For example, if law enforcement were lawfully searching a house for stolen credit cards, but came across cocaine on the kitchen

196 United States of America v. Cristofer Jose Gallegos-Espinal, (No. 19-20427) (5th. Cir. 2020).

197 Department of Homeland Security, Privacy Impact Assessment, U.S. Border Patrol Digital Forensics Programs, DHS Reference No. DHS/CBP/PIA-053(a), July 30, 2020.

198 For example, the New Jersey Supreme Court outlawed consent searches during traffic stops where no reasonable suspicion exists. The California Highway Patrol banned its use of consent searches as part of a broader class action lawsuit brought because of racial profiling. And in Rhode Island, by law, "[n]o operator or owner-passenger of a motor vehicle shall be requested to consent to a search by a law enforcement officer of his or her motor vehicle, that is stopped solely for a traffic violation, unless there exists reasonable suspicion or probable cause of criminal activity."

199 Horton v. California, 496 U.S. 128, 130 (1990).

counter, the plain view exception would allow law enforcement to seize the drugs.[200] In other words, if law enforcement are authorized to search for one thing, but come across another thing that's clearly incriminating, the plain view exception allows them to seize that thing.

This exception may have made sense in the physical world, but it collapses in the digital world. When law enforcement extract all of the data from a cellphone, and then perform a search across all of that data, everything comes into "plain view." Traditionally, the plain view exception is limited by a range of physical factors, such as the size and opacity of closed containers. Only so much can become visible, lawfully, during a search of a physical environment, like the home.

Each of these limitations is upset by the digital environment. In digital searches, "[n]early everything can come into plain view and be subject to use in unrelated cases. The result seems perilously like the regime of general warrants that the Fourth Amendment was enacted to stop."[201] Because forensic software continues to provide law enforcement with ever more powerful search capabilities, the notion of data being "in plain view" is without limit.[202] A search for one kind of digital evidence will almost inevitably reveal troves of other digital evidence.[203] Searching for certain data or keywords, organizing data chronologically, or clicking on different types of extracted data fundamentally changes what's in "plain view" for the investigator.

The Supreme Court has held that the plain view exception "may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."[204] The trouble is, "[c]urrent law allows computer searches for evidence to look disturbingly like searches for all evidence."[205]

200 Emily Berman, *Digital Searches, The Fourth Amendment, and the Magistrates' Revolt*, 68 Emory L. J. 49, 59 (2018). ("According to this doctrine, if the police have a warrant to search a home for firearms used in a robbery and see drugs sitting on a table upon entering the house, for example, those drugs may be seized as well. Imagine that officers seeking evidence of tax fraud come across email messages indicating that the suspect has enlisted a hitman to kill someone. Absent explicit restrictions, the suspect may now be charged not only with tax fraud, but also with attempted murder and solicitation. And while that example may not garner much sympathy for the suspect, who was,after all, soliciting murder, it represents a government intrusion into a private realm for which there was no probable cause and no warrant.")

201 Orin Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 Tex. Tech L. Rev. 1 (2015) (symposium keynote), 11.

202 Most software allows the user to sort by file type — for example, showing all images files in one group, regardless of where they were on the phone. Thus, even though files retain information on their location within the phone, they are not bound by this location when being searched for.

203 Orin S. Kerr, S*earches and Seizures in a Digital World*, 119 Harv. L. Rev. 531 (2005).

204 Coolidge v. New Hampshire, 406 U.S. 443, 466 (1971).

205 Orin Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 Tex. Tech L. Rev. 1 (2015) (symposium keynote), 10-11

As it stands today, the basic equation for digital searches of cellphones is this: technologies like MDFTs empower law enforcement to seize everything and see everything, and the plain view exception effectively allows law enforcement to do anything during those searches. The result: protections guaranteed by the Fourth Amendment are made meaningless. The response from courts across the United States has been tepid, at best. Intervention is necessary.

It's worth considering the counterarguments. One frequent argument in support of the plain view exception for digital searches is that investigators cannot be restricted in their search because potential suspects can and will conceal evidence within a computer's storage.[206] As the argument goes, suspects may obfuscate the location of information by storing data in unanticipated places, with random file names and paths to mislead an investigator. As a result, digital evidence can exist anywhere on a device and investigators need the legal tools to find it.

While someone can fairly easily change where data is stored on a computer, it's significantly more difficult — and in many instances, technically impossible[207] — on cellphones. A cellphone's user interface is significantly more limiting than a desktop computer's, often restricting the ways that users can manipulate files. On a desktop, it's easy to move files around, change file names, or save files into folders or subfolders. Such capabilities are far more limited on a mobile device. Nevertheless, MDFTs allow police to search all of the data on the phone, as if most users have the technical expertise to hide data in arbitrary locations on their phone. With cellphones in particular, the argument that evidence could be hidden anywhere rings hollow.

Abolition of the plain view exception could take several forms. Congress could pass a law to bar the plain view exception for digital searches by amending Rule 41 of the Federal Rules of Criminal Procedure. State legislatures in states that have criminal procedure rules could take similar action. And judges could require, as a condition of issuing a search warrant, that law enforcement agents forswear reliance upon the plain view exception.

The Supreme Court has held that "a cellphone search would typically expose to the government far *more* than the most exhaustive search of a house."[208] As a result, it's time to address the existing loopholes in Fourth Amendment doctrine.

206 Department of Justice, Computer Crimes and Intellectual Property Section, Criminal Division, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations Manual*, ("[c]riminals can mislabel or hide files and directories . . . attempt to delete files to evade detection, or take other steps designed to frustrate law enforcement searches for information. These steps may require agents and law enforcement or other analysts with appropriate expertise to conduct more extensive searches . . . or peruse every file briefly to determine whether it falls within the scope of the warrant.")

207 iOS — Apple's mobile operating system for iPhones — does not allow a user to do any of this.

208 Riley v. California, 573 U.S. 373, 396 (2014).

Require Easy-to-Understand Audit Logs

State and local policymakers should require that mobile device forensic tools used by law enforcement have clear recordkeeping functions, specifically, detailed audit logs and automatic screen recording. This would incentivize MDFT vendors to build this functionality. With such logs, judges and others could better understand the precise steps that law enforcement took when extracting and examining a phone, and public defenders would be better equipped to challenge those steps. Audit logs and screen recordings[209] would document a chronological record of all interactions that law enforcement had with the software, such as how they browsed through the data, any search queries they used, and what data they could have seen.[210]

There is an extreme power and resource imbalance between public defenders and law enforcement.[211] This disparity is only exacerbated by defenders' technological and resource disadvantage: Few public defenders have access to MDFTs. Instead, defenders are often forced to examine forensic reports that are thousands of pages long and "easily navigable only if you have a forensic company's proprietary software."[212] Further, defenders and judges often have no way of knowing whether law enforcement actually stayed within the bounds of a search warrant for a phone. For courts, simply taking law enforcement's word for it should be insufficient — lying under oath is endemic to the institution of American policing.[213] Audit logs would be especially helpful for defenders trying to suppress evidence that was obtained in a prohibited manner.

209 One potential issue with screen recording is the presence of CSAM or other sensitive material.

210 In order to function, software responds to specific events that the user triggers. This means that user activity can be logged at the point of it activating a response from the program.

211 Research has demonstrated that fewer than 30 percent of county-based and 21 percent of state-based public defender offices have enough attorneys to adequately handle their caseloads. *See* Bureau of Justice Statistics, Lynn Langton and Donald Farole Jr., *County Based and Local Public Defender Offices, 2007* (2010), 8, https://www.bjs.gov/content/pub/pdf/clpdo07.pdf; Bureau of Justice Statistics, Lynn Langton and Donald Farole Jr., *State Public Defender Programs, 2007* (2010), 12, www.bjs.gov/content/pub/pdf/spdp07.pdf. *Also see* Justice Policy Institute, *System Overload: The costs of Under-Resourcing Public Defense, 2011*, available at http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf; American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004); Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*, Brennan Center, September 9, 2019, *available at* https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf.

212 Kashmir Hill, "Imagine Being on Trial. With Exonerating Evidence Trapped on Your Phone." New York Times, November 22, 2019, *available at* https://www.nytimes.com/2019/11/22/business/law-enforcement-public-defender-technology-gap.html.

213 *See*, e.g., Irving Younger, "The Perjury Routine," The Nation, May 8, 1967; Myron R. Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 Chi. L. Rev. 1016 (1987); Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, City of New York, Commission Report (1994) at 38; Stanley Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 N. Eng. L. Rev. (1993); Joseph Goldstein, "'Testilying' by Police: A Stubborn Problem," The New York Times, March 18, 2018, *available at* https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html; Peter Keane, "Why cops lie," San Francisco Chronicle, March 15, 2011; Michael Oliver Foley, *Police Perjury: A Factorial Survey*, (2000); Samuel Gross, et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, National Registry of Exoneration, September 1, 2020, *available at* https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

This recommendation even comports with principles articulated by law enforcement associations, like the Association of Chief Police Officers, which has said that "[a]n audit trail . . . of all processes applied to digital evidence should be created and preserved. An independent third party should be able to examine those processes and achieve the same result."[214]

Critically, audit logging is unlikely to be an effective tool for broad transparency and police accountability.[215] This tool will not improve police behavior. But on a case-by-case basis, this tool could give public defenders and judges a significantly clearer window into the nature and extent of cellphone searches.

Enact Robust Data Deletion and Sealing Requirements

State and local lawmakers should require law enforcement to delete any extracted cellphone data that is not related to the objective of the warrant within thirty days from the date the information is obtained.[216] In addition, for cases that result in a conviction, data that was deemed relevant should be sealed at the conclusion of the case. For other cases, where charges are dismissed or do not result in conviction, all data should be deleted, relevant or not. Data deemed relevant in one case should never be used for general intelligence purposes or used in unrelated cases.

As we explained in Section 5, in the absence of clear law or policy, law enforcement could use personal information like contact lists, photos, and location data to fuel police surveillance systems. This is true not only of the data of the person whose phone was searched, but also that of anyone they have been in contact with using their phone. Cellphone searches are unlike traditional seizures because law enforcement extracts all of the data on the device and subsequently searches for case-relevant information. Maintaining information outside the scope of the warrant is akin to law enforcement maintaining the ability to indefinitely and limitlessly search a home.

214 Association of Chief Police Officers, *APCO Good Practice Guide for Computer based Electronic Evidence*, March 2012, available at https://www.digital-detective.net/digital-forensics-documents/ACPO_Good_Practice_Guide_for_Digital_Evidence_v5.pdf. *Also see*: Rick Ayers, Sam Brothers, Wayne Jansen, *Guidelines on Mobile Device Forensics*, NIST Special Publication 800-101, Revision 1, National Institute of Standards and Technology, May 2014, *available at* https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-101r1.pdf. (noting that "[p]roper documentation is essential in providing individuals the ability to re-create the process from beginning to end."); Scientific Working Group on Digital Evidence, SWGDE Best Practices for Mobile Phone Forensics, Feb. 11, 2013, *available at* https://drive.google.com/open?id=18dwENQNzt-bEa0G9GLSUeDxZxeDEeUc-3 (noting that documentation should include "sufficient detail to enable another examiner, competent in the same area of expertise, to repeat the findings independently.").

215 Based on lessons from body-worn cameras, there is little reason to believe that simply being recorded will alter the behavior of an investigator who can justify their actions after the fact. We are more concerned with defenders having the ability to successfully suppress evidence and to not be at a disadvantage in getting exonerating evidence.

216 The only exception should be for exculpatory information.

Policies requiring this kind of data deletion or sealing already exist in New Mexico, Utah, and California.[217] Additionally, New York requires all arrest records for any person not convicted of a crime to be sealed.[218]

There is clear potential for abuse of this kind of policy if law enforcement unilaterally determines the relevancy of data to the warrant. Such abuse can partially be mitigated by requiring clear defense access to the extracted data so they can challenge law enforcement's inclusion or exclusion of information. Audit logs would also help.

Clear retention requirements could not only help hold law enforcement accountable to the scope of the warrant, but could also significantly limit the data that law enforcement could include in internal systems like intelligence databases, "gang databases," and predictive policing tools.[219]

Require Clear Public Logging of Law Enforcement Use

State and local policymakers should require public reporting and logging for how law enforcement use mobile device forensic tools. These records should be released at least monthly, as this would allow more immediate access to information by advocates, policymakers, and the public seeking to understand the capabilities of their police agency. Agencies should additionally release annual reports on overall department usage.

217 New Mexico's Electronic Communications Privacy Act, Section 3.D.2 ("except when the information obtained is exculpatory with respect to the natural person targeted,require that any information obtained through the execution of the warrant that is unrelated to the objective of the warrant be destroyed within thirty days after the information is seized and be not subject to further review, use or disclosure.") *See* https://nmlegis.gov/Sessions/19%20Regular/final/SB0199.pdf; Utah's Electronic Information or Data Privacy Act, Section 1.B, 1.D ("electronic information or data [that is not the subject of the warrant] shall be destroyed in an unrecoverable manner by the law enforcement agency as soon as reasonably possible after the electronic information or data is collected.") *See* https://le.utah.gov/~2019/bills/static/HB0057.html; California's Electronic Communications Privacy Act, 1546.1(d)(2) ("The warrant shall require that any information obtained through the execution of the warrant that is unrelated to the objective of the warrant shall be sealed and not subject to further review, use, or disclosure without a court order."); 1546.1(e)(2) ("When issuing any warrant or order for electronic information, or upon the petition from the target or recipient of the warrant or order, a court may, at its discretion, do any or all of the following: . . . Require that any information obtained through the execution of the warrant or order that is unrelated to the objective of the warrant be destroyed as soon as feasible after the termination of the current investigation and any related investigations or proceedings.). *See* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB178.

218 *See* https://codes.findlaw.com/ny/criminal-procedure-law/cpl-sect-160-50.html.

219 Rashida Richardson, Amba Kak, "It's Time for a Reckoning About This Foundational Piece of Police Technology," Slate, September 11, 2020, *available at* https://slate.com/technology/2020/09/its-time-for-a-reckoning-about-criminal-intelligence-databases.html.

These records should include aggregate information on how law enforcement is using MDFTs, including:

- How many phones were searched in a given time period.
- Whether those searches were by consent (though consent searches should be banned), or through a warrant.
- Warrant numbers associated with searches, when applicable.
- The type(s) of offenses being investigated.
- How often the tools led to successful data extractions.
- Explanations for any failed extractions.
- Which tools were used for extraction and analysis, and their version numbers.

Understanding how, when, and under what legal authority law enforcement use these powerful technologies can increase transparency and accountability.[220] Beyond mere transparency, these kinds of records are important as they can help advocates, researchers, policymakers, and the public effectively pursue policies that reduce the power and scope of law enforcement. More broadly, these kinds of records can help challenge law enforcement's narrative surrounding how, when, and why these tools are used.

While this kind of public reporting can be helpful, it will not inherently lead to a responsible or decreased use of MDFTs by law enforcement. Take wiretapping as an example. Federal law requires an annual reporting of the number of "applications for orders authorizing or approving the interception of wire, oral, or electronic communications."[221] But there is evidence of widespread underreporting of wiretaps.[222] Transparency reports published by wireless service providers like AT&T, Sprint, T-Mobile, and Verizon "state that they implemented three times as many wiretaps as the total number reported by the Administrative Office of the Courts."[223] This casts doubt on whether public reporting of MDFT usage will accurately represent their usage

220 In fact, in a similar context, wiretapping, the Administrative Office of the United States Courts annually reports the number of federal and state "applications for orders authorizing or approving the interception of wire, oral, or electronic communications," including "the offense specified in the order." *See* 18 U.S.C. 2519(2)-(3).

221 18 U.S.C. 2519(1)-(3).

222 Jennifer S. Granick, Patrick Toomey, Naomi Gilens, Daniel Yadron Jr., *Mission Creep and Wiretap Act 'Super Warrants': A Cautionary Tale*, 52 Loy. L.A. L. Rev. 431, 446. ("Despite the statute's reporting requirements, some scholars have raised concerns that the official number of wiretaps is inaccurately low.")

223 *Id.*

by law enforcement. Worse, law enforcement could manipulate these records in order to justify increased funding. However, given that MDFT reporting should include warrant numbers and more detailed information than Title III reporting requires, there is less opportunity for the inaccuracies rampant in aggregate reporting.

Ultimately, this information will still be useful even if incomplete. Policymakers and advocates should remain cautious in using the information agencies report, and cross-reference with other sources of information, like warrants, public records, and reports from individuals and public defenders.

7. Conclusion

Our research shows that every American is at risk of having their phone forensically searched by law enforcement. Significantly more local law enforcement agencies have access to this technology than previously understood. These agencies use the tools far more than previously documented, and use them in a broad array of cases. They do so with few policies or legal constraints in place. Given how routine these searches are today, and given racist policing practices, it's more than likely that these technologies disparately affect and are used against communities of color. Put together, this report documents a dangerous expansion in law enforcement's investigatory power.

For too long, public debate and discussion regarding these tools has been abstracted to the rarest and most sensational cases in which law enforcement cannot gain access to cellphone data. We hope that this report will help recenter the conversation regarding law enforcement's use of mobile device forensic tools to the on-the-ground reality of cellphone searches today in the United States.

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Appendix A: Methodology

In order to determine how many law enforcement agencies have purchased mobile device forensic tools, we sent more than 110 public records requests to a wide range of law enforcement agencies.

We began our public records survey in February 2019. We sent public records requests to a variety of law enforcement agencies: police departments, sheriff offices, district attorneys' and prosecuting offices, state law enforcement, and forensics labs across the country. We also sent records requests to Departments of Finances and Departments of Procurement, many of which keep records of purchases. We sent records requests to the country's 50 largest local police departments, as well as many of the largest state law enforcement agencies.[224] We also sent requests to smaller law enforcement agencies where previous public reporting indicated the purchase of MDFTs.

Many departments provided us some records in response to our requests — some provided full responses, some provided limited responses. As we expected, some departments denied our requests. For example, both the Baltimore and Cincinnati Police Departments denied our requests based on investigatory methods and technique exemption to public disclosure. Others quoted exorbitant fees to fulfill our records request, which we've declined to pay. For example, the Fairfax County (VA) Police Department quoted us $10,349, the Missouri State Highway Patrol quoted us $1,324, and the Jacksonville Sheriff's Office quoted us more than $700,000 to fulfill our requests. Other agencies simply have not responded in a determinative way.
Beyond public records requests to individual agencies, we supplemented our research in four other ways.

First, we explored existing, publicly available reporting or information, through services like MuckRock or other media reporting.

Second, we explored various open databases from city, county, and state governments, which document spending and vendor payments. Such databases often provide a transparent view into government purchasing as a whole, and contain specific purchasing information on MDFTs. In many instances, these databases helped us determine if a police department had purchased MDFTs, even if the department denied our records request. For example, although the Cincinnati

224 U.S. Department of Justice, Bureau of Justice Statistics, "Census of State and Local Enforcement AGencies, 2008," July 2011, Appendix Tables 5, 8 *available at* https://www.bjs.gov/content/pub/pdf/csllea08.pdf.

Police Department denied our records request, a publicly available dataset indicates the police department paid more than $100,000 to vendors like Cellebrite, Grayshift, and MSAB. Similarly, although the Detroit Police Department quoted us over $1,000 to fulfill our request, the City of Detroit's Open Data Portal reveals that the Detroit Police Department paid at least $30,000 to Cellebrite.

Third, we searched databases that document federal grantmaking to local law enforcement agencies. Some data on federal grants helped us determine that a law enforcement agency purchasedMDFTs even if the agency denied our records request. For example, although the Bronx District Attorney's Office denied our request, the office is, among other things, funded through the Coverdell Forensics Science Improvement Grant to "to acquire the Cellebrite Advanced Universal Forensic Extraction Device software solution."

Finally, we used GovSpend, which is a database of government contracts and purchase orders. GovSpend aggregates purchase order data from local, state, and federal government agencies, to provide inter-agency transparency on costs. The database is also open to certain non-governmental parties, like news media organizations. We used GovSpend to better understand the scale of MDFT purchases across the country.

In all, we received more than 12,000 pages of documents in response to our records requests.

Appendix B: Public Records Request Template

[Date]
[Agency Address]

Re: [State Records Request Law] Request

To Whom it May Concern:

This is a request under the [State Records Request Law and citation], on behalf of Upturn, a 501(c)(3) nonprofit organization based in Washington D.C. Our mission is to promote equity and justice in the design, governance, and use of digital technology. This request seeks records relating to the [Agency's] use of mobile device forensic technologies, as well as the Department's policies and procedures governing such use.

Background

Due to the ubiquity of mobile devices, law enforcement sees the data stored on mobile devices, like cellphones, as key sources of evidence for investigations. However, mobile devices can contain large amounts of people's sensitive and private information, much of which may be irrelevant to a given investigation. As the Supreme Court recognized five years ago in *Riley v. California*, "[o]ne of the most notable distinguishing features of modern cellphones is their immense storage capacity." As such, forensic searches of mobile devices are often highly invasive, and we believe that such searches by law enforcement are increasingly common.

Mobile device forensic tools (MDFTs) are used by law enforcement to extract data from mobile devices. In some cases, if the data on the mobile device is encrypted, some MDFTs can help law enforcement circumvent a device's security features in order to access otherwise inaccessible data. These capabilities have been the subject of broad public debate, for example, in the aftermath of the high-profile San Bernardino shooting in 2015. Whether or not devices are encrypted, law enforcement's use of MDFTs is an issue of significant public interest.

Currently, there is a considerable lack of public information available regarding how local law enforcement agencies use MDFTs, and the policies and procedures that govern such use. The public is entitled to understand the Department's activities and capabilities with respect to MDFTs, and this request seeks to further the public's understanding.

Public Records Request

Upturn seeks records regarding the Department's use of **mobile device forensic tools (MDFTs)**. This includes any software, hardware, process, or service that is capable of any of the following:

- extracting any data from a mobile device,
- recovering deleted files from a mobile device, or
- bypassing mobile device passwords, locks, or other security features.

Examples of MDFTs include, but are not limited to, products or services offered by vendors such as Cellebrite, Grayshift, Oxygen Forensics, BlackBag Technologies, Magnet Forensics, MSAB, AccessData, Paraben, Katana Forensics, BK Forensics, and Guidance Software/OpenText.

Upturn specifically requests the following records under the [applicable state law]:

1. Purchase Records and Agreements: Any and all records reflecting an agreement for purchase, acquisition, or license of MDFTs, or permission to use, test, or evaluate MDFTs since 2015.
2. Records of Use: Any and all records describing the Department's use of MDFTs since 2015.
    a. In particular, we seek records reflecting the department's aggregate use of MDFTs. For example, monthly reports that reflect the total number of MDFT cases for each month, broken down by type of crime, and number and type of phones, and number and type of other devices.
        i. Please specify any instances where the department used Cellebrite Advanced Services, or otherwise transferred possession of a device or its contents to a vendor for off-site processing, including Regional Computer Forensics Laboratories.
        ii. Please include any instances of forensic examination of a device (e.g. using JTAG or chip-off processes) that may not involve a vendor's product.
3. Policies Governing Use: Any and all records regarding policies and guidelines governing the use of MDFTs, including but not limited to: training materials regarding their operation, restrictions on when they may be used, limitations on retention and use of collected data, security measures taken to protect stored and in-transit data, guidance on when a warrant or other legal process must be obtained, and guidance on when the existence and use of MDFTs may be revealed to the public, criminal defendants, or judges.

Information About the Request

Upturn appreciates [Agency's] attention to this request. According to [applicable state law], your agency must comply with a request [within X business days / timeframe]. Further, under [applicable state law] we request a fee waiver. As Upturn is a non-profit organization, and disclosure of requested records will promote public awareness and knowledge of governmental action, we are requesting that fees associated with this request be waived. If you determine that a fee waiver is not appropriate in this instance, and if the estimated cost associated with fulfilling this request exceeds $25, please contact me before proceeding to fulfill our request.

Please furnish all applicable records in electronic format to records@upturn.org. For records available only in a physical format, please send such records to:

Upturn
1015 15th St. N.W. Suite 600
Washington, D.C., 20005

Should you have any questions concerning this request, please contact Logan Koepke by telephone at (214) 801-4499 or via e-mail at logan@upturn.org.

Sincerely,

Logan Koepke
Emma Weil

Appendix C: Total Amounts Spent on MDFTs

Law Enforcement Agency	Amount Spent (at least)	Vendors
Anoka County Sheriff	$34,205	AccessData, BlackBag Technologies, Cellebrite, CRU, Guidance Software, Katana Forensics, Magnet Forensics, Micron Consumer Products Group, MSAB, Paraben Corporation
Arizona Department of Public Safety	$110,605	Grayshift, Cellebrite, BlackBag Technologies, Magnet Forensics, Tritech Forensics
Atlanta Police Department	Unknown	Unknown
Austin Police Department	$92,719	AccessData, BlackBag Technologies, Cellebrite, Grayshift, Guidance Software, Magnet Forensics
Baltimore County Police Department	Unknown	Unknown
Bend Police Department	$62,761	Cellebrite
Bernalillo District Attorney	$35,354	Cellebrite
Broward County Sheriff	$563,091	Cellebrite, Grayshift, Oxygen Forensics, Magnet Forensics, MSAB, BlackBag Technologies, AccessData, Katana Forensics, Guidance Software
California DOJ	$225,449	Cellebrite
California Highway Patrol	$25,289	BlackBag Technologies, Cellebrite, MSAB

Law Enforcement Agency	Amount Spent (at least)	Vendors
Charlotte-Mecklenburg Police Department	$181,557	BlackBag Technologies, Cellebrite, Grayshift, MSAB
Chicago Police Department	$31,830	Cellebrite
City of Miami Police Department	$66,558	Cellebrite
Collin County Sheriff	$90,724	Cellebrite, Magnet Forensics
Colorado State Patrol	$56,345	Cellebrite, Federal Law Enforcement Training CT
Columbus Police Department	$114,656	AccessData, Grayshift, Magnet Forensics, Oxygen Forensics, Cellebrite
Cook County District Attorney	$17,495	Cellebrite
Cook County Sheriff's Office	$37,342	Cellebrite
Dallas County District Attorney	$4,902	AccessData, BlackBag Technologies, Cellebrite, Katana Forensics
Dallas Police Department	$482,542	Cellebrite, GTS Technology Solutions, Cellebrite
DC Department of Forensic Sciences	$57,414	Cellebrite, MSAB
DC Metropolitan Police Department	$21,693	Cellebrite
DeKalb Police Department	$4,865	AccessData
Denver Police Department	$51,170	Cellebrite, Cellebrite
El Paso Police Department	Unknown	Unknown

Law Enforcement Agency	Amount Spent (at least)	Vendors
Fairfax County Police Department	Unknown	Unknown
Fort Worth Police Department	$120,921	AccessData, BlackBag Technologies, Cellebrite, Grayshift, MSAB, Oxygen Forensics, Magnet Forensics
Gwinnett County District Attorney	$66,388	H-11 Digital Forensics, Cellebrite, Oxygen Forensics, Magnet Forensics, Susteen, Cleverbridge, Passware
Harris County Sheriff	$176,854	BlackBag Technologies, Cellebrite, Katana Forensics, Magnet Forensics, MSAB
Hennepin County Sheriff	$59,661	Cellebrite, Grayshift
Honolulu Police Department	$60,212	Cellebrite
Houston Police Department	$210,255	AccessData, Cellebrite, Magnet Forensics, MSAB
Illinois State Police	$157,147	Cellebrite, Grayshift, Guidance Software, Magnet Forensics
Indiana State Police	$513,517	BlackBag Technologies, Cellebrite, Magnet Forensics, Grayshift, Katana Forensics, MSAB, OpenText, Oxygen Forensics
Indianapolis Metropolitan Police Department	$153,341	BlackBag Technologies, Cellebrite, Grayshift, Guidance Software, Katana Forensics, Magnet Forensics, MSAB
Iowa Department of Public Safety	$133,324	Cellebrite
Jacksonville County Sheriff	$22,728	Grayshift, Cellebrite

Law Enforcement Agency	Amount Spent (at least)	Vendors
Jefferson Parish Sheriff's Office	Unknown	Unknown
Kansas City Police Department	$81,688	Cellebrite
Las Vegas Metropolitan Police Department	$646,229	AccessData, BlackBag Technologies, Cellebrite, Guidance Software, Katana Forensics, Magnet Forensics, MSAB, EnCase Forensics
Los Angeles District Attorney	$55,795	Cellebrite, Grayshift
Los Angeles Police Department	$358,426	BlackBag Technologies, MSAB, Cellebrite, Guidance Software
Louisville Metro Police Department	$65,692	Cellebrite
Manhattan District Attorney	$638,676	Cellebrite
Massachusetts State Police	Unknown	Unknown
Miami Dade Police Department	$337,072	Cellebrite
Milwaukee Police Department	$7,400	Cellebrite
Modesto Police Department	$147,117	BlackBag Technologies, Grayshift, Cellebrite, AccessData
Nassau Police Department	$64,274	Cellebrite, MSAB, Oxygen Forensics

Law Enforcement Agency	Amount Spent (at least)	Vendors
New York County District Attorney	$495,315	Cellebrite, BlackBag Technologies, Final Data, Forensic Computers Inc, Grayshift, Magnet Forensics, MSAB, EnCase Forensics, AccessData, Teel
New York Police Department	$30,000	Grayshift
North Carolina Department of Public Safety	$122,621	AccessData, Cellebrite, Guidance Software, Katana Forensics, Magnet Forensics, MSAB, OpenText
Ohio State Highway Patrol	$75,088	BlackBag Technologies, Cellebrite, Grayshift, Magnet Forensics
Oklahoma City Police Department	$33,890	Cellebrite, Grayshift, Magnet Forensics, AccessData
Orange County District Attorney	$24,187	Cellebrite, Susteen
Pennsylvania State Police	$540,625	Cellebrite, Magnet Forensics, MSAB, Grayshift, Oxygen Forensics
Pennsylvania State Police	$623,929	Cellebrite, Magnet Forensics, MSAB, Grayshift, Oxygen Forensics
Philadelphia District Attorney	$64,506	AccessData, Cellebrite, Katana Forensics, Magnet Forensics
Phoenix Police Department	$117,460	Cellebrite
Portland Police Bureau	$261,119	AccessData, Cellebrite, Grayshift, Magnet Forensics, MSAB, Oxygen Forensics
Prince George's Police Department	$67,300	Cellebrite
Riverside County Sheriff	$180,535	Cellebrite

Law Enforcement Agency	Amount Spent (at least)	Vendors
Sacramento Police Department	$94,051	Cellebrite, Grayshift, EnCase Forensics
San Bernardino Sheriff	$270,380	BlackBag Technologies, Cellebrite, Guidance Software, Magnet Forensics, MSAB
San Diego District Attorney	$164,499	Cellebrite, Grayshift, Magnet Forensics, MSAB
San Diego Police Department	$232,999	Cellebrite, Grayshift, Magnet Forensics, MSAB, OMC2 LLC/Bantam Tools, Teel
San Francisco Police Department	$40,935	Cellebrite
San Jose Police Department	$296,363	BlackBag Technologies, Cellebrite, Grayshift, Guidance Software, Katana Forensics, Magnet Forensics, MSAB
Santa Clara District Attorney	$233,203	Grayshift, Cellebrite, MSAB, AccessData, Guidance Software
Seattle Police Department	$240,837	Cellebrite, MSAB, Magnet Forensics, Grayshift
Spokane Police Department	$255,369	Cellebrite
St. Joseph County Prosecutor	$14,626	AccessData, Cellebrite, Magnet Forensics
St. Louis Police Department	$26,652	AccessData, BlackBag Technologies, Cellebrite, MSAB, Oxygen Forensics
Suffolk County District Attorney	$31,195	Cellebrite

Law Enforcement Agency	Amount Spent (at least)	Vendors
Suffolk County Police Department	$34,671	BlackBag Technologies, Cellebrite, Grayshift, Guidance Software, Magnet Forensics, OpenText
Tampa Police Department	Unknown	Unknown
Tarrant County District Attorney	$9,986	AccessData, Magnet Forensics
Texas Department of Public Safety	$188,782	BlackBag Technologies, Grayshift, Cellebrite, Magnet Forensics, MSAB, EnCase Forensics, Oxygen Forensics
Travis County District Attorney	$171,980	Cellebrite, Grayshift, MSAB, Guidance Software, OpenText, EnCase Forensics, Teel, Magnet Forensics, BlackBag Technologies
Travis County Sheriff's Office	Unknown	Unknown
Tucson Police Department	$126,958	AccessData, Cellebrite, Grayshift, Magnet Forensics, MSAB, Sanderson Forensics
Tulsa Police Department	Unknown	Cellebrite, Susteen
Washington State Patrol	$52,343	Cellebrite, Magnet Forensics
West Allis Police Department	$10,397	Cellebrite

Upturn
Toward Justice
in Technology

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Submission of Rebecca Shaeffer
Legal Director, Fair Trials Americas
On behalf of Fair Trials Americas

Committee on the Judiciary and Public Safety Public Hearing on on Bill 23-0723, the "Rioting Modernization Amendment Act of 2020"; Bill 23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020"; and Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

October 23 2020

This submission follows oral testimony provided to the Council on October 15.

About Fair Trials: Fair Trials[1] is an international criminal justice reform organization with offices in London, Brussels, and Washington DC. Fair Trials works to improve rights protection in criminal legal systems around the world with reference to international standards and comparative best practice. For the past 20 years, Fair Trials has worked in Europe and globally to develop and implement improved procedural rights standards, including the right to counsel in police custody, improved notification of rights for people in custody (orally and in writing), improved access to disclosure of evidence prior to interrogation, and increased safeguards for children in conflict with the law. Through its cross-regional learning program, "the Translatlantic Bridge," Fair Trials is seeking to support US jurisdictions looking to improve protections for people in custody by providing them with information and expertise from international jurisdictions where access to counsel in custody is well established.

Introduction: As the District looks for meaningful ways to increase accountability and oversight over police, access to counsel in police custody can play an important role in identifying, documenting and preventing police misconduct during a period of time where police are currently able to act with no oversight – in the perilous first hours post-arrest.

In order to maximize the time and resources of the Committee, I would like to validate the contents of the submission of DC Justice Lab in its brief, "A More Mature Miranda,"[2] and the submission of the Georgetown Juvenile Justice Initiative in relation to the particular needs of youth in the District, and to the particular tendency of young people to falsely confess and to waive rights under police pressure. I will not repeat that information here. Instead this submission focuses on additional benefits of providing counsel to arrested people (in this case, children), particularly those which pertain to police oversight and accountability. I also providing, in annex, a general brief on this topic produced by Fair Trials in Annex, entitled, "Station House Counsel: Shifting the Balance of Power Between Citizen and State."[3]

Proposed scope of legislation: In coalition work with the DC Justice Lab, Georgetown Juvenile Justice Initiative, Black Swan Academy, Rights 4 Girls, the ACLU DC, the Center for Court Excellence, and the Public Defender Service, Fair Trials has identified momentum behind the provision of counsel for

[1] www.fairtrials.org
[2] Available at: https://static1.squarespace.com/static/5edff6436067991288014c4c/t/5f7cb311f1089b28400d4ad5/1602007825403/More+Mature+Miranda.pdf
[3] Annex I, also available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Station%20house%20counsel_%20Shifting%20the%20balance%20of%20power%20between%20citizen%20and%20state.pdf

youth in police custody, and we focus on that issue in this brief. However, in other jurisdictions we are working toward access to counsel in police custody for all arrested people, regardless of age, and we see this youth-specific provision as an opportunity to demonstrate the value of early access to counsel as a stepping stone toward full representation for children and adults alike. With that caveat in mind, Fair Trials recommends an amendment to the Comprehensive Policing and Justice Reform Bill (*hereinafter*, **the Policing Bill**) that would:

> Make any statement made to law enforcement officers by any person under eighteen years of age *inadmissible* in any court of the District of Columbia for *any purpose*, including impeachment, unless:
> • The child is advised of their rights by law enforcement in a manner consistent with their cognitive ability;
> • The child actually confers with an attorney in relation to their right to silence and to a laywer; and
> • The child knowingly, intelligently, and voluntarily waives their rights *in the presence of counsel*.

Background: Nationally, about 90% of youths waive their right to counsel.[4] In D.C. the procedure and language for informing children of their rights is the same as for adults, but juveniles' cognitive skills and reading comprehension are still developing and they may not truly understand the information they are given.[5] More importantly, they tend to undervalue the role of counsel. Children are more likely to waive the right to a lawyer despite being the group that is least able to resist police interrogation and to make wrongful confessions.[6][7] Youths face not only the power differentials inherent to all interrogation but also the effect of being raised to respect and obey adults. They are more likely to be influenced by deceptive methods and short-term incentives (i.e., being told they can go home if they say "what happened").[8]

Even if a child does invoke their rights during interrogation, D.C. does not have a formal system for providing a lawyer until the initial hearing stage. However, the legal process begins before the initial hearing. When counsel is not yet appointed, youth are interviewed by Court Social Services officers. D.C. attorneys have reported these interviews including questions about drug use, gang affiliation, and the charged offense itself. Although using these answers as evidence of a criminal offence in court is against the court rules, attorneys have reported them being prejudicial nonetheless, particularly in the context of guilty plea negotiations, diversion and pre-trial decisions.

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[4] "Police routinely read juveniles their rights but do kids understand?" American Bar Association (2016). Available at: https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/august-2016/police-routinely-read-juveniles-their-miranda-rights--but-do-kid/

[5] Id, n 3.

[6] "Arresting Development: Convictions of Innocent Youth," Tepfer, Joshua, et.al. Northwestern University College of Law Scholarly Commons (2010). Available at: https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1204&context=facultyworkingpapers

[7] *Haley v. Ohio*, 332 U.S. 596

[8] "Access Denied: A National Snapshot of States' Failures to Protect Juveniles' Access to Counsel https://njdc.info/wp-content/uploads/2017/10/Access-Denied.pdf

The negative effect of the lack of mandatory juvenile representation has a discriminatory impact on Black children in the District, where Black children make up 95% of youth who are subject to arrest.[9] Furthermore, people from lower socioeconomic backgrounds are also less likely to assert their right to counsel.[10]

While the juvenile system is intended to be primarily rehabilitative, it can and frequently does result in criminal conviction and loss of liberty, with long term impacts on life outcomes for youth. Furthermore, prosecutions of children may be transferred from juvenile to adult criminal court. D.C. tried 541 youths as adults between 2007 and 2012.[11] In D.C., transfer laws stipulate that: juvenile courts may waive jurisdiction at their discretion; in some types of cases jurisdictional waiver is presumptive (though not mandatory); and in other types prosecutors have total discretion to bring the case in criminal court.[12] The juvenile bears the burden of proof in cases of presumptive waiver. D.C. also has "once and adult, always an adult" laws, meaning a defendant who has previously been tried as an adult cannot have a subsequent case brought in juvenile court, no matter the offense.

National and global movement toward station house counsel, especially for youth: An amendment to the Policing Act that provides for counsel for youth in police custody would place the District firmly within a growing movement of jurisdictions both within the USA and around the world that increasingly recognizes the benefits of providing early access to counsel during police custody, prior to interrogation and as a necessary precursor to any effective waiver of the right to silence.

Several states and jurisdictions mandate counsel for younger children in custody (for example, up to age 15), but increasingly, states are beginning to expand access to older children, up to the age of 18. The most significant is the recent passage of SB 203[13] in California, which expands the juvenile access to counsel law first enacted as a city ordinance in San Francisco in 2018,[14] and will be enacted across the state beginning on January 1. A similar law is under consideration in New York State.[15] In Chicago, pursuant to Illinois state law[16] and the terms of a consent decree[17] (meant to address, in part, police torture of people held in Chicago police custody).

These states join dozens of other jurisdictions, including every member state of the European Union, the United Kingdom, Canada Australia and New Zealand in providing access to lawyers for arrested people of any age in police custody. Around the world, police station access to counsel is understood to be a key safeguard against police abuse, arbitrary detention, insufficient notification of rights, unlawful arrest, lack of access to medical care and sanitation, coercive interrogation, and excessive

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[9] "Racial Disparities in DC Policing: Descriptive Evidence from 2013-2017. ACLU DC (July 2019). Available at: https://www.acludc.org/en/racial-disparities-dc-policing-descriptive-evidence-2013-2017

[10] "Do Juveniles Understand what an Attorney is Supposed to Do?" NJDC (2015). Available at: https://njdc.info/wp-content/uploads/2015/09/Do-Juveniles-Understand-What-An-Attorney-Is-Supposed-To-Do.pdf

[11] "Capital City Correction: Reforming DC's Use of Adult Incarceration Against Youth." Campaign for Youth Justice (2014). Available at: http://www.campaignforyouthjustice.org/images/pdf/Capital_City_Correction.pdf

[12] "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting." NCJRS((Sep 2011). Available at: https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf

[13] Available at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB203#:~:text=SB%20203%2C%20Bradford.,Juveniles%3A%20custodial%20interrogation.&text=Existing%20law%20requires%2C%20until%20January,of%20the%20above%2Dspecified%20rights.

[14] The Jeff Adachi Act, mandating both counsel and access to two phone calls for youth in custody, available here: https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-61366.

[15] Text of proposed bill available here: https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A06982&term=2019&Summary=Y&Actions=Y&Memo=Y&Chamber%26nbspVideo%2FTranscript=Y

[16] 725 ILCS 5/103-4. Available at: https://ilga.gov/legislation/ilcs/documents/072500050K103-4.htm

[17] For more information on the terms of the consent decree, see: http://chicagopoliceconsentdecree.org/

prosecutions.[18] In each of these jurisdictions police are able to conduct effective investigations alongside defense counsel in custody.

Other jurisdictions can also provide models for more effective notification of rights for youth in police custody. Alongside the presence of defense counsel, many jurisdictions with stronger procedural rights for arrested people have developed "easy read," simple and visual representations of custody rights, to help children better understand the consequences of waiver. This kind of effective, written notifications of rights go far beyond current Miranda warnings, which are poorly understood by children in particular. Examples of these simple "letters of rights" are included in annex.[19]

Impact beyond the detention context: In the context of the USA and the District, the potential benefits of opening police custody to the oversight and intervention of defense counsel can have a much broader impact than simply preventing ill treatment and protecting the right to silence. The zealous advocacy of counsel in the critical hours immediately post-arrest can have both upstream effects (on the behavior and arrest patterns of police officers) as well as downstream effects (on the course and outcome of charging, diversion, pre-trial detention, and ultimate case outcomes).

Cost Savings due to decarceration and prevention of police misconduct: The Public Defender for Cook County Ill, which has the nation's only dedicated police representation unit, reports that in 18% of cases in which public defenders assist people in custody, they are able to secure the person's immediate release with no criminal charges. A study of Cook County's early representation programs estimated that cost savings associated with early access to a lawyer could range between 12 and 43 million dollars.[20] Cost savings were realized through reduced jail time (both pre-trial and post-adjudication), reduced recidivism, and reduced liability payouts due to police misconduct effectively prevented by counsel.[21] Existing research on early access to counsel has demonstrated lower rates and duration of pre-trial detention, higher probability of a reduction in charges, higher probability of release from detention and reduced jail admissions when lawyers can quickly access arrested people.[22]

Data collection: Furthermore, in addition to the immediate oversight provided by the presence of counsel in police custody, defense lawyers can collect data on patterns of policing and police misconduct that are currently difficult to obtain. For example, defense counsel may be able to gather information on arrests that never lead to criminal charges, including those which are not charged due to unlawful, overzealous or abusive acts by police. This data can aid the work of the Office of Police Complaints and other relevant bodies, which can in turn help to improve community relations.

Conclusion: The state of justice in the District would be substantially improved by an amendment to the Policing Bill requiring counsel for youth in police custody, prior to and during interrogation and in

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[18] "Access and Contact with a Lawyer." Association for the Prevention of Torture. Available at: https://www.apt.ch/en/dfd_print/636/analysis/en

[19] Annex II, "Notice of Rights andEntitlements," Hertsfordshire, UK police, available at: https://www.herts.police.uk/assets/Information-and-services/About-us/rights-and-entitlements-booklet.pdf and "Rights and Entitlements, Leaflet for Young People." Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765546/Rights_and_entitlements_-_leaflet_for_young_people__web_.pdf

[20] "The Fiscal Savings of Accessing the Right to Counsel Within 24 Hours After Arrest," Sykes, Brian et. al. UC Irvine Law Review (2015). Available at: https://www.law.uci.edu/lawreview/vol5/no4/Sykes.pdf

[21] See, "One Hour Access to Counsel: A Cost-Saving Necessity," (2020), Available at: http://www.chicagoappleseed.org/our-blog/one-hour-access-to-counsel-cost-saving-necessity/

[22] "Early Intervention by Counsel," Worden et.al. Office of Justice Programs, NCJRS (April 2020). Available at: https://www.ncjrs.gov/pdffiles1/nij/grants/254620.pdf

order for waivers of the right to counsel and to silence to be valid. Youth are particularly susceptible to police coercion, and custody is a situation of extreme vulnerability. Furthermore, defense counsel can play a pivotal role in decarceration, decriminalization, and oversight of police when they are able to access arrested people in the early hours post arrest.

For further information, please contact Rebecca Shaeffer, Rebecca.shaeffer@fairtrials.net.

OCTOBER 2020

STATION HOUSE COUNSEL: SHIFTING THE BALANCE OF POWER BETWEEN CITIZEN AND STATE

Fair Trials

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02

INTRODUCTION

For people who have been arrested, the immediate hours spent in police custody are a time of extreme vulnerability. As recent documentaries, including *Making a Murderer* and *When They See Us* have exposed, most people in police custody in the US have limited, if any, communication with the outside world, at a time when ill-treatment, coercive questioning, and other rights violations are most likely to occur, and when criminal proceedings are set into motion.

Arrested people in the US are almost never able to access counsel until, at the earliest, the first court hearing. Until then, they are subject to the unchecked power of the police. By the time an arrested person accesses counsel, key decisions about charge, detention, diversion and dismissal have already been made by authorities, and the machinery of the criminal legal system has already irrevocably begun to grind.

As this brief shows, involving defense lawyers earlier can not only provide oversight over arrest, custody and detention but can also have a transformative effect on the entire criminal legal system. Early access to counsel has the potential to disrupt the machinery of criminalization, mass incarceration, and police control.

In 2014, only 3 out of every 1,000 arrestees in Chicago had an attorney at any point while in police custody. When individuals in custody attempt to invoke their legal rights to counsel, they report facing hostility from police.[1]

03

THE PROBLEM: HOW THE US IS FAILING PEOPLE WHO ARE VULNERABLE TO POLICE POWER

US citizens' right to counsel is protected under the US Constitution, but the interpretation of the right to counsel has failed to reach the stage of early police custody. The 6th Amendment right to counsel does not apply until later in the process, usually the first court hearing. The 5th Amendment (derived from the *Miranda v Arizona* decision[2]) has been interpreted only to mean that police must inform an arrested person of their right to a lawyer and their right to silence – not to actually provide a lawyer. An arrested person must assert the right to silence with no legal assistance. In practice, few people are able to maintain the right to silence without counsel.

80%

At least 80% of arrested people waive their right to a lawyer and to silence in the face of police pressure.[8]

Although there are guidelines recommending that a person has access to counsel as soon as is practical after they are taken into custody,[3] in most parts of the United States this is far from the reality.[4] An American Bar Association report from 2004 describes many instances of individuals waiting in jail for several months without access to a lawyer.[5] In one particularly egregious case, a woman was in jail for over a year without once speaking to a lawyer or appearing in court.[6] Some states have adopted their own laws that guarantee access to counsel within a certain period of time.[7] In no jurisdiction in the US are defendants regularly able to access counsel prior to arraignment (sometimes days after arrest).

04

Legal counsel in police stations is needed to protect the right to silence and prevent serious rights abuses, including physical brutality, unlawful arrest, coercive interrogation and denial of medical attention and basic physical needs. Without a lawyer present, these violations are unlikely to ever be remedied.

90%

Around 90% of juveniles, waive their Miranda rights.[9]

But early access to counsel does more than protect defendants from potential abuses – with early access, lawyer can help to divert unworthy cases from ever entering the system.

By the time defendants see a lawyer in court, key decisions have already been made in relation to charging and bail – decisions which will be determinative for many defendants who may be coerced to plead guilty to avoid pre-trial detention, overcharging and long sentences.

Lawyers in police custody can identify unlawful or abusive arrests, cases worthy of diversion or cases that should never be prosecuted at all, acting as a powerful agent for liberation, who can challenge the otherwise inexorable march of mass incarceration.

The Registration of Exonerations has documented that 12% of exonerations arise from false confessions – including 37% of juvenile exonerations and 70% of exonerations of people with mental illness and/or developmental disabilities.[10] A key role for lawyers in police custody is to identify these vulnerabilities and ensure that these individuals are able to withstand police coercion.

05

WHAT DO LAWYERS DO IN POLICE STATIONS?

Lawyers in police station defend the rights of their clients at the time they are most vulnerable. Through confidential and private meetings, they can:

- make sure their client understands their rights – in particular, the right to remain silent. Although the police have the obligation to notify these rights, lawyers are best placed to explain their rights to suspects, and the consequences of waiving them;
- gather information from their client, which may help them secure a pre-trial release;
- find out about detention conditions and treatment by the police and detect and challenge abuses;
- assess their client's fitness for the interrogation; and
- explain what is likely to happen during the process and why.

If an interrogation goes ahead, a lawyer's principal role is to be a check on police coercion. Lawyers can ask to privately advise their client, they can facilitate communication between the police and their client, ask for questions be clarified or rephrased, and flag the need for an interpreter. They can read and check the written records of the interrogation and correct mistakes. If procedural rights are not respected by the police, a lawyer can ask for their observations to be recorded on the interrogation transcript for later legal challenge. For example, if the transcript does not reflect the person's actual responses, the person is inebriated during the interrogation, an interpreter should have been present or the police used coercive techniques.

Lawyers can also start to advocate for their clients' rights with police and prosecutors much earlier in the process. They can make arguments about the propriety of the arrest and any charges that are being considered. They can also, encourage law enforcement not to seek pre-trial detention, to argue for diversion or other non-criminal disposition, and demand sufficient disclosure to be able to make arguments about these early decisions. They also start to build a rapport with their client, which is crucial for effective defense but virtually impossible if you first meet on the doorsteps of the court.

06

HOW STATION COUNSEL COULD BE TRANSFORMATIVE

The transformative effect of early access to counsel goes beyond protecting individuals at a time of vulnerability. Interventions that hold the police to account can have a significant impact both downstream (on the way cases are charged and plead) and upstream (on patterns of arrest), potentially leading to decarceration. Lawyers in police custody can create systematic change to a number of criminal justice outcomes, by:

- Challenging unlawful and abusive arrests, including those that do not lead to criminal charges, discouraging police from unnecessary street contact.
- Reducing prosecutions and jail admissions by encouraging police and prosecutors to drop clearly unworthy cases.
- Identifying the vulnerabilities of arrested people and promoting diversion and treatment opportunities.
- Identifying incidence and patterns of police misconduct and ill treatment of arrested people.
- Improving communication channels and trust between police, community (including victims and witnesses), defenders and prosecutors.
- Capacitating defense lawyers to prepare more comprehensively for arraignment, pre-trial detention and plea negotiations – reducing wait times and administrative hurdles.
- Improving access to medical care and other essential needs of detained people.

07

POLICE STATION ACCESS TO COUNSEL IN EUROPE

In many countries in Europe, people have the right of access to a lawyer, free of charge, prior to and during interrogation, 24 hours a day.

United Kingdom

Following a number of scandals involving police torture of IRA suspects in British custody during the Irish sectarian conflict of the 1980s, UK law was changed to give suspects in police custody a right to consult a solicitor privately and free of charge at any time. Detailed Codes of Practice require the police to: repeatedly inform detainees of this right; prohibit anything which could deter exercise of the right; and facilitate access to a lawyer. This right applies throughout police detention and a suspect has a right to have a lawyer present during interrogation. Where these rights are violated, evidence that is obtained by the police during interview will be inadmissible in criminal proceedings in most circumstances.

European Union

Access to a lawyer in a police station became a right across Europe as a result of a seminal case in 2009, involving a 17 year-old boy in Turkey who was suspected of participating in an unlawful demonstration. It was decided that his conviction, based on a confession given without access to a lawyer, was unfair. This case and subsequent European legislation, led to a revolution in police station access to counsel, which became mandatory across Europe in 2016.

In Belgium, for example, suspects now have the right to confidential communication with a lawyer in police custody before the police interview and to a lawyer being present throughout the police interview. There is a new duty scheme in place for the prompt notification, appointment and payment of lawyers who attend clients in police custody. Many different models have been created across Europe, creating a wealth of learning for the US. Fair Trials is working to ensure that the legal right to access a lawyer in police custody is being implemented across Europe.

08

HOW DOES ACCESS TO COUNSEL WORK IN PRACTICE?

Police station lawyer systems are in place in many parts of the world and can help US jurisdictions understand how police station lawyer access might be designed. While the principles behind access to a lawyer are the same, there is no perfect system. US jurisdictions have an opportunity to learn from other jurisdictions to develop a system that works for them.

How are lawyers contacted?

In some systems, a third-party contractor runs a dedicated line that connects arrested people with on-call lawyers (often through police intermediaries). In others, a bar association plays this role through an online platform. In Belgium the appointment of lawyers is made via an online platform that connects police stations with lawyers.

How long before they get to police station?

Most jurisdictions require that a lawyer who is contacted and on-call must arrive at the police station within a short period of time, usually two hours. Interrogation may not take place until then. Where there may be a delay in a lawyer arriving at the police station in person, a telephone consultation may be held as an initial step. Since COVID-19, some jurisdictions have adopted this practice so that lawyers advise their clients and participate in interrogations via videolink.

Which lawyers do this?

Public defender offices as such do not exist in most of Europe, but private lawyers take on legal aid cases in a coordinated system. Suspects can normally either choose their own nominated lawyer or the on-call lawyer from a scheduled list. Either way, the lawyer's services are provided free of charge and paid for by the state. On-call lawyers are often required to meet certain quality requirements as well as meeting ongoing key performance indicators and quality measures.

How are they paid?

Police station legal advisers are often paid a fixed fee by the State. In England and Wales, the remuneration is around $45 for telephone advice and $250 for in-person attendance.

Do they have an ongoing role in the case?

Sometimes they can help a law firm get a case and the fees for any subsequent trial, which is why there is competition for duty solicitor slots even though the fees are low.

WHAT WOULD ACCESS TO COUNSEL LOOK LIKE IN THE US?

There are few examples of true police station access to counsel programs in the USA, but some attempts have been made. The most prominent example is Cook County/Chicago, where lack of access to counsel in police custody has been persistently problematic, despite being prioritized in the 2019 consent decree developed in response to the US Department of Justice's finding that Chicago police engaged in a pattern or practice of excessive force and racial bias.[11] Even with a special police station representation unit (unique in the country) and a legal obligation to facilitate lawyer access, only 2% of arrested people in Chicago get access to a lawyer, because police have failed to provide arrested people with legally-mandated phone calls to counsel.

Beyond Chicago, efforts are being made in some jurisdictions to expand police station access to counsel for children. In San Francisco, the Jeff Adachi Ordinance, enacted in 2018, provides children with access to counsel before interrogation.[12] Similar legislation is being considered in New York State.[13] However, these limited experiments have not resulted in increased practical access to lawyers for people in custody.

The experience of Chicago suggests that at least in some jurisdictions, the "on call" system used in the UK and most of Europe may not work in the US, given the recalcitrance of many police cultures. We need to experiment to assess which models will be most effective at disrupting abusive and carceral police and legal cultures.

The existence of organized public defender offices (absent in most of Europe and the UK) creates the possibility of innovative models of police station access, for example the 24/7 presence of public defenders in police precincts. As jurisdictions experiment with different access models, some key elements should be included:

- accountability for police who fail or refuse to facilitate access to counsel;
- presumption of inadmissibility of statements obtained outside the presence of counsel;
- codification and implementation of broader custody rights and record keeping on procedural safeguards, including concrete timeframes for provision of rights including phone calls, access to medical care, sanitation, food and water, etc.
- data collection on take up, effectiveness and impact of station house lawyers on upstream and downstream outcomes;
- fee structures and attendance regimes for police station lawyers that protect their independence from police; and
- training of defense lawyers, police and prosecutors on the role of lawyers in police custody.

A study by First Defense Legal Aid in Chicago, which works to improve access to counsel during the first 24 hours following arrest, found that providing earlier access to counsel for arrested people in police custody in Cook County could create fiscal savings of between $12 and $43 million, largely in reduced jail time.[14]

POSSIBLE CHALLENGES

Global experience offers important lessons for US jurisdictions on the potential challenges to implementing police station access to counsel:

- **Independence of police station lawyers:** Lawyers who spend a lot of time in proximity to police, may find it challenging to retain sufficient independence from police interests and to be seen as independent by communities. Care should be taken to ensure that the system for appointing counsel, rotating lawyers in and out of police custody and community engagement enables robust defense.
- **Conflicts:** Some indigent defense systems may find it challenging to identify potential conflicts of interest between co-defendants at the early stage of police custody. A system for identifying and managing conflicts should be developed.
- **Police facilitation of counsel:** Most European systems rely on police initiating the request for counsel and informing arrested people of this right. The experience in Chicago suggests this may not be effective in some US contexts. Despite the fact that it is a Class 3 felony for police to fail to observe the right to counsel in Illinois, police regularly obstruct this right in practice in Cook County. These violations, among others, are the subject of an ongoing consent decree based on DOJ findings.[15] Therefore, it may be necessary, to ensure defense counsel are present and have access to people in police custody continuously, or else to appoint independent third parties to facilitate access.
- **Waivers of the right to counsel by arrested people:** Even where the right to counsel in police custody is well-established, many arrested people continue to waive their right to a lawyer.[16] Procedural safeguards are needed to ensure that waivers are knowing and voluntary.
- **Compensation for counsel:** Because police station-based legal work may be more arduous, and may occur during nights and weekends, compensation for lawyers should be sufficient to ensure they are not disincentivized from providing high quality representation. In ongoing efforts to divert funding from abusive police forces to community investment, provision for defense rights in police custody should be a priority for municipalities.

CONCLUSION

It is time for US jurisdictions to learn from the experience of countless global jurisdictions that have rebalanced the relationship between police and citizens. We must ensure that in the vulnerable moments after arrest, people's rights are safeguarded and that there is oversight of police behaviour, by the advocacy of a defense lawyer. The police can no longer be permitted to operate in the shadows. There must be accountability at all stages of criminal legal proceedings, and Americans' Constitutional right to counsel must be fully implemented.

About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. For the past 20 years, Fair Trials has worked to develop and implement improved procedural rights standards for criminal defendants across Europe and around the world. Fair Trials is uniquely placed to lead this work, given its experience working with jurisdictions in the EU to implement programs providing access to a lawyer upon arrest, in the police station. For more information, please contact Rebecca Shaeffer, Legal Director of Fair Trials (Americas), at rebecca.shaeffer@fairtrials.net.

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3. American Bar Association, Standards for Criminal Justice: Providing Defense Services, Standard 5-6.1, 1992
4. American Bar Association, Gideon's Broken Promise: America's Continuing Quest for Equal Justice, 2004
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So you've been arrested

When you arrive

In the cell

Interview

What might happen next

Leaving the police station

A guide to custody for young people

When you arrive:

At the police station you can:

- Speak to a solicitor (this is free and the solicitor does not work for the police)
- Get help if you feel unwell or are hurt

You are in a safe place. If there is something that is worrying you, you can talk to someone

If you are a girl, you can ask to speak to a female member of staff.

The police will tell your parent or carer that you are at the police station.

If you don't understand your rights you can ask a police officer.

Any items you have with you when you are arrested may be taken from you.

The police will keep these safe. You may get these back when you are released or they may be kept as evidence.

The police will ask you about your health – it is important you give as much information as possible.

You may be searched when you get to the police station.

The police will find you an appropriate adult to be with you when you are interviewed. It can be your parent or carer, a family member over 18 or someone from the Youth Offending Team.

A solicitor is someone who makes sure that you understand all of the legal words and also can give you advice. You have a right to speak to a solicitor for free.

Things the police may do:

- Measure your height
- Take your photo
- Take a sample of your DNA
- Scan your fingerprints

In the cell:

If you have any health needs, or take medication, you should tell the police officer.

You may ask for a shower and exercise, and will be offered food.

If you have any religious needs the police will try and make sure you have everything you need.

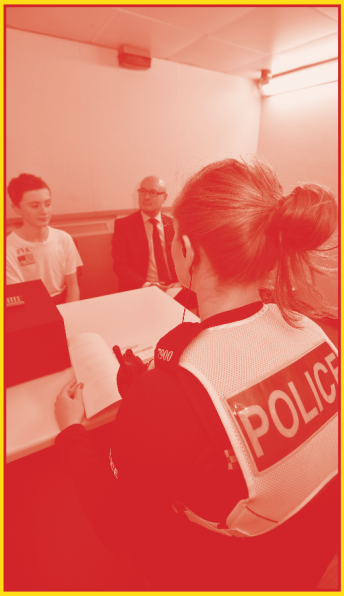
The custody sergeant will check on you to make sure you are ok and have everything you need.

The police won't always know how long you will be kept in for – it is usually around 2-3 hours.

The police can usually keep you in for up to 24 hours – one whole day and night.

The interview:

- You can speak to your solicitor before the interview and the solicitor and appropriate adult can be in the interview with you
- There might be two police officers in the interview
- If you answer "no comment", the police will still ask all of their questions
- You can ask for a break if you want one.



You will be taken back to the cell while the police make a decision – they will try and do this quickly.

What might happen next:

RELEASED	If the investigation is not complete, you will be released, you may be given a date to come back to the police station You might have some rules to follow e.g. being back home for a certain time or not going to certain places If you are charged, you will be given a date to go to court.
REMAND	The police have decided to charge you with the offence You may be given somewhere to stay overnight or, as a last resort, kept in a police cell.
NO FURTHER ACTION	The police have decided not to charge you and you are free to leave the police station.

LEAVING THE POLICE STATION:

Before you leave the police station, the police officer will make sure you are safe when you are released.
You will be given your property back (e.g. your mobile phone and your wallet) unless it is being kept for evidence.
The police officer and your appropriate adult will discuss how you are getting home. The police may be able to take you home, or ask your parent/carer to come and collect you.

CI4935v3_May_2017

Rights and Entitlements

Easy Read booklet

This booklet is about your Rights and Entitlements. It tells you:

- What will happen to you after you have been arrested.
- The rights you have and the help people can give you.

The Law Society

Developed by Hertfordshire Constabulary - version 3 - December 2019

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Read only

Contents

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Some rights you have in Police custody.

You have the right to talk to a solicitor.

A solicitor understands the law and can give you advice.

See page 11 for more information.

You have the right to medical care.

Tell the Police if you are hurt or feeling ill.

See page 23 for more information.

You have the right to an interpreter who will explain things in your own language.

See page 25 - language interpreters.

See page 29 - sign language interpreters.

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You will be given food and drink.

You can have breakfast, lunch and dinner.

See page 20 for more information.

You can ask the Police to tell someone where you are.

You may be allowed to speak to someone on the phone.

See page 32 for more information.

Some people can have an Appropriate Adult.

An Appropriate Adult gives vulnerable people extra help.

See page 15 for more information.

If you are aged under 18 or are over 18 and find it difficult to talk about or understand what is happening, the Police will always find you an Appropriate Adult.

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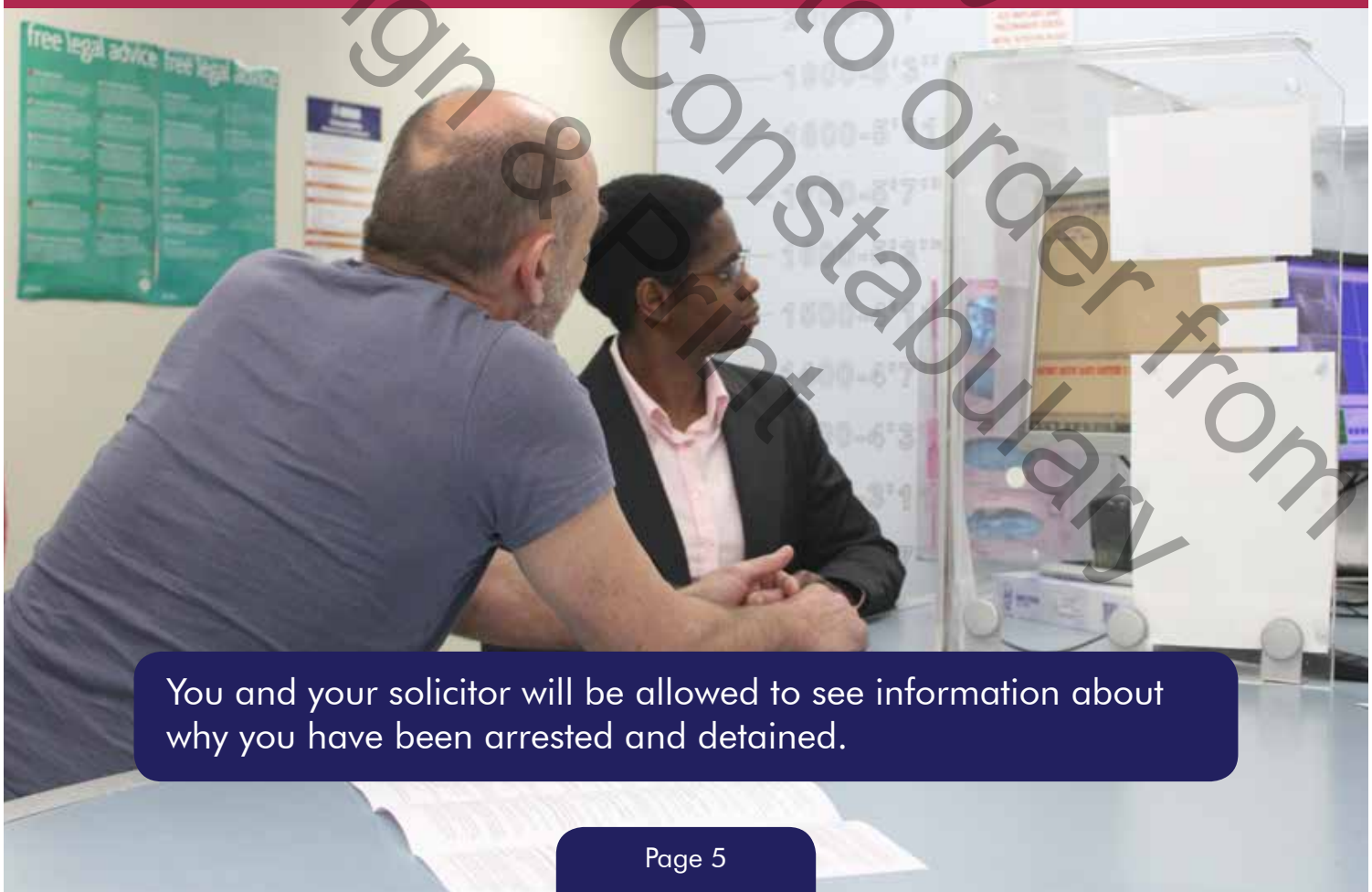
You will be booked into Police custody.

Being kept at the Police station is called 'being detained'.

You can ask why you have been arrested and detained.

The Police must tell you what you have been arrested for and why they need to keep you at the Police station.



You and your solicitor will be allowed to see information about why you have been arrested and detained.

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The Police will take some things from you.

These will usually be returned to you when you leave custody or at the end of the investigation.

Things like your phone, money and jewellery will be put in a bag and kept safe.

You may have to take your shoes off. The Police will give you other shoes to wear.

You may have to take your belt or other clothing off and give it to the Police.

If the Police take your clothes they will give you other clothes to wear.

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Things the Police will do

The Police will measure how tall you are.

The Police will take a photograph of you.

The Police will take a sample of your DNA.

They will take some saliva from inside your mouth using a stick. This does not hurt.

The Police will scan your fingerprints using a special machine.

If you have an Appropriate Adult, they will be with you when your DNA is taken and your fingerprints scanned.

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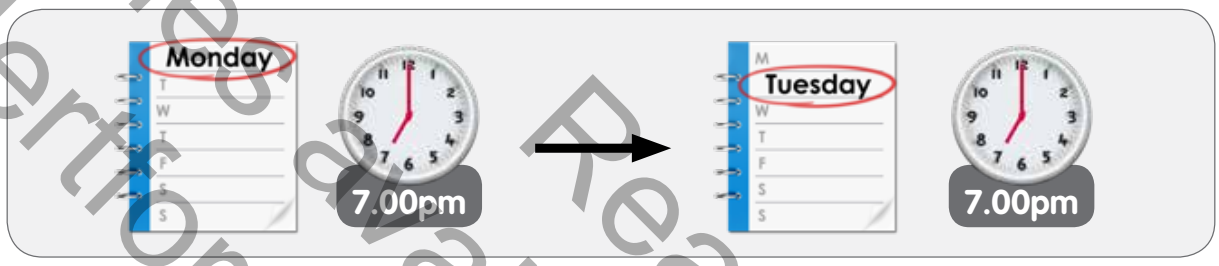
How long you can be kept in custody

Usually the Police can detain you for up to 24 hours (1 day) without charging you with a crime.

This gives the Police time to investigate the alleged crime.



When you first come into custody the Police may not know how long you will be detained for.

Most people are only kept in Police custody for a few hours.

The Police will let you go home as soon as they can.

A senior Police officer or a court has to agree for you to be detained longer than 24 hours.

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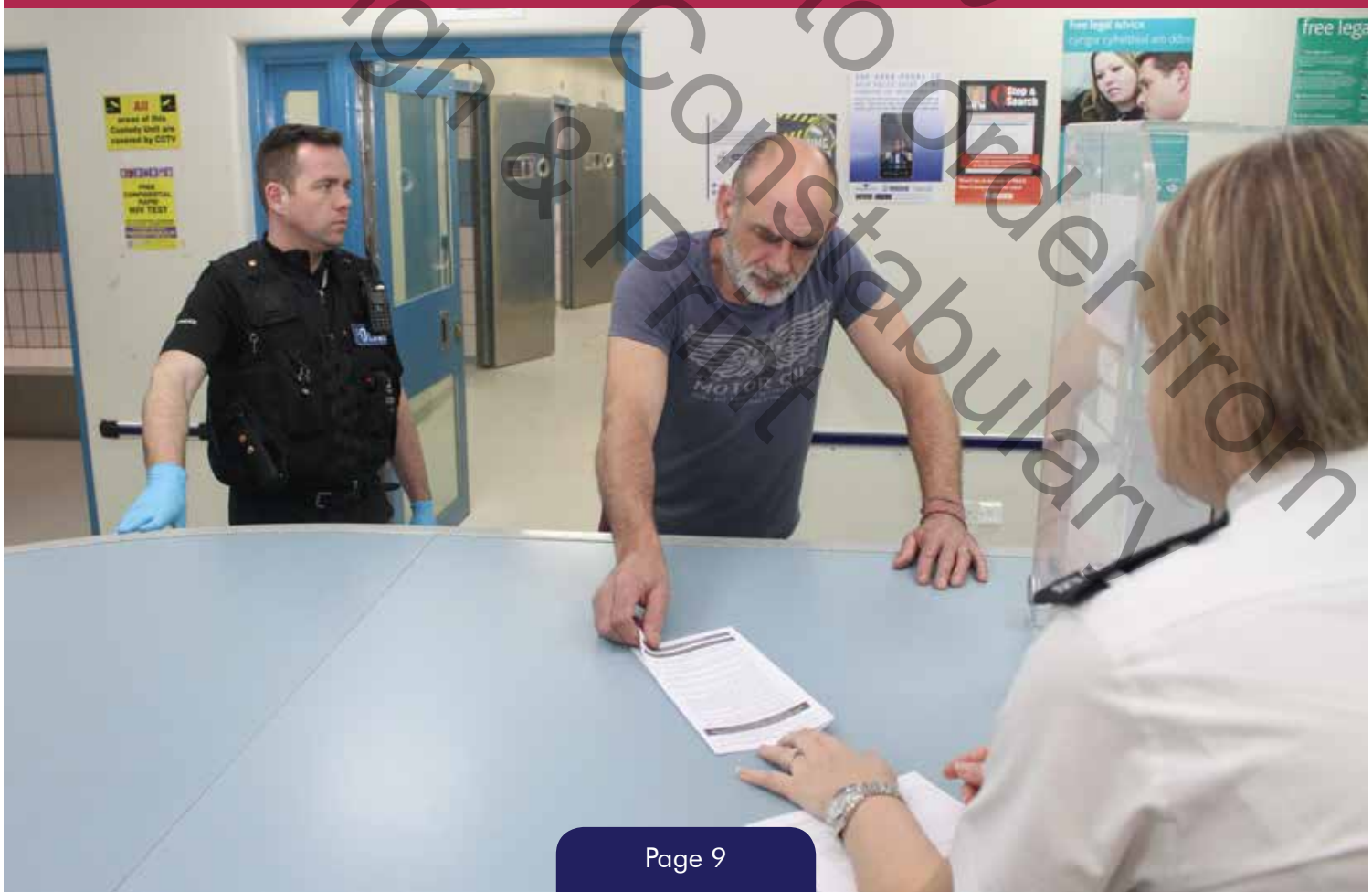
Your 'Rights and Entitlements' in Police custody.

The Police will give you a leaflet about how they should treat you and look after you.

Rights and Entitlements are:

- how the law says you must be treated in Police custody, and
- things you can have while in Police custody.



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Rights and Entitlements

Understanding your Rights and Entitlements.

The Police must give you time to read the Rights and Entitlements leaflet.

The Police will help you to understand the Rights and Entitlements leaflet.

This booklet can also help you understand your Rights and Entitlements.

You can ask to read the 'Codes of Practice'.

This is a book that explains your Rights and Entitlements in a lot of detail.

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You have the right to talk to a solicitor.

A solicitor understands the law. They can give you advice and help you if the Police interview you.

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A solicitor can give you advice

The Police must ask you if you want a solicitor.

The solicitor will usually talk to you on the phone.

The Police will not think you have done anything wrong because you want to talk to a solicitor.

If the Police want to interview you the solicitor will usually come to the Police station.

The solicitor will talk to you before the interview.

Before you are interviewed, you and your solicitor must be given some information about the offence, and the evidence the Police have.

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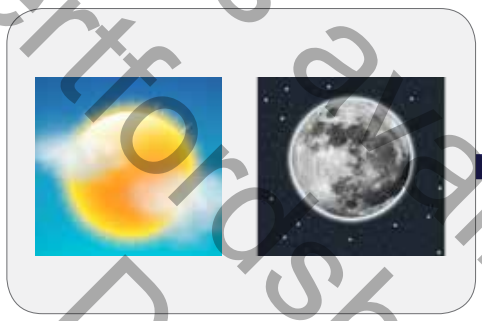
Tell the Police if you want to talk to a solicitor.

You do not have to pay to talk to a solicitor.



You can ask to talk to a solicitor during the day or at night.

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? Do you want to talk to a solicitor?

Talking to a solicitor

Some rules about talking to a solicitor.

You can talk to the solicitor in private before the Police interview you.

The Police are not usually allowed to interview you until you have talked to the solicitor.

The solicitor will usually be with you when you are interviewed by the Police.

If you said you didn't want a solicitor you can change your mind. You can say that you do want a solicitor.

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Some people can have an Appropriate Adult.

An Appropriate Adult gives extra help to people who are vulnerable.

If you are aged under 18 or are over 18 and find it difficult to talk about or understand what is happening, the Police will always find you an Appropriate Adult.

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The Appropriate Adult will help you to understand what is happening.

Appropriate Adults do not work for the Police.

Their job is to help you.

They could be a relative, volunteer or a social worker.

They will make sure you understand why you have been arrested.

They will be with you when the Police talk to you about your rights.

They will explain your rights to you.

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The Appropriate Adult will make sure you are treated fairly.

An Appropriate Adult will support you.

They will be with you when the Police do things like take your, photo, DNA and fingerprints.

They can ask for a solicitor for you if they think you need one.

They will be with you if the Police interview you about the crime.

They will help you if the Police ask you to sign any papers.

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Letters, numbers and clocks.

This page may be useful for an Appropriate Adult to use when communicating with the person they are supporting.

A B C D E F G H I

J K L M N O P Q R

S T U V W X Y Z

0 1 2 3 4 5 6 7 8 9

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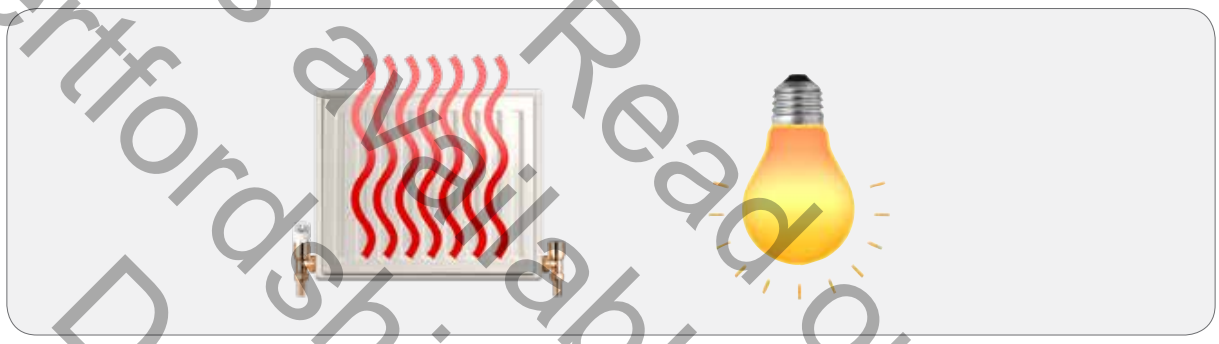
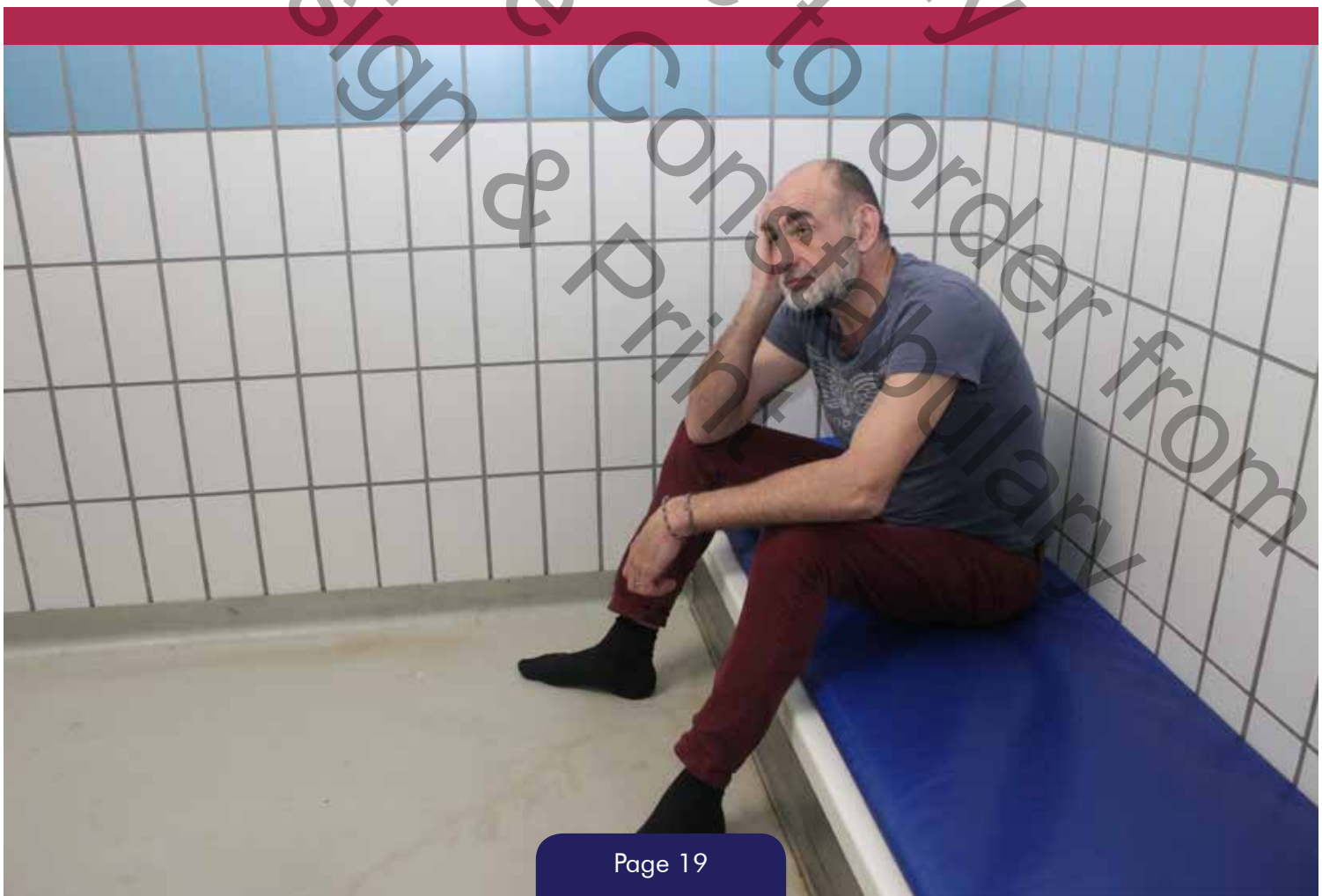
You may have to spend time in a Police cell.

Your cell should be clean and warm.

Your cell should have a light.





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The Police will help you to stay well.

You can rest and sleep in your cell. The Police will give you a blanket.

You will be given drinks.

You will be given food.

You can have breakfast, lunch and dinner.

You can ask for something to read.

Independent Custody Visitors sometimes visit you in your cell to check you are being looked after properly.

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The Police will help to keep you safe.

They will check to make sure you are okay while you are in your cell.

Press the button in your cell to tell the Police if you need help or feel unwell.

They will come to your cell and ask you what you need.

After 6 hours a senior Police officer will decide if you should still be detained.

You or your solicitor can talk to the senior officer about this.

A senior officer will talk to you again later if you are still being detained.

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You can speak to a member of staff alone about anything private.

They will help you.

If you are male you can ask to talk to a man.

If you are female you can ask to talk to a woman.

If you are female and have your period, you can have sanitary towels and tampons. These are free.

If you are a girl under 18, you will be looked after by a woman. You can ask to speak to them at any time.

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Other things you can ask for

You can ask the Police for these things.

You are allowed out of your cell to have some fresh air and exercise.

You can ask for a pen and paper.

You are allowed things you need to help you practice your religion.

Tell the Police if you need the toilet or want a shower.

Some cells will have a toilet in them.

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You can have medical help if you need it.

If you are hurt or ill the Police will call a nurse or doctor to help you.

Tell the Police if you have medication you need to take.

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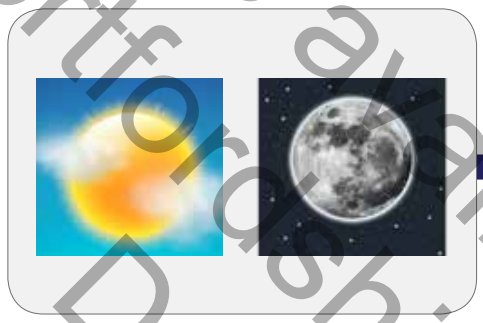
Tell the Police if you need medical help.

You do not have to pay for medical help.



You can ask the Police for medical help during the day or at night.

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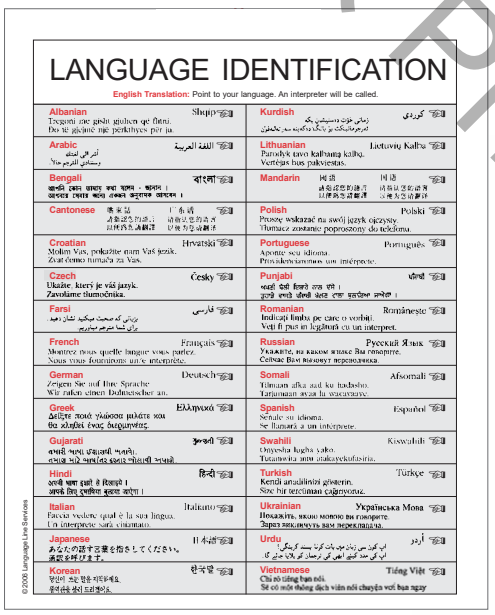
? Do you need medical help?

The Police will get a language interpreter if you need one.

Use these pages to tell the Police if you need an interpreter who speaks your first language.

The Police will find out what language you speak.



LANGUAGE IDENTIFICATION

English Translation: Point to your language. An interpreter will be called.

Albanian Shqip Tregoni me gisht gjuhën që flitni. Do të gjejmë një përkthyes për ju.	**Kurdish** کوردی زمانی خۆتی دەستنیشان بکە لەبرەوەیشەوە سەرنجمانخەین
Arabic اللغة العربية أشر إلى اختك وسنأتي للترجم ٧٠٠	**Lithuanian** Lietuvių Kalba Parodyk savo kalbantį kalbą. Vertėjas bus pakviestas.
Bengali বাংলা আপনি যেভাষা ব্যবহার করেন তা আঙ্গুল দিয়ে দেখান । আমরাএক দোভাষীকে ডাকবো ।।	**Mandarin** 国语 请指出您的语言 请指出您的语言 请指出您的语言
Cantonese 廣東話 請指出您的語言 請指出您的語言 請指出您的語言	**Polish** Polski Proszę wskazać na swój język ojczysty. Tłumacz zostanie poproszony do telefonu.
Croatian Hrvatski Molim Vas, pokažite nam Vaš govor. Zvat ćemo tumača za Vas.	**Portuguese** Português Aponte seu idioma. Providenciaremos um intérprete.
Czech Česky Ukažte, který je váš jazyk. Zavoláme tlumočníka.	**Punjabi** ਪੰਜਾਬੀ ਆਪਣੀ ਦਾਨੀ ਤੋਂਦੀ ਨੂੰਦਸ ਦੀ । ਤੁਹਾਡੇ ਵਾਸਤੇ ਦੋਭਾਸ਼ੀਏ ਨੂੰਬੁਲਾਇਆ ਜਾਵੇਗਾ ।
Farsi فارسی بزبانی که صحبت میکنید نشان دهید برای شما مترجم میآوریم	**Romanian** Româneşte Indicați limba pe care o vorbiți. Veți fi pus în legătură cu un interpret.
French Français Montrez nous quelle langue vous parlez. Nous vous fournirons un/e interprète.	**Russian** Русский Язык Укажите, на каком языке Вы говорите. Сейчас Вам вызовут переводчика.
German Deutsch Zeigen Sie auf Ihre Sprache Wir rufen einen Dolmetscher an.	**Somali** Af-Somali Tilmaan jiha aad ku hadasho. Tarjumaan ayaa la wacayaaye.
Greek Ελληνικά Δείξτε ποιό γλώσσα μιλάτε και θα καλέσει ένας διερμηνέας.	**Spanish** Español Señale su idioma. Se llamará a un intérprete.
Gujarati ગુજરાતી તમારી ભાષા દર્શાવતી બતાવો. તમારા માટે ભાષાંતરકારને બોલાવશે.	**Swahili** Kiswahili Onyesha lugha yako. Tutamwita mtu atakayekufasiria.
Hindi हिन्दी अपनी भाषा इशारे से दिखाइये । आपके लिए दुभाषिया बुलाया जाएगा ।	**Turkish** Türkçe Kendi anadilinizi gösterin. Size bir tercüman çağrılacak.
Italian Italiano Faccia vedere qual è la sua lingua. Un interprete sarà chiamato.	**Ukrainian** Українська Мова Покажіть, якою мовою ви говорите. Зараз викличуть вам перекладача.
Japanese 日本語 あなたの話す言葉を指さしてください。 通訳を呼びます。	**Urdu** اردو اپنی زبان پر انگلی رکھیں آپ کی مدد کیلئے ایک ترجمان کو بلایا جائے گا
Korean 한국말 당신이 쓰는 말을 지적하세요. 통역사를 불러드리겠어요.	**Vietnamese** Tiếng Việt Chỉ nói tiếng bạn nói. Sẽ có một thông dịch viên nói chuyện với bạn ngay

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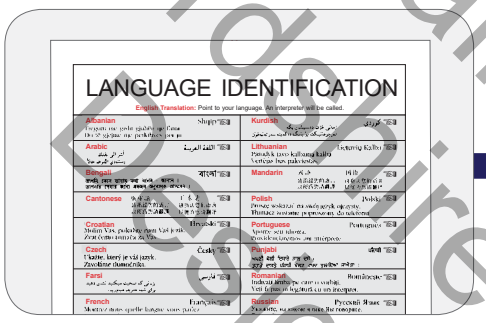
Language interpreter

A language interpreter will speak your first language.

You can have a language interpreter if you do not speak or understand English.



The Police have a leaflet to help you say what language you speak.

The Police will find someone who speaks your first language.

They will help you to talk to the Police.

The interpreter may also translate some important written information into your first language.

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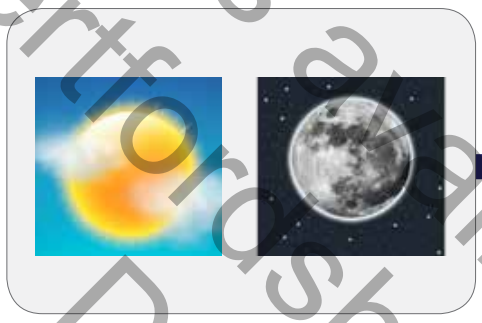
Tell the Police if you need a language interpreter.

You do not have to pay
for a language interpreter.



You can ask for an interpreter
during the day or at night.

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? Do you need a language interpreter?

This map may be a useful aid to help people to point out their country of origin.

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Reprographic Consultancy

The Police will get a sign language interpreter if you need one.

Use these pages to tell the Police if you need an sign language interpreter.

If you use sign language the Police will film any interview they have with you.

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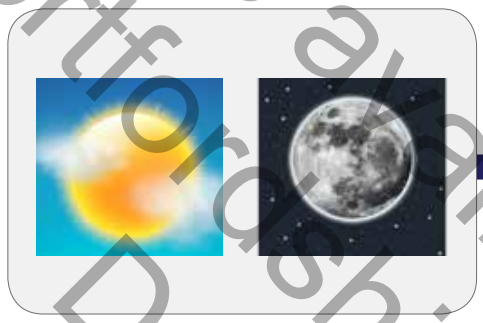
Tell the Police if you need a sign language interpreter.

You do not have to pay for a sign language interpreter.



You can ask for a sign language interpreter during the day or at night.

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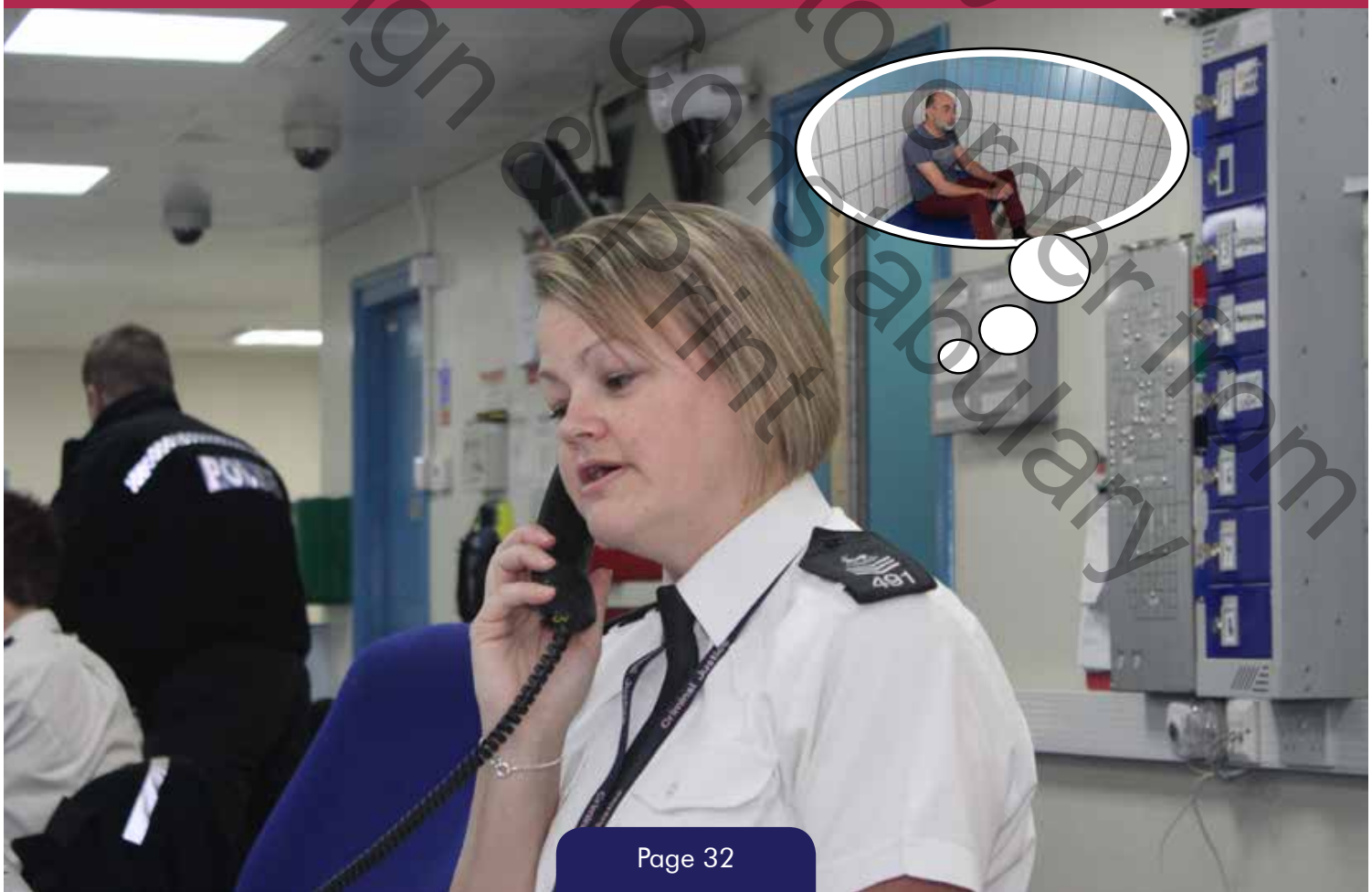
? Do you need a sign language interpreter?

You can ask the Police to tell someone where you are.

The Police may not be able to contact someone straight away if they are still investigating the crime.

You may be allowed to speak to someone on the phone.



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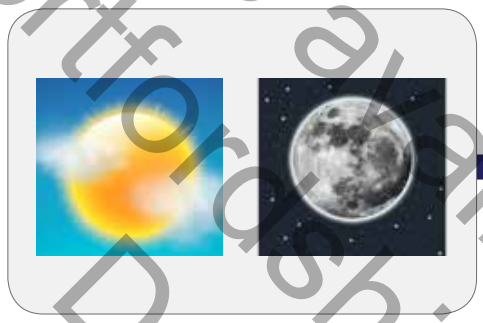
Tell the Police if you want them to contact someone.

You do not have to pay for the Police to contact someone.



You can ask the Police to contact someone you know during the day or at night.

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? Do you want the Police to contact someone, like a relative, for you?

If you are not British the Police can contact your Embassy.

Tell the Police if you want your Embassy or Consulate to be told where you are.

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The Police will phone your embassy for you.

You do not have to pay to contact your Embassy.

You can tell us if you are seeking political asylum from your country.

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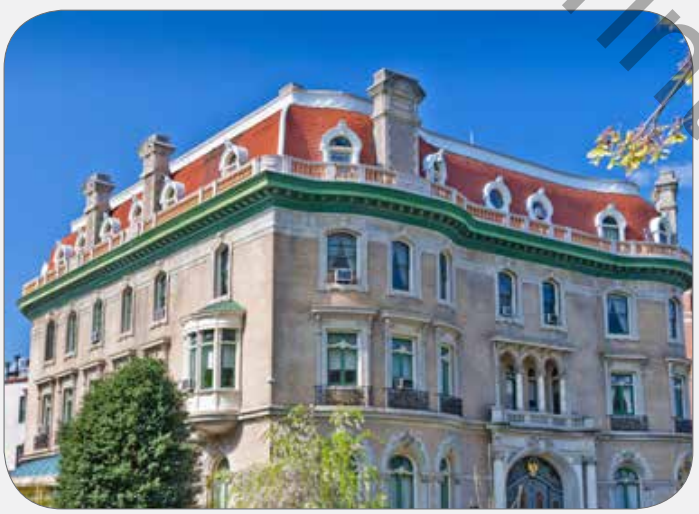
Do you want the Police to tell your embassy or consulate where you are?



The Police may want to interview you about the crime.

You have the right to remain silent.

You do not have to say anything when the Police interview you.

Your solicitor can give you advice.

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It may harm your defence if you do not mention, when questioned, something you later rely on in court.

The photo story below explains this difficult sentence.

This photostory is an example of how not talking to the Police could harm your defence in court.

John chose not to tell the Police where he was when the crime happened.

When he went to court John said where he was when the crime happened.

The magistrates wondered why he hadn't told the Police where he was.

The magistrates thought John might not be telling the truth in court.

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Anything you do say may be given in evidence.

Your solicitor can give you advice about talking to the Police.

You can choose to answer the questions the Police ask you.

The Police will record their interview with you using a machine like this.

If your case goes to court the Police will read out what you told them as evidence.

This will help the court decide if you are guilty of the crime or not.

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Police interviews

Some rules about Police interviews.

The interview room must be warm, clean and have a light on.

You must be allowed to sit down when you are being interviewed.

The Police officers usually have to tell you their name and their rank. For example 'Sergeant Andy Jones'.

You will have a break at meal times. You will also have a drinks break after two hours.

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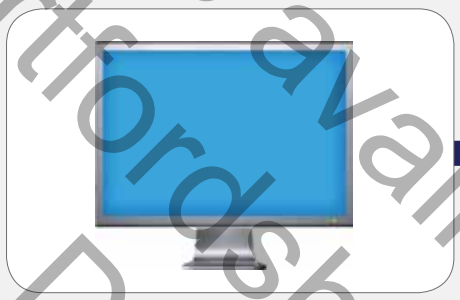
You have the right to see your custody record.

Your custody record is the notes the Police write about you at the Police station.



Your custody record is kept on computer at the Police station.

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Your custody record

You can look at your custody record on computer.

Your solicitor and your appropriate adult can ask to see your custody record.

Your custody record will say why you were arrested and detained at the Police station.

Your custody record will have notes about everything that happens to you at the Police station.

You can ask for a copy of your custody record up to 12 months after you leave the Police station.

The Police will post it to you.

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If the Police have enough evidence they may 'charge' you with a crime.

If you are charged with a crime you will need to be seen in court. This may be done via a video link from the Police station.

Some people are taken to court from the Police station.

Some people are released from custody.

Some people are released on bail.

They have to come back to the Police station, or go to court another day

Some people are released 'under investigation'.

They may not have to come back to the Police station but could be sent a letter to go to court on another day.

Some people are released without being charged.

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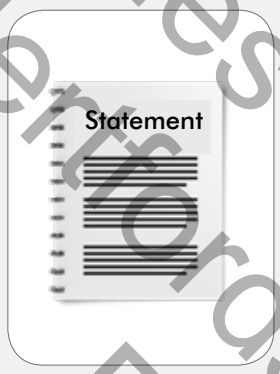
The Police evidence

If you are charged with a crime you can see the Police evidence before you go to court.



Evidence can include things like statements from witnesses, fingerprints, medical evidence and CCTV film.

You and your solicitor will be able to see the evidence the Police have about the crime.

If you have to go to court you can ask your solicitor to go with you.

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How to make a complaint about your treatment.

You can complain if you feel the Police have treated you badly or unfairly.

You or your solicitor can ask to speak to a Police Inspector, or a Police officer of a higher rank.

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You can also make a complaint after you have been released from custody.

You can go to any Police station and make a complaint.

You can complain to the Independent Office for Police Conduct (IOPC).

You can ask your solicitor to make a complaint for you.

You can contact your local MP to make a complaint.

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Dear Judiciary Committee Members,

I gave live testimony on Oct 15th, and I am writing to provide further, more detailed input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. The bills currently under consideration are nowhere near enough. Even the reforms I have outlined above, if adopted, will not solve the problem, but they are at least a good step forward as we move towards the only possible full-scale solution to police violence: steadily defunding the police until we have abolished them outright.

Thank you,

Benjamin

Benjamin Merrick

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

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DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Kate Taylor Mighty

Good afternoon Councilman Allen and members of the committee.

My name is Katherine Crowder. I don't have any titles or represent any groups. I'm a wife, a mother, a full time essential worker, and a concerned citizen actively involved in my community. I would like to use my time to testify about the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020" and personal experience with sections of "The Comprehensive Policing and Justice Reform Amendment Act of 2020" in regard to first amendment assemblies.

As our country faced a pandemic and had collectively come to a pause, we watched together in horror as George Floyd cried out for his mother while Derek Chauvin kneeled on his neck for 8:46 seconds. "I can't breathe" was a plea heard around the world, bringing thousands of people in every state and several different countries, pouring out into the streets with a united voice demanding one thing - justice.

In late May, I joined thousands of those voices in Washington DC and marched for hours without incident or interruption. During this time, I saw hundreds of law enforcement officers from different departments, with different uniforms, and different cars. At no point had I witnessed any acts of violence, property damage, arrests, or any form of interruption from law enforcement.

When I was two blocks away from going back to my car, there was a line of police in riot gear in the middle of the street. There was no largely identifiable or visible indication that they were local law enforcement on the front of their uniforms, only the back of their helmets. They didn't appear any different from the dozens of officers I'd seen throughout the day.

I didn't hear a word from any of the police officers in riot gear. They were silent, and other than one officer I could see, all stood stationary. I didn't hear any orders given, any direction where to go, there was no indication that force had been authorized, and no real reason at all to even believe any force was about to be used.

Without warning, one officer began pepper spraying young Black protesters near where I was standing, who were visibly non-threatening. They were in regular clothes - shorts, tshirts, tank tops - it was hot - carrying nothing but signs and cell phones.

Again, without warning, officers began tossing grenades indiscriminately at people, sending sparks, deafening bangs, clouds of smoke, and shrapnel flying through the air.

I was injured by one of these devices. My hand was cupped around my mouth when the first device went off right at my feet. Something from it hit my inner elbow, leaving it bleeding and with a large contusion the size of my hand. Had my arm not been there, it could have hit me, or anyone nearby, in the neck, face, or head, causing much more serious injury.

As officers continued throwing explosives, people screamed and shouted, "They're still trying to kill us!" That was the impression left by MPD that night. "They're still trying to kill us" as people demanding police accountability recorded and were likely livestreaming these interactions to their friends and family.

The reason I chose to bring this day up is because the Constitutionally protected right to assemble and to petition the government for a redress of grievances is exactly what finally brought us here to able to tell you people are tired.

Tired, because George Floyd, Breonna Taylor, Tamir Rice, Philando Castile, Deon Kay, and TOO many others - never should have died at the hands of law enforcement, and many of their interactions never should have happened at all. Because their families deserve answers, transparency, and accountability and it shouldn't take millions of people watching, sharing, marching, and demanding justice - for justice to occur. It should just be the right, expected, human thing to do and DC has the opportunity today to lead by example.

The first step is being taken by admitting there's a problem and although I support the legislation proposed in the Police Reform Act, there’s room for improvement, as seen by the many recommendations presented here today.

This is - just - a step, and in order for change to continue to happen, it is critical the ban against local law enforcement using chemical irritants, impact munitions, and stun grenades to disperse first amendment assemblies be upheld vigilantly and to the highest standard.

Over the years, MPD has continued to demonstrate little discipline in regards to safety when using these weapons and cost the city millions of dollars over their response to first amendment assemblies. People deserve a strong guarantee that their voices can rightfully and respectfully continue to be heard without threat of excessive force, indiscriminate targeting, and serious injury by law enforcement.

A people united, are a people undeterred, and it is vital within a democracy that displays of might don't overtake or overshadow the rights of the people that brought us together today to finally discuss much needed and long overdue reform.

Thank you for your time and allowing me to testify today."

Sincerely,
Katherine Crowder

Dear Committee Members,
Following up on my testimony from last week, please find below three recommendations for B23-0771. Happy to discuss with you or your staff if there are any questions.

As a Ward 1 resident and scientist who has worked in nonproliferation for several years I provide these recommendations in my personal capacity. The purpose of these recommendations is to make sure that others in the future do not misinterpret the statute **to excuse the use of these agents by law enforcement. Below are straightforward changes to definitions and additional oversight suggested to manage these risks**.

Recommendation #1

The definition of chemical irritants (Line 33) in the bill is consistent with the CWC language covering "riot agents" and should be sufficient to cover all standard "chemical irritants". I **recommend either removing or clarifying the second portion of the clause beginning on line 35.**

Recommended text:

> "Chemical irritant" means tear gas or any chemical which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure. **For the purposes of this bill "chemical irritants" includes any such substance prohibited for either law enforcement or warfare use by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, which entered into force in the United States on April 29, 1997**. (or remove this bolded sentence entirely, see below for reason)

Reasons:

1. The word "prohibited" (line 35) is ambiguous because of the CWC. The CWC defines "purposes not prohibited" to include law enforcement use including domestic riot control. Although riot control agents are banned in warfare to prevent escalation, the treaty does not ban law enforcement use. Specifically law enforcement uses are not prohibited. Someone later on could try to argue that the application of these chemicals is legal because it is not prohibited by the treaty. Therefore I suggest clarifying the word "prohibited" in the bill.
2. The relevant chemical irritants all fall into the general description that is already covered by the language of the bill (e.g., pepper spray, CS, CN, CR, etc). No additional specific chemical irritants are "scheduled" (i.e., banned) under the CWC. Scheduled chemicals tend to be even more dangerous chemical weapons and their precursors (e.g. nerve gas, mustard gas), and their use is already banned by US law. **I recommend either removing the "or" clause altogether or clarifying it.** If keeping this clause, I also suggest using the date the treaty went into force which was several years after the signature date**.** I would not specify the chemicals - the definition of chemical irritants is future proof as originally written in this bill.

Recommendation #2

The bill limits use of chemical irritants to *disperse* a First Amendment assembly. What about other purposes, and who defines "dispersal"? For example, is it intended to prevent use of pepper spray (OC) on individuals at such assemblies too? That seems ambiguous in the text because one could argue that pepper spray use on an individual is not "dispersal". **Consider if**

the intent of the legislation is to prevent ALL uses of chemical irritants at First Amendment assemblies or what uses specifically are intended to be allowed.

Recommendation #3

What are the criteria being used by law enforcement to decide whether an assembly is a First Amendment assembly? We have seen instances in DC and across the country where peaceful assemblies have been deemed riots by police. Once police have determined an assembly is no longer a First Amendment assembly, what is prohibited? **Consider how the following factors impact this bill: (1) the definition of what is/isn't a "First Amendment activity", (2) who is making the determination in the moment, and (3) what checks, balances, and transparency is involved in making and documenting that decision.**

Thank you for your consideration of these recommendations.

Regards,
Gautham Venugopalan, Ph.D.

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee.

As an infectious disease biologist at Walter Reed, I am compelled to testify on DC's public health crisis. It is prevalent and ongoing. It disproportionately affects poor people and people of color. Of those it disproportionately affects, it comes with an intensified risk of mortality. We do not yet have a cure. However, we can assess the efficacy of the measures the council has funded to counter this crisis of racial and wealth inequity.

DCPS has a $23 million contract with MPD, enlisting armed police at schools. But according to the School Survey on Crime and Safety, police presence in schools increases reporting of non-serious violent crimes to law enforcement, which leads disproportionately to arrests of Black students.

In 1965 the McCone Commission identified access to transportation as critical to racial equity and yet, in DC in 2018, Washington Lawyers' Committee for Civil Rights and Urban Affairs found that 90% percent of Metro Transit Police citations for fare evasion were issued to Black residents.

As a response to a public health crisis, policing in DC does not meet even a minimum standard of efficacy for a therapeutic.

But it doesn't have to be this way.

For example, the Piscataway Project, which implemented and evaluated school-based violence prevention approaches, found that these strategies consistently reduced delinquent behavior in schools (Hunter et al., J School Psych, 2001).

San Francisco Muni's Community Transit Assistants Program resulted in a 98% drop in high-risk incidents.

And in Bogotá, Colombia, traffic mimes (with red noses) used de-escalation tactics through performance art, leading to a 50% drop in traffic fatalities (Caballero 2004).

None of these successes required a single ticket, arrest, or firearm.

It makes as much sense to send police officers to defend against coronavirus infection as it does to send them to defend against racial and wealth inequity. We have rightly identified that the coronavirus, and not its victims, should be the target of our efforts to stem the virus' affliction on this

city. In the case of the ongoing crisis of racial and wealth inequity that afflicts DC, I urge the council to pass legislation that targets the disease and not its victims.

I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Eric Lewitus

POLICE EXECUTIVE
RESEARCH FORUM

Chuck Wexler
Executive Director

September 30, 2020

The Honorable Charles Allen
Chairman
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue NW
Suite 110
Washington, DC 20004

Dear Chairman Allen:

Thank you for the opportunity to submit comments on behalf of the Police Executive Research Forum (PERF) regarding Bill 23-882 (the "Comprehensive Policing and Justice Reform Amendment Act of 2020").

The Police Executive Research Forum is a national independent research organization, based in Washington, that focuses on critical issues in policing. Since its founding in 1976, PERF has identified best practices on issues such as reducing police use of force, de-escalation tactics and strategies, new technologies in law enforcement, and the role of police on issues such as the opioid epidemic and homelessness. (See https://www.policeforum.org/ for further information.)

I would like to comment on one section of this legislation, which would amend Section 3900 of District of Columbia Municipal Regulations to provide that "Members [of the Police Department] may not review their Body-Worn Camera recordings or BWC recordings that have been shared with them to assist with initial report writing."

In 2014, PERF released a major report and guidelines on police use of body-worn cameras, Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned. Our report, which was produced with support from the U.S. Justice Department's Office of Community Oriented Policing Services, was based on extensive research and a national conference in which more than 200 law enforcement officials, academics, and other experts helped produce our 33 guidelines for a model BWC program.

One of the more complex issues was whether officers should be permitted to review BWC footage of an incident prior to making a statement or report on the incident. As detailed on pages 29-30 of our report, we considered various points of view on this point, but most police chiefs we consulted said that allowing officers to review BWC footage results in the best evidence of what actually took place.

For example, Charles Ramsey, at that time Police Commissioner in Philadelphia and previously Chief of the Washington, DC Metropolitan Police Department, told us, "When you're involved

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in a tense situation, you don't necessarily see everything that is going on around you, and it can later be difficult to remember exactly what happened. So I wouldn't have a problem with allowing an officer to review a video prior to making a statement."

Based on the recommendations of Commissioner Ramsey and many others, our report recommends the following in Guideline 20, on page 45:

20. Officers should be permitted to review video footage of an incident in which they were involved, prior to making a statement about the incident.

This can occur, for example, if an officer is involved in a shooting and has to give a statement about the shooting that may be used in an administrative review or a criminal or civil court proceeding.

Rationale:

- Reviewing footage will help officers remember the incident more clearly, which leads to more accurate documentation of events. The goal is to find the truth, which is facilitated by letting officers have all possible evidence of the event.
- Real-time recording of the event is considered best evidence. It often provides a more accurate record than an officer's recollection, which can be affected by stress and other factors. Research into eyewitness testimony demonstrates that stressful situations with many distractions are difficult even for trained observers to recall correctly.
- If a jury or administrative review body sees that the report says one thing and the video indicates another, this can create inconsistencies in the evidence that might damage a case or unfairly undermine the officer's credibility.

In the years since our guidelines were released in 2014, we have not had any occasion to revisit or reconsider Guideline 20. We have not become aware of any major incidents in which officers' review of BWC footage has resulted in falsification of reports or created problems with prosecutions or with officer discipline.

I hope this information will be useful to you as you consider BWC policies and other reforms in your legislation. Please let me know if you would like any additional information from PERF.

Sincerely,

Chuck Wexler
Executive Director
Police Executive Research Forum

Cc: *Committee on the Judiciary and Public Safety*
At-Large Councilmember Anita Bonds
Ward 3 Councilmember Mary M. Cheh
Ward 7 Councilmember Vincent C. Gray
Ward 2 Councilmember Brooke Pinto

Re: Bill 23-0882 - Comprehensive Policing and Justice Reform Amendment Act of 2020

Greetings Committee Chairman Allen and Councilmembers of the District of Columbia.
My name is Patricia Stamper. I live in Ward 7 in the Deanwood neighborhood with my husband and two boys. Thank you for providing District residents with an opportunity to participate in our democracy and for bringing the conversation of public safety to the forefront of our community. After reviewing Bill 23-0882 - Comprehensive Policing and Justice Reform Amendment Act of 2020, here are my recommendations and why:

1. As a wife of a man that is Black and a mother of two Black boys I worry about their safety constantly because of the historical perception of Black bodies are viewed by law enforcement as a threat. However, I see my husband as a kind-hearted and hard working man who provides for his family. I would like to recommend ALL body camera footage that is currently collected by MPD officers to be made available to the public in 3-6 months.

2. I would like to recommend that instead of sending MPD officers to domestic issues that DC Council mandate that a Dept of Health or Dept of Behavioral Health Social worker, therapist or psychologist be sent out in tandem with MPD to respond to the call for service.

Thanks so much for your time. I am available to answer any questions.

Best,

Mrs. Patricia Stamper

Date: 10.15.2020

To: Ms. Kate Mitchell, Director
Committee on the Judiciary & Public Safety
Councilmember Charles Allen, Chairperson
Council of the District of Columbia

From: DeVaughn Jones, Chair
Legal Redress Committee, NAACP D.C. Branch

Re: Written testimony regarding B23-0723, B23-0771, B23-0882

To the Committee Director, Membership, and D.C. City Council,

I do not have much independent testimony regarding the above-three bills. Rather, I write to ask you to give particular attention to the testimonies of the D.C. Justice Lab, headed by Ms. Patrice Sulton on Panel 4 of today's hearings. I've had the pleasure of reviewing the Lab's multiple proposals, and am excited that the Council will be able to review such well-prepared, good-intentioned, and civic-minded proposals for law enforcement reform. I've had the pleasure of meeting a handful of the participants personally, including Ms. Katrina Jackson, Ms. Sabrin Qadi, and Ms. Sulton herself. Each of them has a passion for justice rooted in personal experience - and like many Justice Lab participants, their proposals speak to the urgency of today's hearing. They have seen and felt the consequences of D.C.'s law enforcement status quo - and unlike many of the people they're fighting for, they are still alive to share their stories.

Similarly, Ward 8 Commissioner Salim Adofo's testimony deserves particular attention. The Commissioner requires no introduction in his hometown, but I do offer one observation from my experience working with Salim in my role at the NAACP he speaks on behalf of the people. He works on behalf of the people. And indeed when he presents his testimony today, it will be on behalf of his District neighbors your and I's neighbors, too. And like the Justice Lab, Salim's testimony comes from feeling the consequences of law enforcement regulation in the District. As you hear from the Justice Lab and Commissioner Adofo, I implore you to connect their testimony with their lived experiences and the lived experiences of the District at-large.

Many people have benefitted from the policing status quo. Many of those beneficiaries will provide compelling testimony to you, too. But the utilitarian in me concludes with this: as we move forward to reform how police can and cannot conduct themselves in our communities **our** communities we owe deference to the voices of the majority. Not the voting majority, or the taxpaying majority, but the **human** majority. We must listen to the majority of lived experiences in the District now and throughout the short time this great city has existed. I dare say that millions of people that have lived in the District over the past five years would present overwhelming evidence to reign back MPD's monopoly on deadly force.

Unfortunately, the people with the most compelling evidence are not here to give it. Fortunately for us, and for the quality of the Council's impending legislation, we have people like the Justice Lab and Commissioner Adofo to listen to.

Hello,

As a DC resident in Ward 4, I'm happy to see that changes are being made in response to the overwhelming need of the people for an end to police brutality.

Initially, I support all of the comments submitted by the ACLU-DC, Black Lives Matter DC, DC Justice Lab, the Working Families Party DC, Stop Police Terror Project DC, Black Swan Academy, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

As a young person growing up in schools today, where being surveilled by School Resource Officers became a common daily practice, I can say firsthand that a uniformed officer's presence in school halls never made me feel safer. Instead, it brought a dark tension into a place where children are meant to grow, learn, and interact safely -- a looming threat that was a constant reminder that we were viewed not just as students, but as potential threats that could be quickly cracked down upon.

As a white student, though, the tension I felt was never, ever as likely to become a hard reality. Like any child, there were times in school when I was distracted, disinterested, or disruptive. But these behaviors that got me a light slap on the wrist are the same ones that get Black and brown children put into the carceral system.

Studies show that the presence of police officers in schools may actually increase safety and disciplinary problems. According to the ACLU, schools employing police officers have seen increases in student offenses and student arrests by as much as 400 percent.

Students arrested at school are much likelier to experience incarceration as adults. And nationwide, Black students are 4 times more likely to be suspended than white students and 3.5 times more likely to be arrested within school than white students, despite exhibiting similar behavioral patterns -- so, **with increased policing comes scientifically increased likelihood that Black students will end up incarcerated later in life.**

If the goal is to keep DC schools peaceful, safe, and productive, the research shows that putting more police in schools has the opposite effect. Instead, to truly keep students safe, we need more trained professionals who don't respond to disciplinary issues with force.

In this summer's debates over the role and number of security guards and police officers in city schools, DC Councilmember David Grosso noted that **the ratio of security guards and police officers per student is much higher than those for counselors, psychologists, or social workers**. D.C.'s combined $32 million in police department and school district security spending could have hired an additional 215 school psychologists, 335 guidance counselors, or 322 social workers -- each of which would make a huge difference to the DC school system. It's not conjecture, it's proven -- that's what real investment in student safety looks like.

Again, I'm happy to see that changes are being made in DC, but when the changes don't use researched solutions addressing the root of the problem, it begs the question of what they're meant to fix. **Police didn't exist in schools for centuries and shouldn't be there now -- we need to defund school police budgets and invest instead in guidance, mental health, and care**. The health, safety, and futures of DC's children depend on it.

Thank you.

Sarah Gertler

When legislation is required to prevent the police from using chokeholds against the people they are charged to protect and serve, then we must recognize that something more than policies must be changed; we need social, political, and economic transformation. My name is Bill Mefford and I am the Executive Director of the Festival Center. We are a hub for organizations seeking to build justice movements and we train and mobilize faith leaders to serve in those movements.

I certainly hope the DC City Council will pass the Comprehensive Policing and Justice Reform Amendment Act of 2020 as a first and necessary step in addressing police violence, but we also must examine the values associated with the current system that pits the police against local communities, particularly communities of color.

From a Christian perspective, Scripture describes one of the intentions of a system of justice is to be a means of healing for society as a whole. This happens because all people, regardless of any social, political, cultural, or economic barriers imposed on them, have access to fair and equal justice. Justice is meant to fairly distribute societal resources according to need more than merit. The result of justice should be that none are left out, none are marginalized, and all people have access to happiness. Thus, grievances are settled and authentic peace is created because all have confidence in the system of justice.

We as a city and especially as a nation are far away from this intended reality.

However, the Comprehensive Policing and Justice Reform Amendment Act of 2020 is a necessary step towards the healing we need as a city. Importantly, the legislation will strengthen procedural protections when the police seek to search a person's vehicle, home, or property, and it will also strengthen the District's use of force standards by clearly defining non-deadly and deadly force while limiting the situations in which both non-deadly and deadly force can be used.

Also significant, this bill will restrict the ability of District law enforcement agencies to acquire or request certain military equipment like armored vehicles, grenades, or drones, and it requires agencies that currently possess such equipment to return it. Since 1990 the United States government has transferred $6 billion worth of military equipment to local law enforcement agencies and it is time for DC to put an end to this for our residents.

Still, so much more needs to be done. We need to examine the values underlying the current system that has sought to attain the military-style weapons for the police in the first place. How is peace ever truly attained through sheer force and intimidation? Instead of policing through fear and overwhelming force, we should shift our resources to transformative justice approaches that work to bring real healing to survivors of crime and accountability to the person responsible for the harm committed. Restorative justice models have a much greater track record in lowering recidivism than our current retributive models, which only serve to spread harm further. Under restorative justice models, community members are allowed to work together to keep each other safe.

I should be clear: shifting resources means we must defund the police. Defunding the police is a necessary step towards achieving authentic peace in our city. Defunding the police means recognizing the historical role of the police as one rooted in racial oppression and systematic

abuse of Black and Brown people. Defunding the police means investing in our communities so that we can finally allow resources to be given to areas which will enhance the quality of life. Quality of life, in turn, will result in a decrease crime, which will dramatically reduce the spaces for police to be involved in peoples' lives. Affordable housing, accessible healthcare, available mental health services, quality education for all students, and a secure safety net for vulnerable people can be attained if we truly value the welfare of DC residents over and above the funding of armed forces roaming the streets of our neighborhoods.

Our over-investment in policing over and above our communities has had a very real cost in all areas of the lives of DC residents. We have helped to perpetuate an over-reliance on policing as the answer to our problems, calling the police not only in emergencies, but also in response to white people's fears or annoyance in many situations where people of color are simply trying to live their lives. Police occupy far too many areas of our lives including the schools our children attend. It should not be surprising that our current system of policing only exacerbates conflicts and deepens entrenched racism. By reducing the spaces occupied by police we give greater opportunities for community leadership to flourish and community resources to be utilized.

The Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020 will not solve all of our problems, but it is a necessary first step of a long journey towards healing and authentic peace. The only obstacle in our way to having a peaceful city is political will and the answer for those challenges rests in your hands.

UNIVERSITY OF
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October 15, 2020

The Honorable Charles Allen
Chairman
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue NW, Suite 110
Washington, DC 20004
via email: judiciary@dccouncil.us

Dear Chairman Allen,

I am writing to submit comments regarding Bill 23-882, the Comprehensive Policing and Justice Reform Act of 2020. Specifically, my comments are directed to the portion of the proposed legislation that would amend Section 3900 of the District of Columbia's Municipal Regulation to prohibit officers employed by the Metropolitan Police Department from reviewing police body-worn camera ("BWC") video "to assist with initial report writing." I respectfully advise that while officers should *not* be permitted to review their BWC videos prior to writing use-of-force reports, they generally should be able to do so in other contexts.

I have studied policing as an academic for more than eight years. I am a tenured member of the faculty of the University of South Carolina School of Law, where my research focuses on the regulation of policing, including the use of force, investigative procedures, agency policies, police culture, and industry practices. My previous academic appointment was a two-year teaching fellowship at Harvard Law School, where I researched the same topics. In that time, I have published extensively on policing. I am the principal coauthor of *Evaluating Police Uses of Force*, a book published by NYU Press in May 2020, and my articles have been published in a number leading academic journals. In presentations, articles, and other writings, I have championed a range of significant police reforms.[1] I am also a former city police officer and state investigator, having served in those capacities for more than seven-and-a-half years.

[1] *See, e.g.*, Seth W. Stoughton et al., *How to Actually Fix America's Police*, THE ATLANTIC (June 3, 2020), http:\\bit.ly\PoliceReformEssay.

As is relevant here, I have written and presented extensively on police BWCs. In *Police Body-Worn Cameras*, an article published by the North Carolina Law Review in 2018, I identified and critically examined the potential benefits, capabilities, and limitations of BWCs, providing a framework for police agency executives and policymakers to consider whether to adopt BWCs and how to successfully implement a BWC program. I have served as a BWC subject matter expert pursuant to a Bureau of Justice Assistance grant to develop technical assistance related to police body-worn cameras; in that capacity, I provided verbal and written consultation to CNA Analysis & Solutions and presented, by invitation, a keynote address on BWC systems. By invitation, I have conducted trainings and presentations specifically on police BWCs to a variety of audiences, including the Conference of Chief Justices; the American Judges Association; judicial conferences in Arizona, Indiana, Kansas, Missouri, North Dakota, Ohio, South Carolina, and Tennessee; the Crown/Defence Conference in Manitoba (CAN); the Federal Law Enforcement Training Center; a group of federal Inspector General Investigators; the South Carolina Police Chiefs Association; the Peace Officers' Association of Georgia; senior executives at the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives; the command staff of the Kansas City (MO) Police Department; and investigators, lawyers, and supervisors with Chicago's Civilian Office of Police Accountability, among others.

The issue of whether and to what extent officers should be allowed to review BWC video prior to writing a report—that is, to engage in "pre-report review"—is a controversial one. On the one hand, there is a legitimate interest in ensuring that officers' reports are complete and accurate. On the other hand, there is a legitimate interest in ensuring that officers do not engage in gamesmanship by using video to manufacture *ex post* justifications for their actions or unconsciously contaminate their contemporaneous perceptions of events.

In my opinion, this balance is best struck by prohibiting officers from engaging in pre-report review in the context of use-of-force reports but permitting pre-report review in other contexts. As I have written elsewhere:

> The core concern relates to the potential for officers to base their reports on the body-camera video itself instead of their own perceptions or recollections. In the context of incident or arrest reports, which turn on objective facts rather than the officer's perception, a pre-report review may be relatively unproblematic. An officer writing up a burglary report, for example, should be able to review the recorded interview with the victim so that the officer can include in the report a complete list and description of any stolen items. In the same vein, an officer writing up a DUI arrest would benefit from the ability to review BWC footage so that she can accurately record the ways in which the stopped motorist failed field sobriety exercises. Although officer reports are generally accurate, the availability of video can make them even more accurate, allowing agencies to reap the informational benefits of BWCs.

> Use-of-force reports, however, are a different story. The propriety of a use of force does not turn on the objective facts of the situation, but on the reasonableness of an officer's perceptions and actions. In this context, officers should not be able to review BWC footage before writing a report. Most obviously, it creates both the opportunity for deception and, even more importantly, the perception that there is nothing to prevent officers from engaging in deception. To the extent that deception occurs, it may well occur in some occasions as a result of the officer being put in a moral dilemma. Consider, for example, an officer who is interacting with a bellicose subject and notices, out of the corner of her eye, the subject ball his hands into fists. Fearing an attack, the officer preemptively uses force, bringing the subject to the ground. Upon reviewing the video, however, the officer sees that the subject's hands, more clearly visible in the video than in her peripheral vision, were never balled into fists after all. What is that hapless officer to do? Ideally, perhaps, the officer would document her perceptions as well as her knowledge that her perceptions were inaccurate. Officers are only human, however, and it is entirely plausible to suspect that some number of officers in that position would leave out any mention of balled fists and instead find *something* in the video that they could use to justify their actions.[2]

This difference in treatment between use-of-force reports and other reports (e.g., arrest or incident reports) reflects the differences in those two contexts. At the risk of over-simplification, what matters in most contexts and for most reports is what *actually happened*; the list of items reported missing by the burglary victim, the eyewitness's description of the alleged perpetrator, whether and how quickly an individual left the premises after being told to do so, *et cetera*. In the use-of-force context, however, an officer's report is supposed to reflect what the officer *perceived*. It is my understanding that, prior to the emergency legislation passed in June 2020, officers could not review BWC videos prior to preparing reports regarding a "police shooting." I would recommend expanding that to all uses of force and in-custody deaths or, at a minimum to uses of force resulting in serious injury and in-custody deaths.

Importantly, however, the concerns that justify a prohibition on pre-report review in the use-of-force context—primarily concerns related to self-interested gamesmanship or deception—may exist, but they are less salient in contexts other than the use of force. Further, there can be significant benefits to allowing pre-report review. As a threshold matter, I am personally familiar with or have communicated with colleagues in other countries about how foreign national, provincial, or local police agencies use BWC systems. So far as I am aware, no modern Western democracy prohibits officers from reviewing BWC videos prior to preparing reports (outside of the use-of-force context). There are at least three reasons to permit pre-report review outside of the use-of-force context.

[2] Seth W. Stoughton, *Police Body-Worn Cameras*, 96 N.C.L. REV. 1363, 1418-19 (2018) (citations omitted).

First, most police reports are neither intended nor expected to be an auto-biographical account of a single officer's perceptions. Instead, arrest and incident reports are intended to document a range of evidence and information that was been observed or collected not just by the reporting officer, but also by other officers. Consider a few common scenarios. When multiple officers investigate a single incident, often a single officer—the "primary" officer—does the report, relying on and documenting information provided by the other officers. The primary officer investigating a burglary, for example, may speak to the victim but include in her report information obtained from other officers' during their respective interviews of the neighbors. The primary officer may rely on the what they're told by the other officers and the written notes taken by those other officers It would be to everyone's benefit if the primary officer could also review the other officers' BWC videos of those interviews. In domestic dispute or domestic violence investigations, it is almost universal for one officer to speak with one party and another officer to speak, out of hearing, with the other party. Here, too, one officer typically writes the report and includes information gathered and shared by the other officer. Again, the officer writing the report may rely on the other officer tells them and the written notes taken by the other officer. Here, too, it would be to everyone's benefit for the officer writing the report to have access to and review the other officer's BWC footage. When officers change shifts, it is not at all uncommon for officers who have made arrests or started an investigation as they are ending their shifts to turn those arrests or investigations over to officers who are coming on shift. The same point holds; it would be to everyone's benefit if the officers taking over the arrest or investigation could review the other officers' BWC videos in much the same way that they listen to the other officers' statements and rely on their written notes. The same thing is true when a supervisor gets involved in an incident and makes an arrest, then turns the arrest over to a subordinate officer, who handles the paperwork. This is not just true in the context of arrest and incident reports, but also in affidavits supporting officers' applications for search or arrest warrants. Generally speaking, a single officer will submit a single affidavit in support of a warrant, but that affidavit will often have information from multiple officers and sometimes multiple reports.

As these examples suggest, the vast majority of police reports are based on far more than the authoring officer's unaided memory of their own personal observations. Instead, arrest or incident reports are, and are intended to be, compilations of accurate information gathered from a number of different sources, often by a number of different officers. If an officer can rely, when preparing an arrest or incident report, on his own memory, his written notes, any still photographs that were taken, information orally provided by other officers, the written notes of other officers, *et cetera*, it makes little sense to exempt BWC video from the information that the officer can review as they write that report.

Second, keeping in mind that the primary goal of most police reports is to convey accurate information, not necessarily a particular officer's limited observations, pre-report review can increase the accuracy of police reports. The best available evidence suggests that BWC video can serve an essentially mnemonic function. In one study, researchers outfitted participants with a "SenseCam," an outward-facing, body-mounted camera that takes periodic still images (but not

video); when wearers reviewed the images, they were able to better recall details about the relevant event even when those details were not reflected in the images themselves.[3] Thus, not only is there good reason to believe that video may be more accurate than human memory, there is also reason to believe that video may actually *aid* human memory. An unpublished study from the Netherlands compared the quantity (meaning the number of statements) and quality (meaning the accuracy of statements) of police reports when officers did and did not engage in pre-report review, finding a marked improvement in both quantity and quality when officers could review their BWC videos prior to writing the report. It is worth pointing out that the study showed there was a similar benefit when officers could write their reports, review the video, and then supplement their reports (a "write, review, revise" approach), but that process both takes additional time and creates additional reports that the eventual audience must sift through. To the extent that body-worn camera video accurately captures information or prompts an officer to include accurate information, it makes little sense to deprive an officer writing the report—or, just as importantly, the prosecutor, defense attorney, civil rights attorneys, judges, jurors, and others who may read and rely on that report—of the benefit of that information.

Third, to the extent that there is a concern about officers selectively *excluding* certain information from reports, such as evidence that would tend to exculpate an arrestee, that concern is distinct from the issue of pre-report review. Officers are *always* supposed to include relevant evidence, whether inculpatory or exculpatory, in their reports and their affidavits in support of warrants. Any failure to do so is indeed serious and merits being taken seriously, but depriving officers of a source of what can be accurate and relevant information—*including* exculpatory information—does not advance or address that concern.

For the foregoing reasons, I believe that the best policy is to prohibit officers from reviewing BWC video prior to preparing use-of-force reports, but to permit pre-report review in other contexts.

Respectfully,

Seth Stoughton

Disclaimer

Please note that any opinions offered in this letter are solely those of the author and do not necessarily reflect the views of the University of South Carolina, the University of South Carolina School of Law, or any affiliated entities or personnel.

[3] Steve Hodges et al., *SenseCam: A wearable camera that stimulates and rehabilitates autobiographical memory*, 19 Memory 685 (2011), https://doi.org/10.1080/09658211.2011.605591

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Christopher Bangs

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Runal Das

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support this attempt at police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

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Sincerely,

Lisa Pahel

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Stuart Karaffa

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Michael Swistara

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
PUBLIC HEARING
1350 Pennsylvania Avenue, N.W.,
Washington, D.C. 20004

October 15, 2020

Good day Councilmember and Chairperson Charles Allen and Committee members of the Judiciary and Public Safety. The following is my written testimony that I present for inclusion of Bill B23-0882 - The Comprehensive Policing and Justice Reform Amendment Act of 2020.

Indoctrination of the Constitution of America's with the Bill of Rights have paved the way of white privilege and has caused undue harm too many nationalities; with misinformation written in history books, and constant brutal attacks on POC. The Black Lives Matter movement resurrected anti slavery, oppression and police brutality in July 2013, starting with the use of the hashtag #BlackLivesMatter on social media after the acquittal of George Zimmerman in the shooting death of African-American teen Trayvon Martin 17 months earlier in February 2012. The movement became nationally recognized for street demonstrations following the 2014 deaths of two African Americans, that of Michael Brown—resulting in protests and unrest in Ferguson, Missouri. Most recently the murder of George Floyd by the hands of police officers during a pandemic caused global upheaval whereby citizens who care said enough is enough.

People are calling for a process to defund the police departments. Our MPD is not like other jurisdictions and should not be included as such. However, DC Council jumped on the bandwagon by make immediate budget changes and legislation that may not have been in the best interests of DC. The MPD structure here in the district has an additional 10 agencies including 4 sub agencies. MPD's budget affects this entire group and sub group. Taking any funding will no doubt have a trickle down effect on the agencies that follow.

I have however come to realize why Cathy Lanier nominated Peter Newsham for Chief of Police. It wasn't because he was the best candidate or more qualified it was because Newsham would continue Lanier's agenda without her. There are black American males on the police force who are overlooked because of the way the nomination system is set up. Then we have Chairman Mendelson following in Lanier's footsteps. Why?

During election time seniors are the super voters are always being courted with blacks in Wards, 5,7, and 8; but we have to have a white privileged person heading up MPD who is less qualified. I have worked constantly with MPD since 1996 as a volunteer. I have seen some reforms. However, with qualified immunity and a police union who protects the cocky behavior and misconduct of their police officers there lies the problem. Moreover, great black police officers are being overlooked since MPD recruits college graduates; these individuals come in get trained by long term street experienced officers and then are promoted. Systemic..

The way in which things are thought out with our city leaders and those who are wanting to lead needs to be addressed. This past primary election DC had a male running for Ward 7 Democratic Councilmember who was known as a big time drug dealer in DC. Further, this person is a core leader of the BLM DC Chapter. Then the DC Chapter of BLM has one main vocal female who is not a native Washingtonian; who is constantly tapped by local media to speak about BLM. She constantly bashes the DC police department, won't speak to the Mayor and during a recent WTOP interview was asked if she cared about diners eating peacefully, minding their business only to be surprised and verbally attacked by a group chanting BLM don't they? Her response was No. Then we have Ward 5 CM who claims on a resume and upon initial installation of his council seat to be a civil rights attorney when in fact he only worked in the Justice Department and never performed any civil rights litigations nor wrote. These are the people who our prestigious District Council follows and acts?

This writing is on behalf of all of the Senior citizens who are law abiding citizen in the District of Columbia. Most of us, including me, appreciate law and order. However, current times has allowed returning citizens more opportunities than us. Moreover. Councilmembers need to be honest about who is actually committing brazing gun violence in our beautiful city – young black Americans; stop covering it up. I remember a couple of years back during a hearing with MPD CM Vincent Gray was on the diaz grandstanding about how Black males were being harassed by police officers in front of a barbershop; Vincent Gray asked Chief Newsham to have his officers to go hug these guys. A week later gun violence erupted in his Ward with 10 year old Makiyah Wilson being shot dead by several black males.

Systemic racism has played a major part in all of this I agree. I just recently received my AncestryDNA results that determines I am 33 % Nigerian and 12% Congo Bantu. Meaning my ancestors were brought over on the slave ships in 1750 to build America. I still work hard I know the difference between right and wrong I struggle financially but I have never attempted to kill another person for money. My beliefs are that the Universe will work through people and others to help. I did ask CM McDuffie for a job after I was the one who initiated his run for Council, got his campaign office on RI ave and brought awareness to the Ward about him since his was totally unknown. Then once he wins he tells me .. a lot of people volunteered on my campaign.

So I pen this writing to give the Council a clearer picture of what could possible help with making changes and to actually know who are some of the people you give the honor system and how they truly operate.

Regards,

Debbie Smith Steiner,
Prior ANC in Ward 5 for 19 years
Past Edgewood Civic Association President

Dear Judiciary Committee Members,

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the revisions below, as well as those proposed by the above-listed organizations below. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding

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Franklin Roberts

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Jonah Furman

Police Reform Testimony
Tamika Spellman
HIPS Policy and Advocacy Director

I am less than ecstatic that this conversation is happening and sad at the same time because of the overwhelming number of lives lost and the lives that have been negatively affected by current and past policing. Going forward, I see nothing good coming from reform and I will explain why.

Black men infiltrated police departments in America with the premise of 'changing them from within'. The mission to reform them from the inside never happened despite the overwhelming longevity of policing issues where people of color are concerned. It is needless to say that that reform never happened. At varying times, reform has been a topic of discussion over the years, varying laws created and implemented- but nothing seriously changed. Instead the police union strengthened the ability to continue brazen lawlessness within policing agencies, gaining more and greater abilities to not be held responsible for failures, abuse of power, homicides/murders or rapes and other offenses they commit. To alude that prosecuting bad cops will reduced officer moral is ludicris, as what other job can you get away with literally murder or rape and not have any legal repercusions or financial burdens? Only Law Enforcement enjoys that privilege. We pay them healthy salaries with benefits and then we pay for liability insurance for those instances that they break the law, kill someone or cause harm that results in financial burdens to the citizens they are sworn to protect and serve. That is one hell of a sweet deal.

Accountability is laughable as well, having their cohort investigate themselves is a joke, as they never find them guilty- even when there is overwhelming evidence of guilt. So punishments never happen, and back to doing what they do best, terrorize the citizens of the District. Yeah, terorism is a strong word, but that is just how communities of color see MPD. You will find only a handful of people of color that supports policing in its current form, and they see reform as good, whereas the overwhelming majority see it as laughable when thousands said clearly they want them defunded to the point of not existing.

The real solution is decareation in the sense of removing or decriminalizing laws that do not affect/effect public safety or public health. But since we are pushing reform, here are elements I suggest to bridge a few gaps:

No more liability insurance for officer misconduct, murders, rapes etc. They should pay for their own. How can we as a city go forward carrying huge liability insurance bills for an agency that exhibits reckless abandon? Never admit wrong doing, no punishment of any sort, keep their jobs and we pick up the bill for what is really state sanctioned murder, rape or whatever offence of the day they commit. They should carry personal liability insurance to cover damages they cause instead of making the city liable for their actions as criminal behaviors should be subject to equal punishment under the law, not us supporting their lawlessness or reckless behaviors. It's insulting to ask us to pay for liability insurance for someone who has killed your child or best friend, raped you or someone you know or beat you or your neighbor's kid for no reason. Whenever an officer is guilty of breaking laws, found guilty of murder or any other offence where monitary dmages have been awarded, it is on the officer to pay them, not the city. Tax dollars should never be used to make good for bad police/policing behaviors. Maybe this will make them think before they act and stop them from using the lame excuse of fearing for their lives in the presence of unarmed/non threatening Black people.

Transparency and public participation in contract talks: Absolute must have going forward because this is where we get shafted and police build these unrealistic and unethical protections against lawless behaviors and misconduct upon the people who pay the taxes used to pay them. That relationship of shutting taxpayers out of the contract talks has to change in order to be taken seriously. I know most people of any race wouldn't agree to these elitist powers nor any of these outrageous demands and protections they have already been given. Full resident participation is a must going forward.

Accountability assurance: Body cameras are public property, ultimately paid for with tax dollars no matter local or federal, we the people made it possible so it's ultimately our property. There should be 100% transpanance at all times on all footage, available within a reasonable time by any citizen for any reason. Not only is this necessary, so is the compliance with the law and not built in protections negotiated in a contract against transparency and providing publicly owned and maintained property available with little to no restriction in a timely manner. Maybe

put it in the hand of a neutral outside entity since MPD has a history of denying access to public property.

Deliverables: At long last! The golden egg! Exactly what do they promise us for all we pay and provide for them? Nothing! That should change. And in that changing, I hope to prove the need to defund them and place resources in place to address issues policing has no power to effect change on. Chief Newshame said it best that police aren't peace officers, which is true because they are property and revenue protectors and genorators, not crime preventers or protectors of people. They do not de-escalate situations but are good at arresting you after things have gone too far. They don't prevent crime or criminal activities from happening but they sure can arrest you after the fact. So what is it they deliver? Safety? Most of the Black and Brown people in DC do not feel safe in the presence of police, as our outcomes are more often than not not very favorable. The ridiculously over bloated police budget is a joke, and the same results they currently produce can be had with a significantly smaller police presence and monies from that budget put in places that will actually address poverty that can stop mostly all crime/criminal acts. Resources are key to this, told by many of my colleges so I won't go into that but appeal more so the a common theme that the people said what they want, and that is defunding MPD. That should happens and HIPS will have something to present in the spring to showcase how it can be done, but for now we will echo what the constituents are telling you they want resources, education, training, programs, services, harm reduction methods, decriminalization of sex work, drug use and paraphernaila, healthcare, mental healthcare, living wage jobs for everyone that wants one, and most of all, housing as a human right by ending homelessness. Of all these things we need, no police/policing agency has power to give, change or effect change on. And again by Chief Newshame's own admission, has no interest in doing anything related to being peace officers. However what they can do when they are protecting property and revenue is to conduct themselves in a respectful manner that doesn't traumatize human beings or leave them dead or maimed for life. Be mindful these are flesh and blood living beings, not property that is insured to be replaced or rebuilt like property looted and ransacked by protesters and rioters. They are insured, remember. Business owner's are required by law to have insurance and those objects are ultimately replaceable. Maybe if Black lives carried more sentimental value than objects that are insured we wouldn't be having these conversations as often as we do. Not that I condone it but I understand it and why it happens. It's the response to it that is inappropriate and has to be addressed. Harsher policing isn't de-escaltion, it's aggravation. Then the police murdering another citizen happens and you think we

sympathize with things damaged or looted that are insured when Black lives are continuing to be lost at the hands of police? Using banned tactics and then ordering a stockpile of tear gas? Replacing Newshame is a must because he is ineffective at controlling his officers and following directives, law and mandates from the mayor or council on conduct, policy and actions to not be used or employed in the District, and cut their budget by ⅓ and reduce the force by 1500 officers, unarming and implementation of resident oversight of the special police and put those resources back into the people as we have so overwhelmingly requested be done. Just because Newshame is an eloquent speaker and plays nice with the media doesn't make them effective at their job. Mind you, this is what the people want and I will be presenting the blueprint on how this is to be accomplished in the spring. But for now these are priorities I would like considered and explored.

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Sara Buettner-Connelly

Planned Parenthood®
Care. No matter what.
Planned Parenthood of Metropolitan Washington, DC

Testimony of Serina Floyd MD, MSPH, FACOG
Medical Director, Planned Parenthood of Metropolitan Washington, DC

Written testimony in support of B23-0771, Internationally Banned Chemical Weapon Prohibition Amendment Act of 2019
DC Council Committee on the Judiciary and Public Safety
Public Hearing, Wednesday, October 15, 2020

Thank you for the opportunity to provide written testimony on this important legislation. I am the Medical Director at Planned Parenthood of Metropolitan Washington, DC (PPMW) and a board-certified obstetrician-gynecologist who has been providing reproductive health care for 19 years. PPMW understands that access to sexual and reproductive healthcare transforms people's lives, and for over eighty years, has provided comprehensive reproductive healthcare across the Metropolitan Washington region, serving over 18,000 patients annually.

I testify in support of B23-0771, the Internationally Banned Chemical Weapon Prohibition Amendment Act of 2019, and thank Councilmembers Nadeau, Grosso, Trayon White, Robert White, Silverman, Todd, and Allen for their leadership on this bill. Tear gas is a weapon of war that has no place on civilian streets and should not ever be used on anyone, particularly those exercising their right to protest in the District. PPMW is concerned about the use of tear gas in protests because of the many detrimental health effects it has been shown to have on skin, eye, respiratory and gastrointestinal systems; effects that are intensified in those who already suffer from chronic medical conditions.[1]

In addition, there is an emerging concern about the impact of tear gas on reproductive health. There have been multiple reports that exposure to tear gas has been correlated with miscarriage.[2] Over the last several months, as tear gas has been used on protesters across the country, both cisgender women and transgender male protesters have reported menstrual irregularities including multiple periods in one cycle, extremely heavy bleeding, unusually long periods, or cramping soon after exposure.[3][4] These reports are currently being studied through research being conducted at Planned Parenthood North Central States, which serves the region

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[1] Tear gas: an epidemiological and mechanistic reassessment. doi:10.1111/nyas.13141
[2] *Ibid.*
[3] Tear gaslighting: is there a link between protesting and messed up periods? https://www.marieclaire.com/health-fitness/a33648135/tear-gas-effects-reproductive-system/; Irregular periods and horrible headaches: how tear gas is making Portland sick. https://www.vice.com/en/article/4ay5mn/an-endless-barrage-of-tear-gas-is-making-portland-sick
[4] 'It's like they're testing it on us': Portland protesters say tear gas has caused irregularities with their periods. https://www.opb.org/article/2020/07/29/tear-gas-period-menstrual-cycle-portland/

including Minneapolis, Minnesota.[5] There is cause for significant concern about the impact of tear gas on the health of all individuals but particularly the health of reproductive-age persons, and that is why PPMW supports this legislation to ban the use of tear gas against protesters in the District.

Thank you again to Chairman Allen and members of the Committee for the opportunity to provide testimony.

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5 https://www.plannedparenthood.org/planned-parenthood-north-central-states/about-ppncs/research/tear-gas-and-reproductive-health-study

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. These reforms do not go far enough, and I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

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2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. As a white person in DC, I essentially live free from police interactions unless I intervene in them harassing my Black neighbors. We know that police just aren't need in most situations. Conflicts can be resolved peacefully amongst neighbors. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Thank you for your time.

Vick Baker

Dear Judiciary Committee Members,

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Thomas Boland-Reeves

STND4YOU, Inc. Forensic Speech-Language Pathology Clinical Opinion Letter

To: D.C. Council Committee on the Judiciary and Public Safety
Bill: B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"
Re: A More Mature Miranda Doctrine

October 15, 2020

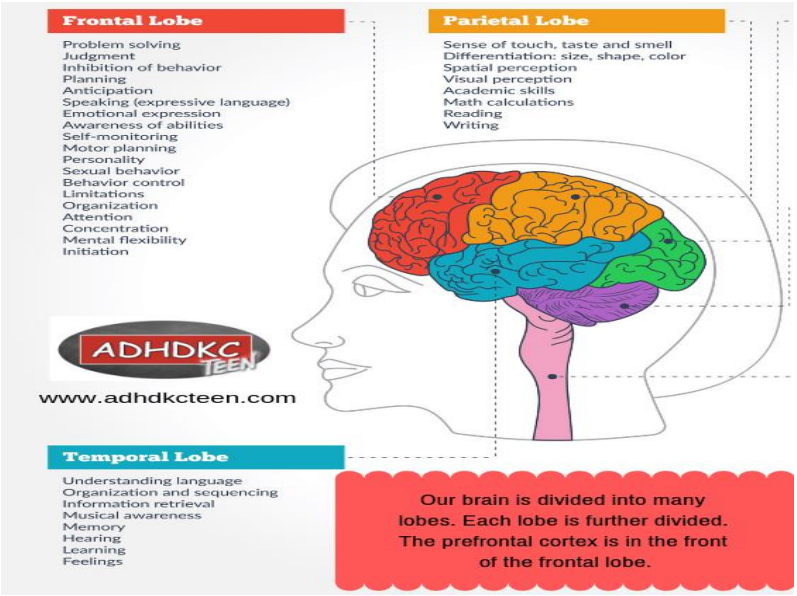
STND4YOU, Inc. is a Nonprofit organization developed to address diversion, advocacy and free wrap-around clinical services for Black and Latinx youth who are placed at-risk for delinquency and involvement with the justice system secondary to their overlooked cognitive and communication disorders. There is a portion of the need for more mature Miranda Rights that we believe should make mention of the number of Black youth who are also overrepresented in the special education system who do not understand their rights due to varying language and learning disorders. Clinicians like Speech-Language Pathologists should be consulted to discuss what and how the youth's understanding can be impacted during this process. We would like to be involved to add this piece to a very powerful movement you are creating. Our founder, Dr. Shameka Stanford is an associate professor in the department of Communication Sciences & Disorders at Howard University, and a juvenile Forensic Speech-Language Pathologist (the first and only in the United States) with a clinical specialty in in juvenile law and special education law.

This letter is written to support the More Mature Miranda Initiative. In support of the more mature Miranda initiative, it is important for me to highlight how the presence of cognitive and communication disorders can increase a youth's vulnerability to waive a right they do not inherently have the knowledge, intelligence, and cognitive ability to comprehend. My opinions are based on my education in the area of communication sciences and disorders and forensics, clinical training, and clinical forensic experience in relation to these matters. Research has demonstrated that children account for an increased amount of coerced confessions secondary to their developing cognitive abilities. However, the discussion about coerced confessions cannot be had without addressing the prevalence of children living with learning disabilities, cognitive and communication disorders who are coerced or falsely confess to crimes. Communication and Cognitive disorders (CCD) is defined as a deficit or significant impairment in the primary functions of attention, memory, problem solving, emotional functioning, comprehension and production, literacy, pragmatics, social skills, and expressive and receptive language (American Speech-Language-Hearing Association, 1997). Cognitive-communication disorders can impact an individual's communication and comprehension status in a way that affects their ability to fully participate in their (Stanford, 2019). More specifically, during the Miranda rights, cognitive and communication impairments affect the individual's comprehension, judgement, consequential thinking, and decision-making skills. This is most prevalent in children with cognitive and communication disorders during a time where their brain is also concurrently developing.

Maturity of language and cognitive skills occurs with the development of the frontal lobe, particularly the prefrontal cortex (PFC), which is a continuous process from childhood until late adolescence (Ciccia, Meulenbroek, & Turkstra, 2009). The frontal lobe in a typically developing brain controls the child's ability to emotionally regulate as well as, problem-solving, process information/think, and comprehend information. However, the brain and particularly the frontal lobe does not fully develop until approximately 25 years of age or older. Consequently, this means the prefrontal and temporal cortexes of the child with a cognitive and communication impairments that responds to and utilizes good judgement and comprehension is not consistently and automatically activated when engaging with law enforcement. In a child with cognitive and communication disorders, there are areas of the brain that are necessary for the ability to comprehend, functionally problem solve, and think rationally that will never be fully developed (Johnson, Blum, & Geidd, 2009; Stanford, 2018). Explicitly, secondary to cognitive and communication disorders, areas of the brain that regulates the child's verbal-reasoning skills, problem

solving skills, and comprehension during the reading of Miranda rights may take longer than the 25 years old to fully develop, if at all.

The visual below presents the **frontal and temporal lobe areas** of the typically developing brain where children with cognitive and communication disorders experiences significant impact in the areas where consequential thinking, problem-solving, judgment, self-monitoring, concentration, attention, and most importantly understanding language are control are activated.



In the area of **cognition**, memory, reasoning, judgment, attention and concentration impairments can impact the child's ability to understand the Miranda rights. In the area of **executive functioning,** impairment in problem-solving, decision-making, organization, and planning can impact the child's ability to understand the Miranda rights. As aforementioned, to inherently understand Miranda Rights to the extent you make a conscious decision to waiving your rights would require; (1) functional critical thinking, (2) executive function, (3) and comprehension skills. At a micro level the child with underlying language impairments would also need to possess strong vocabulary, verbal reasoning, inferencing, and recalling information skills. In the areas of **communication,** impairments in thinking and processing, difficulty understanding language, and vocabulary deficits can impair the child's ability to understand the Miranda rights. For instance, in a 2018 (not yet published) research study in which I analyzed the confluence of cognitive and communication disorders and increased risk of referral to the justice system for black youth, 85% of the participants demonstrated vocabulary impairments. Further, data from the research study demonstrated that 90% of the participants were unable to define 70% of the words presented in the Miranda Rights. For example, a 70% of the participants were unable to define the words attorney, appointed, and afford. The findings of this analysis identified six key domains of communication and cognition that when impaired can increase the risk of youth being coerced into confessions, and false or forced waivers of their rights. These areas included: 1) age-appropriate vocabulary development and skills; 2) abstract language comprehension; and 4) processing and organizational planning. This demonstrates that although the youth may verbalize understanding and demonstrate a surface level comprehension of the words of the Miranda rights in isolation; it is more likely than not, a significant portion are unable to comprehend the words contained within it well enough to understand the overall context.

Lastly, the inability to functionally track and participate in conversations with peers and adults can impair the child's ability to understand the Miranda rights. This information is most relevant to understanding how cognitive and communicative disorders in children can impact their understanding of the information presented in the Miranda rights. The Miranda rights are built on the expectation that the individual can demonstrate and process what is requested of them and what will occur during the law

enforcement interaction. To do this, the individual must be able to follow directions, comprehend the words used, recall information, and infer the consequences of what may occur if they choose to waive their rights. Consequently, children with cognitive and communication disorders are significantly unable to decipher what is expected of them resulting in misunderstandings which can increase their risk of waiving their rights. Especially when the child is engaged in a situation that causes frustration, anxiety, tension distress. During heightened situations of distress, like being arrested or unexpected law enforcement interaction, children with cognitive and communication disorders will primarily rationalize and respond with the emotional parts of their brain, not taking the time to determine if the communication lacks comprehension.

Therefore, it becomes necessary that as we determine a more mature Miranda, we keep in context that just because children may be able to periodically demonstrate the ability to determine what is happening, does not mean that their cognitive and communication limitations and impairments are not consistently present and likely to impact their ability to understand their rights and the consequences of waiving their rights.

Thank you,

Shameka Stanford, Ph.D., CCC-SLp

Shameka Stanford, Ph.D., CCC-SLP/L
COO, STND4YOU, Inc.
Juvenile Forensic Speech-Language Pathologist

References:

American Speech-Language-Hearing Association. (1997). Preferred practice patterns for the profession of speech-language pathology. *ASHA*.

Ciccia, A. H., Meulenbroek, P., Turkstra, L. S. (2009). Adolescent brain and cognitive developments: Implications for clinical assessment in traumatic brain injury. *Topics in Language Disorders, 29* (3), 249-265.

Stanford, S. N. (2019, June 12). Who Was Really "Wilding" When They See Us Highlights The Wrongful Conviction of Black Youth with Language and Learning Disorders. Coalition for Youth Justice: http://www.juvjustice.org/blog/1127

Stanford, S. & Muhammad, B., (2018). The Confluence of Language and Learning Disorders and the School-To-Prison Pipeline Among Minority Students of Color: A Critical Race Theory. *Journal of Gender, Social Policy, and the Law,* 691-718.

Date: Wednesday, October 21, 2020

Name: Holly Rogers
Mailing Address: 1538 New Jersey Ave NW
Washington, DC 20001

To: Councilmember Charles Allen
Chairperson of the Committee on the Judiciary & Public Safety
1350 Pennsylvania Ave NW
Washington, DC 20004

Re: Bills 23-0723, 23-0771, & 23-0882

Committee Chairman Allen and Councilmembers of the District of Columbia,

My name is Holly Rogers, and I am a resident of Ward 6. Thank you for providing District residents with an opportunity to participate in this conversation to bring public safety to the forefront of our community. After reviewing Bills 23-0723 - Rioting Modernization Amendment Act of 2020, 23-0771 - Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020, and 23-0882 - Comprehensive Policing and Justice Reform Amendment Act of 2020, the following are my questions, criticisms, and recommendations:

1. In B23-0771, it is stated that the use of chemical irritants will be banned at "First Amendment Assemblies". What is a "First Amendment Assembly"? Who decides what a "First Amendment Assembly" is? This choice of phrasing seems to suggest that this ban may only apply to what some authority figure determines is a *peaceful*, *organized*, *permitted* assembly where citizens are exercising their First Amendment rights. What if MPD decides the assembly isn't peaceful, is riotous, or doesn't fit their definition of proper exercising of First Amendment rights? Without a clear line delimiting exactly when chemical irritants cannot be used, the interpretation of this bill is far too subjective.

   This bill should contain a **complete, absolute** ban on the use of chemical irritants by MPD in **all** cases, not just those vaguely defined as "First Amendment Assemblies." If chemical irritants are not allowed in war according to the Geneva Protocols, they shouldn't be allowed to be used on residents of our city. Under what circumstances would you feel comfortable having MPD use tear gas and other chemical irritants on your constituents, neighbors, and family members? It is beyond time to instate a complete ban on use of chemical irritants by MPD.

   Please note that this criticism is also applicable to B23-0882 Subtitle P.

2. In B23-0882 Subtitle F, the limitations on consent searches are outlined clearly. However, as has been acknowledged previously when the Council passed Bill 23-0825 (Comprehensive Policing and Justice Reform Second Emergency 77 Amendment Act of 2020), when police obtain consent

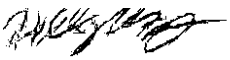
to search a person, vehicle, home, or property, the cooperation by the subject is not truly consensual. Often people waive their rights against unreasonable searches because they believe they do not have a choice, as was argued in Jones *v.* United States (154 A.3d 591, 595-96 (D.C. 2017)). People often give consent to police officers because: they feel coerced, they feel that they have no other option, and/or they are legitimately afraid for their safety should they refuse consent. Furthermore, by obtaining a subject's consent, the officer no longer needs probable cause to conduct the search—they just need consent. In this way, consent searches bypass our Fourth Amendment rights.

I ask that the Council please consider the potential ramifications of consent searches. People most in need of protection from police overreach—especially BIPOC—are likely to waive their rights and consent to a search. The Council must consider eliminating consent searches in D.C.

3. In B23-0882 Subtitle F, after all the limitations on consent searches, it is stated that "nothing in this section shall be construed to create a private right of action." Although I agree that as long as consent searches are permitted, definitive proof of consent is essential; however, to be effective and fully enforceable the Bill must allow for legal action from private citizens if the search was nonconsensual. If there is no recorded proof of consent and it therefore is presumed that the search was nonconsensual and subsequently illegal, the proposed limitations on consent searches do not truly protect subjects from illegal searches if they cannot pursue legal action after the illegal search. Enforcement of the proposed limitations on consent searches is lacking in B23-0882.

   Again, as outlined above, the inability to truly enforce the proposed limitations on consent searches further indicates the problematic nature of consent searches in D.C. The Council must consider eliminating consent searches in D.C.

Thank you for your time,



Holly Rogers

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Linda Gomaa

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Eamon McGoldrick

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4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Bart Sheard

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Laura Van Dyke

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, moving towards defunding the Metropolitan Police Department entirely.

To start, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

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Ben Lee

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David Herman

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Laura Jaghlit

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Connor Czora

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Ryan Carroll

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Kaela Bamberger

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Deidre Nelms

Dear Judiciary Committee Members,

I am a Ward 2 resident writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

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Robert Cline

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Alexandra Seymour

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Madeleine Stirling

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Sincerely,
Marli Kasdan

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Shivani Desai

The Police Reform bill was written too quickly, covers too many topics and much of its potential implementation hasn't been thought through. I ask that the Council/Committee please spend more time flushing out the facets of the bill and work more collaboratively with the Mayor and MPD.

The Rioting Modernization bill should not be enacted immediately before the Presidential election and the inauguration - two events expected to include protests which may devolve into serious riots. We don't want a police force contending with riots only a few weeks after all the rules have changed.

Thank you,
Sarah Bever, DC resident

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Ryan Anderson

Committee on the Judiciary and Public Safety
B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"
Submitted on October 23, 2020
Jayme Epstein, Ward 3

My name is Jayme Epstein, and I am a resident of the Woodley Park neighborhood of Ward 3. I'm a member of Jews United for Justice, a community of thousands of Jews and allies committed to advancing social, racial, and economic justice in DC. I urge you to support the Comprehensive Policing and Justice Reform Amendment Act of 2020. I also, however, know that the proposed legislation does not go far enough. I also support the demands to defund the police from Stop Police Terror Project DC, Black Swan Academy, and other groups in DC's Movement for Black Lives, such as reallocating funding from the MPD budget to pay for medical and mental health professionals and social workers to respond to emergency calls and moving funding for school resource police officers to pay for mental health care and trauma-informed services. I urge the Council to re-prioritize where the city puts its money, redirecting money from an ever-expanding police force, that actually makes our communities less safe, to programs that will increase safety and decrease both violence and the structural racism that so inhibits the lives of DC's Black residents.

As a White person living in a mostly White community in this highly and shamefully segregated city, I have no dealings with the police. I grew up hearing that if I became lost or needed help, I should find a man in a uniform to help me, tell him my address and phone number, and he'd make everything okay. As an adult, I have learned that this is not what Black parents tell their children. I have taught Black men and women, many of whom are parents, in the Congress Heights neighborhood in Southeast DC, who have told me their stories of police harassment. I have attended meetings and previous Judiciary Committee oversight hearings where Black DC residents describe both daily harassment and physical abuse from police in DC and their anguish at the failure of government leaders to investigate and hold the police accountable for the police killings of Black people.

I am the parent of a young man who towered over me by the age of 13. At age 16, he began driving. Like all parents, I worried about where he was and what he was up to and was relieved when he came home at night. But I never really worried about whether he would come home. I simply cannot fathom what it must be like to have to think every day that when my son walks out the door he might not not come back, or might come back physically or emotionally damaged -- simply because of the color of his skin. And that the perpetrators of the violence against him -- whether physical or the daily harassment wearing down his self-confidence and sense of security -- would be the police I had so revered as a child.

Here in DC right now, and all over the country, we've witnessed a tremendous outpouring of protests and public comments by local and national leaders grieving the murder of George Floyd. The mayor has painted Black Lives Matter on the street. But I have to ask: will anything

change for the residents of DC? We've been through this before and nothing has changed. We have to grasp this moment and show Black DC residents that their specific lives do actually matter, so we're defunding the police and increasing the funding of programs that will keep them safe and allow them and their children to thrive.

In addition, although the proposed bill includes several important steps, it is important that the Council go further to reduce the harassment and over-policing of DC's Black residents by removing police from schools (as urged by Black Swan Academy), limiting police enforcement of traffic stops, creating a non-police crisis response system, expanding the role of violence interruption and trauma-informed approaches to public safety, and rehauling the District's criminal code to decrease penalties and decriminalize offenses.

Please do not let this moment pass. Please do not once again tell DC's African American community that their lives matter and then do nothing to invest in their lives. Please listen to the anguish, and then use your power to redirect funds to programs that actually work to make us all safer and stronger.

Thank you for the opportunity to submit testimony.

BLACK LIVES
D

FOR IMMEDIATE RELEASE

June 6, 2020

"Black people are allowed to be joyful or feel seen with DC renaming a street after Black Lives Matter. It's also our responsibility to let you know what we are fighting for, who has the power to change things and that power concedes nothing without demand."

-Kiki Green, a Core Organizer with Black Lives Matter DC

as always those we have lost to police here in DC:

- **Jeffery Price,** age 22, was chased to his death in DC by the Metropolitan Police Department on May 4, 2018.
- **D'Quan Young**, age 24, was shot and killed in DC by the Metropolitan Police Department (MPD) on May 9, 2018.
- **Marqueese Alston**, 22, was shot and killed in DC by the Metropolitan Police Department (MPD) June 12, 2018
- **Terrence Sterling**, 31, was chased, shot and killed by DC by the Metropolitan Police Department (MPD) on September 11, 2016

- **Ralphael Briscoe**- age 18, as shot and killed in DC by the Metropolitan Police Department (MPD) on April 26, 2011
- The names of more loved ones lost have been compiled here by Stop Police Terror Project DC.

These are the names of the people that performative Black Lives Matter street art leaves out. These are the names that fuel our commitment to #DefundPolice and #StopMPD. We know that for some DC is the seat of power and imperialism, the symbolic representation of harmful systems but it is also home to hundreds of thousands of Black people who are oppressed by the very systems people claim to be against. It never fails that in the National discourse people ignore those killed right here in DC by police while protesting police brutality and muder in our city.

We stand by our critique of the DC Mayor Muriel Bowser after the unveiling of the Black Lives Matter Mural and the renaming of Black Lives Matter Plaza. “Black Lives Matter” is a complete statement. There is no grey area or ambiguity. We hold that we have a duty to the loved ones named above to ensure that they are not forgotten and their deaths are not exploited for publicity, performance, or distraction. Mayor Muriel Bowser must be held accountable for the lip service she pays in making such a statement while she continues to intentionally underfund and cut

services and programs that meet the basic survival needs of Black people in DC.

To chip away at the investments in communities that actually make us safer while proposing an additional $45 million dollar increase in funding for the Metropolitan Police Department's budget a few weeks ago is NOT making Black lives matter. Bowser justifies the over policing of Black bodies by pointing to the heart breaking number of Black people who have died as a result of violence in our streets. Simultaneously she publicly admits that increased police presence has little effect on violent crimes, especially homicide. Homicides continue to increase despite the MPD budget growing every year and more and more officers on the streets. In a continuation of her intentional efforts to first not fund, then dissect, and now lie about implementing the Neighborhood Engagement Achieves Results Act (NEAR Act), that threats community violence as a public health issue, she just proposed to cut $800k from the Office of Neighborhood Safety and Engagement that the Act created and where the violence interruption program sits. Additionally, she still has not opened the stand alone Office of Violence Prevention also required by the Act. Stop Police Terror Project DC and Black Lives Matter DC were instrumental in the creation, passage, funding of the NEAR Act.

I.

Some areas that the policy budget money is going to include:

- Funding for even more police officers, despite DC already having more officers per capita than almost anywhere else in the country
- Seventeen additional school resource officers (or police officers who work in schools)
- Additional funding for unspecified work with Homeland Security
- Additional funding to the Narcotics and Special Investigations Division (NSID), an extremely violent division of the MPD that operates with almost no accountability.

(To make matters worse, one of the only areas of the MPD budget that appears to have been cut is its office in charge of responding to Freedom of Information Act (FOIA) requests, one of the few ways the MPD is accountable to the public.)

At the same time violence prevention programs in DC, which already made up a tiny percentage of the DC budget, have been cut significantly, including $800,000 taken from the Office of Neighborhood Safety and Engagement (ONSE), $1.4 million cut from the Roving Leaders program and what seems to be the elimination of the Cure the Streets program.

The solutions:

This is not just about MPD getting increased funding while specific programs get cut, however. It's about the need to radically shift our priorities. We don't just want to halt increases to the MPD's bloated budget, we want to defund it and shift that money toward non-police resources that actually make us safer. These include:

- Maintaining and **increasing** funding for the Office of Neighborhood and Safety Engagement and violence interrupter programs.
- Reallocating funding from the MPD budget to pay for medical and mental health professionals and social workers to respond to emergency calls.
- Cutting funding for school resource officers and reallocating that funding to pay for mental health care and trauma-informed services in DC public schools, along with technological support for remote learning.
- Increased services for formerly incarcerated DC residents including housing, education, and job assistance.
- Maintaining a permanent budget item for public housing repairs. This year, the council should put $60 million to repair public housing.
- Increasing the availability of high-quality childcare.
- Maintaining and increasing funding for vital nutrition and food access programs.
- Suspending rent and mortgage payments in DC until the COVID-19 crisis is over

- Providing COVID-19 relief funding to all DC residents, including undocumented residents.

Just a third of the current MPD budget could fund many of these programs for years – think how much housing could be built with 190 million, or people fed, how many school counselors and nurses could be hired.

To submit your testimony

> **Upload a 3-minute video of your testimony to the Judiciary Committee's Dropbox via this link**
> Submit voicemail testimony to the Committee's GoogleVoice number at (202) 350-1362.
> Email written testimony to judiciary@dccouncil.us

Additional resources

More information on testimony submission and process

Full DC budget

Activists push for tax increases, more child care spending in D.C. budget

DCFPI budget priorities

Fair Budget Coalition FY21 report

DC Tenants Union Cancel Rent campaign

The Pandemic Is the Right Time to Defund the Police

No More Money for the Police (NYT piece that specifically mentions DC's violence interrupter program as a good alternative to policing that needs more funding)

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Elizabeth Sawyer

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sarah Greenbaum

Testimony of Katherine Myer
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
Moms Demand Action / Everytown for Gun Safety
October 23, 2020

Dear Chairperson Allen, Committee members, and Staff,

Thank you for the opportunity to offer testimony. My name is Katherine Myer, and I am writing as a representative of Moms Demand Action and Everytown for Gun Safety.

Police reform in this country is long overdue. We are glad to see these proposals being set forth to ensure law enforcement is supporting all communities in the District equally and fairly.

We have a gun violence crisis in our community—and that was true long before the pandemic hit and families were thrust into poverty, job loss, illness, and more. We saw longstanding tensions boil over this summer, further damaging the already precarious relationship between communities of color and the Metropolitan Police Department. We have been encouraged by our conversations with several Council members, but those conversations take time. **We need immediate action to save lives in our community.**

Put simply, police violence is gun violence, and we cannot end gun violence without addressing this crisis. A single incident of police violence can plant the seed for fear and community distrust of police, making it harder to prevent or solve violent crime, and in turn, making communities already fighting systemic and structural barriers more at risk for violence

Moms Demand Action specifically applauds the inclusion of the following provisions:

- Improving Access to Body-Worn Camera Recordings
- Prohibiting the Use of Neck Restraints
- Office of Police Complaints Reforms
- Use of Force Review Board Membership Expansion
- Mandatory Continuing Education Expansion
- Reconstituting the Police Officer Standards and Training Board
- Use of Force Reforms
- Restrictions on the Purchase and Use of Military Weaponry
- Metro Transit Police Department Oversight and Accountability

In addition to reforming the police department, our city must stop funding the militarization of police. Instead, we should increase funding for critical programs, such as de-escalation and implicit bias training, addressing domestic violence, and preventing hate crimes. The money saved from ending the militarization of our police department should be reinvested in community-based programs such as violence interruption and hospital-based initiatives, so that police intervention is avoided in the first place.

Police violence is gun violence and we must fight the toxic combination of systemic racism, America's gun culture and the militarization of law enforcement that has resulted in the tragic death of so many—particularly Black people.

Moms Demand Action will thoughtfully follow the lead of the organizations that have been in the fight against police violence for many years, especially Black-led organizations.

We urge the Council to do the same.

KATHERINE MYER

Testimony by

Racial Justice Action of All Souls Church, Unitarian

On B23-0288, The Comprehensive Policing and Justice Reform Amendment Act of 2020

October 23, 2020

Chairperson Allen, Councilmembers, and Staff of the Committee on the Judiciary,

We are members of All Souls Church, Unitarian – a D.C. congregation that has supported the struggle for justice for the last 199 years: from the abolition of slavery, to civil rights, to marriage equality, to the movement for Black lives.

We affirm the inherent worth and dignity of every person. We join our voices to those who have been victimized by policing and violence. And we proclaim loudly that Black lives matter!

We call on the DC Council to pass laws that make sweeping changes to the administration of justice, that end police violence, and that redirect funding to areas of the budget that actually contribute to community safety and well-being.

We believe the Comprehensive Policing and Racial Justice Reform Amendment Act of 2020 includes provisions that have the potential to reduce the harm caused by police violence. Thus, we support passage of the legislation.

Yet, we emphatically assert that this bill, despite its name, is not comprehensive. More is needed in order to end the cycle of police and community violence that afflicts our city.

We say the names of Archie "Artie" Elliott III, D'Quan Young, Marqueese Alston, Alonzo Smith, Terrence Sterling, Ralphael Briscoe, and Gary Hopkins Jr., all of whom were murdered by the Metro Police Department. When saying their names, we know these are among the multitude of Black, Brown, and Indigenous People of Color who have been killed and traumatized in other ways at the hands of those who have sworn a civic duty to protect and serve us all.

We believe the current moment challenges our city to make truly comprehensive changes so that violence can cease, and justice may thrive.

To that end, we call on the Council to keep listening to those who have been victimized by police violence and to those who have been working for decades to re-imagine and redefine justice. This includes Black Lives Matter (BLM), Black Lives of Unitarian Universalism (BLUU), Black Swan Academy (BSA), Black Youth Project 100 (BYP100), Diverse and Revolutionary Unitarian Universalist Multicultural Ministries (DRUUM), Movement for Black Lives (M4BL), Stop Police Terror Project DC (SPTP-DC), Undocublack and other organizations by and for Black people.

With them, we imagine communities where conflicts are settled largely by members of those communities, amongst themselves, without the involvement of the police or the justice system. We

imagine communities where justice is not punitive, but restorative. We imagine communities where the role of police is limited as a last resort, not as first responders expected to perform multiple roles.

We look forward to Council hearings planned for December focusing on alternatives to policing.

The impulse to call the police whenever there is conflict is a habit we, as citizens, must kick. In our own congregation at All Souls, we have begun the process of changing past policies and practices that led us to call the police for help. We are increasingly aware that calling the police does not ensure safety for all members of the community. All of us must be involved in this work of transformation.

We ask the Council to improve the current proposed legislation by ending stop-and-frisk "jump- out" tactics, prohibiting "knee to the back" tactics, and shoring up alternatives to the police. We support redirecting funds to community-based first responders, violence interrupters, credible messengers, mental health and social workers. We support the elimination of police in schools.

We call upon the Council to provide effective oversight of existing legislation, such as the NEAR Act, and, provisions of the current law, if passed, such as:

- civilian protections when police search a vehicle, home or property,
- restrictions on police use of deadly force, and
- restrictions on the purchase and use of military weapons and equipment.

All too often, essential programs are defunded, while police budgets remain intact or grow. This must change. Do we need to spend more than $40 million in 2021 to replace police vehicles? We believe police funding should be redirected in ways that actually improve peoples' lives. We ask the Council to invest in our citizens':

- education,
- healthcare,
- affordable and accessible housing,
- medical and family leave,
- food access, as well as
- meaningful employment.

We join the call to immediately defund the police.

Building what Rev. Dr. Martin Luther King, Jr., called the Beloved Community is an ongoing and ever evolving process. Too many have died at the hands of police to continue doing things the same way. We commit to staying in this work for the long haul to create the trust, safety and well-being that all individuals and communities deserve.

Sincerely,

Racial Justice Action

All Souls Church, Unitarian

1500 Harvard Street, NW

Washington DC 20009

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Greg Afinogenov

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DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Joshua Lawson

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

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Ana Bailey

Dear Judiciary Committee Members,

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Tamara Vatnick

TO: DC Council
FROM: Laura Killalea, GW Law Student and D.C. resident
RE: Support for the Comprehensive Policing and Justice Reform Amendment Act of 2020
DATE: October 23, 2020

Dear Members of the D.C. Council,

I am a proud D.C. resident and student at George Washington University Law School, writing in support of the Comprehensive Policing and Justice Reform Act of 2020. I'm grateful to the DC Council for taking action in June of this year and passing this emergency legislation, and I hope that you will heed the cries across the nation and in the District, and make it permament. I urge you to enact the act as passed in June, and particularly hope that you will include the provisions on the use of deadly force. These provisions are essential to creating equity in enforcement and in justice under law.

Thank you very much for your time and consideration.

Sincerely,
Laura Killalea

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

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2) The people who perform basic public services in DC shouldn’t carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants. To be clear, it is often the case that the presence of a firearm escalates a situation that might have otherwise remained calm. Removing firearms from basic interactions between citizens and police might help in shifting the adversarial, "thin blue line" mentality that many officers bring to their jobs.

3) Police reform shouldn’t just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren’t needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

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George Tobias

Judiciary Committee Oct 15 Hearing Written Testimony

October 23, 2020

Yael Nagar, Ward 1

My name is Yael Nagar and I live in Columbia Heights in Ward 1. I'm a member of Jews United for Justice, a community of thousands of Jews and allies committed to advancing social, racial, and economic justice in DC. I serve on Jews United for Justice's racial equity team because I believe in the inherent dignity and value in all human life, and know if our city prioritizes these values, we can only grow stronger. Part of this means ensuring that those in our city who have traditionally been oppressed by systems and structures of power like the Metropolitan Police Department, primarily our Black and brown residents, are protected from those structures.

It is for this reason I write to you today: to support the Comprehensive Policing and Justice Reform Amendment Act of 2020 and to urge the Council to take further steps to defund MPD and reallocate funds to other essential services that improve the lives of DC residents and help address the root causes of crime. As our city grapples with the systemic and institutional racism recently highlighted by the uprising this summer and the killing of Deon Kay, I ask that the DC Council do everything in its power to protect all DC residents, hold police accountable, and create transparent policing processes. I support the recommendations made by Black Lives Matter DC, ACLU-DC, DC Justice Lab, DC Working Families Party, HIPS, Metro DC DSA, Defender Impact Initiative, and others, and urge the Council to adopt them.

I am inspired to speak up about these issues because my Jewish tradition teaches me that each and every life is important and valuable. As the Mishnah teaches, "He who takes one life it is as though he has destroyed the universe and he who saves one life it is as though he has saved the universe" (Mishnah Sanhedrin 4:5). Police violence has destroyed so many worlds in our city, and too many laws protect police, not residents. The Torah teaches me "Do not stand idly by while your neighbor's blood is shed" (Leviticus 19:16); it pains me that the Black community has been oppressed and killed by MPD for far too long, and I cannot stay silent any longer.

Since moving to Ward 1 three and half years ago, I have heard debates among neighbors about crime and law enforcement. Some of my neighbors feel that crime is too high and police presence must be increased. These concerns are not entirely unfounded nor are their fears invalid--just earlier today my husband heard gunshots at the dog park near our house on Park Road NW--but I question the immediate turn toward increasing police presence. This is an instinct we need to move away from, as we have seen time and time again that more police does not equal more public safety. Despite the fact that MPD's budget has grown consistently through the years, to the current proposal of $580 billion, and DC has more police per capita than any other city, the homicide rate in DC has grown, reaching the highest murder count in a decade in 2019 with 166 homicides. As of today, October 22, 2020, the number of homicides in DC has already reached 163. Clearly, increasing the police budget and number of police on the streets is not making us safer. At the same time, police violence, and lack of accountability to the public, has put the lives of Black residents at risk, and too many have been lost. This is fundamentally not

acceptable. We need to be shifting resources toward other essential services that prevent crime, such as violence interruption programs and broad access to mental health professionals and social workers.

The Comprehensive Policing and Justice Reform Amendment Act of 2020 encourages increased police accountability, limits use of force, and raises minimum standards for MPD appointment, all of which are critical reforms that I support. However, it does not go far enough; police reform is not sufficient. Following the lead of BLM DC, Stop Police Terror Project (SPTP) DC, and the Defund MPD campaign being led by the Movement for Black Lives DC, I support the call to divest from the police and instead invest in human needs and violence prevention that will actually make all of us safer. Some of the recommendations SPTP has provided that I want to highlight are increasing funding for the Office of Neighborhood and Safety Engagement; reallocating funding from MPD toward funding more mental health professionals and social workers to respond to emergency calls; increased services for formerly incarcerated DC residents including housing, education, and job assistance; and increasing funding for vital nutrition and food access programs. These are crucial steps toward increased safety for all DC residents and the implementation of these recommendations is urgently needed. Thank you for the opportunity to submit written testimony.

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

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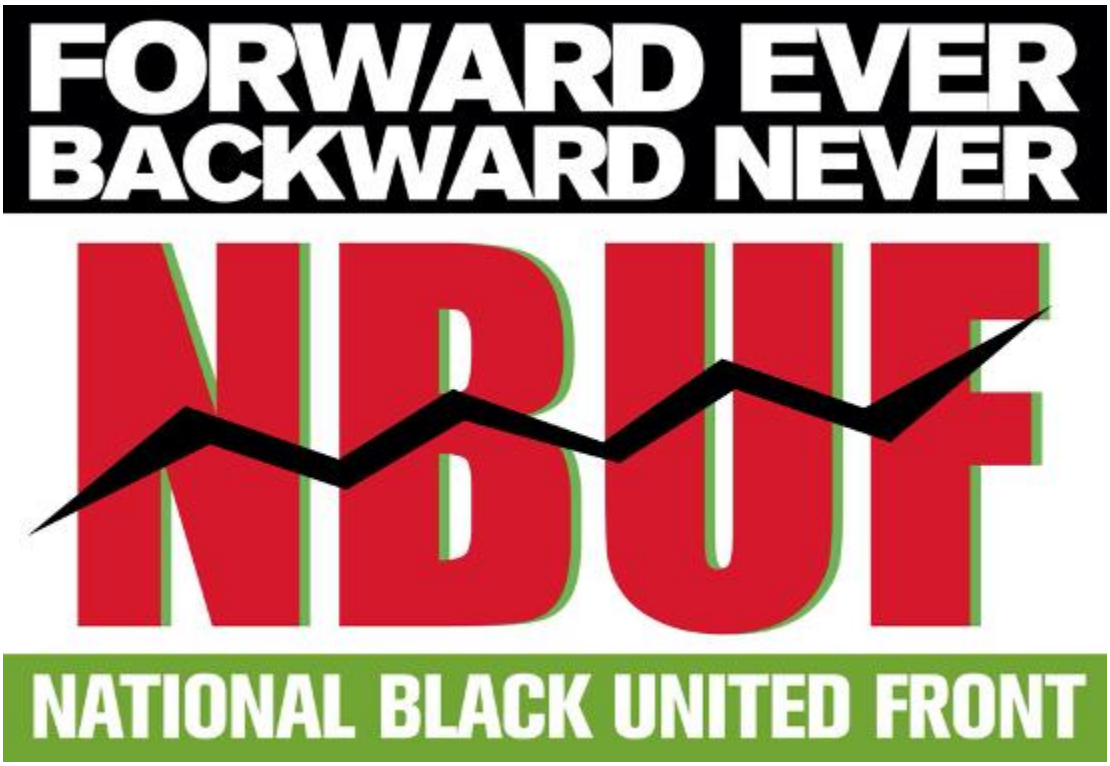
Ben Davis

National Black United Front

Comprehensive Policing and Justice Reform Amendment Act of 2020

Official Testimony to the
District of Columbia
Committee on the Judiciary & Public Safety



Chairperson Charles Allen and the Committee of the Whole, my name is Yafet Girmay and I am testifying as Vice Chair of International Affairs for the National Black United Front (NBUF), an all-volunteer organization that includes all social, political & religious sections of the Black community.

I am here today on behalf of NBUF in support of bill B23-0882 Comprehensive Policing And Justice Reform Amendment Act, which is to provide for comprehensive policing and justice reform for District residents and visitors, and for other purposes.

As we understand history, we are committed to not making and allowing the same mistake twice. From the shooting death of unarmed teenager Michael Brown, to the heavily militarized police response, to the protests in the wake of Brown's death, to the failure of the grand jury to indict Officer Darren Wilson for his role in the shooting, the events in Ferguson, Missouri. These events have turned up the intensity on a consistent simmering debate over the persistent inequalities in our criminal justice system. The recent events have made the urgent need to act even more clear: In the Eric Garner and Tamir Rice cases where no officers were held accountable for their actions.

We understand the center of this debate has always been a conversation about inequities in the basic functioning of the criminal justice system including police practices, the use of force and aggressive policing, arrest and prosecution policies, the severity of criminal sentences, and the disparate impact many of these policies have on the black community. It is blatantly obvious there is a deep-seated sentiment within the black community that the criminal justice system is inherently rigged against them and that the institutions supposedly designed to protect them are failing them, or even worse, targeting them. Moreover, the gap between black and white views

on law enforcement, the criminal justice system, and race relations in this country only seems to be growing. This ever-widening gulf further complicates our attempts to understand exactly what is at issue in cases such as the deaths of Brown and Garner, the failure of the grand juries in those cases to indict the officers responsible, and the opportunity to think through ideas and options for concrete solutions to address the underlying problems.

The Bill points out one aspect that can be pushed further for example in which an officers justification for a search is based on the person's consent and they have to explain that the person is being asked to consent and that they can refuse the search; Fines and complaints should be added to that and accumulated so repeat violators aren't able to be rehired.

Policymakers across the country have targeted several major areas in their reform discussions, Specific actions to incorporate include:

- Ensuring more transparency about police use of force and disciplinary records
- Banning chokeholds
- Making it easier to sue or prosecute officers who commit abuses
- Requires the Mayor to publicly release the names and body-worn camera recordings of any officer who committed an officer-involved death or serious use of force, unless the subject or their next of kin objects to its release at least within 24 hours
- Education on racism and white supremacy
- Incorporate three strikes rules for police officers who receive over 3 complaints/write ups.
- Strengthen the fine imposed on officers who use the illegal method of chokehold to the Maximum penalty instituted by DC code.
- As it pertains to the Police Reform board, while adding a representative from each ward is impactful. A stronger approach would be a fair process that allows active community voices, those who can speak to the needs of the wards being represented. As well as, increasing the representation of Wards 7 and 8 who are most affected by unfair application of policing policies.

Activists and some Democratic officials want to reimagine the system to root out structural racism, calling to redirect chunks of police funding to social services or even replace whole departments with a new public safety system. A current report "A Roadmap for Reimagining Public Safety in the United States: 14 Recommendations on Policing, Community Investment, and Accountability," it recommends shifting investments from policing to social services, affordable housing, schools, community-based healthcare systems, especially mental health and voluntary drug treatment – and local economic development. Redirecting resources from policing to services that effectively address underlying and overwhelming societal problems, along with establishing effective, independent oversight of police, would hold police accountable for their tactics of brutality and would improve public safety.

Police reform efforts should address racial and economic inequities and other societal problems, some caused by policing itself, to be effective. Poverty in the US has stratified along racial lines and profound disinvestment in social services and community development have contributed to homelessness, untreated mental health conditions, unemployment, lack of quality schooling, and other issues. They have also contributed to higher crime rates in Black and poor neighborhoods.

Particularly since the "tough on crime" approaches and "war on drugs" of the 1970s, governments at all levels have for decades invested in policing, prosecutions, and prisons as their primary tools in some cases for profit, rather than investing in addressing these root problems to improve public safety and quality of life. These approaches have left underlying societal problems unresolved, while creating a system of mass incarceration and heavy policing that have had a devastating and disproportionate impact on Black people.

As a U.S. criminal legal system researcher put it "Police violence, especially toward Black people, ranging from killings to abusive stops and searches, is a major way that structural racism manifests itself in the US, and until governments invest in supporting communities rather than criminalizing and controlling them, that violence will not stop."

We appreciate your time, thank you.

Forward Ever Backward Never,

Yafet Girmay

National Black United Front

Written Testimony on B23-0288
The Comprehensive Policing and Justice Reform Amendment Act of 2020
From 56 Individual Religious Leaders

October 23, 2020

Chairperson Allen, Councilmembers, and Staff of the Committee on the Judiciary,

As religious leaders that represent people from across the religious, theological, and political spectrum, we urge you to pass legislation that makes sweeping changes to reduce police violence, including a significant redirection of funding to other areas that can actually achieve community trust, safety, and well-being. We believe the Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020 includes some positive and necessary measures, but more—so much more—is needed.

When we hear the names of Archie "Artie" Elliott III, D'Quan Young, Marqueese Alston, Alonzo Smith, Terrence Sterling, Ralphael Briscoe, and Gary Hopkins Jr., all of whom were murdered by the Metropolitan Police Department, our hearts are broken for their families and our resolve is strengthened that we must see fundamental change now. It is time—indeed it is far past time!—for the DC City Council to ensure Black lives matter and that our communities are protected and served by our public institutions, especially the police.

According to our holy texts, the distribution of justice is intended to be a means of healing for all people. We believe there should be an emphasis on restorative justice rather than retributive justice. Restorative justice is designed to alleviate conflict and reconcile aggrieved parties. Restorative justice seeks to bring healing to the individual and their community who have been harmed while holding those who committed the harm accountable. While retributive justice results in hostility, violence, and distrust, restorative justice leads to the building of the Beloved Community, which is what we aspire to as faith leaders.

The current role of the police in Washington, DC, exacerbates conflict and leads to violence all too often. Because of federal funding we have overly militarized the police. Far too often police show up to peaceful gatherings outfitted for conflict. As a society, we have become too dependent on the false belief that conflicts are best solved through military force; that overwhelming police violence will crush societal harm of any kind. This is partly because of the easy access to military hardware and partly because the police have been assigned too many roles in our local communities; roles that many leaders already in our communities can and should fill.

One significant area the role of the police must recede is the practice of stop and frisk, which targets Black people at a dramatically higher rate than others in DC. In a study published this past June, the ACLU found that though Black people make up 46% of the DC population, they composed 72% of individuals stopped by DC police over a five-month period. Not only are Black people targets of this broken form of policing, young people, members of the LGBTQ community, homeless people, and immigrants are at risk as well. It is time for stop and frisk to end.

The Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020 is a necessary step towards a community where peace and justice are attainable. Importantly, the legislation will strengthen procedural protections when the police seek to search a person's vehicle, home, or property, and it will also strengthen the District's use of force standards by clearly defining non-deadly and deadly force while limiting the situations in which both non-deadly and deadly force can be used. Equally crucial, this bill restricts the ability of District law enforcement agencies to acquire or request certain military equipment like armored vehicles, grenades, or drones and it requires agencies who currently possess such equipment to return it.

These and other aspects of the legislation are important to pass, but there is so much more to be done. Thus, we echo the call put forth by our siblings in Black Lives Matter and Black Youth Project 100 to defund the police. We need to invest the current resources used to intimidate members of our communities to instead actually improve peoples' lives. This can be done by using those resources to provide affordable and accessible housing, healthcare, education, and meaningful employment. Too many people have died at the hands of the police to continue to do things the same way anymore. Sweeping change is needed to create trust and the kinds of safety that all individuals and communities deserve. We are ready and willing to work with you to ensure that meaningful and lasting change is realized.

Sincerely,

Rabbi Aaron Alexander
Adas Israel

Rev. Aundreia Alexander
Covenant Baptist United Church of Christ

Dr. Ann Barnet
6th Day Faith Community

Rev. Karen Brau
Luther Place Church

Jerry Brown
Augustana Lutheran Church

Rev. Michael Bryant
Former Staff Chaplain DC Jail - Currently
Catholic Chaplain -

Rev. Andrew Cheung
Washington Community Fellowship

Rev. Tony Coleman
All Souls Church Unitarian

Rev. Rachel Cornwell
Dumbarton United Methodist Church

Rev. Lyn Cox
Washington Ethical Society

Rev. Cornelius Ejiogu
Josephite

Rev. Renata Eustis
Christ Lutheran Church

Rev. Patricia Fears
Fellowship Baptist Church

Rabbi Charles Feinberg
Interfaith Action for Human Rights

Rev. Diane Ford Dessables
Founder, Gemstones in the Sun

Rev. Ginger Gaines-Cirelli
Foundry UMC

Rev. Delonte Gholston
Peace Fellowship Church

Rev. Louise Green
All Souls Church Unitarian

Rev. Mark Greiner
Capitol Hill Presbyterian Church

Rev. Graylan Hagler
Plymouth Congregational United Church of Christ

Rev. Ruth Hamilton
Westminster Presbyterian Church

Rev. Amanda Hendler-Voss
First Congregational United Church of Christ

Rev. Benjamin Hogue
Lutheran Church of the Reformation

The Rev. Peter Jarrett-Schell
Calvary Episcopal Church

Rev. Ellen Jennings
Cleveland Park Congregational UCC

Rev. Dr. Paul Johnson
Hughes Memorial UMC

Rev. Garrick Jordan
Plymouth UCC

Rev. Robert Keithan
All Souls Church Unitarian

The Rev. Margrethe Kleiber
Augustana Lutheran Church

Rev. Thomas Knoll
First Trinity Lutheran Church

Rev. William H. Lamar IV
Metropolitan African Methodist Episcopal Church

Rev. Cynthia Lapp
Hyattsville Mennonite Church

Pastor Mike Little
Bread of Life Church

Rev. Kaeley McEvoy
Westmoreland Congregational Church UCC

Rev. Terrance M. McKinley
Campbell AME Church

Dr. Bill Mefford
The Festival Center
Lay Pastor Sandra Miller
Seekers Church and Festival Center

Rev. Darryl Moch
Sr Associate Minister, Inner Light Ministries, UCC

Rev. Dr. Sterling Morse
Church of the Redeemer Presbyterian DC

Ryane Nickens
The TraRon Center

Rev. Julie Pennington-Russell
The First Baptist Church of the City of Washington, D.C.

Rev. Ben Roberts
Foundry UMC

Rev. Kathleen Rolenz
All Souls Church Unitarian

Rev Sally Sarratt
Calvary Baptist Church

Louis Sawyer Jr
DC Reentry Task Force

Rev. LeeAnn Schray
Christ Lutheran

Merikay Smith
The Church of Jesus Christ of Latter-day Saints

Rev. Donna Sokol
Mount Vernon Place UMC

Sandy Sorensen
UCC Justice and Witness Ministries

Rev. Maria Swearingen
Calvary Baptist Church

Rev. Aaron Wade
The Community Church of Washington, DC-UCC

The Rev. Susan Walker
St. Stephen and the Incarnation

Denise Walker, Esq.
Augustana Lutheran, Comunidad Santa Maria

Rev. Dr. Rose Wayland
Sixth Presbyterian Church

Rev. Michael Wilker
Lutheran Church of the Reformation

Elaine Wilson
Friends Meeting of Washington

Submitted by: Rev. Rob Keithan
All Souls Church Unitarian
1500 Harvard St NW
Washington, DC 20009
202.517.1468
rkeithan@allsouls.ws

Dear Judiciary Committee Members,

I am writing regarding the three Police Reform bills currently before the committee. I am encouraged by the extent to which the Council has taken the issue of police violence seriously and promised that the conversation that began with the passage of the emergency act did not end there.

My name is Niq Clark. I have lived in SMD 6A02 for nearly nine years, and in DC for approximately sixteen years. During my years here I have been assaulted several times. I believe this happened primarily in 2007 and almost entirely near my home at the time on the 1100 block of I St SE. All of those incidents were single punches to my face. All of the people who punched me were Black. I am white. I lost teeth, days of work, medical bills, and a sense of stability in my neighborhood. On each of these occasions I summoned MPD. On one occasion two youths blocked my path on the sidewalk and raised their fists to me. I said “What are you doing?” and one of them punched me. They then let me continue on my way, just as an MPD cruiser passed, which I waved down, pointing to the group of youths they had rejoined. The officer in the cruiser leapt out, roughly handcuffing the youth who had raised a fist without punching me, ignoring protests that the cuffs were painfully tight. The other youths scattered and ran. Events since that day - particularly the events of this year - have made it clear to me how much danger I placed those kids in. Their behavior should absolutely not be tolerated, but neither should a system that would injure them or place them in mortal danger over what they did. Had those kids had the kind of favorable treatment I received automatically by dint of my race, they would not have been in that position. I did stupid things that hurt people as a kid, and no one ever called the police on me. If they had, I doubt the police would have handled me as roughly as MPD handled the kid who raised a fist without even taking a swing. Moreover, I imagine that kids who had the kinds of opportunities, comfort and leeway I had enjoyed would be a lot less likely to go around punching people out of resentment.

This year I investigated ways that I could help ease the threat of police violence in my neighborhood. Much of the burden that we place on police officers would be better performed by unarmed professionals in their respective areas such as mental health, suicidality, substance use, conflict mediation, domestic violence intervention to name a few. I learned that the first step to reducing police interactions is to get to know your neighbors, so I sent letters to everyone on my block introducing myself and listing alternative numbers to call for a variety of situations. I walked around my neighborhood in a face shield and gloves checking in on my neighbors and learning about how we could help each other cope with the many hardships that have emerged this year.

Broadly, I support the positions and comments of Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to consider the following in formulating revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The DC Auditor could catalogue and track the MPD spends on its many functions, and issue a report before the upcoming budget cycle to facilitate assessing appropriate police functions and budgets.

2) Invest in new approaches to community safety like mental health responders for people in crisis and programs that provide communities with the tools that they need to interrupt violence and abuse. Follow the lead of the CAHOOTS program in Eugene, Oregon by making more appropriate responses to these kinds of emergencies available through DC's 911 service.
    a) Cut crime off at the roots by investing in the health, wellbeing, housing, education and prosperity of our most vulnerable neighbors.
    b) Focus on the harm done by both crime and overpolicing in our neighborhoods and invest on repairing it and creating a robust system of accountability for officers and officials.

3) We must assess the actions of our police officers honestly with regard to when, where, how and for whom they promote stratification and exacerbate inequality, prioritize property over life and health, and fail to promote safety. A recent report from the DC Police Complaints Board found that very few of the complaints of police misconduct that are sustained result in discipline more serious than a mild reprimand or additional training. We need to be able to break through the code of silence and hold offices accountable.
    a) The entity DC entrusts to investigate misconduct needs the authority not just to make disciplinary recommendations - a power the Office of Police Complaints currently lacks - but to enforce reasonable disciplinary measures targeted to address both the causes and the results of police misconduct.
    b) Disciplinary powers of the investigating body should include removal from duty subject to a nontrivial appeal, and the filing of criminal charges where appropriate.
    c) Officers must also be prepared to provide recompense to communities injured by their misconduct by - for example - providing service to help repair the damage to that community, apologizing to injured parties, and hearing victims' statements.

4) We should decriminalize sex work. It would:
    a) reduce violence by enobling sex workers to report violent police and violent clients;
    b) provide a path to health care for sex workers and end the disincentive for condom use that carrying condoms is sometimes cited as evidence of intent to do sex work;
    c) advance equality for vulnerable populations such as Black trans women who report being frequently profiled as sex workers by police seeking to harass them;
    d) reduce the incarceration of nonviolent people from a group that tends to be disproportionately Black and trans.

5) We must remove armed security including police, security guards and special police from schools, stores and housing except as summoned to address incidents or credible threats of violence. Considerable research points to stronger correlations between the severity of school discipline with a student's race than with that student's behavior; enforcing this kind of discipline by force of arms is a recipe for racially disparate police violence.
    a) Provide schools and communities with alternatives like community mediation, violence interruption and restorative justice. Make these alternatives easy to reach by including them in DC's 911 service.
    b) Engage students in every phase of the disciplinary process they will be held to. Enlist their imaginations to forge alternatives that address the issues they are concerned about.

6) The District must abolish or set strenuous limits on the use of grand juries, particularly when a police officer faces indictment.
    a) In homicides by police officers deemed "justified" by grand juries, the evidence comes from the officer's co-workers - frequently participants in a "code of silence" that seeks to excuse misconduct.
    b) Of all the nations to inherit English common law from colonization, only the United States has failed to abolish grand juries.

7) The District must place clear and rigorous limits on the use of consent searches, including Stop and Frisk tactics.
    a) The people most likely to waive their Miranda rights are from the most vulnerable groups of citizens: unhoused people, sex workers, trans people, poor people and disproportionately Black people. As vulnerable citizens are those most in need of protection from police overreach, it is clear that those involved know that the enumerated rights provide no real protection when the threat of an armed officer confronts them.
    b) Courts regularly presume on little evidence that Miranda rights were waived voluntarily. The District needs more strenuous protection of these rights for our neighbors who feel they have no choice but to waive them.
    c) The DC Justice Lab has crafted proposed statutory language that seeks to address this issue in part by limiting consent searches to occur only after a person has an opportunity to consult with a lawyer. The following reflect further recommendations regarding Stop and Frisk or Jump Out tactics.
        i) Reassign all officers in paramilitary units, and disband those units.
        ii) Prohibit plainclothes policing and the use of unmarked cars except as necessary to a targeted and justified undercover operation.
        iii) Prohibit demands to see someone's waistband without probable cause.
        iv) Prohibit pretextual excuses for reasonable articulable suspicion or probable cause including:
            (1) presence in a high-crime neighborhood;
            (2) apparent nervousness around officers;

(3) furtive movements, gestures or running;
(4) generic bulges in clothing;
(5) time of day.

v) Suppress the use of evidence gathered using discriminatory Stop and Frisk tactics.

8) The District must prohibit the use of public funds and of funds from any common carrier or utility operating in the District for donations or payments to any union representing one of the law enforcement agencies operating in the District.
9) Overuse of warrants leads to terrorization of communities and preventable use of deadly force by officers and civilians. I support the following recommendations regarding the use of warrants:
    a) Require strong evidence, due diligence and transparency.
    b) Prohibit issuance of warrants for drug activity alone.
    c) Ban no-knock and limit quick-knock warrants.
    d) During the execution of a warrant, prohibit handcuffing, drawing weapons and searching individuals unless the officer is prepared to face a robust process to prove that the action was based on a reasonable belief that the act was necessary to prevent imminent physical injury.
    e) Hold officers personally liable for the compensation of victims. Do not pay officer liability from the District's coffers unless a given threshold is met based on a fraction of the officer's income.

The streets of Washington DC have felt safer to me since I endeavored to meet all of the people on my block and to share together as neighbors, but the more I learn about law enforcement, the less safe I feel I and my neighbors will be when an officer arrives. I urge you to take seriously the unique moment before us to begin to bring about real change away from a system that continues to privilege race and property over community and safety. I hope you will take these suggestions seriously as you move into the next phases of these three bills.

Thank you very much for your time

Niq Clark

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

geraldine galdamez

National Black United Front
Official Testimony to the Council of the District of Columbia

Committee on

Judiciary & Public Safety Public Hearing

Bill 23-882 Comprehensive Policing and Justice Reform

Amendment Act of 2020

October 15, 2020

Public safety is a very important issue for the residents of the District of Columbia. Many of the residents have that it is one of their primary concerns. Realizing that the Metropolitan Police Department (MPD) is the primary agency dedicated to the physical security of the residents, it is critical that we understand the historical context of the police and its role in the community.

"How the U.S. Got Its Police Force" is the title of an article in the May 2017 issue of Time Magazine. The article states, "In the South, however, the economics that drove the creation of police forces were centered not on the protection of shipping interests but on the preservation of the slavery system. Some of the primary policing institutions there were the slave patrols tasked with chasing down runaways and preventing slave revolts, Potter says; the first formal slave patrol had been created in the Carolina colonies in 1704. During the Civil War, the military became the primary form of law enforcement in the South, but during Reconstruction, many local sheriffs functioned in a way analogous to the earlier slave patrols, enforcing segregation and the disenfranchisement of freed slaves."

It is important to provide context to the development of law enforcement because it gives an understanding of the origins and intent of the role of police. To be clear, the intent and origin of the police department were to protect the economic interests of White male landowners over the age of thirty - because of these origins, police, crime, and economics will be forever linked in this society.

As we move into a space to correct historical wrongs, it is my main objective to ensure that MPD fulfills its commitment to the District of Columbia and that is protecting all of its

residents and guests. Therefore, on behalf of the residents of the members and supports of the National Black United Front, we make the forthcoming recommendations on Bill 23-882 Comprehensive Policing and Justice Reform Amendment Act of 2020.

Statements Made by Minors

To better protect children from the current inadequacies of the Miranda doctrine, the District of Columbia should make any statement made by a minor in a custodial interrogation inadmissible unless:

(1) the minor was advised of their rights by the interrogating law enforcement official,

(2) the minor was given an opportunity to confer with an attorney regarding the waiver of those rights, and

(3) the minor knowingly, intelligently, and voluntarily waived those rights in the presence of counsel. D.C. should not permit any child to waive any Miranda right without assistance from counsel.

These protections would ensure that waivers are actually knowing, intelligent, and voluntary; prevent false confessions; and reduce wrongful convictions.

Stop and Frisk

The most callous example of stop-and-frisk in the District of Columbia is the Metropolitan Police Department's jump-out squads. Specialized paramilitary units such as the Gun Recovery Unit ("GRU") in the Narcotics and Special Investigations Division ("NSID") use tactics often

referred to as “jump-outs” by community members because of how they operate in D.C.’s predominantly-Black neighborhoods: Officers jump out of unmarked cars to surround, stop, and search individuals without basis. These routine patrols drive around demanding that people who are doing nothing wrong stop, lift up their shirts, and display their waistbands to prove that they are not carrying firearms. Jump-outs often work in plainclothes with tactical vests, however, a similar tactic has also been observed from marked cars. This unlawful and discriminatory treatment undermines community trust in law enforcement and does not improve public safety. This tactic must be ended immediately to ensure the safety of our community members and to preserve the constitutionality of policing in D.C. MPD’s paramilitary units jump-out tactics are in line with a larger culture of celebrating police violence and the idea that D.C. residents from certain neighborhoods should be treated as inherently dangerous. Although D.C. leadership denies that jump-outs are still a pervasive aspect of Department culture, these units brag about the often-violent practice.

Therefore the District must:

1. Disband existing paramilitary units and reassign those officers.
2. Require officers to work in full uniform and marked police cars, unless they are conducting a justified and targeted undercover operation.
3. Prohibit officers from demanding to see a person’s waistband without probable cause.
4. Suppress all evidence seized as a result of “jump outs” and other discriminatory stop and frisk tactics.

5. Disallow the following common pre-textual basis for reasonable articulable suspicion or probable cause:

- Presence in a high-crime neighborhood;
- Apparent nervousness around police officers;
- So-called furtive gestures or movements or running;
- A generic bulge in a person's clothing; and
- Time of day.

Special Police

D.C. has the most police per capita of any large city. We have no need for armed guards patrolling the same communities that police already oversaturate. These officers lack the training and accountability to safely patrol properties and should be disarmed to protect the community. To solve this problem, it is recommended that D.C. Council:

• Disarm special police officers;

• Increase the quantity and quality of training required;

• Pass the Special Police Officer Oversight Amendment Act; and

• Disallow pursuit beyond property boundaries.

Forward Ever Backwards Never
National Black United Front
Central Committee

Dear Judiciary Committee Members,

I wanted to write to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough to achieve the necessary outcome to keep all residents of DC safe and free of racism and harassment by law enforcement. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

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3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. Let me say that again: DC residents deserve to live free from police violence, brutality, and racism.

I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Best,
Olivia Valdez

nvrdc
Network for Victim Recovery of DC

Committee on the Judiciary and Public Safety

Hearing on Bill 23-0882, The "Comprehensive Policing and Justice Reform Amendment Act of 2020"

Testimony of Kristin Eliason, NVRDC Director of Legal & Strategic Advocacy

October 15, 2020

Thank you Chairman Allen, other Committee members, and staff for the opportunity to submit testimony on the "Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020" (hereinafter "the Bill"). My name is Kristin Eliason and I am submitting testimony on behalf of the Network for Victim Recovery of DC (NVRDC) in my capacity as Director of Legal & Strategic Advocacy. This testimony is to serve as a supplement to the testimony submitted by the DC Coalition Against Domestic Violence (DCCADV) and joined by NVRDC. Since May 2012, NVRDC has provided holistic victim services, including free legal representation, advocacy, and case management to over 4,400 victims of crime[1] in the District.

As an organization dedicated to empowering victims of crime to achieve survivor-defined justice with the assistance of our services, we know that experiencing a crime is just one part of a survivor's various intersecting identities—our clients live, work, and go to school in this community and being a crime victim doesn't make them immune from directly or indirectly experiencing the systemic violence and racism inherent in this country's current methods of policing and our criminal legal system; therefore, it is imperative that the values of our clients and our community are reflected in how we address crime and victimization. We know that much like the various paths survivors take to heal from crime, our community must address crime not only by providing for victims' needs in the aftermath of a crime but also exploring ways to hold folks who commit harm accountable and understanding and addressing the root causes of crime. While hundreds of victims of crime come to NVRDC for assistance every year, we know that many of our clients are impacted and experience harm as a result of the ways in which our city has historically responded to crime. We also know that crime statistics are based on reported crime and don't fully reflect the experience of violence in DC, especially in Black and Brown communities.[2] According to US Census Bureau, 46% of DC's residents identify as Black or African American and it is important for the District to understand and account for the fact that its Black residents' experiences with white supremacy forging anti-blackness, especially in policing, compounds the barriers they often face in accessing support, services, and justice following a victimization.

[1] NVRDC recognizes that people who experience crime may use a different term when describing themselves, such as survivor; however, crime victim in our local and Federal laws is a legal term of art and therefore NVRDC will be using this term throughout this testimony. Using this term is not meant to invalidate or discount the experiences or perspectives of any person who has experienced crime.
[2] *See National Crime Victimization Survey, Victimizations Not Reported to the Police, 2006—2010,* Langston, L., Berzofsky, M., et. al., United States Department of Justice Office of Justice Programs Special Report: National Crime Victimization Survey (August 2012), https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf

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As an organization dedicated to the empowerment of crime victims, we advocate to ensure that victims' experiences are dignified in every way they might choose to access their self-defined justice. For some of our clients, justice involves police interaction and the criminal legal system. As such, NVRDC relies on working and collaborative partnerships with entities involved in the detection, investigation, and prosecution of crime, including MPD. We are grateful for the times these partnerships served to benefit our clients but it is also our responsibility to name the ways that police/community/victim relationships can shape perceptions and impact the experiences of our clients. In working with our BIPOC clients, we witness every day the immense hardships experienced by survivors with one or intersecting marginalized identities, whether it be bias from government agencies tasked with providing resources to crime victims, fear of interacting with law enforcement as a result of personal experiences with police, witnessing hard done to family, friends, or neighbors by various government entities, inappropriate or reprehensible behavior directed to the crime victim by the police investigating their case, or the knowledge that the criminal legal system is designed to oppress people who look like them, fail them, or fall short of meeting their needs. The problem of addressing violent crimes while also disrupting the historic oppression and violence perpetuated on BIPOC folks in our country and community.

Many victims of crime, including many NVRDC clients, have experienced first-hand the injustices, violence, and racism perpetuated by our criminal legal system as a result of over policing in their neighborhoods, harassment by law enforcement as a result of experiencing homelessness or engaging in sex work, or while being arrested or incarcerated. Some are just fearful because of experiences family, friends, and neighbors have had with police or what, generationally, BIPOC have be taught what it means to interact with police based on the historical experiences of their elder family members. As such, accessing any sort of formal systems for justice or support for many District residents who have experienced crime is not an option. Lack of access to vital resources funded by the government can be detrimental to a survivor's healing, wellbeing, and even livelihood.

For victims of crime in the District, to access many forms of support, such as Crime Victims Compensation, there are either actual or perceived requirements for interacting with formal systems. BIPOC victims of crime in the District are forced to engage with law enforcement in order to receive many services—a choice that may, because of their identities, put them at risk of harm by the system purporting to protect them. Even in circumstances where police interaction is not a requirement, there is often confusion in the community where victims of crime think they must report to or interact with the police in order to access services which ultimately lowers the number of folks accessing these spaces and services.

Our organization works with a local restorative justice practitioner to provide additional options for justice and accountability for our clients who are sexual assault survivors.

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There is a desire and need in our community for addressing harm that is different from what our current formal systems provide. Additionally, there is a strong need for police to understand the reasons Black and Brown communities fear police and do not want to interact with police, even when their safety is at risk as the result of a commission of a crime. NVRDC recommends trauma training for MPD employees but feels this type of training will fall short of meeting the needs of District residents whose communities have experienced abuse and violence as a result of policing. We urge the District to work with community service providers and members of the community to understand and learn from the experiences of District residents—no amount of internal improvements will matter if the underlying reasons leading to abuse by police are addressed.

We hope this bill is just the beginning of major changes in how the District 1) holds accountable those involved in the detection, investigation, and prosecution of crime, 2) works to dismantle the system of racist oppression ingrained in our policing and criminal legal system; 3) responds to the needs of crime victims beyond offering the current criminal and civil court options; 4) addresses the underlying causes of crime; and 5) responds to the maltreatment of crime victims by law enforcement.

NVRDC proposes the following regarding Bill 23-0882:

Subtitle B – Improving Access to Body-Worn Cameras:
This portion of the bill must contain provisions ensuring the preservation of privacy of the victim in both in the storage and release of body-worn camera footage under Federal and District law. Regarding prohibiting the Mayor from releasing body-worn camera footage absent the consent of the "individual against whom the serious use of force was used" or a deceased victim's next of kin, measures must be implemented to ensure that such consent is both informed and reasonably time-limited. The requirement that the Mayor notify the decedent's next of kin of the impending release under Subtitle B should be expanded to include those individuals whom the serious use of force was used, not just a deceased individual's next of kin. Additionally, any such notice of release should be reasonable and timely and should also include to whom and in what manner the footage will be released. Finally, in any procedure under this Subtitle in which there is a disagreement amongst the persons who must consent to the release that necessitates the Mayor seeking a resolution in DC Superior Court, NVRDC strongly suggests a procedure be adopted to allow for notice to and an opportunity to be heard by the persons who must consent to the release *prior* to the court making a determination on the release of the body-worn camera footage.

Subtitle C – Office of Police Complaints

In addition to the recommendations made regarding this Subtitle in DCCADV's testimony, we recommend those recommendations be applied to victims of any crime type. NVRDC also recommends greater transparency in the Office of Police Complaints (OPC) investigation process and accountability mechanisms for when

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those who file complaints are treated without fairness or respect for their dignity or privacy. Additionally, NVRDC recommends that all employees in the OPC receive annual training on working with those who have experienced trauma, violence, and crime in a trauma-informed way to ensure that complainants are treated with fairness and with respect for their dignity and privacy and that complainants do not feel forced, coerced, or pressured in participating in OPC investigations.

NVRDC also recommends that the number of seats on the Police Complaints Board be expanded to include a designated member of the victim services community.

Subtitle D – Use of Force Review Board Membership Expansion

As with the Police Complaints Board, NVRDC recommends that the number of civilian seats be expanded to also include a seat designated specifically for a member of the victim services community.

Subtitle F – Limitations on Consent Searches

NVRDC echoes the recommendations and observations made in DCCADV's testimony and echoes that, while MPD must provide interpretation services, our clients needing interpreter services report that MPD is inconsistent in following and often in violation of this requirement. NVRDC has worked with clients who have experienced searches that were neither executed pursuant to a warrant nor conducted pursuant to an applicable exception to the warrant requirement. These clients experienced a crime and were not informed that their consent was required by the investigating officers, nor was their consent obtained. In addition to such searches being unlawful, they only serve to further distrust and fear of police by crime victims whose participation in the investigation may be crucial to the victim's or public's safety.

The consent obtained by the victim should be informed, specific, and time limited. Any victim who is in need of interpreter services should be provided access to such services prior to any discussion of consent with the victim. The member(s) of MPD seeking consent of the victim should not be used as the interpreter in this situation and, instead, should be done by an interpreter. NVRDC recommends that minimum standards be set for interpreters used by MPD in both consent search situations and whenever working with victims with language access needs. NVRDC recommends that in order to determine such standards be done in consultation with the DC Office of Human Rights Language Access Program and the non-profit Ayuda.

Subjects of such consent searches should be provided with a rights card, similar to the Sexual Assault Victim's Rights Card provided for under DC Code § 23-1907(13) that provides the subject of the search with general information such as the subject's right to withhold consent to such a search. The card should comply with requirements set out by the DC Language Access Act and should, in addition to English, be available,

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at the very least, in the following languages: Spanish, Chinese, Vietnamese, Korean, French, and Amharic.

Subtitle G – Mandatory Continuing Education Expansion; Reconstituting the Police Officer Standards and Training Board

NVRDC is appreciative of the opportunities we have been provided to train members of MPD on responding to victims of crime; however, these trainings have usually been limited to groups within MPD. NVRDC recommends that MPD officers receive continuing education on working with victims of crime, to include specific training on trauma-informed interviewing and common manifestations of trauma in crime victims.

NVRDC recommends that the number of community representatives on the Police Officers Standards and Training Board (POST) be increased from five to seven members, with those two additional members being from the victim services community, and with one of those members having a background in services for survivors of intrafamily offenses, to include domestic violence, sexual assault, or stalking.

Subtitle K – Amending Minimum Standards for Police Officers

In addition to the requirements proposed in the Bill and the recommendations made by DCCADV, NVRDC also suggests that any applicant for appointment as a sworn member of MPD be ineligible for appointment if they currently or previously had a court order (such as a Civil Protection Order) issued against them in any jurisdiction as a result of the commission of an intrafamily offense.

Subtitle M – Officer Discipline Reforms

NVRDC recommends that any acts or occurrence of a sexual nature be added as acts or occurrences allegedly constituting cause under new paragraph (1A).

Additionally, NVRDC recommends processes be implemented to allow for complainants to learn the outcome of the complaint and what corrective action has been taken. For victims of crime who also experienced misconduct by police, not knowing whether they will have to interact with the member of MPD, concerns over similar conduct being perpetrated on future victims, and not knowing what actually happened as a result of their complaint only adds to the mistrust a victim or the community feels in the police.

Subtitle R – Metro Transit Police Department Oversight and Accountability

NVRDC recommends that any recommendations made for the Police Complaints Board under Subtitle C also be implemented for the Police Complaints Board under Subtitle R. NVRDC further recommends that "sexual harassment" be added under subsection (f)(10)—although such abuse or misuse may be implicitly covered under

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this section, specifically listing that behavior alongside the abuses and misuses listed in (f)(10)(A)-(F) demonstrate the seriousness with which the Council takes such behavior by Metro Transit Police.

Additional Recommendations:

NVRDC supports the recommendations outlined in DCCADV's testimony. Additionally, NVRDC recommends that such provisions be applied to victims of all crime types where applicable. Additionally, NVRDC recommends the following:

- As stated above, victims of crime, especially those who have intersecting marginalized identities or who have experienced abuse committed by police, face an impossible choice—interact with a system that has already harmed you and/or your community in order to receive services or go without such services. The Crime Victims Compensation Program is a prime example of this dilemma—victims of crime who do not obtain a Civil Protection Order or receive a medical-forensic exam must report to police in order to access Crime Victims Compensation (CVC). NVRDC recommends consideration for removing this requirement altogether[3] or adding additional options to the law governing accessing CVC.
- NVRDC also recommends that this Bill include a provision amending the CVC requirements that would allow for complaints to OPC that allege serious use of force, criminal offenses, or sexual harassment by a member of MPD to create eligibility for CVC without an accompanying police report.
- NVRDC recommends that the District fund and allow for alternatives to our criminal legal system that hold those who commit crime accountable, such as restorative justice programs and that such programs are informed, run, or led by those who have experienced crime.

Thank you for your time and commitment to making the District a place that is safe for everyone. I am happy to take any questions you may have.

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[3] NVRDC understands there may be limitations imposed by Federal law that would not allow, currently, for such an elimination, but encourages the Council to continue to consider this issue and alternatives to police reports to access CVC.

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

rebecca rossi

Written Testimony on Behalf of Community Oversight of Surveillance – D.C. Coalition Partners

D.C. Council Committee on the Judiciary and Public Safety

Public Hearing on B23-0723, The Rioting Modernization Amendment Act of 2020, B23-0881, The Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020 and B23-0882, The Comprehensive Policing and Justice Reform Amendment Act of 2020

Thursday, October 15, 2020

Dear Chairman Allen and Members of the Committee on the Judiciary:

Thank you for holding this important hearing on much-needed police reform legislation and protestors' rights. Our coalition, the Community Oversight of Surveillance-D.C. (COS-DC), is a local coalition of groups based in Washington, D.C., that is working to secure enactment of legislation here in the District to provide transparency and accountability for government use of surveillance technologies.[1] We are a diverse and growing coalition of local and national stakeholders that include civil rights organizations, technology policy organizations, government oversight organizations, local advocates, and beyond.

Our coalition applauds the efforts that the Committee is undertaking to address police reform in the District. The brutal police killings of George Floyd, Breonna Taylor, and others this past spring—which follow a long history of police brutality toward Black people—has spurred a long overdue reckoning over racial justice in our country, as well as our approach to policing. We are glad that the Committee, and in turn the Council, are responding swiftly and seriously to calls for widespread reform, first with the emergency legislation passed in July[2] and now with a more permanent set of bills.

However, our COS-DC coalition urges that this reform effort also consider and set rules for police use of surveillance technologies. While it is important to directly address police conduct and accountability, we must realize that increasingly common technical tools contribute to much of the disproportionate policing in the United States, while also enabling police to monitor and potentially stifle dissent. Over the past two decades, police departments and other government agencies across the country have been acquiring, deploying, and gaining access to surveillance equipment, in secret, without any notice to the public or authorization from local legislatures. These technologies include everything from traditional CCTV cameras to large networks of private security and doorbell

[1] Community Oversight of Surveillance DC, https://takectrldc.org/ (last visited Oct. 16, 2020).
[2] D.C. Act 23-336, the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, https://code.dccouncil.us/dc/council/acts/23-336.html.

cameras, facial recognition systems, license plate readers, gunshot locators with audio surveillance, smart street light bulbs with video surveillance capabilities, drones, and much more.[3]

Many of these powerful surveillance technologies are extremely privacy invasive, as they provide the government an unprecedented ability to monitor local residents over time, and accumulate vast amounts of personal data (especially when combined). Accordingly, it is critical that residents and local elected officials are able to provide input into whether, and how, any surveillance technology is used in their jurisdiction. For example, numerous studies have established that technologies like facial recognition are biased against women and people of color,[4] and we now have clear examples of cases in which facial recognition mismatches led to the wrongful arrests of Black men.[5] Surveillance technologies are also often disproportionately used on communities of color,[6] leading to higher arrest rates in those communities and potentially feeding this cycle of police brutality and racialized policing.[7]

Beyond the serious issues of privacy-invasiveness and discriminatory policing, First Amendment rights are also at stake. This summer, as Black Lives Matter protestors pushed for racial justice both here in the District and across the country, reports emerged showing that protesters were subject to mass surveillance by police, who used a wide array of these technologies.[8] Such surveillance can have a chilling effect on speech, and modern surveillance technology has dramatically increased the scope and scale of the already-concerning surveillance of protests—especially protests by and for communities of color. New forms of biometric surveillance can track thousands of protesters from each

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[3] COMMUNITY CONTROL OVER POLICE SURVEILLANCE: TECHNOLOGY 101, ACLU (2020), https://www.aclu.org/report/community-control-over-police-surveillance-technology-101.

[4] Patrick Grother, Mei Ngan, Kayee Hanaoka, FACE RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS, NISTIR 8280, NAT'L INST. OF STANDARDS AND TECHNOLOGY (Dec. 2019), *available a*t https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf.

[5] Kashmir Hill, *Wrongfully Accused by an Algorithm*, NY Times (Jun. 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html; Kris Holt, *Facial recognition linked to a second wrongful arrest by Detroit police*, Engadget (July 10, 2020), https://www.engadget.com/facialrecognition-false-match-wrongful-arrest-224053761.html.

[6] See e.g., Brian Barret, *The Baltimore PD's Race Bias Extends to High-Tech Spying, Too*, Wired (Aug. 16, 2016), https://www.wired.com/2016/08/baltimore-pds-race-bias-extends-high-tech-spying/; Adam Goldman and Matt Apuzzo, *NYPD Defends Tactics over Mosque Spying; Records Reveal New Details on Muslim Surveillance*, Huffington Post (Feb. 25, 2012), http://www.huffingtonpost.com/2012/02/24/nypd-defends-tactics-over_n_1298997.html;
Dave Mass & Jeremy Gillula, *What You Can Learn From Oakland's Raw ALPR Data*, EFF (Jan. 21, 2015), https://www.eff.org/deeplinks/2015/01/what-we-learned-oakland-raw-alpr-data.

[7] *See* Rashida Richardson, Jason Schultz & and Kate Crawford, DIRTY DATA, BAD PREDICTIONS: HOW CIVIL RIGHTS VIOLATIONS IMPACT POLICE DATA, PREDICTIVE POLICING SYSTEMS, AND JUSTICE (Feb. 13, 2019). 94 N.Y.U. L. REV. ONLINE 192 (2019), *available a*t SSRN: https://ssrn.com/abstract=3333423 (discussion of predictive policing technology's threats to rights resulting from the software perpetuating existing and historic racialized policing).

[8] Rebecca Heilweil, *Members of Congress Want to Know More About Law Enforcement's Surveillance of Protestors,* Vox (Jun. 10, 2020), https://www.vox.com/recode/2020/5/29/21274828/drone-minneapolis-protests-predator-surveillance-police.

surveillance camera—and the Metropolitan Police Department (MPD) has hundreds of CCTV cameras across the District.[9] Unfortunately, due to the lack of laws in place regulating most of these technologies, we may never know the full extent of which technologies have been used to watch Black Lives Matters protesters in the District.

These threats are not hypothetical, and are not only perpetrated by the federal government. We know that the MPD uses facial recognition technology, cell-site simulators, automatic license plate readers, and gunshot locators, among a wide range of other surveillance tools.[10] But we lack complete information about the surveillance technology they possess, and the policies that govern their use. Absent such information we cannot tell if the rights of District residents are protected.

Amidst historic calls for racial justice, and a barrage of threats to those making such calls, it's time to bring oversight and accountability to police use of surveillance technologies in the District, and the Committee should strive to do so in its reform efforts. At the very least, democratic processes must be put in place surrounding the acquisition and use of surveillance tech. The legislation our coalition seeks would do just that—require transparency into what police technologies are in use, and require opportunities for both community and Council input, before they may be deployed.

Over the past few years, local communities across the country have begun to enact these "Community Control Over Police Surveillance" (CCOPS) bills to provide much needed transparency and accountability for local government surveillance programs.[11] The purpose of CCOPS is to ensure that residents and lawmakers are empowered to decide whether and how surveillance technology is acquired and used by local law enforcement agencies. To date, sixteen jurisdictions in California, Massachusetts, Michigan, New York, Ohio, Tennessee, and Washington State have adopted local laws based on the CCOPS model, and dozens of other jurisdictions are considering similar proposals.[12] Even the New York Police Department, one of the most historically secretive police departments in the nation, is now governed by a similar ordinance, enacted this summer.[13]

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[9] Deirde Paine. "DC to Spend $5 Million for Additional 140 Security Cameras Around City." The DC Post, Nov. 27, 2019, https://thedcpost.com/washington-dc-5-million-new-security-cameras/.

[10] *See e.g.*, Letter from Chief of Police Cathy L. Lanier to Councilmember Charles Allen, (March 2, 2020), https://dccouncil.us/wp-content/uploads/2020/03/JPS-Performance-Oversight-Responses-2020-MPD.pdf (confirming the Metropolitan Police Department's use of facial recognition technology, automatic license plate readers and cell site simulators in response to Committee and questions); *see also*, Lauren Sarkesian and Maria Angel, *Debate on Police Surveillance Technologies in D.C. Is Long Overdue* (Sept. 10, 2020), https://www.newamerica.org/oti/blog/debate-police-surveillance-technologies-dc-long-overdue/.

[11] COMMUNITY CONTROL OVER POLICE SURVEILLANCE, ACLU (last visited Oct. 16, 2020), https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance; Mailyn Fidler, *Fourteen Places Have Passed Local Surveillance Laws. Here's How They're Doing*, Lawfare Blog, Sept. 3, 2020, https://www.lawfareblog.com/fourteen-places-have-passed-local-surveillance-laws-heres-how-theyre-doing.

[12] *Id*.

[13] New York City Code § 14-188, https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-124303; Alan Feur, *Council Forces N.Y.P.D. to Disclose Use of Drones and Other Spy Tech*, NY Times (Jun. 18, 2020), https://www.nytimes.com/2020/06/18/nyregion/nypd-police-surveillance-technology-vote.html.

Now, it's time for the District of Columbia to follow suit. As our nation's capital, Washington, D.C. has long been one of the central places for protest in the United States. District residents need safeguards from inappropriate government surveillance as we exercise our First Amendment rights, as well as protection from everyday discriminatory uses of surveillance technology. This requires transparency and accountability surrounding the technology the MPD already possesses, thorough scrutiny when MPD seeks to obtain new technologies, and ongoing community oversight of the use of all surveillance technologies.

At its core, the legislation we urge the Council to take up would require the D.C. government to:

- Use a transparent public process when any D.C. government agency seeks to acquire and use any surveillance technology.
- Weigh costs and benefits to the District regarding technology the Council is considering, including impact on individual civil rights and civil liberties.
- Establish written rules for use of surveillance technologies to be approved by the Council.
- Create a surveillance advisory group, which would include members with expertise in privacy and technology, that would advise D.C. government agencies and the Council on the civil rights and civil liberties risks related to specific surveillance technologies, and provide impact reports ahead of debates on new technologies.
- Conduct regular audits and evaluations of the use and impact of surveillance technologies, including the impact on rights and liberties.

This legislation would therefore ensure that decisions surrounding police technologies are made with thorough consideration and crucial buy-in from both the D.C. community and the Council. Significantly, it would also provide clear processes and rules that safeguard residents' rights and provide transparency. This process, and the transparency it would bring to our policing, would in turn help to build trust between the community and its police—a goal we know the Committee shares, and that we all seek to achieve now more than ever. It would also ensure that sound financial decisions are made about how we invest in our community's public safety.

To begin the process of considering the legislation we recommend, we as a coalition ask that the Council hold a public roundtable on the state of surveillance in the District this fall, in order to learn from impacted D.C. residents as well as privacy and technology experts. Further, we ask that the Committee consider surveillance-related legislation as soon as possible as part of its comprehensive police reform efforts, and our coalition stands ready to help in these matters.

Thank you for your consideration.

Respectfully,

ACLU-DC
Brennan Center for Justice
Center for Democracy & Technology
Jews United for Justice
New America's Open Technology Institute
The Project On Government Oversight

Date: Friday, October 23, 2020

Name: Kris Garrity
Mailing Address: 901 H ST NE #430 Washington, DC 20002

To: Councilmember Charles Allen
Chairperson of the Committee on the Judiciary & Public Safety
1350 Pennsylvania Ave NW
Washington, DC 20004

Re: Bill 23-0882 - Comprehensive Policing and Justice Reform Amendment Act of 2020

Greetings Committee Chairman Allen and Councilmembers of the District of Columbia.
My name is Kris Garrity. I live in Ward 6. Thank you for providing District residents with an opportunity to participate in our democracy and for bringing the conversation of public safety to the forefront of our community. After reviewing Bill 23-0882 - Comprehensive Policing and Justice Reform Amendment Act of 2020, here are my recommendations, in line with DC Justice Lab, Black Swan Academy, and Stop the Police Terror Project DC + Showing Up for Racial Justice DC:

1. End jump-outs
    a. Disband existing paramilitary units and reassign those officers.
    b. Require officers to work in full uniform and marked police cars, unless they are conducting a justified and targeted undercover operation.
    c. Prohibit officers from demanding to see a person's waistband without probable cause.
    d. Disallow the following common pre-textual bases for reasonable articulable suspicion or probable cause:
        i. Presence in a high-crime neighborhood;
        ii. Apparent nervousness around police officers;
        iii. So-called furtive gestures or movements or running;
        iv. A generic bulge in a person's clothing; and
        v. Time of day.
    e. Suppress all evidence seized as a result of "jump outs" and other discriminatory stop and frisk tactics.
2. Eliminate consent searches
3. Limit search warrants
    a. Require strong evidence, due diligence, and transparency.
    b. Disallow search warrants for drug activity or based on drug activity alone.

    c. Ban no-knock warrants and limit quick-knock warrants.
    d. Prohibit handcuffing, gun-pointing, and searching individuals, unless immediately necessary to prevent a physical injury.
    e. Compensate victims.
4. Disarm special police
    a. Disarm special police officers.
    b. Increase the quantity and quality of training required.
    c. Pass the Special Police Officer Oversight Amendment Act.
    d. Disallow pursuit beyond property boundaries.
5. A more mature *Miranda* for kids
    a. The District of Columbia should make any statement made to law enforcement officers by any person under eighteen years of age inadmissible in any court of the District of Columbia for any purpose, including impeachment, unless:
        i. The child is advised of their rights by law enforcement;
        ii. The child is given an opportunity to confer with an attorney; and
        iii. The child knowingly, intelligently, and voluntarily waives their rights in the presence of counsel.
6. Police-free schools
    a. Remove all forms of police from D.C. schools including DC police officers, special police officers and security officers that are contracted &/or managed through the Metropolitan Police Department.
    b. Invest in resources that will create a safer, healthier, more equitable school environment.
        i. Commit $6 million for expansion of school-based mental health programs and $4.4 million to expand the use of community-based violence interrupters in schools and the broader community.
        ii. Reject the mayor's proposed $18.5 million increase to the police budget in the fiscal year 2021 city budget.
7. A total, complete ban on deadly force by MPD.
8. A ban on the use of "chemical irritants" and "projectiles" in all cases not just vaguely defined "First Amendment Assemblies."
9. Prohibitions on editing and cutting of body worn camera footage, including not allowing the MPD to redact the faces of officers (who are public employees) at the scene.

In line with the aforementioned analysis and recommendations of the DC Justice Lab, Black Swan Academy, and Stop the Police Terror Project DC + Showing Up for Racial Justice DC. I call for the District to prioritize community-focused public safety measures over continuing to fund MPD.

Thank you for your time.

Good Morning Councilmembers and staff

Thanks for giving me the opportunity to testify before you this morning regarding the police reform bill.

I want to express my reservation about the bill, to the extent that it does not include the perspective, ideas, and suggestions from MPD. I live in a ward 7 a predominately African American Ward. A ward with the lowest annual medium incomes and I suspect a ward with one of the highest crime rates, particularly in ANC7F. ANC7F is an area inundated with deeply affordable housing; as well few resources to effectively address the needs of the poor. An area where a halfway house for returning citizens is being proposed in "downtown Minnesota Avenue". A halfway House which was rejected in your Ward councilmember Allen; and fell through in Ward5.

I live on a block where my next-door neighbor barricaded himself in his home after MPD came to his home. The young man shot an officer before being taken into custody. At the end of the block my 87-year-old neighbor who lives alone in her home; barely missed being shot when an errant bullet came through her window barely missing her as she was walking to her living room. I live in a block where a young man who lived across the street was shot and killed on Minnesota Avenue. A young woman was killed at Minnesota and Ames leaving behind a five-year-old child. Two months ago, a young man was shot and killed at Minnesota Ave. and Ames St. at 4:00PM, broad daylight. Shots being fired and drug overdoses are routine. I do not want to forget my neighbor new to the neighborhood was attacked, robbed, and savagely beaten walking from Minnesota Ave metro to his home. This occurred approximately 5:30 PM.

The police work tirelessly to deal with crime in our neighborhood, with a focus on Community Policing. In our neighborhood which covers Ames, Blaine, Clay 36th and 35th Street; we have started a program called porch patrol, Where officer meet with a few different neighbors one to two times per month. They get to interact with residents for a few minutes getting to know the resident personally; discussing and sharing information on a more personal level. Residents get to know and feel comfortable with MPD. We have had Summer and Fall initiative in our neighborhood. Captain Kennedy used his personal funds and partnered with our neighborhood organization to provide Thanksgiving baskets to residents. A couple of summers ago many officers, including Captain Weaver joined our line dancing class. I could go on and on about this kind of community policing.

In addition, MPD holds monthly PSA meeting in every PSA. Our Commander Habeebullah holds a monthly Commanders meeting. Officer who routinely patrol the area never fail to chat for a minute when they see you outside.

I remember, while watching the movie Silence of the Lambs the character, Hannibal Lector was talking about the first murder committed by a serial killer. Hannibal Lector said we covet what we see. That which we see everyday on a regular basis. I think that is a similar situation with MPD. We critique and criticize that which we see every day. We do not see our legislators on a regular basis. In fact, Councilmember Allen since you have chaired Public Safety, I believe I have seen you one time at a Council hearing held in Deanwood. I know of at least one meeting that you or a staff member were invited to a where, neither you nor your staff was available. I have seen Chief Newsham many times at community meetings, community walks, crime scenes etc. I see Commander Habeebullah and her staff regularly in the community.

Finally, my suggestions before you discuss any kind of reform, I suggest you begin Suring up Agencies/programs already in place.

First, for 911 or 311 non-emergency police calls. 911 staff need to know where/how to appropriately route calls. Also take into consideration the thousand of calls MPD receives daily. How will these calls be correctly routed? In our haste, let us not throw the baby out with the bath water.

I would suggest that you have an after hours for each of the Agencies which needs to respond to after hour emergencies. All that is needed is that staff person needs to respond to a call received via 911 or 311. Sometimes the call can be handled by phone, the report is then written and routed to the appropriate unit the next workday. When an assessment determines that the worker needs to make a home visit then that is what they do. Sometimes the situation might require that the worker be accompanied by an MPD officer; however, the assessment is made by the worker and case is routed to appropriate agency/unit not MPD for follow up.

Finally, legislation needs to be introduced by the Council to address the safety needs of the community when our safety and well-being is in jeopardy. The legislation does not have to entail an arrest, citations can be given with referrals to appropriate Agencies.

While I know this City is determined to build luxury apartments/condos in every nook and cranny. I think that SE Community Hospital can be designated for in patient drug treatment or short- term mental treatment. The DC jail could be used for returning citizens needing to be placed in a halfway house. Although realistically speaking since the property where the jail is located is considered prime property; I expect to see expensive housing built on this land very soon. Typical for DC leadership.

Thank you for the opportunity to testify

Betty Diggs

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Executive Office of Mayor Muriel Bowser

Public Hearing on

B23-723, the "Rioting Modernization Amendment Act of 2020"

B23-771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020"

B23-882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

Testimony of

Dr. Roger A. Mitchell, Jr.
Interim Deputy Mayor for Public Safety and Justice

Before the
Committee on the Judiciary and Public Safety
The Honorable Charles Allen, Chairperson
Council of the District of Columbia

October 15, 2020
3:00 PM

Good afternoon Chairperson Allen and members of the Committee on the Judiciary and Public Safety. I am Dr. Roger A. Mitchell, Jr., Interim Deputy Mayor for Public Safety and Justice, and I will be providing testimony on Bill 23-882, the "Comprehensive Policing and Justice Reform Amendment Act," and Bill 23-723, the "Rioting Modernization Amendment Act." Joining me is Metropolitan Police Department Chief Peter Newsham to present additional testimony on the bills.

"Let us test and examine our ways."
– Lamentations 3:40

We all understand the importance of ensuring our police department and criminal justice system reflect our values, protect the sanctity of life, and recognize the dignity of every individual. We all have seen the numerous traumatizing videos of Black men and women being murdered, assaulted, and grossly disrespected by police officers. We see the anguish and hear the pain in far too many of our Black and Latinx communities, both in our city and across the nation. While we firmly believe that the role of a police department is to protect and serve, far too many of our family, friends, and neighbors who are persons of color don't see the police that way. Many of our residents have personal, lived experiences with police officers where they felt they were treated unfairly, unjustly, or unconstitutionally. Our duty is to constantly review our laws, policies, and practices to ensure they meet the evolving values of our city. This is an opportune time for a careful, thoughtful, and collaborative review.

In my role as the District's Chief Medical Examiner, I constantly see the impact of violence on our communities. Like a number of other large cities, the District is seeing a significant increase in gun-related violence. And as we tragically well know, this violence leaves a residual traumatic impact on survivors, their families, friends, neighbors, classmates, and their community.

Just in the past seven days, eight people died as a result of gun violence in our city. This is unacceptable. Each one of those murdered men and women had people who loved them and are mourning their loss. It requires all of us – elected officials, agency leaders, schools, faith leaders, nonprofit and community-based organizations, health providers, housing providers, private sector employers, and law enforcement – to develop, institute, and sustain a coordinated, multiyear strategy to reduce and stop cyclical, retaliatory violence and to begin healing our residents who have been suffering from years of untreated trauma. In the coming weeks, I will be speaking more on these critical issues.

This hearing is an important byproduct of the demonstrations happening here and in many cities across the country. It is an opportunity to improve police practice where necessary, to highlight good police practices, and to build deeper relationships between law enforcement and the communities they serve. We must use this opportunity to examine what it actually means to do community policing. Our goal must be to look at our own systems to ensure our residents are living in communities that are safe, raising their children with opportunities, and serve as foundations for those families to grow and thrive. We must examine all of our service delivery systems to ensure each is operating with transparency, compassion, and effectively carrying out its mission. We must continue to examine our court systems, our government services, and our healthcare delivery to residents to ensure each is responsive to the changing needs of our city.

I want to be clear: We have a good police force. The men and women of the Metropolitan Police Department risk their lives daily in service of the community.

The Metropolitan Police Department's demographics more closely match those of its residents than any other large city in the country. Since her first year in office, Mayor Bowser has continuously expanded the size of the police cadet program, which hires DC public school graduates, pays for their education at the University of the District of Columbia to earn academic credits, and puts them on track to entering the Police Academy. Cadets embody the goals of community policing – including understanding the needs, customs, and cultures of our neighborhoods – which makes them critical assets to the future of the Metropolitan Police Department. Having our residents serve as MPD officers is an important step in reforming police practices from within.

But we all know that we are not going to arrest our way out of the current increase in gun violence. And for the past five years, Mayor Bowser has focused on a variety of non-law enforcement efforts to treat the needs of our most vulnerable residents and communities. In the interest of time, I will mention just a few of those efforts.

Since 2015, Mayor Bowser led a coordinated effort to reduce violent crime in specific areas in the District through strategic prevention and coordinated enforcement, referred to as "Safer Stronger DC." These investments were done across multiple agencies, focusing on violence prevention, workforce development, neighborhood investments, and educational programming. The initiative incorporated an advisory board, comprised of government agencies, community organizations, academics, and community members. A second initiative that connects the work being done across agencies is the Violence Fatality Review Committee. This committee reviews all homicides and suicides to identify patterns, conduct a retrospective review of socioeconomic determinant risk factors, and recommend systemic changes. The third initiative is the Hospital-based Violence Intervention Program (HVIP), which is run out of the Office of Victim Services and Justice Grants. This program, which currently operates in five DC-area hospitals, engages victims and their families while they are in the hospital recovering from an intentional injury and seeks to create a support system that leads to long-term change.

Mayor Bowser has supported a public health approach to violence prevention and has tasked her agencies with working with partners inside and outside of government to develop solutions. We have expanded programming at the Office of Neighborhood Safety and Engagement through its Pathways Program. This program has provided intensive mentoring, cognitive therapy, and job training for residents who are justice involved. In addition, we provide administrative support to the Comprehensive Homicide Elimination Strategy Task Force which is working on a citywide approach to violence prevention.

Finally, we look forward to working with the Committee on record sealing reform and making sure it is passed by Council this year. Mayor Bowser's "Second Chance Amendment Act" (Bill 23-16) envisions a radical restructuring of the District's outdated criminal record sealing laws. It will simplify the process and greatly expand its reach. Enactment of record sealing reform will immediately impact tens of thousands of individuals, giving them a second chance at finding employment, housing, and educational opportunities.

Bill 23-882, the "Comprehensive Policing and Justice Reform Amendment Act"

The Executive is generally supportive of this bill and its provisions. We support the provision prohibiting the use of neck restraints as it reflects longstanding MPD policy on which all officers are trained. We support including members of the public on MPD's Use of Force Review Board – their insight will be a valuable asset to this review. We are supportive of the inclusion of racism and white supremacy on the continuing education requirements for MPD officers, to give officers insight to their own potential biases. Finally, we support the enfranchisement of residents serving sentences for felonies. And I want to highlight the work being done by the Department of Corrections to ensure residents in their custody who were convicted of felonies are aware of their right to vote and are able to do so.

However, we believe that there are several provisions in the bill that require additional consideration.

First, we recommend flexibility on the timeline for MPD to release body-worn camera (BWC) footage. Five days may not be enough time to allow for other required actions – such as notifying a family, arranging their viewing of the footage, and obtaining their consent to publicly release the footage – in a manner that is trauma-informed and centers on the family and their needs. Conversely, the five days may also be too long to ensure that the public gets timely access to the details of the shooting. While the Executive recognizes the Council's intent to increase transparency in deaths or serious encounters resulting from an interaction with a police officer, we believe the family of the decedent or the citizen themselves needs to be centered in this process. We are committed to working with the Council and trauma-informed specialists on a process that is focused on families' needs and minimizes additional trauma to a grieving family. The Executive is committed to ensuring a timely release of BWC footage as recently demonstrated. We strongly recommend working with the Committee to develop a specific and intentional timeline for public release of such critical information while supporting the families of those involved.

Second, the Executive recommends allowing police officers to view their BWC footage as they write an incident report. We support the consensus view incorporated into the BWC law in 2016 that prohibited officers from viewing their BWC only in cases of a fatal shooting. We are unaware of any evidence-based practices or peer-reviewed research that supports the prohibition of officers from reviewing their BWC footage before they write their report on any incident, whether it is an officer-involved shooting, a sexual assault, a robbery, or a traffic collision.

Third, we believe Subtitle C of the bill should be amended to maintain MPD as a non-voting member of the Police Complaints Board. MPD is a valuable resource to the board and is able to answer board members' questions on the agency's policies, training, or procedures. It would be useful to have an MPD official whose job it is to investigate these complaints to be present on the board. We are unaware of the rationale used in the emergency version of this legislation in removing MPD from the board.

I want to reiterate the Executive's commitment to working closely with you on this bill so it can be a model for the entire country.

Bill 23-723, the "Rioting Modernization Amendment Act"

This bill would have a significant impact on preventing destructive rioting that has affected several of our commercial and retail businesses. The bill, as written, would severely constrain the ability of police officers to respond in situations where individuals are intentionally damaging property, whether by shattering windows, setting fires, or looting.

I am concerned that it would require an officer to prove that a rioter had knowledge that at least nine other people were acting to commit the offense of rioting. The police officer must know that a person committed or attempted to commit an assault, theft, or property damage – and that the person knew nine other people were doing the same thing. If the officer cannot make this finding, then no arrest can be made. In his testimony, Chief Newsham will speak more on this unworkable standard.

I will be blunt in the end result of enactment of this bill: I am worried that bad actors from outside of Washington DC will come to our city for the sole purpose of violence and destruction. It may have the unintended result of where a rioting crowd is setting fires, smashing windows, or committing assaults, responding officers would be inclined to stand aside and watch the violence happen, rather than making immediate arrests

To be absolutely clear, the Executive strongly supports the public's constitutional right to demonstrate. We have hundreds of such events every year in the District and the overwhelming majority of them are peaceful. However, in those few instances where a small group of individuals intend to cause destruction, our police officers must be able to hold those individuals accountable for their harmful actions. As we have unfortunately seen both here in the District and elsewhere, federal law enforcement and military units can be deployed in ways that violate our city's protocols and without any accountability to our residents. That is the last thing we should ever want to see happen.

* * *

Chairperson Allen, I appreciate the opportunity to testify. You will be hearing from several other District agencies today and I want to reiterate the Executive's commitment to working with the Council on these bills.

Thank you.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Metropolitan Police Department

Comprehensive Policing and Justice Reform Amendment Act of 2020
(B23-0882)

and

Rioting Modernization Amendment Act of 2020 (B23-0723)

Testimony of
Peter Newsham
Chief of Police

Before the
Committee on the Judiciary & Public Safety
Councilmember Charles Allen, Chair
Council of the District of Columbia

October 15, 2020
Washington, DC 20004

It is the mission of the Metropolitan Police Department to safeguard the District of Columbia and protect its residents and visitors with the highest regard for the sanctity of human life. We will strive at all times to accomplish our mission with a focus on service, integrity, and fairness by upholding our city's motto, Justitia Omnibus -- Justice for All.

Good afternoon, Chairperson Allen, members of the Committee, and everyone watching and listening remotely. I am here to provide public testimony on the *Comprehensive Policing and Justice Reform Amendment Act* and the *Rioting Modernization Act*. I will address the Policing and Justice Reform legislation now, and the Rioting legislation later this afternoon.

* * *

Our country is facing a number of challenges right now including grappling with structural racism that pervades many aspects of our society – housing, education, healthcare, access to financial resources, and access to opportunity are all impacted. This past May, the murder of George Floyd very publicly highlighted the effects of racism and the need for police reform in our country. Fortunately, the District of Columbia has a law enforcement agency that is committed to reform. The Metropolitan Police Department is known for listening to and learning from our community, and MPD has a proven history of being willing to take proactive efforts to confront bias and eliminate injurious practices.

As you know, nineteen years ago MPD entered into a Memorandum of Agreement on Use of Force with the Department of Justice. When those reforms were adopted, MPD became a national model for use of force policies and practices. In fact, a number of those policies MPD implemented years ago are included in the Policing and Justice Reform legislation under discussion today.

The Department continued major reform efforts thanks to the leadership of and legislation enacted by the Council in 2004, when MPD revised its practices for First Amendment assemblies, and became a national leader in supporting peaceful demonstrations.

A follow-up evaluation of MPD's use of force policies and practices was conducted in 2015 by the DC Auditor. The DC Auditor contracted with the original Independent Monitor, and he confirmed that MPD continues to be a national leader in use of force practices and "remains committed to limiting and managing use of force – and to fair, unbiased and constitutional policing."

In recent years through improved hiring practices, forward-thinking policy, innovative training, accountability, and transparency, the Department has continued on a steady path of progress and reform. In 2016, MPD updated our Use of Force Policy and revised our mission statement to explicitly recognize the sanctity of all human life. The Department then trained all officers on the

new decision-making framework on use of force that emphasizes de-escalation, proportionality, and reasonableness.

In the past four years, MPD has worked to address concerns about bias and other issues in policing by implementing comprehensive screening for new recruits to ensure that our new hires reflect our DC values. MPD has doubled down on its commitment to a diverse workforce through targeted recruitment, and more than tripling in size our cadet program that hires DC high school graduates who matriculate into police officers.

Prior to the murder of George Floyd, MPD's forward-thinking policies prohibited the use of chokeholds and established an officer's duty to intervene. MPD officers are required by policy to intervene if they observe fellow officers using excessive force and to report if an officer is engaging in misconduct. MPD is also one of a few departments nationwide to actively train on the duties to intervene and report.

In 2018, MPD launched innovative training in partnership with the University of the District of Columbia and the National Museum of African American History and Culture (NMAAHC). This training helps MPD members focus on historical reasons for the challenging relationship between police and African American communities and motivates our officers to work to mend that relationship. The initial training featured a guided tour of the museum, a lecture on Black history and culture, and a facilitated discussion on race and policing.

Because of the overwhelmingly positive feedback from the community and the members to the initial curriculum, we are continuing this discussion in 2020 with the professors returning for more facilitated discussions on Black history and culture and its current relationship to policing. Phase Two focuses on procedural justice and how the earlier lessons are relevant to improving police-community relations today, particularly in terms of how we can appropriately engage individuals of all backgrounds who may have a negative perception of the police. Using documentary footage and current popular images, video, and music as a framing device, as well as voices from the community, professors are continuing the discussion to promote understanding of the history of law enforcement and relationships with Black, immigrant, LGBTQ+, and other underserved communities. Although we have worked to continue this through virtual learning, we hope to be able to continue in-person group discussions when the public health emergency ends.

In January of this year, based on several months of work with the DC Office of the Attorney General (OAG), MPD issued new policy governing interactions with juveniles. We recognize that the nature and circumstances of contacts with police can have a lasting impression on a young person. The policy enhancements are a reminder to our members to always treat individuals – regardless of their age – safely, respectfully, and with the best possible service. Through research and collaboration with OAG, MPD identified practices best suited for the District and implemented a number of new guidelines in our policy, including limiting

handcuffing or arrests of juveniles on scene whenever possible and encouraging officers to apply for a custody order (a juvenile arrest warrant) when there are no immediate public safety concerns.

In addition to strong policy and training, MPD emphasizes accountability and transparency to support an open and trusting relationship with the community we serve. More than 3,200 body-worn cameras (BWCs) are deployed to full-duty officers and sergeants in public contact positions, and they are required to be activated for every call for service. Officer conduct and uses of force are subject to external review by the independent Office of Police Complaints or the U.S. Attorney's Office, each of which has direct access to all BWC videos, as does the DC OAG.

Transparency is critical to community trust. That is why MPD makes all policies and a growing number of data sets – from police stops and arrests to crimes and hate crimes – available directly to the public on our website, MPDC.DC.gov. We also encourage members of the community to learn more about our operations from an officer perspective, through ride-alongs and our Community Engagement Academy.

Regarding police stops, earlier this week, a significant effort was launched to create community dialogue and support independent and robust research around police stops. Once MPD published the first four weeks of data from its expanded stop data collection in September 2019, we began planning the next steps for comprehensive and independent analysis of the data as well as community discussion on the role and impact of stops in our neighborhoods. The end result of our initiative is that this week and next, Georgetown Law, Howard University, and The Lab @ DC are co-hosting a two-week event on "*Reimagining the Role of Police Stops in Public Safety: A Workshop Series on Reducing Harm through Research, Policy, and Practice.*"

By bringing together impacted community members, advocates, researchers, and police practitioners, we can begin to understand more completely the costs and benefits of police stops and develop a research agenda and policy recommendations. The workshop series is designed to balance considerations of timeliness of analyses with ensuring that any research on this question is inclusive and credible, reflective of community concerns, scientifically rigorous, and conducted with transparency and objectivity.

This research agenda is just the latest effort of many through which MPD has tried to confront the issue of racism in policing head on.

I highlight this work to demonstrate MPD's well established and strong commitment to reform and progress. I have no doubt that there are areas where the Department can and will continue to improve in our service to the community. The Policing and Justice Reform Act will further this

in areas such as improved communication about consent searches and the expanded Use of Force Review Board.

While the Department has implemented all relevant areas of the emergency legislation, the one area where I remain most concerned is the new prohibition on officers being able to view body-worn camera (BWC) footage before writing routine reports. Before the passage of the emergency legislation, officers could review their BWC video before writing reports for any incident except a police-involved shooting. The legislation now prohibits this. This policy that was initially developed, like the rest of the BWC policy, through a comprehensive and inclusive process involving key stakeholders and community members before being enacted by the Council.

The original policy also has the support of the national and independent Police Executive Research Forum, which conducted extensive research supported by the US Department of Justice to develop best practice policies around body-worn cameras. Their rationale for allowing officers to review BWC videos included:

- "Reviewing footage will help officers remember the incident more clearly, which leads to more accurate documentation of events. The goal is to the find the truth, which is facilitated by letting officers have all possible evidence of the event.
- "Real-time recording of the event is considered best evidence. It often provides a more accurate record than an officer's recollection, which can be affected by stress and other factors. Research into eyewitness testimony demonstrates that stressful situations with many distractions are difficult even for trained observers to recall correctly."
- "If a jury or administrative review body sees that the report says one thing and the video indicates another, this can create inconsistencies in the evidence that might damage a case or unfairly undermine the officer's credibility."

The new prohibition in the Act is inconsistent with the best practices as developed by the Police Executive Research forum. I urge the Council to modify this provision to be in line with national best practices.

* * *

To close my testimony on the Policing and Justice Reform Act, I would like to reiterate my strong commitment and that of the Department to working with our communities and the Council on continually improving our police service to the District.

Thank you for the opportunity to address the Council. I will be happy to address any questions that you may have.

Rioting Modernization Amendment Act of 2020

The District of Columbia hosts hundreds of First Amendment demonstrations and assemblies each year. The vast majority of these are facilitated safely and peacefully for all those involved by the Metropolitan Police Department. MPD is a recognized leader in ensuring that individuals of all backgrounds and opinions are able to safely assemble and exercise their First Amendment rights in the nation's capital. Before I discuss the specifics of the Rioting Modernization Amendment Act, I would like to share with the Council and the public a video providing details on the small number of riots that have taken place amidst the almost daily peaceful demonstrations in DC since the tragic death of George Floyd in Minneapolis. It is essential for this discussion that everyone understand the difference between the peaceful demonstrations and violent and destructive riots.

* * *

I know my time is limited so I will be very direct about the likely consequences of the proposed legislation. It would leave MPD officers with almost no legal tools to address violent and destructive rioting in the District.

The changes to the rioting legislation will make it impossible for the offense to be charged at the time of the riot. In order to make an arrest, an officer would need to have probable cause to believe that a specific person:

- Knowingly committed or attempted to commit an offense that causes or would cause bodily injury, property damage, theft, or sexual contact, **and**
- Was "Reckless as to the fact nine or more other people" are each committing or attempting to commit one of the same offenses, generally in the same area and at the same time.

The first provision means that rioting would become a secondary charge; officers could only charge it if they already had probable cause to make an arrest for one of the other offenses. The tactics that rioters use, which I will describe in a moment, make it ***very unlikely*** that officers will be able to make such an arrest on scene or will be able to identify the suspect through subsequent investigation. The second provision means officers would ***never*** be able to charge it on scene.

It is important to distinguish between people who peacefully demonstrate and those that participate in violent and destructive riots. The rioters that we have seen over the past several months and years are intent on committing destruction and violence and have developed tactics to evade identification and arrest. Beyond just covering their face, they dress similarly – usually in all black – to avoid identification through their clothing. They often change or exchange outer clothing or hats to further frustrate identification. They also exchange bags so that the person who committed damage to or destruction of property or an assault won't be found carrying the tools used to the commit the crime. When officers attempt to arrest individuals involved in the

riots, others involved in the action will intervene or throw objects at the arresting officers creating a greater likelihood of officers having to use force and exacerbating the situation. The result is a more dangerous situation for the rioters and the police. Additionally, under the proposed legislation, the people who knowingly facilitate the crimes won't face legal consequences.

If the Council proceeds with this legislation, rioters will be able to act with impunity. Police won't be able to detain violent and destructive rioters. It is important to note that dispersing a group that is intent on rioting only spreads the destructive behavior to other parts of the city. More businesses will be impacted by the destruction and looting, likely leading to higher insurance costs and possibly lost businesses and wages in the city.

Lastly, the Council must remember that this law is content neutral. In law enforcement circles, it is widely believed that there will be civil unrest after the November election regardless of who wins. It is also believed that there is a strong chance of unrest when Washington, DC hosts the inauguration in January. Regardless of who wins the election, now is not the time to restrict the police department's ability to effectively deal with illegal rioting.

Therefore, I urge the Council to take no rash action on this legislation at this time. Next year, the Council can take more time to deliberate on less drastic changes to the rioting law that both respects civil liberties and protects the District from people intent on committing violence and destruction on our streets while hiding under the umbrella of our nation's fundamental First Amendment rights.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
POLICE COMPLAINTS BOARD
OFFICE OF POLICE COMPLAINTS

PUBLIC HEARING
B23-0723, THE "RIOTING MODERNIZATION AMENDMENT ACT OF 2020"
B23-0771, THE "INTERNATIONALLY BANNED CHEMICAL WEAPON PROHIBITION AMENDMENT ACT OF 2020"
AND
B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"

BEFORE THE

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
CHARLES ALLEN, CHAIR

Testimony of Michael G. Tobin, Executive Director
Office of Police Complaints

October 15, 2020

TESTIMONY OF

MICHAEL G. TOBIN,
EXECUTIVE DIRECTOR
OFFICE OF POLICE COMPLAINTS

October 15, 2020

Good afternoon Chairman Allen and members of the Committee on the Judiciary and Public Safety. I am Michael G. Tobin, the executive director of the Office of Police Complaints (OPC).

The mission of OPC is to improve community trust in the District's police departments through effective civilian oversight. Effective civilian oversight is a common denominator among cities that embrace forward-thinking community policing concepts. In the District of Columbia, the role of community participation in police oversight is provided by OPC and its community-based member board, the Police Complaints Board (PCB). The OPC staff and PCB work to improve community trust by holding police officers accountable for misconduct with an effective community complaint program and by providing a reliable system of police policy review.

OPC has four core functions: (1) Investigate community complaints against the Metropolitan Police Department (MPD) and the DC Housing Authority Police Department (DCHAPD), (2) Conduct mediations, when appropriate, within those investigations, (3) Conduct outreach throughout the community, and (4) Provide the Mayor, the Council, MPD, DCHAPD, and the community with policy recommendations that will better the police practices within our community and build better trust in the District's police forces.

I appreciate the opportunity to provide testimony regarding: (1) Bill 23-0723, the "Rioting Modernization Amendment Act of 2020", (2) Bill 23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", and (3) Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020" as this corresponds with our statutory authority to advise and recommend on police practices and policies.

I am generally in favor of the three bills this hearing is addressing. The stated purpose of B23-0723, the "Rioting Modernization Amendment Act of 2020", is to amend the Act relating to crime and criminal procedure in the District of Columbia to provide definitions for certain terms related to the offense of rioting, to clarify the conduct that constitutes rioting, to revise the penalties for convictions, and to establish a right to a jury trial for prosecutions. The stated purpose of B23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", is to amend the First Amendment Rights and Police Standards Act of 2003 to prohibit the use of chemical irritants at First Amendment assemblies. The stated purpose of B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020", is to provide for comprehensive policing and justice reform for District residents and visitors.

I would like to begin by discussing B23-0723, the "Rioting Modernization Amendment Act of 2020".

Rioting Modernization Act

- Provides needed clarity by reducing the ability to declare a First Amendment assembly a riot without having specific indicators of crowd behavior. It provides better guidance to MPD, USAO, and demonstrators to determine what constitutes lawful conduct within the First Amendment versus what is criminal conduct.

Secondly, in regards to B23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020".

- Adoption of the international standard is a logical extension of appropriate restrictions. The irony is that the federal government is a signatory to the International Act but fails to follow it domestically.

Lastly, addressing selected provisions of Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020".

Subtitle A. Neck Restraints

- Over the past several months the UFRB has had a number of neck restraint cases, illustrating the continuing need to clarify the neck restraint provisions. The majority of cases reviewed by the UFRB have been found not justified and not within policy, however, clarifying statutory language concerning neck restraints versus trachea hold and carotid hold eliminates any potential confusion and aligns the statute with current MPD policy.

Subtitle C OPC Reforms

- By expanding OPC jurisdiction to investigate misconduct beyond what is specifically alleged by a complainant is a measure that has been advocated by many parts of the community. It is a significant improvement that will go a long way toward improving community trust.

Subtitle D Use of Force Review Board (UFRB)

- If civilian appointees to the UFRB receive adequate training it will improve community understanding of how and when serious force is utilized by MPD. In cases that garner public attention, it will be very beneficial for the community to know that they have a voice in determining whether the police use of force was justified. In addition, having access to all of the available evidence in a serious use of force incident will increase transparency and trust in the review process.

Subtitle F Consent Searches

- This is a much-needed provision that we have advocated for several years to establish. This provision is essentially a declaration that as a matter of policy, consent searches should not be used as a technique of routine policing in our community but rather as an exceptional circumstance.

Subtitle G Police Officers Standards and Training Board (POST)

- This Board has a very important function that has not been performed for at least 10 years – for the past 6 years I have advocated for its reconstitution to no avail. Hiring the right people and training them appropriately is the core of developing police officers that conduct themselves professionally, and the POST board is intended to provide the necessary oversight to do so.

In furtherance of OPC's policy recommendation function, in the past three weeks, OPC has published four policy recommendation reports.

First, on September 28, 2020, the National Police Foundation (NPF) released, and OPC published, its independent review of MPD's Narcotics and Specialized Investigations Division (NSID). This review was conducted as a result of "D.C. Law 23-16. Fiscal Year 2020 Budget Support Act of 2019". Through data collection, research, interviews and other review methods regarding stops and searches, NPF found that there was a total of 2,871 reported stops involving NSID-assigned personnel during August 1, 2019 to January 31, 2020 and a reported total of 3,680 persons who were stopped during those interactions. Out of the 3,680 persons stopped, 1,699 persons (46.2%), were reported searched or had a protective pat down conducted with probable cause as the most common justification for the search.

In this report, the NPF highlighted and recommended that MPD has very specific definitions of what constitutes a "stop" and what constitutes a "field contact." Only MPD's definition of a "stop" fits into the Neighborhood Engagement Achieves Results Act of 2015's (NEAR Act) definition of a "stop." Therefore, the NPF noted that MPD, in accordance with GO 304.10 and the NEAR Act, is not required to collect data regarding "field contacts." In line with the effective practices of other jurisdiction, the NPF recommends that the District review MPD's

"stop" and "field contact" definitions in accordance with the intent of the NEAR Act to allow data collection of MPD's "field contacts" as well as "stop" data.

Secondly, on October 5, 2020 the Police Complaints Board released the "Policy Report #21-1: Stop and Frisk Data Review" report recommending that MPD increase transparency with the community by following their own suggestion to undertake a comprehensive analysis of the MPD "Stop Data Report February 2020" which, among other things, showed that from July 22, 2019 through December 31, 2019, 72% of MPD's stops were of black people exhibiting the possibility of racial bias in District policing.

Further, on October 13, 2020, the PCB published its "Report on Use of Force by the Washington, D.C. Metropolitan Police Department 2019." In 2019, MPD's reported use of force incidents increased less than 1% in 2019. However, MPD's reported use of force incidents have increased 84% since 2015. The number of officers who reported using force in 2019 decreased by 8%; however, more than one-third of all MPD officers reported using force in 2019. It is important to note that our use of force reporting is having an impact. In our first report, we made eight recommendations to MPD highlighting where MPD could implement more effective practices within their use of force guidance and use of force collection. In our second report, OPC made an additional four recommendations including one update to the original eight recommendations.

In our 2019 report, we highlighted that as of May 2020, MPD has implemented five of our recommendations, partially implemented three, and has not implemented four. OPC recommended

that MPD create an electronic use of force form with mandatory fields and a mandatory supervisor review to eliminate hand-written and incomplete forms and MPD has fully implemented this recommendation as of January 2020. This new electronic, mandatory field form will drastically improve MPD's use of force data collection, which in turn, will have exponential impact on the analysis that MPD and OPC can conduct with the consistent, quality-checked, and validated data entered by the officer who exercised force on a member of the public. Two recommendations MPD has not implemented, nor agrees with, is our recommendation that MPD collect use of force data immediately after the force is used, and that MPD include fields such as the number of shots fired and where the shots fired made impact.

Lastly, on October 14, 2020 the Police Complaints Board released "Policy Report #21-2: Discipline" that highlighted MPD's disciplinary process shortcomings regarding sustained OPC complaints. The PCB recommended modifications to MPD's disciplinary process for sustained complaints bringing OPC and the PCB into the decision-making process to secure higher community trust in the system.

In conclusion, OPC has a very important role in ensuring the District's police forces serve the community with the most effective practices and in a way that continues to build trust. I thank the Committee for its time, and we will be happy to answer any questions you may have.

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDCIARY

COUNCIL OF THE DISTRICT OF COLUMBIA

PUBLIC HEARING

B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"

Testimony of Niquelle M. Allen, Esq.
Director of Open Government
Board of Ethics and Government Accountability

Thursday, October 15, 2020
10:00am
Virtual Hearing via Zoom

Good afternoon, Chairman Allen and Members of the Committee on the Judiciary and Public Safety. I am Niquelle Allen, the District of Columbia Director of Open Government. The Office of Open Government, an office within the Board of Ethics and Government Accountability, facilitates District of Columbia Government's compliance with the Freedom of Information Act (FOIA) and advocates for a fair and efficient FOIA process. Thank you for this opportunity to testify regarding Bill 23-0882, The "Comprehensive Policing and Justice Reform Amendment Act of 2020." My testimony today concerns "Subtitle B: Improving Access to Body-Worn Camera Video Recordings."

INTRODUCTION

I would like to begin by commending the D.C. Council for taking significant action to increase transparency in policing in the District of Columbia in light of the mass demonstrations that have occurred since the murder of George Floyd on May 25, 2020, and many other victims of police misconduct in the United States. Body-Worn Camera (BWC) recordings of the police along civilian video recordings have proven indispensable in the call for justice for all persons impacted by police misconduct. It also informs the public about policing and police actions. The release and preservation of BWC footage is intended to deter officer misconduct and eliminate ambiguity in excessive force cases. This Bill makes great strides in increasing government transparency through the BWC program by requiring the Mayor, with consent of the subject of the video and/or their next of kin, to publicly release BWC footage and names of officers involved in five days when there is use of excessive force or a death.

However, while the Bill takes important steps to increase transparency, it does not address the problems that the Office of Open Government is aware of concerning the general release of BWC footage. Significant barriers to transparency exist when members of the public and the media request BWC footage through the FOIA process. These barriers are over-redaction of the video footage, timely production of the video footage, and the cost associated with processing FOIA requests. I am presenting this testimony today to offer suggestions regarding how this Bill could be enhanced to address these issues.

BODY WORN CAMERAS AND D.C. FOIA

The effectiveness of the District's use of BWCs must be viewed through the lens of the FOIA. The videos taken with BWCs are public records that are created and maintained by the Metropolitan Police Department (MPD) and the public may request access to those records under FOIA. While citizens have access to BWC footage under FOIA, its release and availability are often limited due to FOIA exceptions. The limited release of BWC footage calls into question the utility of BWCs in providing the public with a timely, relevant, and clear view of the MPD officers' actions. There is also a financial barrier to obtaining this information because the cost of producing BWC footage may be passed on to FOIA requesters.

Personal Privacy Redactions under D.C. FOIA Law

MPD's current BWC policies consider privacy protections of law enforcement personnel and the public; access protocols; the retention of non-evidentiary video versus video that may be used in the litigation of criminal and civil matters; cost of video storage and the collection of metadata; and the monetary and human capital costs inherent to the review and editing of video pursuant to public access laws.[1] MPD may reasonably and legally rely upon several exemptions that prevent the full release of unredacted BWC footage to the public.[2] Namely, the investigatory records exemption and the personal privacy exemptions may cause much of the footage to require redaction.[3] In response to FOIA requests, we have received complaints that MPD has released BWC videos that have been redacted beyond recognition — that is, videos with all faces, all voices, all street names, badge numbers, every car tag in sight, and the like redacted. While the redactions based on the law enforcement FOIA exemptions may be valid, if the BWC camera footage that is released is unrecognizable it has no value. When BWC footage is released to the public in extremely redacted form, the public does not get the full story and it appears as if the government has something to hide.

Personal Privacy

It many of these instances, MPD relies on the personal privacy exemption when it redacts information concerning individual law enforcement officers. I do not interpret this exemption to extend to police officers operating in their official capacity. There should be no expectation of personal privacy for individual officers acting on behalf of the District of Columbia and in uniform. Further, there should be no redactions when in the public space. It is reasonable to have an expectation of privacy in spaces closed to the public, medical facilities, and the like. If the incident recorded occurs in the public space, then the signs and other indicators of locations should not be redacted. I encourage the Committee to consider amending the law or regulations concerning BWC to address this issue. Further, while maintaining the public's privacy and protecting witness identities are reasonable justifications for redacting videos, releasing these excessively redacted videos is not in the public's interest.

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[1] Police Executive Research Forum (PERF), *Implementing a Body-Worn Camera Program Recommendations and Lessons Learned* (http://ric-zai-inc.com/Publications/cops-p296-pub.pdf).

[2] D.C. Official Code § 2-532 affords to any person the "*...right to inspect…and to copy any public record of a public body*" except as expressly provided in the enumerated exemptions under D.C. Official Code § 2-534.

[3] D.C. Official Code § 2-534(a)(3)(A-F) exempts investigatory records compiled for law enforcement purposes if release would interfere with enforcement proceedings; Council investigations; Office of Police Complaint investigations; deprive a person of due process; constitute and unwarranted invasion of personal privacy; disclose a confidential source; disclose investigative techniques; endanger law enforcement personnel. D.C. Official Code § 2-534(a)(2) exempts from disclosure information of such a personal nature that release would constitute an unwarranted invasion of personal privacy.

Balancing the Public's Interest and Personal Privacy

With respect to the release of BWC footage when there is a significant public interest in the content, when it does not involve excessive force or death, the Committee should consider articulating a litmus test for the MPD to follow when determining whether releasing the video is in the public's interest and outweighs personal privacy considerations. Such considerations could include the public response to the incident, the location (public vs. private property), and the degree of harm resulting from withholding the video. Even without a change to the law or regulations, MPD should enact and release clear policies that inform the public – in plain language – of when it will release BWC footage and under what conditions. MPD's articulation of clear, well-reasoned policies about the release of BWC footage in response to FOIA requests will bolster the long-term success of the BWC program.

Timing and Cost of Production

The Committee should consider including a provision in this Bill that requires MPD to waive any cost for producing BWC video footage or limit (impose a cap) the cost MPD may charge a requester to receive the footage. Notably, in California, on May 28, 2020, the state supreme court ruled that California's government agencies cannot pass the cost of redacting police body-camera footage and other digital public records onto the members of the public who requested them under the California Public Records Act. [4] The court held that:

> "Just as agencies cannot recover the costs of searching through a filing cabinet for paper records, they cannot recover comparable costs for electronic records. Nor, for similar reasons, does 'extraction' cover the cost of redacting exempt data from otherwise producible electronic records."

This case is instructive and I believe the District should take similar action. In the interest of transparency, MPD should not be permitted to pass the cost of video production and redaction to requesters. These costs are prohibitive for many requesters and serve as a significant barrier to transparency.

If these costs are not waived, they should be significantly reduced and MPD should release to the public, in the form of policy or regulation, redaction guidance that explains the cost of the act of redaction in actual work hours (cost per hour). Promulgating regulations or policies respecting cost per hour for production and guidelines for redacting would serve the public interest by clarifying the video production process and ensuring that any cost incurred is reasonable.

[4] https://www.rcfp.org/wp-content/uploads/2019/05/2020-05-28-NLG-v.-City-of-Hayward-Opinion.pdf

To reduce cost and control the time it takes to produce the video, I also encourage MPD to consider internal resources to process BWC video footage and prepare it for production. Having government personnel perform video redactions could reduce costs to the public to receive BWC footage. MPD should have an attorney and technical personnel available to process these FOIA requests internally. Using internal resources could result in a cost savings and decrease the amount of time it takes to turn over footage.

CONCLUSION

Giving the media and the public full, transparent, and timely information ensures that the public has full access to the government and ensures that the government's actions may be examined and scrutinized when necessary. In the area of policing, where citizens and officers may find themselves in life or death situations, the recordings get us closer to the truth of whether or not the police have infringed upon the rights and liberties of citizens or have acted properly. Transparency through the use of BWCs and timely release of useable footage is paramount to maintaining an informed citizenry and a just, transparent government.

Thank you, Chairman Allen, for the opportunity to testify. I am happy to answer any questions from the Committee.

D.C. Criminal Code Reform Commission

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To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety
From: Richard Schmechel,
Executive Director, D.C. Criminal Code Reform Commission (CCRC)
Date: October 15, 2020
Re: Testimony for the October 15, 2020 Hearing on B23-0723, the "Rioting Modernization Amendment Act of 2020" and B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020."

Introduction.

Thank you for the opportunity to provide testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on B23-0723, the "Rioting Modernization Amendment Act of 2020" (hereafter "rioting bill"), and B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020," (hereafter "policing and justice reform bill"). My name is Richard Schmechel. I am the Executive Director of the Criminal Code Reform Commission (CCRC) and am testifying on its behalf.

The CCRC is a small, independent District agency that began operation October 1, 2016. The CCRC's primary mission is to issue comprehensive recommendations for the Mayor and Council on reform of the District's criminal statutes. Specifically, the CCRC's work is focused on developing comprehensive recommendations to reform the District's "substantive" criminal statutes—i.e. laws that define crimes and punishments.

The CCRC expects to issue its final recommendations on or by March 30, 2021. These recommendations will address at least four matters in the policing and justice reform bill and rioting bill, including: (1) codification of a new restriction on law enforcement use of force; (2) repeal of the current failure to arrest statute (D.C. Code § 5-115.03); (3) changes to the jury demandability statute (D.C. Code § 16-705(b)(1)); and (4) changes to the rioting statute (D.C. Code § 22-1322). My testimony is limited to these four subjects.

Absent final recommendations approved by the CCRC's statutorily-designated Advisory Group, the agency cannot take a position regarding the specific bill language now before the Committee. However, the CCRC has completed research and drafted statutory language on the four abovementioned matters and is near finalization of its recommendations. Based on its current drafts on these four topics, the CCRC draft recommendations are almost entirely consistent with, and broadly supportive of, the police and justice reform bill and rioting bill language.

I. Codification of a new restriction on law enforcement use of deadly force.

To start, I'd like to raise two points regarding Subtitle N of the policing and justice reform bill, regarding the use of deadly force by a law enforcement officer.

First, this provision would begin to fill a substantial gap in the current D.C. Code. The District currently is in a minority of jurisdictions nationally for not legislatively codifying the requirements self-defense, defense of others, and other general defenses. Such defenses exist in the District only to the extent they have been recognized by federally-appointed judges in individual cases over the last two centuries. For decades, the Model Penal Code, dozens of jurisdictions, and a broad array of experts have recognized that all general defenses, including as to use of deadly force, should be codified by the legislative branch because they involve weighty policy choices and fixing the language by statute provides a more consistent basis for administering the law.

Second, the language in subsections (a), (b) and (c)(1) of Subtitle N appears consistent with codified language in other jurisdictions and current District case law, while subsection (c)(2) would change District law to some degree. There are some ambiguities in subsections (a), (b) and (c)(1) that could be interpreted in a manner that would change District law, however. These ambiguities include: the meaning of "intended" in the proposed definition of "deadly force;" whether "totality of the circumstances" in subsection (b)(2) includes facts unknown to the law enforcement officer but available to the factfinder;[1] the overall characterization of the provision as a limitation on self-defense or defense of others; and the burden of proof for raising this apparent defense. However, on their face, subsections (a), (b), and (c)(1) are consistent with current District case law and national norms. Subsection (c)(2), in contrast, has little precedent in other jurisdictions' statutes. However, evidentiary provisions regarding police conduct is a fast-changing legislative area and subsection (c)(2) is quite limited in its effect. The subsection does not preclude consideration of any evidence nor make any evidence dispositive. It is merely a non-exclusive list to guide factfinder inquiry.

The policing and justice reform bill language differs somewhat from the current CCRC draft recommendations by providing less specificity regarding requirements of the defense and not addressing some possible scenarios. The CCRC draft recommendations go into more detail by, for example:

- Clarifying the meaning of "reasonable" and "necessary" by requiring the use of deadly force to be "necessary in its timing, nature, and degree;"
- Specifying that attempts to use deadly force are treated the same as actual uses of deadly force;[2]

[1] While "totality of circumstances" is ambiguous on its face as to whether the analysis reaches circumstances that the law enforcement officer has no subjective awareness of, the provision in subsection (c)(2)(A)(i) referring to "possessed or appeared to possess a deadly weapon" suggests that the "totality of circumstances" is meant to include facts *not* known to the law enforcement officer at the time of the incident (e.g., the complainant actually "possessed" a deadly weapon even though they did not appear to do so).

[2] The bill addresses this issue through its inclusion in the definition of "deadly force" of "force that is … intended to cause serious bodily injury or death." However, "intended" is not defined and it is unclear if the term is meant to differ from the requirements for attempt liability in the District.

- Specifying that deadly force may be justified to prevent a sexual act (involving penetration) or confinement (kidnapping), when other requirements of the defense are met; and
- Specifying, in addition to other considerations, that a factfinder must consider whether all reasonable efforts were made to prevent a loss of a life, including abandoning efforts to apprehend the complainant.

The CCRC draft recommendations also more comprehensively address the use of force (not just deadly force) in self-defense or defense of others, and they do so not only for law enforcement officers but for all persons. The CCRC draft recommendations specify other exceptions to claims of self-defense and defense of others, and they do all this by using definitions standardized across many revised statutes rather than being limited to the law enforcement use of deadly force.

Yet, while the CCRC draft recommendations go into greater detail and provide a much broader framework for self-defense and defense of others, the differences between the bill language and the CCRC draft recommendations are minor and the bill is almost entirely consistent with the draft recommendations and current law.

II. Repeal of the current failure to arrest statute (D.C. Code § 5–115.03).

The next matter I'd like to raise briefly is Subtitle J of the of the policing and justice reform bill, which repeals of D.C. Code § 5-115.03, a statute that criminalizes failure to make an arrest for an offense committed in a law enforcement officer's presence.

A fundamental tenet of any criminal justice system must be that the criminal justice system is a last resort when other efforts to ensure public safety fail. This statute enshrines the opposite, making an officer criminally liable for not making an arrest even when doing so does not advance justice. Moreover, as the statute refers to both federal and District law, it effectively binds District law enforcement officers to follow federal crime policy on drug and other offenses even when such the District has a different policy. The statute is routinely ignored in current practice and continuing to include the law in the D.C. Code undermines the legitimacy of all criminal laws.

When an officer's failure to arrest an individual is because of the officer's collusion in a protection scheme or because of some other illicit motive, other criminal statutes and doctrines of accomplice and conspiracy liability adequately sufficiently criminalize and punish such conduct.

Consistent with the bill, the CCRC draft recommendations also recommend repeal of this statute.[3]

III. Changes to the jury demandability statute (D.C. Code § 16-705(b)(1)).

Next, I'd like to raise three points regarding Subtitle I of the policing and justice reform bill, which gives the option of a jury trial (rather than a single-judge bench trial) to persons accused of committing a simple assault against a law enforcement officer.

[3] *See* CCRC First Draft of Report #29 – Failure to Arrest (attached).

The first point is that this amendment appears to fulfill the intent of the 2016 Neighborhood Engagement Achieves Results (NEAR) Act to let jurors decide charges of assaults on police officers. The NEAR Act in relevant part made the misdemeanor charge of assault against a police officer (APO) and charges of resisting arrest subject to six months maximum incarceration instead of 180 days. Why this slight increase? Since 1993 the District's jury demandability statute has provided that a 180-day offense *is not* jury demandable whereas a six-month offense *is* jury demandable. The NEAR Act legislation made APO and resisting arrest charges jury demandable, in recognition that most states do so and that the change, in part, could make prosecutors consider diversion options and take judges out of the position of having to make an adverse credibility determinations that could impact an officer's career.[4]

However, the NEAR Act didn't change the District's general "simple assault" statute (D.C. Code § 22-404(a)(1)), even though the simple assault statute is a 180-day, not jury demandable offense that can be brought against any person accused of assaulting anyone (including a law enforcement officer). Consequently, the NEAR Act left open the possibility that, based on the same conduct, instead of bringing a six-month jury-demandable APO charge, a prosecutor instead could bring a simple assault charge with a 180-day penalty and avoid the person accused of assaulting a law enforcement officer asking for a jury trial.

Available evidence suggests that, because the NEAR Act failed to amend jury demandability for simple assault charges against a police officer, the legislation failed to make a practical difference in how these cases were handled. Prosecutorial charging practices merely shifted to bring simple assault charges instead of APO charges. While court data on simple assault charging and convictions does not track whether the complainant in the case was a law enforcement officer, a drop in APO charges after passage of the NEAR Act coincides with a similar size increase in the number of simple assault charges.[5]

The second point I'd like to raise in connection with this expansion of jury demandability is to note that the District is a national outlier in its restrictions on the right to a jury trial. Most states make every single crime carrying an imprisonment penalty jury demandable.

Thirty-five states currently provide the right to a jury trial in virtually all criminal prosecutions in the first instance.[6] Another three states require bench trials for some minor criminal offenses, but provide a jury trial right *de novo* on appeal, effectively guaranteeing a jury trial right in every case.[7] Another three states have developed systems that stop short of a full jury

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[4] Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17.

[5] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 10-11 (attached).

[6] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Alabama, Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming).

[7] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Arkansas, North Carolina, and Virginia).

trial right, but are more expansive than the constitutional minimum.[8] Only nine other jurisdictions have jury trial rights that, like the District's, set jury demandability at the constitutional minimum.[9]

The third point is that while expansion of jury demandability may or may not result in some administrative efficiency costs,[10] it may have significant effects on the public's perception of the legitimacy of the justice system. This point has been articulated eloquently in a 2018 concurring opinion by Senior Judge Washington of the D.C. Court of Appeals who noted that the Council could reconsider its past decision to "value judicial economy above the right to a jury trial."

> Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial. This may be an important message to send at this time because many communities, especially communities of color, are openly questioning whether courts are truly independent or are merely the end game in the exercise of police powers by the state.[11]

Public participation in deciding the facts of alleged assaults on a law enforcement officer may improve public trust and confidence even if the results were to be no different than those made by judges in non-jury bench trials.

The current CCRC draft recommendation on jury demandability provides that all forms of assault and threats where the complainant is a law enforcement officer should be jury demandable, consistent with Subtitle I in the policing and justice reform bill. However, the current CCRC draft recommendations on jury demandability go further, recommending (at present—these issues are still under review) the District revert to the standard it held from 1926[12] to 1993[13] that defendants have a right to demand a jury in any case in which they are subject to imprisonment for more than 90 days. In addition, certain other offenses with a 90-day or lower imprisonment penalty would also be jury demandable under the CCRC draft recommendation.[14]

IV. Changes to the rioting statute (D.C. Code § 22-1322).

Lastly, I'd like to raise several points regarding the rioting bill, which revises the elements and penalty of D.C. Code § 22-1322, the District's rioting statute.

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[8] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Hawaii (adopting a three-part test to determine an offense's severity), New Mexico (providing a jury trial right for all offenses punishable by more than ninety days), and New York (providing a full jury trial right throughout the state, but only for offenses punishable by six months in New York City).

[9] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Arizona, Connecticut, Delaware, Louisiana, Mississippi, Nevada, New Jersey, Pennsylvania, and Rhode Island).

[10] The criminal justice system is a dynamic system with multiple actors exercising discretion who can adjust to time and staffing constraints in various ways. For example, rather than increase court jury trials, the system may adjust to an expansion of jury demandability by changing charging practices (as happened previously when the NEAR Act made APO jury demandable but left simple assault non-jury demandable) or plea bargaining practices.

[11] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018).

[12] Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119).

[13] Criminal and Juvenile Justice Reform Amendment Act of 1992, D.C. Law 9-272.

[14] *See* CCRC First Draft of Report #51 – Jury Demandable Offenses (attached).

First, what is distinctive about rioting as compared to the hundreds of other crimes in the D.C. Code is that an actor is engaging in wrongdoing in a group context. Other aspects of the crime being equal, group action may be harder to oppose or control, may lower inhibitions so as to effectively embolden others to join in, or may lead to a more severe overall harm resulting from cumulative actions. Consequently, wrongdoing committed in a group context arguably[15] merits having a separate offense of rioting and punishing such conduct somewhat more severely than the same conduct committed outside the group context.

However, it is critical to not lose sight of the fact that regardless whether there is a rioting statute or not, with whatever punishment it may provide, the D.C. Code contains hundreds of other criminal offenses that punish each particular form of wrongdoing in a far more specific and proportionate manner. Crimes as various as theft, destruction of property, robbery, assault, and sexual abuse vary sharply in their requirements and seriousness and a person who commits these acts should first and foremost be charged according their particular form of wrongdoing even if, in addition, there is some slight liability under a rioting statute.

For example, a person who breaks a store window during a riot could alternatively, or in addition to a rioting charge, be charged under the District's destruction of property offense which provides liability for anyone who "maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his or her own."[16] If the window damage was $1,000 or more, that person is subject to a 10 year imprisonment penalty under current District law (the same as felony rioting), and if the damage is less than $1,000 then the maximum imprisonment is 180 days (the same as misdemeanor rioting).[17] Similarly, a person who enters a store with intent to steal an item of any value during a riot ("looting") could alternatively, or in addition to a rioting charge, be charged under the District's second degree burglary statute and be subject to a 15 year imprisonment.[18] Vandalizing property with spray paint could alternatively, or in addition to a rioting charge, be charged under the District's graffiti offense and be subject to a 180-day penalty.[19] Merely threatening to commit property damage of any sort or bodily injury of any sort could alternatively, or in addition to a rioting charge, be charged under the District's threats offense and be subject to a 20 year penalty.[20]

Even when a person's conduct falls short of these traditional crimes, the District's disorderly conduct statute[21] authorizes arrest, conviction, and up to a 90 day penalty for the very same general types of behavior involved in "riotous" activity:

> "(a) In any place open to the general public, and in the communal areas of multi-unit housing, it is unlawful for a person to:

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[15] Even this fundamental justification for a rioting statute is open to debate, as it may be thought that an individual is less culpable and deserves a lower punishment for committing a crime in a group context as compared to engaging in such context on their own.
[16] D.C. Code § 22–303.
[17] *Id.*
[18] D.C. Code § 22–801.
[19] D.C. Code § 22–3312.04.
[20] D.C. Code § 22–1810.
[21] D.C. Code § 22–1321.

(1) Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken;

(2) Incite or provoke violence where there is a likelihood that such violence will ensue; or

(3) Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence by that person or another person."

Moreover, both the current D.C. Code rioting statute and the reform bill's rioting statute implicitly assume that another crime provides the primary liability and punishment for illegal rioting by punishing any person who engages in rioting the same, with a flat and relatively low 180-day penalty regardless whether the individual committed an assault, an aggravated assault, a petty theft, or arson of a building. That penalty is obviously disproportionate—too low or too high—if rioting is the most severe, primary charge. However, the current 180-day penalty makes sense for a secondary offense that effectively provides a small, but significant, increase in liability for committing the act as part of group conduct.

Second, just as the D.C. Code's many crimes already provide more appropriate descriptions of the elements that must be proven and the punishment for the crime that a person commits during a riot, the D.C. Code also provides liability for any person who "incites" any type of criminal conduct. The District's current "aiding and abetting" statute in D.C. Code § 22-1805 provides that, "for any criminal offense all persons advising, *inciting*, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories." This aiding and abetting statute effectively makes a person who incites damage to property during a riot liable to the same criminal penalty as the person who actually commits the damage to property. Moreover, if a person incites multiple people to engage in damage to property during a riot, that person's liability is likewise multiplied. The District's conspiracy liability statute, D.C. Code § 22-1805a also provides overlapping liability for a person who agrees to joint participation in what constitutes a crime.

Pointing out that the current D.C. Code already addresses "incitement" of any crime is important because the current rioting statute takes a sharply different approach to incitement by penalizing incitement of rioting that results in excess of $5,000 property damage or someone experiencing serious bodily injury by 10 years imprisonment. That 10-year penalty is 20 times the 180-day penalty for incitement that results in lesser harm[22]—and 20 times the 180-day penalty for the rioter who actually commits the serious bodily injury or property damage! I'll address the likely reason for this anomalous 10-year penalty for incitement next. But, the point here is that even without a separate incitement provision a person who incites another to commit a crime faces equal liability for that crime, be it serious or minor. The flat, high penalty reserved for inciting rioting that causes serious bodily injury or more than $5,000 of damage, consequently, appears to

[22] Notably, the District's current disorderly conduct offense, D.C. Code § 22–1321, provides a maximum 90-day penalty for a person to: "Incite or provoke violence where there is a likelihood that such violence will ensue" regardless of consequences."

be superfluous[23] and the penalty disproportionate to the harm that the actor causes as compared to the penalties provided elsewhere in the current D.C. Code.[24]

Also, regarding incitement, it bears repeating that the District's current disorderly conduct statute,[25] quoted above, also specifically refers to a person who "incites" others to misconduct. The statute authorizes arrest, conviction, and provides up to a 90 day penalty for a person to "incite or provoke violence where there is a likelihood that such violence will ensue." [26]

Third, the District's current rioting statute is vague and, as a consequence, raises particular concerns to how it may infringe on free speech and assembly rights under the First Amendment. The statute's broad language requires proof only of a mere "threat" of "tumultuous and violent conduct" and a "grave danger" of harm by a group as small as five people. Moreover, as discussed further below, the statute specifically criminalizes any speech that amounts to "incitement" of rioting but does not define the term or specify how such incitement differs from the type of encouragement that is generally criminalized as aiding and abetting elsewhere in the D.C. Code. The absence of any concrete, objectively measurable results that must be proven for a rioting charge opens up the possibility of bias influencing when the statute is applied. For example, a certain group erroneously may be deemed to be "riotous" based on the content of their speech or conduct covered by the First Amendment. Or, peaceful protestors who stand near others committing violence may be deemed, by their presence, to be encouraging, facilitating, or inciting

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[23] The terms "incite" and "urge" as used in the District rioting statute are not defined in the statute itself or in case law. There also is no District law on whether or to what extent "incite" and "urge" as used in the rioting statute differ from the scope of the existing aiding and abetting statute in D.C. Code § 22–1805. Congressional legislative history suggests that both "incite" and "urge" were understood as terms "nearly synonymous with 'abet'" and refer to words or actions that "set in motion a riotous situation." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Pages 23-25.

[24] It should be noted that if the rioting statute were to be the sole charge for conduct (rather than being in addition to liability for a separate D.C. Code offense), there would be a consistent logic to setting a 10-year maximum imprisonment penalty for incitement for rioting that causes serious bodily injury or over $5,000 in property damage. This is because the current aggravated assault statute, D.C. Code § 22-404.01, provides a 10-year maximum imprisonment penalty for causing serious bodily injury to another, the current destruction of property statute, D.C. Code § 22-303, provides a 10-year maximum imprisonment penalty for destroying $1,000 or more of property, and the current aiding and abetting statute, D.C. Code § 22-1805a, treats a person who "incites" liable to the same penalty as the person who actually commits the act in question.

However, first, as noted previously, the remainder of the current rioting statute implicitly assumes the opposite—that rioting is an add-on charge and a person may still be liable for the more specific crime the person commits. Second, the rioting statute presumably covers other (worse) harms than serious bodily injury (e.g., causing death) which merit more severe punishment than what is authorized for serious bodily injury. Finally, there is strong reason to doubt that the current D.C. Code's equal punishment of $1,000 of property destruction and serious bodily injury. The CCRC has conducted public opinion surveys that consistently found District residents rate the loss of $5,000 of property to be about the equivalent in seriousness to a more minor "significant bodily injury" that requires treatment but not hospitalization as in a "serious bodily injury." *See, e.g.*, survey questions 5.02 and 4.24 in CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses (https://ccrc.dc.gov/node/1436766).

[25] D.C. Code § 22–1321.

[26] *Id*.

violent conduct. This conflict between the First Amendment and the rioting statute was explicitly recognized and endorsed by at least one member of Congress who helped pass the current statute.[27]

While the connection between incitement of rioting and free speech has not always been recognized, recently the Acting United States Attorney who has authority over District rioting charges has explicitly recognized this connection and said that his office has charged specific offenses instead of rioting.[28] However such charging practices may have or be changing, this position appears to differ sharply with the policy and practice of the Metropolitan Police Department (MPD). The Acting United States Attorney stated with regard to a number of recent arrests that MPD "arrested as a collective" persons for rioting when the arresting documents did not demonstrate "any articulable facts linking criminal conduct to each individual arrested."[29] The prosecutor went on to emphasize that, "we cannot charge crimes on the basis of mere presence or guilt by association."[30]

The fourth point I'd like to raise about the District's current rioting statute is its history with respect to race. The earliest predecessor of the District's rioting statute that the CCRC has been able to identify is an 1827 Ordinance of the Corporation of Washington entitled "Idle, Disorderly or Tumultuous Assemblages of Negroes Prohibited."[31] As a display at the National Museum of African American History and Culture states, through most of the 19th century, Black Codes in the District and virtually all Southern states prohibited African Americans to gather in groups of more than five. The language of the District's *current* rioting statute was passed by Congress in 1967 as racial tensions were at a peak, under the guidance of then Chairman of the

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[27] In support of the current law, Rep. Joel Broyhill, argued, "Those who incite others to violence should be punished whether or not their freedom of speech is involved." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 9.

[28] Keith L. Alexander and Meryl Kornfield, *Among more than 400 arrested during protests in the District, most cases involve curfew violations and burglary*, WASHINGTON POST (June 16, 2020) (https://www.washingtonpost.com/local/public-safety/among-more-than-400-arrested-during-protests-in-the-district-most-cases-involve-curfew-violations-and-burglary/2020/06/14/ef7e2e82-ac93-11ea-94d2-d7bc43b26bf9_story.html) ("'I did not authorize any of those individuals to be charged with rioting. I think that's a very gray area, a very dangerous area that bleeds into protesting, and what is First Amendment [protected] and what is not,' [Acting United States Attorney] Sherwin said in a June 5 statement to The Washington Post. 'But what we did charge and will continue to charge is any and all acts of violence, physical aggression and property damage — such conduct will never be condoned or accepted in the District.'").

[29] Peter Hermann and Spencer S. Hsu, Prosecutor accuses D.C. police of making rioting arrests with insufficient evidence, WASHINGTON POST (September 1, 2020) (https://www.washingtonpost.com/local/public-safety/prosecutor-accuses-dc-police-of-making-rioting-arrests-with-insufficient-evidence/2020/09/01/96310954-ec61-11ea-99a1-71343d03bc29_story.html) (quoting from and linking to September 1, 2020 Letter of Acting United States Attorney to Michael R. Sherwin to Mayor Muriel Bowser at: https://www.washingtonpost.com/context/letter-from-acting-u-s-attorney-michael-sherwin-to-d-c-mayor-muriel-bowser/41cbbcc9-54fd-4e82-a8ac-3e465ea170de/?itid=lk_inline_manual_7).

[30] *Id.*

[31] Ordinances of the Corporation of Washington, May 31, 1827, Section 3 ("All idle, disorderly or tumultuous assemblages of negroes, so as to disturb the peace or repose of the citizens are hereby prohibited, and any free negro or mulatto, found offending against the provisions of this section may, on conviction thereof before a justice of the peace be recognized with one or more sureties, in the penal sum of twenty dollars, conditioned for his or her peaceable and orderly behavior, for any period of time, not exceeding six months from the date of such recognizance.").

House Committee on the District of Columbia John McMillan.[32] The anomalous penalty for inciting rioting that results in a serious bodily injury or over $5,000[33] in property damage very well may have been based on an assumption by some Congressmen about the operation of race riots in the 1960s—subsequently deemed erroneous—that they were premeditated and orchestrated by "professional agitators."[34] While the rioting statute was prosecuted most frequently during the 1968 riots at the assassination of Dr. King,[35] dozens of arrests under the statute have occurred this past summer.[36] From 2010-2019, as described below, most of those charged with rioting were white.

As noted above, the absence of any concrete, objectively measurable results that must be proven to sustain a rioting charge opens up the possibility that erroneous decisions will be made about what conduct constitutes a threat of violent conduct and what speech constitutes incitement of rioting. Similarly, the ambiguous language of the current rioting statute, untethered to more specifically defined criminal conduct, opens up the possibility that erroneous decisions will be made based on bias about appearance.

Fifth and finally, while the crime of rioting has been used frequently charged in recent years, very few convictions have resulted. A CCRC analysis of Superior Court data[37] for adult charging and sentencing 2010-2019 (ten years, including inauguration rioting arrests but not 2020 arrests) shows that misdemeanor rioting (D.C. Code § 22–1322(b)) was charged a total of 199 times during that period and felony rioting (D.C. Code § 22–1322(d)) 219 times during that period. In contrast, there were just 13 total convictions during that ten year span for misdemeanor rioting and just 1 felony rioting convictions. All 14 convictions were obtained by pleas. Approximately 84% of those charged (both misdemeanor and felony charges) were white, 92% of those convicted for misdemeanor rioting were white, and the sole felony conviction also appears to have been

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[32] McMillan, a signatory of the Southern Manifesto and opponent of District home rule, in 1967 sent a truckload of watermelons in response to receiving a budget from the District's newly appointed black Mayor-Commissioner Walter Washington. Harry S. Jaffe and Tom Sherwood, Dream City: Race, Power, and the Decline of Washington D.C., 1994, p.62.

[33] The statute's dollar threshold has not changed since 1967. Accounting for inflation, the 1967 threshold would be equivalent to $38,909.88 in 2020 dollars. *See* https://www.in2013dollars.com/us/inflation/.

[34] In support of the Anti-Riot Act, Rep. Joel Broyhill testified that recent District riots were premeditated, proclaiming, "These outbreaks of lawlessness that have become a scourge throughout this nation are not spontaneous in their origin. They are conceived in the twisted minds of the hate-mongers, a trained cadre of professional agitators who operate in open defiance of law, order, and decency…They plot the destruction…with zeal and devotion to stealth and secrecy." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 7. However, in 1968, President Johnson's "Kerner Commission" completed an in-depth study of riots in ten American cities. One of the commission's key findings was that "The urban disorders of the summer of 1967 were not caused by, nor were they the consequence of any organized plan or 'conspiracy.'" National Advisory Commission on Civil Disorders Report, February 29, 1968, at Page 4.

[35] In April 1968 alone, District police arrested 7,600 people on rioting charges. See Rachel Chason and Rebecca Tan, *For black residents who saw D.C. burn decades ago, Floyd protests feel like hope*, WASHINGTON POST (June 16, 2020), available at https://www.washingtonpost.com/local/dc-politics/dc-protests-1968-george-floyd/2020/06/15/bc5475e6-ab28-11ea-9063-e69bd6520940_story.html.

[36] Eliza Berkon, *U.S. Attorney For D.C. Refutes Bowser's Claims That The Office Lacks 'Willingness' To Prosecute Protesters*, DCIST (September 1, 2020), available at https://dcist.com/story/20/09/01/dc-us-attorney-michael-sherwin-refutes-bowser-claim-office-prosecute-protesters/.

[37] CCRC Advisory Group Memo #38: Statistics on District Adult Criminal Charges and Convictions, available at https://ccrc.dc.gov/node/1490156.

white. Most of those who pled guilty to misdemeanor rioting served no time in jail but did receive suspended sentences. The sole person convicted of felony rioting appears to have been sentenced to serve 4 months in jail, the remainder of their 36 month sentence suspended. All but one (13 of 14) conviction had a conspiracy charge in the case. The person sentenced for felony rioting appears to have been sentenced in the case for another crime as well. The CCRC analysis is based on first-in-time court entries as to sentencing and may not reflect subsequent changes due to appeals or otherwise. For further details on the methodology and limitations of the CCRC analysis, see CCRC Advisory Group Memo #38: Statistics on District Adult Criminal Charges and Convictions.[38]

The rioting bill language before the Committee differs from the current CCRC draft recommendation language in minor respects. The current CCRC draft recommendations on rioting, for example:

- Require the actor engage in an offense reckless that at least seven others are engaging in specified criminal conduct in the perceptible area;
- Do not include sexual contact as a predicate offense;
- Clarify, through a different definition of a location "open to the public" that the statute applies in locations that require proof of age or identity to enter and may require a security screening; and
- Use a variety of standardized mental state and other terminology.[39]

However, the differences between the bill language and the current CCRC draft recommendations are minor, and the bill is almost entirely consistent with the draft recommendations.

Closing.

I have attached to my testimony, below, the CCRC's latest draft recommendations and accompanying commentary concerning law enforcement use of force, failure to arrest, jury demandability, and rioting. These documents describe in greater detail the CCRC's latest statutory language and how such language would change current District law. However, please bear in mind that the CCRC draft recommendations have been developed as a comprehensive whole with general provisions that are not included here, and the draft recommendations remain subject to further change prior to their release in March 2021.

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[38] *Id.*

[39] The CCRC's standardized mental state and other terminology clarifies the meaning of "reckless," clarifies that there must be proof of *both* the fact that others are committing criminal offenses nearby *and* that the defendant is aware of a substantial risk that such offenses are being committed, and clearly specifies predicate offenses as those that have as an element what is defined as a "bodily injury."

Notably, as the current D.C. Code contains offenses that are not defined in terms of "bodily injury," the Committee's rioting statute may benefit from clarification as to whether offenses such as simple assault (D.C. Code § 22–404(a)(1)) are intended to be included as predicate offenses for rioting liability. The current text may be construed as either requiring a fact-specific analysis of a given case to determine whether there is an offense involving bodily injury, or requiring a categorical analysis of whether the legal elements of the offense explicitly require "bodily injury."

Thank you for your consideration. For questions about this testimony or the CCRC's work more generally, please contact our office or visit the agency website at www.ccrc.dc.gov.

Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

Current as of September 28, 2020:
RCC § 22E-403. Defense of Self or Another Person.

(a) *Defense*. It is a defense that, in fact, the actor reasonably believes the conduct constituting the offense is necessary, in its timing, nature, and degree, to protect the actor or another person from a physical contact, bodily injury, sexual act, sexual contact, confinement, or death.

(b) *Exceptions*. This defense is not available when:

(1) In fact, the actor uses or attempts to use deadly force, unless the actor:

(A) Reasonably believes the conduct is necessary in its timing, nature, and degree, to protect the actor or another person from serious bodily injury, a sexual act, confinement, or death; or

(B) Both:

(i) Is inside their own individual dwelling unit; and

(ii) Reasonably believes the conduct is necessary in its timing, nature, and degree, to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement;

(2) The actor recklessly brings about the situation requiring the defense, unless, in fact:

(A) The actor is a law enforcement officer acting within the reasonable scope of that role;

(B) The actor's conduct that brought about the situation is speech only; or

(C) The actor withdraws or makes reasonable efforts to withdraw from the location; or

(3) The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct.

(c) *Use of deadly force by a law enforcement officer.* When, in fact, the actor is a law enforcement officer who uses or attempts to use deadly force, a factfinder shall include consideration of all of the following when determining whether the actor reasonably believed the conduct was necessary, in its timing, nature and degree:

(1) The law enforcement officer's training and experience;

(2) Whether the complainant:

(A) Appeared to possess, either on their person or in a location where it is readily available, a dangerous weapon; and

(B) Was afforded an opportunity to comply with an order to surrender any suspected dangerous weapons;

(3) Whether the law enforcement officer engaged in de-escalation measures, including taking cover, waiting for back-up, trying to calm the complainant, or using non-deadly force;

(4) Whether the law enforcement officer increased the risk of a confrontation resulting in deadly force being used; and

(5) Whether the law enforcement officer made all reasonable efforts to prevent a loss of a life, including abandoning efforts to apprehend the complainant.

(d) *Definitions*. The terms "intentionally" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "complainant," "dangerous weapon," "deadly force," "law

enforcement officer," "serious bodily injury," "sexual act," "sexual contact," and "speech" have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes the defense of self or another person defense for the Revised Criminal Code (RCC). The defense applies where a person acts under a reasonable belief that they are protecting themselves or another person from a specified physical harm. The RCC defense of self or another person defense is the first codification of such a defense in the District.*

Subsection (a) establishes the requirements for the defense. The term "in fact" indicates that no culpable mental state need be proven for the defense requirements in subsection (a).

Subsection (a) specifies that the person must reasonably believe that the conduct constituting the offense is necessary to prevent a specified physical harm to the actor or to another person from occurring or continuing.[40] The harm at issue may be a physical contact, bodily injury, sexual act, sexual contact, confinement, or death and must be specific and identifiable. The harm could be caused by a criminal act or an accident.[41] The terms "bodily injury," "sexual act," and "sexual contact" are defined in RCC § 22E-701 and include a wide array of conduct.[42] The phrase "physical contact" should be construed to have the same meaning as in RCC § 22E-1205. The word "confinement" is undefined and is intended to broadly include confining a person in a closed space, limiting a person's movements by applying physical restraints to the body, and taking a person to another location against their will. The actor's belief that the harm will occur may be mistaken,[43] but it must be objectively reasonable. Reasonableness is an objective standard that takes into account relevant characteristics of the actor.[44] A person acting in the heat of passion caused by an assault may actually and reasonably believe something that seems unreasonable to a calm mind and does not necessarily lose a claim of defense or another person by using greater

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[40] An additional motive, such as animus or hatred toward the complainant, does not defeat an otherwise valid claim of self-defense or defense of another person. *Parker v. United States*, 155 A.3d 835 (D.C. 2017).

[41] Consider, for example, a baseball coach who observes Player A is about to take a practice swing that will accidentally hit Player B. The coach may be justified in assaulting Player A, roughly pushing them out of the way, to protect Player B from being injured.

[42] The fact that a person may defend against even the most minor bodily injury or sexual contact is offset by the requirement that the conduct must be necessary in its timing, nature, and degree. For example, an actor may be justified in using a great amount physical force to protect against a beating about the head or a prolonged groping of the breast and be unjustified in using the same degree of force to protect against a mere grazing of the arm or buttocks.

[43] *Sloan v. United States*, 527 A.2d 1277 (D.C. 1987); *Jackson v. United States*, 645 A.2d 1099 (D.C. 1994).

[44] *See* Commentary to RCC § 22E-401, Lesser Harm; Model Penal Code § 3.02 cmt. at 241-42 (1985) (concerning the necessity defense) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed…The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.") (Citations omitted).

force than would seem necessary to a calm mind.[45] The actor must believe that the conduct is necessary in its timing, nature, and degree.[46] Conduct is not necessary if the harm can be avoided by a reasonable "legal alternative available to the defendants that does not involve violation of the law."[47] Retreat may be a reasonable way to avoid a harm, however an actor has no affirmative duty to retreat before using force when the requirements of the defense are otherwise satisfied.[48]

Subsection (b) establishes three exceptions to the defense of self or another person defense.

Paragraph (b)(1) limits the availability of the defense when the actor uses or attempts to use deadly force. The term "deadly force" is defined in RCC § 22E-701 and means any physical force that is likely to cause serious bodily injury or death or death. A person may use deadly force even if the person does not intend to cause a serious injury[49] and even if death or serious injury does not occur.[50] The word "attempt" in paragraph (b)(1) should be construed to have the same meaning as in Criminal Attempt under RCC § 22E-301. That is, a person attempts to use deadly force if they engage in conduct that is reasonably adapted to causing serious bodily injury or death.[51] Subparagraph (b)(1)(A) applies to any actor in any location and permits deadly force only to protect against serious bodily injury, a sexual act, confinement or death. Subparagraph (b)(1)(B) applies only when the actor is inside their own individual dwelling unit[52] and permits deadly force to protect against the lesser harms of bodily injury and sexual contact, provided that other requirements of the defense are met.

Paragraph (b)(2) precludes application of the defense if the defendant is reckless in bringing about the situation that necessitates the defense. "Reckless" is defined in in RCC § 22E-

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[45] *Fersner v. United States*, 482 A.2d 387, 392 (D.C. 1984) ("[W]hen it comes to determining whether—and to what degree—force is reasonably necessary to defend a third person under attack, the focus ultimately must be on the intervenor's, not the victim's, reasonable perceptions of the situation."). *See also Lee v. United States*, 61 A.3d 655, 660 (D.C. 2013); *Jones v. United States*, 555 A.2d 1024, 1027–28 (D.C. 1989); *Graves v. United States*, 554 A.2d 1145, 1147–49 (D.C. 1989).

[46] The reasonableness of the belief that the conduct is necessary is fact-sensitive and depends in part on the type of harm that is being threatened, the degree of harm that is being threatened, and, in the case of defense of a third person, that third person's ability to protect themselves. The actor's awareness of the complainant's reputation for violence is also a relevant consideration. *See, e.g., Hart v. United States*, 863 A.2d 866, 870 (D.C. 2004)

[47] *See* Commentary to RCC § 22E-401, Lesser Harm; *Griffin v. United States*, 447 A.2d 776, 778 (D.C. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980) ("Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.")).

[48] *Gillis v. U. S.*, 400 A.2d 311, 313 (D.C. 1979) (explaining there is no affirmative duty to retreat because "when faced with a real or apparent threat of serious bodily harm or death itself, the average person lacks the ability to reason in a restrained manner how best to save himself and whether it is safe to retreat" but that a jury may consider whether a defendant "could have avoided further encounter by stepping back or walking away" in deciding whether the defendant was actually or apparently in danger).

[49] For example, a factfinder may find that an actor who repeatedly stabs a person in the abdomen with a long knife used deadly force that was objectively likely to kill the person, even though the actor subjectively intended to only inflict a superficial wound. Expert testimony may be required to assist the factfinder in understanding whether particular conduct is likely to cause death or serious bodily injury.

[50] For example, a factfinder may find that a bullet wound was likely to cause a serious bodily injury if not for immediate intervention by a medical professional. Expert testimony may be required to assist the factfinder in understanding whether a particular injury is likely to cause death or serious bodily injury.

[51] A person does not attempt to use deadly force by merely desiring to seriously injure the other person. For example, a person who intends to kill someone by pinching their arm does not attempt to use deadly force.

[52] The word "inside" should be construed to mean inside the boundaries of the structure and to include a sunroom or balcony that is exposed to outdoor elements. The term "dwelling" is defined in RCC § 22E-701 and does not require proof of ownership or long-term residency. The words "individual" and "unit" make clear that the communal areas of multi-unit housing buildings are not included.

206 and here requires that the person consciously disregard a substantial risk that they would cause the danger to occur and that the person's disregard of the risk is clearly blameworthy. This exception generally excludes initial aggressors from the defense.[53] However, if after a confrontation begins, the actor becomes subject to an unforeseeable amount of force, the actor may nevertheless respond in self-defense.[54]

Subparagraphs (b)(2)(A) – (b)(2)(c) identify three circumstances in which a person may claim self-defense or defense of another person even though they were the initial aggressor.

Under subparagraph (b)(2)(A), a law enforcement officer may claim self-defense or defense of another person even if the officer provoked the danger that necessitated the defensive conduct.[55] The term "law enforcement officer" is defined in RCC § 22E-701. Subparagraph (b)(2)(A) requires that the officer be acting within the reasonable scope of their professional role.[56] Law enforcement officers acting in their professional roles who are required to engage in conduct that they are practically certain will cause another person to use force are not barred from raising the defense under subsection (b)(2).

Under subparagraph (b)(2)(B), the defense is still available to an initial aggressor who is engaging in speech[57] only.[58] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures. While political speech enjoys the greatest protection under the First Amendment, the exercise of other forms of speech does not alone constitute a provocation that bars the speaker from subsequently defending themselves or others if they are attacked and otherwise meet the requirements of the defense.

Under subparagraph (b)(2)(C), the defense is still available to an initial aggressor who withdraws[59] or makes reasonable efforts to withdraw from the location.[60] Efforts to withdraw include communicating a desire to withdraw.

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[53] Consider, for example, an actor who learns of a protest in a neighboring town and wants to confront the protestors and cause a violent scene. The actor arms himself with a concealed firearm and begins assaulting protestors, hoping that one will fight back and give him a reason to use deadly force to in self-defense. Paragraph (b)(2) precludes the defense unless one of the criteria in subparagraphs (b)(2)(A), (b)(2)(B), or (b)(2)(C) is satisfied.

[54] Under these circumstances, it cannot be said that the person consciously disregarded a substantial risk that they would provoke the danger. *See Andrews v. United States,* 125 A.3d 316, 323 n.22 (D.C. 2015) (defense available when complainant "unjustifiably escalate[d] the ... level of violence[.]"); *see also Lee v. United States*, 61 A.3d 655, 658 n.2 (D.C. 2013).

[55] For example, if an officer is assaulted while placing someone under arrest, the officer may be justified in using the degree of force necessary to protect the officer from further assault. *See also* RCC § 22E-402, Execution of Public Duty.

[56] For example, the officer might lose the justification defense if they are engaged in a personal dispute while off-duty or if they are engaging in conduct while on duty that is outside the reasonable scope of their job duties.

[57] Consider, for example, an actor who appears at a political demonstration fighting for racial justice wearing a t-shirt with racist slurs written on it, fully intending and expecting that it will provoke a physical attack. If a demonstrator attacks the actor, the actor still has a right to use the degree of force necessary to protect herself from further assault.

[58] The phrase "speech only" does not include menacing under RCC § 22E-1203, criminal threats under RCC § 22E-1204, or the tort of assault, defined as "putting another in apprehension of an immediate and harmful or offensive conduct." *See Madden v. D.C. Transit System, Inc.*, 307 A.2d 756, 767 (D.C. 1973); *Person v. Children's Hosp. Nat Medical Center*, 562 A.2d 648, 650 (D.C. 1989).

[59] If the defendant disengages, he is able to defend himself against any subsequent attack. *See Rorie v. United States*, 882 A.2d 763, 775 (D.C. 2005).

[60] Consider, for example, a Bar Patron A who challenges Bar Patron B to meet outside for a fight. When a large crowd gathers, A has second thoughts and tries to run away. B prevents A from fleeing and begins severely beating A. A may be now be justified in committing assault against B in self-defense.

Paragraph (b)(3) precludes application of the defense if the actor is reckless as to the fact that they are protecting against conduct that is lawful.[61] The term "reckless" is defined in RCC § 22E-206 and here requires that the person consciously disregard a substantial risk that the physical harm at issue is lawful and that the actor's conduct is blameworthy under the circumstances. The exception does not require proof that the actor knows the specific law at issue but does require conscious disregard of a substantial risk that the physical harm is lawful in some manner.[62]

Subsection (c) requires a factfinder to include consideration of certain specific facts when determining whether an actor who is a law enforcement officer and uses deadly force reasonably believed the conduct was necessary, in its timing, nature and degree. The terms "law enforcement officer" and "deadly force" are defined in RCC § 22E-701. The term "in fact" indicates that the actor is strictly liable with respect to whether they are a law enforcement officer and with respect to whether the force used is deadly force.[63] The list is not exhaustive and the factfinder may consider other factors.

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised defense of self or another person defense clearly changes current District law in three main ways.*

First, the revised statute does not categorically require that the harm to be avoided be immediate. The current D.C. Code does not codify a self-defense or defense of others defense. However, District case law[64] and the District's current pattern jury instruction require immediacy.[65] In contrast, the RCC statute requires the conduct be necessary in its timing, nature, and degree, but does not specify that harm to be avoided must be imminent. In unusual circumstances, conduct may be necessary to avoid non-immediate but otherwise inevitable harm.[66] This change improves the proportionality of the revised statutes.

Second, the revised defense provides that the use of deadly force is justified if the actor is inside their own dwelling and reasonably believes the conduct is necessary in its timing, nature, and degree, to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement. The D.C. Code does not codify a defense of self or another person defense. The DCCA has not squarely decided to accept or reject the "castle doctrine" that one who through no fault of his own is attacked in one's own home is under no duty to retreat.[67] The District of

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[61] For example, an actor is not justified in committing an assault against a corrections officer to protect themselves against being confined inside D.C. Jail.

[62] Consider, for example, an actor who physically attacks a bouncer, in defense of a person the bouncer is removing at a bar. It is inconsequential that the actor does not know the specific law that authorizes a bouncer to act. If the actor recklessly disregards the fact that bouncer's conduct is lawful, the defense of another person defense does not apply.

[63] RCC § 22E-207.

[64] *Sacrini v. United States*, 38 App. D.C. 371, 378 (D.C. Cir. 1912) ("[I]t is necessary before one may kill another in self-defense, that he shall actually have believed in his own mind at the very moment he strikes the blow, that then either his life is in danger, or that he is in danger of great bodily harm."); *Dawkins v. United States*, 189 A.3d 223, 233, 235 (D.C. 2019).

[65] Crim. Jury Inst. for DC Instruction § 9.500 (2019).

[66] As the Model Penal Code commentary to Necessity explains, "[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A's car to a remote mountain location for a month's stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A's car although the threatened harm will not occur for three weeks." *See* Model Penal Code § 3.02 cmt. at 17 (1985).

[67] *Cooper v. United States*, 512 A.2d 1002, 1005 (D.C. 1986); *see also Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996) ("We need not decide definitively whether the castle rule should apply.").

Columbia Court of Appeals (DCCA) has adopted a "middle ground" approach to analyzing whether a person has a duty to retreat, holding that while there is no affirmative duty to retreat, a failure to retreat is some evidence of whether a defendant was actually or apparently in danger.[68] However, the court has held that the doctrine does not apply when the attacker is a co-occupant of the same home.[69] In contrast, the revised defense includes a broader right to self-defense inside one's dwelling,[70] as defined in RCC § 22E-701, permitting the use of deadly force to protect against more than serious bodily injury or death, irrespective of the complainant's co-occupancy. Deadly force may be used to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement when the actor is in their dwelling and the other requirements of the defense (reasonable belief that the conduct is necessary in its timing, nature, and degree) are met.[71] The revised defense specifically recognizes that protection against even lower-level bodily harms that occur in the home (versus another location) involve special consideration and a blanket ban on the use of deadly force for such lesser harms is unwarranted. This change improves the clarity and proportionality of the revised statutes.

Third, the revised statute provides that a law enforcement officer may be justified in using deadly force to protect a person from a sexual act or confinement. The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 forbids a law enforcement officer from using deadly force unless it is immediately necessary to protect a person from serious bodily injury or death.[72] In contrast, although there are few circumstances in which it would reasonably appear necessary in timing, nature, and degree to use deadly force to protect against a lesser harm, the revised statute permits the defense should such circumstances arise.[73] This change improves the proportionality of the revised statutes.

Beyond these three changes to current District law, five other aspects of the revised statute may constitute substantive changes to District law.

First, the revised defense applies to all offenses. The D.C. Code does not codify a self-defense or defense of others defense. The DCCA has recognized that self-defense is a defense to various offenses, including assault, possession of a prohibited weapon and threats.[74] However, the scope of offenses to which the current self-defense and defense of others defense applies is largely undefined. To resolve this ambiguity, the RCC clarifies that defense of self or another person may justify any offense. Limiting the defense to crimes involving the use of physical force, as is

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[68] *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979).

[69] *Cooper v. United States*, 512 A.2d 1002, 1005–06 (D.C. 1986). The court reasoned that co-occupants are usually related and have some obligation to attempt to defuse the situation. The court stated that even unrelated roommates have a heightened obligation to treat each other with a degree of tolerance and respect.

[70] Unlike some jurisdictions, the revised defense does not offer any broader protection inside one's place of business.

[71] Instances where deadly force is reasonably necessary in timing, nature, and degree to protect against a bodily injury or sexual contact are expected to be extremely rare, as other means of protection such as withdrawal or more moderate use of force may avoid the harm.

[72] Act 23-336.

[73] Consider, for example, an assailant who has confined a large number of people in an internment camp, where they are being raped and tortured but not sustaining serious bodily injuries. If all other reasonable legal alternatives have been exhausted, an officer may be justified in using a less-lethal weapon that is likely (though not certain) to kill the assailant.

[74] *McBride v. United States,* 441 A.2d 644 (D.C. 1982)*; Potter v. United States,* 534 A.2d 943 (D.C. 1987); *Reid v. United States*, 581 A.2d 359 (D.C. 1990); *Douglas v. United States*, 859 A.2d 641 (D.C. 2004); *Hernandez v. United States*, 853 A.2d 202 (D.C. 2004).

common in many jurisdictions,[75] may lead to counterintuitive and undesirable outcomes.[76] This change improves the consistency and proportionality of the revised statutes.

Second, the revised statute provides that an actor may be justified in using deadly force to protect against a sexual act or confinement. The current D.C. Code does not codify a self-defense or defense of others defense. District case law provides that a person may use deadly force to protect against "serious bodily harm,"[77] but has not defined the term "harm" in this context,[78] as distinguishable from "serious bodily injury" found elsewhere in the D.C. Code and case law.[79] Resolving this ambiguity, the revised statute permits the defense should such circumstances arise, provided that the conduct reasonably appears necessary in timing, nature, and degree. This change clarifies and may improve the proportionality of the revised statutes.

Third, the revised statute defines clear parameters for when the defense is available to a someone who provokes an attack. District case law has held that self-defense is not available to someone who "deliberately places himself in a position where he has reason to believe his presence would provoke trouble."[80] The District of Columbia Court of Appeals (DCCA) has adopted a "middle ground" approach to analyzing whether a person has a duty to retreat, holding that while there is no affirmative duty to retreat, a failure to retreat is some evidence of whether a defendant was actually or apparently in danger.[81] The ambiguity of this rule has resulted in courts requiring a duty to retreat in some cases and not others, with sometimes inconsistent and counterintuitive outcomes.[82] Resolving this ambiguity, the revised statute applies the RCC's standardized definition of "reckless"[83] and clarifies that any person (other than a law enforcement officer or a

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[75] *See* Model Penal Code §§ 3.04 and 3.05.

[76] Consider, for example, an actor who picks up a large tree branch to protect themselves from an assault in a public park. Under the Model Penal Code's formulation, the actor would have a defense to assault for hitting the attacker with the tree branch but would have no defense to disorderly conduct for instead swinging the branch around wildly to create an appearance of danger.

[77] *Sacrini v. United States*, 38 App. D.C. 371, 378 (D.C. Cir. 1912); *Gillis v. U. S.*, 400 A.2d 311, 313 (D.C. 1979).

[78] *But see Brown v. United States*, 139 A.3d 870, 872 (D.C. 2016) (defining "serious bodily harm" to have the same meaning as "serious bodily injury" with respect to the meaning of "deadly force"); *Stewart v. United States*, 370 A.2d 1374, 1376 (D.C. 1977) (recognizing in *dicta* that other jurisdictions include sexual attacks as a bodily harm that is a possible predicate for a duress defense but then describing only serious bodily injury and death as predicates in the District).

[79] "Serious bodily injury" in other contexts has been construed to mean injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or loss or impairment of a bodily member or function. *Brown v. United States*, 139 A.3d 870, 876 (D.C. 2016) (regarding the meaning of "serious bodily injury" in defense of property); *Jackson v. United States*, 970 A.2d 277, 279 (D.C. 2009) (citing *Jackson v. United States,* 940 A.2d 981, 986 (D.C. 2008); *Bolanos v. United States,* 938 A.2d 672, 677 (D.C. 2007); *Payne v. United States,* 932 A.2d 1095, 1099 (D.C. 2007); *Swinton v. United States,* 902 A.2d 772, 776–77 (D.C. 2006)); *see also* RCC § 22E-701.

[80] *Rowe v. United States*, 370 F.2d 240, 241 (D.C. Cir. 1966); *Harris v. United States*, 364 F.2d 701 (D.C. Cir. 1966) ("One cannot provoke fight and then rely on claim of self-defense when such provocation results in counterattack unless he has previously withdrawn from fray and communicated such withdrawal."); *Nowlin v. United States*, 382 A.2d 9, 14 n.7 (D.C. 1978); *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995).

[81] *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979).

[82] *Compare Laney v. United States*, 294 F. 412, 414 (D.C. Cir. 1923) (finding that self-defense was unavailable to a man who ran away from a mob of 100 men yelling "Catch the nigger," and "Kill the nigger," because he reached a place of "comparative safety" and could have gone home) *with Marshall v. United States*, 45 App. D.C. 373 (1916) (finding no duty to retreat during a fight over a craps game and stating, "The right of a defendant when in imminent danger to take life does not depend upon whether there was an opportunity to escape.").

[83] RCC § 22E-701.

person engaging in mere speech[84]) who consciously disregards a substantial risk that they will provoke the danger necessitating the defense loses the right to self-defense, unless they retreat or make reasonable efforts to retreat.[85] This change improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised defense does not apply when the person is reckless as to the fact that they are protecting against conduct that is lawful.[86] The current D.C. Code does not codify a self-defense or defense of others defense. District case law has held that a person has no right to defend against an apparently lawful arrest or other apparently lawful restraint by a police officer,[87] but has not yet addressed other lawful conduct.[88] Resolving this ambiguity, the revised statute clarifies that a person cannot assert the offense if they are defending against a physical contact, bodily injury, sexual act, sexual contact, confinement, or death that is lawful and they are reckless as the fact that it is lawful. This change clarifies the revised statute.

Fifth, the revised statute amends the list of factors that a factfinder should consider when determining whether a law enforcement officer reasonably believed that deadly force was necessary, in its timing, nature and degree. The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 states that a factfinder should consider the totality of the circumstances and provides a non-exhaustive list of factors.[89] One of these factors is: "Whether the subject of the use of deadly force [] [p]ossessed or appeared to possess a deadly weapon."[90] The scope and meaning of "possession" of a deadly weapon, whether an officer's training and experience is relevant, and other factors in this statute are unclear and there is no case law to date. To resolve these ambiguities, the revised statute clarifies the provision regarding possession of a weapon[91] and expands the list to include the officer's training and experience[92] and whether the law enforcement officer made all reasonable efforts to prevent a loss of a life. This clarifies the revised statute.

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[84] *See* Crim. Jury Inst. for DC Instruction § 9.504 (2019).

[85] *See Harris v. United States*, 364 F.2d 701, 702 (D.C. Cir. 1966); *Parker v. United States*, 158 F.2d 185, 186 (D.C. Cir. 1946); *Rowe v. United States*, 164 U.S. 546 (1896); *Bedney v. United States*, 471 A.2d 1022, 1023–24 (D.C. 1984).

[86] For example, an actor is not justified in committing an assault against a corrections officer to protect themselves against being confined inside D.C. Jail.

[87] *Speed v. United States*, 562 A.2d 124, 128 (D.C. 1989).

[88] E.g., a parent who is disciplining a child.

[89] Act 23-336.

[90] *Id*.

[91] Current law requires the factfinder to consider whether the complainant "Possessed or appeared to possess a deadly weapon," whereas the revised statute focuses on whether it appeared to the law enforcement officer that the person possessed a weapon or had one readily available. It is of little consequence that a person constructively possessed a weapon in a far-off location.

[92] *See* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, & Imperfect Self-Def.*, 2018 U. Ill. L. Rev. 629, 665 (2018) ("Unlike civilians, police officers undergo extensive training, including training on threat perception, and are more attuned than the average citizen to behaviors indicative of threat. Therefore, it makes sense to assess the reasonableness of an officer's beliefs and actions from the perspective of a reasonable officer in the defendant officer's shoes.") (Citations omitted.).

Relation to National Legal Trends. *Statutory codification of self-defense and defense of others is broadly supported by national legal trends, however, there is variance with respect to the rights of initial aggressors*[93] *and the duty to retreat.*

All 29 reform jurisdictions[94] codify a defense for using force to defend a person.[95] A growing majority of states impose no duty to "retreat to the wall" before using deadly force outside of one's home or business.[96] A few states include the Model Penal Code's surrender-possession and comply-with-demand limits on deadly force.[97]

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[93] *See* § 10.4(e) The aggressor's right to self-defense, 2 Subst. Crim. L. § 10.4(e) (3d ed.) (explaining An initial aggressor (or mutual combatant) to use self-defense in two situations: when a nondeadly aggressor is met with deadly force or when the initial aggressor withdraws (or tries to withdraw)).

[94] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

[95] Ala.Code § 13A-3-23; Alaska Stat. Ann. § 11.81.330; Ariz. Rev. Stat. Ann. § 13-405; Ark. Code Ann. §§ 5-2-605, 5-2-607; Colo. Rev. Stat. Ann. § 18-1-704; Conn. Gen. Stat. Ann. § 53a-19; Del. Code Ann. tit. 11, § 464; Haw. Rev. Stat. Ann. § 703-304; 720 Ill. Comp. Stat. Ann. 5/7-1; Ind. Code Ann. § 35-41-3-2; Kan. Stat. Ann. § 21-5222; Ky. Rev. Stat. Ann. § 503.050; Me. Rev. Stat. tit. 17-A § 108; Minn. Stat. Ann. § 609.065; Mo. Ann. Stat. § 563.031; Mont. Code Ann. § 45-3-102; Mont. Code Ann. § 45-3-105; N.H. Rev. Stat. Ann. § 627:4; N.J. Stat. Ann. § 2C:3-4; N.Y. Penal Law § 35.15; N.D. Cent. Code Ann. § 12.1-05-03; Ohio Rev. Code Ann. § 2901.05; Or. Rev. Stat. Ann. § 161.209; 18 Pa. Stat. and Cons. Stat. Ann. § 505; S.D. Codified Laws § 22-16-35; Tenn. Code Ann. § 39-11-611; Tex. Penal Code Ann. § 9.31; Utah Code Ann. § 76-2-407; Wash. Rev. Code Ann. § 9A.16.020; Wis. Stat. Ann. § 939.48.

[96] *See* § 10.4(f) Necessity for retreat, 2 Subst. Crim. L. § 10.4(f) (3d ed.) (explaining the National Rifle Association has recently advocated for states to pass "Stand Your Ground" laws, but the ABA Task Force has found that "[s]tand-your-ground laws hinder law enforcement, are applied inconsistently, and disproportionately affect minorities," and also "that states with some form of stand-your-ground laws have seen increasing homicide rates.").

[97] *Id*. (citing Conn. Gen. Stat. Ann. § 53a-19; Del. Code Ann. tit. 11, § 464; Haw. Rev. Stat. § 703-304; Me. Rev. Stat. Ann. tit. 17-A, § 108; Neb. Rev. Stat. § 28-1409; N.J. Stat. Ann. § 2C:3-4); Model Penal Code § 3.04.

Current as of February 19, 2020
Failure to Arrest, D.C. Code § 5-115.03

The Commission recommends the repeal of D.C. Code § 5-115.03 which criminalizes neglect to make an arrest for an offense committed in a law enforcement officer's presence.

COMMENTARY

Explanatory Note and Relation to Current District Law.
Current D.C. Code § 5-115.03 provides:

> If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District Jail or Penitentiary not exceeding 2 years, or by a fine not exceeding $500. A member of the police force who deals with an individual in accordance with § 24-604(b) shall not be considered as having violated this section.[98]

The D.C. Court of Appeals (DCCA) does not appear to have published any opinions in which a criminal defendant was charged with violating this statute. However, the DCCA has referred to this statute when finding that members of the Metropolitan Police Departments are "always on duty."[99] Additionally, the U.S. District Court for the District of Columbia has referred to this statute when finding that the District does not have a policy or practice of allowing officers to break the law and shielding the government from liability under 42 U.S.C. § 1983.[100]

There is no legislative history available as to the original intent of the statute because it is among the oldest in the D.C. Code. The crime began as part of wartime (Civil War) 1861 legislation that originally created a unified "Metropolitan Police district of the District of Columbia" out of the "corporations of Washington and Georgetown, and the county of Washington." [101]

The scope of D.C. Code § 5-115.03 is ambiguous because it does not specify culpable mental states as to applicable criminal laws or the relevant conduct of persons. In other words, it

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[98] D.C. Code § 5-115.03.
[99] *See* D.C. Code § 22–405; *Mattis v. United States*, 995 A.2d 223, 225–26 (D.C. 2010)(finding off-duty police officers are protected by the District's assault on a police officer statute); *Lande v. Menage Ltd. Pshp.*, 702 A.2d 1259 (D.C. 1997)(finding private business not liable for the unlawful actions of the off-duty police officers they employed as security guards).
[100] *Gregory v. District of Columbia*, 957 F. Supp. 299 (D.D.C. 1997)
[101] *See Compilation of the Laws in Force in the District of Columbia, April 1, 1868,* U.S. Government Printing Office (1868) at 400, (available online at https://books.google.com/books?id=87kWAAAAYAAJ&printsec=frontcover#v=onepage&q&f=false) (citing Congress' August 6, 1861 Act to create a Metropolitan Police district of the District of Columbia, and to establish a police therefor, and providing in section 21 of the law: "It shall be a misdemeanor punishable by imprisonment in the county jail or penitentiary not exceeding two years, or by a fine not exceeding five hundred dollars for any person without justifiable or excusable cause to use personal violence upon any elector in said district, or upon any member of the police force thereof when in the discharge of his duty, or for any such member to neglect making any arrest for an offence against the law of the United States, committed in his presence, or for any person not a member of the police force to falsely represent himself as being such member, with a fraudulent design.").

is unclear from the statute whether police officers may be criminally liable for neglecting to arrest persons if he or she is unaware of the laws being broken or that person's conduct.[102]

However, even if limited to situations where an officer knows a person is breaking a criminal law in their presence, the statutory language makes no exception for the many circumstances in which safety concerns or District policy would require an officer to decline to arrest. In some situations, requiring an officer to make an arrest may compromise the officer's safety,[103] the arrestee's safety,[104] or the safety of a third party.[105] In some situations, Metropolitan Police Department (MPD) orders specifically direct officers to engage with people in a manner that may not result in an arrest for wrongdoing.[106] In still other situations, District law[107] conflicts with federal law[108] and requiring an arrest undermines the District's authority to make and enforce its own criminal laws.[109]

In rare circumstances,[110] requiring law enforcement officers to make arrests for criminal actions they know to be committed in their presence may be consistent with District policy. The CCRC will evaluate such situations in the context of its review of future offenses. However, the CCRC recommends the repeal of the broad failure to make arrest requirement in D.C. Code § 5-115.03. This change improves the consistency and proportionality of the revised offenses.

Relation to National Legal Trends.

No other state has a similar criminal provision concerning a failure to make an arrest. Nevada and Oklahoma criminalize willfully refusing to arrest a person after being "lawfully commanded" to do so.[111] New Jersey punishes a public servant's refraining from performing a duty when it is done "with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit."[112] Twenty-five states explicitly allow law enforcement officers to issue a citation instead of arrest for some or all offenses, by statute or in the rules of criminal

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[102] For example, it is unclear if an officer would be liable for failure to arrest when he or she observes a group of people playing outside without knowing that the game they are playing is shindy or that there is a law against playing shindy, D.C. Code § 22-1308.

[103] E.g., the officer is undercover, the officer is outnumbered, the officer is unarmed or physically outmatched,

[104] E.g., a person in need of immediate medical care for an injury, illness, or psychiatric condition. *See* D.C. Code § 21-521.

[105] E.g., a hostage.

[106] *See., e.g.,* Metropolitan Police Department, General Order 201.26(V)(D)(2)(f), April 6, 2011; Metropolitan Police Department, General Order 303.01(I)(B)(2)-(3), April 30, 1992; Metropolitan Police Department, Special Order 96-10, July 10, 1996; Metropolitan Police Department, General Order 502.04, April 24, 2018;

[107] D.C. Code § 48-1201 (providing a civil penalty for possession of marijuana, one ounce or less).

[108] 21 U.S. Code § 844 (criminalizing possession of a controlled substance, including marijuana).

[109] Notably, the District recently adopted a policy of non-custodial arrests for public consumption of marijuana. *See* Martin Weil and Clarence Williams, *D.C. arrests for marijuana use to result in citation, not custody, officials say*, Washington Post, September 21, 2018, *available at* https://wapo.st/2OJBEZo?tid=ss_mail&utm_term=.9078c3261301.

[110] *See, e.g.,* D.C. Code § 16-1031 (requiring police officers to make an arrest in domestic violence, but without a criminal penalty for failure to comply). Another situation where a mandatory arrest policy may be considered is when a law enforcement officer is present during a criminal act by another officer. For example, Officer A witnesses Officer B steal narcotics from the evidence control branch and, although A did not consciously desire B to steal and was not an accomplice or accessory after-the-fact, he fails to arrest B to protect B's job. In such situations, the officer's failure to arrest may be conduct sufficiently harmful to be criminalized. This situation will be reviewed when the CCRC examines the District's obstruction of justice statutory provisions.

[111] Nev. Rev. Stat. Ann. § 199.270; Okla. Stat. Ann. tit. 21, § 537.

[112] N.J. Stat. Ann. § 2C:30-2.

procedure.[113] Eleven additional states appear to allow officers to issue a citation instead of arrest (that is, the code has a citation procedure and does not explicitly require an arrest).[114] Ten states enforce a presumption that officers will issue a citation instead of arrest for certain offenses.[115]

[113] Alaska, Arkansas, California, Colorado, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, and Vermont. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[114] Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Montana, North Carolina, Oregon, Texas, and Wyoming. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[115] Alaska, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, Ohio, Pennsylvania, Rhode Island, and Vermont. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

Current as of February 19, 2020
D.C. Code § 16-705. Jury trial; trial by court.

(b) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury, except that if:

(1) (A) The defendant is charged with an offense that is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days (or for more than six months in the case of the offense of contempt of court);

(B) The defendant is charged with an attempt, conspiracy, or solicitation to commit an offense specified in subparagraph (b)(1)(A) of this section;

(C) The defendant is charged with an offense under Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in D.C. Code § 22E-701;

(D) The defendant is charged with a "registration offense" as defined in D.C. Code § 22-4001(8);

(E) The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant's deportation from the United States under federal immigration law; or

(F) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year; and

(2) The defendant demands a trial by jury, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.

COMMENTARY

Explanatory Note. *This section establishes the jury or nonjury trial provision for the Revised Criminal Code (RCC) and other D.C. Code provisions. The revised statute replaces D.C. Code § 16-705(b)(1) (Jury trial; trial by court).* The revised portion of D.C. Code § 16-705(b)(1) concerns the extension of a statutory right to a jury trial in six circumstances.

Subparagraph (b)(1)(A) of the revised statute permits a criminal defendant to demand a jury trial when charged with an offense punishable by imprisonment for more than 90 days.

Subparagraph (b)(1)(B) of the revised statute permits a defendant to demand a jury trial when charged with an inchoate form of an offense—i.e. attempt, solicitation, or conspiracy—that would be punishable by imprisonment for more than 90 days.

Subparagraph (b)(1)(C) of the revised statute permits a jury demand for a charge under Chapter 12 of Title 22E, including robbery, assault, menacing, criminal threats, and offensive physical contact, if the person who is alleged to have been subjected to the criminal offense [116] is a law enforcement officer as defined in § 22E-701.

Subparagraph (b)(1)(D) of the revised statute provides a right to a jury trial to a charge for a "registration offense" as defined under the District's sex offender registration statutes.

Subparagraph (b)(1)(E) of the revised statute extends a right to a jury for any charge[117] which, as a matter of law, could result in deportation of the defendant under federal immigration law were the defendant convicted of the crime and proven to be a non-citizen. This provision does not require any proof or assertion that the defendant is, in fact, a non-citizen or that federal authorities, in fact, would deport the defendant if convicted. The question under subparagraph (b)(1)(E) is purely a question of law—whether the charged offense could result in deportation under federal immigration law if the defendant were a non-citizen.

Subparagraph (b)(1)(F) of the revised statute provides a jury trial right to a criminal defendant charged with two or more offenses with a combined possibility of imprisonment of more than one year or more than $4,000.[118]

Relation to Current District Law. Revised D.C. Code § 16-705(b)(1) changes current District law by extending the circumstances under which a defendant is entitled to a jury trial. However, the revised statute makes no change to the process for waiver of a jury trial right, the jury trial procedure itself, or the procedures for adjudication absent a jury trial. The revised statute maintains the current language regarding the right to a jury trial where guaranteed by the United States Constitution, the current fine structure for jury demandable offenses, and the current language regarding jury demandable contempt of court cases.

In general, current D.C. Code § 16-705 establishes the circumstances under which a criminal defendant is entitled to a jury trial,[119] the process for waiving a jury trial,[120] the procedure for adjudicating cases in which a defendant is not entitled to a jury trial or a jury trial is waived,[121] and the procedure for jury trials.[122] Under current D.C. Code § 16-705, a criminal defendant is entitled to a jury trial in six instances: (1) where a jury trial is guaranteed by the United States Constitution;[123] (2) where the defendant is charged with an offense punishable by a fine over

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[116] The term "complainant" is defined in RCC § 22E-701 as a "person who is alleged to have been subjected to the criminal offense," such that the phrasing here is identical to "complainant" in RCC § 22E-701.

[117] The application of federal immigration law to District statutes is complex and constantly evolving. Establishing a definitive list of the District's deportable misdemeanor offenses would be an immense and likely fruitless undertaking. Consequently, the revised statute codifies a clear, flexible standard that courts can evaluate as needed as federal law changes.

[118] *See* D.C. Code §§ 4-516 (Assessments for crime victims assistance and compensation); 16-711 (Restitution or reparation); 22-3571.01 (Fines for criminal offenses).

[119] D.C. Code §§ 16-705(a)-(b-1).

[120] D.C. Code § 16-705(a); D.C. Code § 16-705(b)(2); D.C. Code § 16-705(b-1).

[121] D.C. Code §§ 16-705(a)-(b-1).

[122] D.C. Code § 16-705(c).

[123] D.C. Code § 16-705(a). According to the United States Supreme Court, a criminal defendant is entitled to a jury trial under the United States Constitution when charged with a "serious" offense, but not when charged with a "petty" offense. *Duncan v. Louisiana*, 391 U.S. 145, 157-62 (1968). The Supreme Court has identified the maximum authorized penalty as the most relevant objective criteria by which to judge an offense's severity and has held then no offense may be deemed "petty" if it is punishable by more than six months imprisonment. *Baldwin v. New York*, 399

$1,000;[124] (3) where a defendant is charged with two or more offenses punishable by a cumulative fine of over $4,000;[125] (4) where a defendant faces imprisonment for more than 6 months for contempt of court;[126] (5) where a defendant is charged with an offense punishable by more than 180 days imprisonment;[127] and (6) where a defendant is charged with two or more offenses punishable by imprisonment for more than two years.[128] The current statute also clarifies that when a defendant is charged with two or more offenses, if one of the offenses is jury demandable, all offenses shall be tried by jury unless waived.[129]

The revised statute changes D.C. Code § 16-705(b)(1) to expand the right of a criminal defendant to demand a jury trial in several ways. First, in contrast to the current standard of more than 180 days,[130] subparagraph (b)(1)(A) of the revised statute sets the baseline right to a jury of one's peers for a non-contempt of court charge that carries a maximum imprisonment penalty of more than 90 days. Second, in contrast to current law which makes no distinction as to whether a charge is an attempt or other inchoate form of an offense that is jury demandable, subparagraph (b)(1)(B) of the revised statute treats inchoate forms of a jury-demandable offense as jury demandable, regardless whether their imprisonment penalty is 90 days or less. Third, the revised statute creates entirely new statutory rights to a jury for any charge which, under subparagraph (b)(1)(C) or subparagraph (b)(1)(D) is an offense in Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in § 22E-701, or a charge for a "registration offense" as defined in § 22-4001(8). Fourth, the revised statute, in subparagraph (b)(1)(E), codifies a statutory right to a jury for a charge that, as a matter of law, could result in deportation were the defendant proven to be a non-citizen and convicted of the crime. This change appears to expand D.C. Court of Appeals (DCCA) case law that provides a right to a jury on constitutional grounds for a non-citizen defendant who is subject to possible deportation if convicted of the offense.[131] Finally, subparagraph (b)(1)(F) of the revised statute reduces from two years to one year the

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U.S. 66, 68-69 (1970). Offenses punishable by six months imprisonment or less are presumptively "petty," but that presumption may be overcome if a defendant shows that additional statutory penalties, viewed in conjunction with the maximum period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is "serious." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

[124] D.C. Code § 16-705(b)(1)(A).

[125] D.C. Code § 16-705(b)(1)(B).

[126] D.C. Code § 16-705(b)(1)(A).

[127] D.C. Code § 16-705(b)(1)(A).

[128] D.C. Code § 16-705(b)(1)(B).

[129] D.C. Code § 16-705(b-1).

[130] D.C. Code § 16-705(b)(1)(A).

[131] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury."). The *Bado* decision does not explicitly state that a defendant must prove that he or she is a non-citizen in order to avail themselves of the right to a jury for a deportable offense, although this appears to be implicit in the *Bado* decision's reliance on Supreme Court precedent in *Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989)* and repeated emphasis that the *Blanton* court relied on the consequences to a *particular* defendant. *See also Miller v. United States,* 209 A.3d 75, 79 (D.C. 2019)("Although the trial record did not reveal that Ms. Miller is not a citizen, the United States has not relied on that circumstance to argue that the error in this case was not obvious for purposes of the plain-error standard. We therefore do not address that issue. … Second, the United States's proposed reading of Bado appears to rest on the premise that a defendant has a constitutional right to a jury trial only if conviction would in a practical sense make the defendant's situation worse than it otherwise would be. Bado, however, repeatedly states that the relevant inquiry is whether the defendant "faces" or "is exposed" to the penalty at issue, or alternatively whether the penalty "could be" imposed, if the defendant is convicted. E.g., 186 A.3d at 1246, 1249-50, 1252, 1253, 1256, 1257, 1261.").

cumulative term of imprisonment that a defendant must be subject to under two or more charges in order to demand a jury. The one-year threshold is four times the otherwise applicable revised threshold of 90 days in subparagraph (b)(1)(A), just as the current threshold of two years is four times the otherwise applicable threshold of 180 days.[132]

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The rationale for limiting a right to a jury to offenses punishable by 180 days or less is rooted in a specific factual context that no longer exists in the District.

For most of the past century, the District has provided a more expansive jury trial right than it does today.[133] Between 1926 and 1993, criminal defendants were entitled to a jury trial in all cases punishable by a fine or penalty of $300 or more, or by imprisonment for more than 90 days.[134] In 1992, however, the D.C. Council passed the Criminal and Juvenile Justice Reform Amendment Act, increasing the penalty threshold for a jury trial more than threefold and doubling the imprisonment threshold.[135] Although this was a dramatic change to the substantive jury trial right, its impact on the actual number of jury trials in the District was minimal. As Fred B. Ugast, then Chief Judge of D.C. Superior Court subsequently explained, because the vast majority of charged misdemeanors at the time had maximum penalties of one year, the amendment did not result in a significant change in jury trial rates.[136] However, the year after the Criminal and Juvenile Justice Reform Amendment Act went into effect, the Council passed the Omnibus Criminal Justice Reform Amendment Act of 1994.[137] The legislation reduced the penalties of more than forty misdemeanor offenses to remove criminal defendants' rights to demand a jury trial.[138] Today, jury trial rates in misdemeanor cases remain well below 1%.[139]

Both the Criminal and Juvenile Justice Reform Amendment Act of 1992 and the Omnibus Criminal Justice Reform Amendment Act of 1994 were passed at a time when responding to violent crime was the Council's priority as part of a conscious effort to promote expediency in the criminal process. Although there was no claim that the legislation would result in cost savings, the stated aim of the legislation was to promote judicial efficiency:

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[132] D.C. Code § 16-705(b)(1)(A).

[133] *See* Act of June 17, 1870, 41st Cong., (1870) (16 Stat. 153) (providing right to trial by jury *de novo* on appeal from all actions in Police Court); Act of March 3, 1891, 51st Cong., (1891) (26 Stat. 848) (providing right to trial by jury in Police Court for all cases punishable by penalty $50 or more or imprisonment for thirty days or more); Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119) (providing right to trial by jury in Police Court for all cases punishable by penalty of $300 or more or by imprisonment for more than ninety days).

[134] Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119).

[135] Criminal and Juvenile Justice Reform Amendment Act of 1992, D.C. Law 9-272.

[136] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" attached "Copy of letter dated September 20, 1993 from Chief Judge Fred B. Ugast of the Superior Court ("Last year, the Council passed an amendment to D.C. Code §16-705(b)(1) providing for the right to a trial by jury in criminal cases where the maximum penalty exceeds 180 days incarceration or a fine of $1000 (up from 90 days and $300). Because the vast majority of charged misdemeanors currently have maximum penalties of one year, the amendment has not significantly reduced the number of jury trials in misdemeanor cases.").

[137] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[138] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[139] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor jury trials as a percentage of misdemeanor dispositions at: 0.13% in 2003, 0.15% in 2004, 0.16% in 2005, 0.10% in 2006, 0.27% in 2007, 0.18% in 2008, 0.11% in 2009, 0.10% in 2010, 0.13% in 2011, 0.23% in 2012, 0.21% in 2013, 0.09% in 2014, 0.20% in 2015, 0.07% in 2016, 0.08% in 2017, and 0.07% in 2018.

> Title V reduces the penalty of more than 40 crimes to 180 days, presumptively making them non-jury demandable. Both the Superior Court and the U.S. Attorney support this change to allow for efficiencies in the judicial process. While there would be no actual monetary savings, this change will relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow more felony trials to be scheduled at an earlier date.[140]

In 1993, the year the Criminal and Juvenile Justice Reform Amendment Act went into effect and the year the Omnibus Criminal Justice Reform Amendment Act was introduced, violent crime in the District had reached an all-time high. According to the FBI's Uniform Crime Reporting Program, rates of violent crime in the District peaked in 1993 at 2,922 per 100,000 people.[141] The D.C. Council was reaching for all available options to respond. As noted in the committee report for the Omnibus Criminal Justice Reform Amendment Act of 1994:

> Over the past few years, the Council has passed much legislation in an attempt to curtail the crime and violence in the District of Columbia. However, crime and violence continues to hold the District of Columbia within its grip. . . .
>
> . . . The Council in its continued fight, must look at all options to increase public safety, including redefining crimes, reviewing management, and reallocating resources.[142]

Yet, overall violent crime in the District has been in steady decline since 1993.[143] In 2018, violent crime in the District reached 996 per 100,000 people, a 66% decrease from 1993,[144] and the lowest since the 1967.[145] This decrease in violent crime rates in the District in recent decades undermines the primary rationale for prioritizing judicial expediency over due process.

In addition, the impact of expanding jury demandability on judicial resources is unclear. Assuming that both judicial and prosecutorial resources are relatively constant and inelastic in the near future, and that jury trials require greater resources than bench trials, the result of expanding jury demandability may be an increase in non-trial dispositions (plea, diversion, or dismissal) for lower level cases. This is because any judicial impact depends on prosecutorial charging decisions which are highly discretionary, dynamic, and likely to change with resource pressure.

Expansion of the jury trial right would almost certainly increase to some degree the number of misdemeanor jury trials held annually. However, the overall rate of jury trials has been variable but at historic lows in recent years. The rate of jury trials has steadily declined for decades across

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[140] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4.

[141] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

[142] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 2.

[143] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

[144] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

[145] Federal Bureau of Investigation, UCR Data Tool, Violent Crime Rates in the District of Columbia, 1960-2014, https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm.

the United States, with jury trials making up only a small fraction of overall dispositions.[146] In the District, felony jury trial rates averaged 7% over the past 15 years,[147] with the vast majority of charges resulting in either dismissal (36%)[148] or a guilty plea (52%).[149] Similarly, the vast majority of misdemeanor cases in the District resolve through dismissal (42%),[150] a plea (30%),[151] or diversion (14%).[152] Misdemeanor bench trial rates have remained low, averaging 5% of all misdemeanor dispositions.[153] There is no reason to think that an expansion of the misdemeanor jury trial right would create a significant shift in these numbers beyond converting bench trials to jury trials.

Further undermining the judicial efficiency argument is the fact that the vast majority of states successfully provide full jury trial rights to their citizens. Thirty-five states currently provide the right to a jury trial in virtually all criminal prosecutions in the first instance.[154] Another three states require bench trials for some minor criminal offenses, but provide a jury trial right *de novo*

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[146] *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Emp. L. Stud. 459 (2004); Brian J. Ostrom, Shauna M. Strickland, and Paula L. Hannaford-Agor, "Examining Trial Trends in State Courts: 1976-2002," Journal of Empirical Legal Studies 1, no. 3 (November 2004): 755-782.

[147] Compiled from District of Columbia Courts Annual Reports, showing felony jury trials as a percentage of felony dispositions at: 5% in 2003, 5% in 2004, 4% in 2005, 5% in 2006, 7% in 2007, 8% in 2008, 8% in 2009, 10% in 2010, 9% in 2011, 9% in 2012, 10% in 2013, 10% in 2014, 9% in 2015, 6% in 2016, 5% in 2017, and 4% in 2018.

[148] Compiled from District of Columbia Courts Annual Reports, showing felony dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of felony dispositions at: 46% in 2003, 44% in 2004, 40% in 2005, 31% in 2006, 33% in 2007, 34% in 2008, 31% in 2009, 27% in 2010, 27% in 2011, 27% in 2012, 25% in 2013, 29% in 2014, 32% in 2015, 38% in 2016, 43% in 2017, and 41% in 2018.

[149] Compiled from District of Columbia Courts Annual Reports, showing felony guilty pleas as a percentage of felony dispositions at: 34% in 2003, 35% in 2004, 28% in 2005, 62% in 2006, 59% in 2007, 58% in 2008, 60% in 2009, 63% in 2010, 63% in 2011, 62% in 2012, 64% in 2013, 59% in 2014, 58% in 2015, 56% in 2016, 51% in 2017, and 54% in 2018.

[150] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of misdemeanor dispositions at: 46% in 2003, 41% in 2004, 39% in 2005, 36% in 2006, 40% in 2007, 39% in 2008, 44% in 2009, 40% in 2010, 43% in 2011, 39% in 2012, 36% in 2013, 40% in 2014, 43% in 2015, 49% in 2016, 47% in 2017, and 51% in 2018.

[151] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor guilty pleas as a percentage of misdemeanor dispositions at: 21% in 2003, 23% in 2004, 26% in 2005, 41% in 2006, 36% in 2007, 34% in 2008, 31% in 2009, 36% in 2010, 32% in 2011, 29% in 2012, 31% in 2013, 30% in 2014, 28% in 2015, 27% in 2016, 28% in 2017, and 27% in 2018.

[152] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor diversion as a percentage of misdemeanor dispositions at: 8% in 2003, 9% in 2004, 5% in 2005, 10% in 2006, 11% in 2007, 14% in 2008, 15% in 2009, 14% in 2010, 17% in 2011, 23% in 2012, 25% in 2013, 21% in 2014, 20% in 2015, 18% in 2016, 18% in 2017, and 16% in 2018.

[153] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor bench trials as a percentage of misdemeanor dispositions at: 3% in 2003, 4% in 2004, 4% in 2005, 5% in 2006, 5% in 2007, 5% in 2008, 6% in 2009, 8% in 2010, 6% in 2011, 7% in 2012, 6% in 2013, 7% in 2014, 7% in 2015, 5% in 2016, 5% in 2017, and 5% in 2018.

[154] The following thirty-five states ensure the right to a jury trial in the first instance for virtually all criminal offenses: Alabama, Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details. Some states provide this right by judicial interpretation of state constitutional provisions while others have legislatively enacted it.

on appeal, effectively guaranteeing a jury trial right in every case.[155] Another three states have developed systems that stop short of a full jury trial right, but are more expansive than the constitutional minimum.[156] Only nine other jurisdictions have jury trial rights that, like the District's, set jury demandability at the constitutional minimum.[157]

Yet, even if the rationale of judicial efficiency or financial[158] cost still holds for the District today, for several reasons, it is not clear that these considerations should outweigh right to a jury of one's peers.

First, the right to a jury is a foundational right of the American legal system. It is one of the only rights enumerated in the original, unamended Constitution[159] and is given additional protection in the Sixth Amendment.[160] The constitutional language itself is unequivocal, ensuring the right to a jury trial for "all Crimes"[161] and in "all criminal prosecutions."[162] As many historians, legal scholars, and Supreme Court Justices have pointed out, the jury trial serves a score of critical democratic functions.[163] It ensures that community standards are represented in local courtrooms.[164]

Second, the Council itself, in considering legislation impacting the jury trial right in the District, has repeatedly discussed and considered numerous circumstances in which the jury serves a particularly important role in weighing the outcome of a case. This includes cases where civil liberties are at stake,[165] cases where subjectivity plays a large role in demarcating criminal

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[155] Arkansas, North Carolina, and Virginia. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[156] Hawaii (adopting a three-part test to determine an offense's severity), New Mexico (providing a jury trial right for all offenses punishable by more than ninety days), and New York (providing a full jury trial right throughout the state, but only for offenses punishable by six months in New York City). See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[157] Arizona, Connecticut, Delaware, Louisiana, Mississippi, Nevada, New Jersey, Pennsylvania, and Rhode Island. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[158] Considering that the 1994 reduction in jury-demandable offenses had no anticipated monetary impact, it is likewise unlikely that the reverse process, an expansion of jury-demandable offenses, would result in additional cost. Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4 (indicating no monetary savings as a result of the amendment).

[159] U.S. Const. art. III, § 2, cl. 1 (The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury).

[160] U.S. Const. amend. VI, cl. 1 (In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed).

[161] U.S. Const. art. III, § 2, cl. 1.

[162] U.S. Const. amend. VI, cl. 1.

[163] *See*, *e.g.*, Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wisc. L. R. 133, 136-37 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).

[164] *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).

[165] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, —that is, allowing for a jury trial—is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones will permit law enforcement against otherwise permitted activity—freedom of association, for instance—and thus the bill permits trial by jury.").

conduct,[166] and cases where law enforcement officers' credibility is at issue.[167] While these Council statements have been made in the context of specific offenses, these rationales apply much more broadly across misdemeanors.[168]

Third, rights-based arguments aside, the limitations on jury demandability produce two main problems in specific cases.

First, the existence of a divide between jury-demandable and non-jury demandable cases in which the former require greater prosecutorial and judicial resources than the latter distorts charging practices by incentivizing the prosecution of lower charges that do not fully account for the facts of a case. Prosecutors enjoy wide discretion in charging decisions and the overlap between the scope of conduct covered by particular offenses (to a lesser degree under the RCC than the current D.C. Code) gives prosecutors multiple options as to which crimes to charge in a given case. If a prosecutor wishes to avoid a jury trial for any reason—and to the extent that added time is required for a jury trial or a conviction is less likely,[169] a prosecutor may be incentivized to do so—he or she often can simply opt to charge a non-jury demandable offense. The extent to which prosecutors make their charging decisions based on whether the crime is jury demandable is difficult to measure because charging discretion may be based on so many different reasons and

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[166] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt."); Committee on the Judiciary Report on Bill 18-151, the "Omnibus Public Safety and Justice Amendment Act of 2009," at 33 ("A key change recommended by the Committee has to do ensuring a defendant's right to a jury trial. The primary factor in the Committee's decision to ensure this right relates to the subjective nature of stalking. It seems highly appropriate that a jury of peers would be best equipped to judge whether the behavior is acceptable or outside the norm and indicative of escalating problems. As stated by PDS, '[s]talking is an offense for which the community, not a single judge, should sit in judgment. Community norms should inform decisions about whether behavior is criminal or excusable.'").

[167] *See* Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17 (emphasizing the importance of the jury in moderating prosecutorial charging decisions and the importance of removing the judge from having to make officer credibility findings as support for making assault on police officer offenses jury demandable).

[168] For example, for a charge of current D.C. Code § 22–1307, Crowding, obstructing, or incommoding (a 90 day offense) or other misdemeanor public order offenses the complainant of record and sole witness may be a law enforcement officer. Arguably, as with assault on a police officer, the same rationale of removing the judge from having to make officer credibility findings in a case would support making this offense jury demandable.

[169] Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("But while the Council's goal may have been efficiency, the effect on imprisonment rates was immediate and monumental. At the time, according to a report by the Court's executive officer, Superior Court judges were almost twice as likely as a jury to decide that someone was guilty—so reducing jury trials made the conviction rate skyrocket. For misdemeanors, the year prior to the MSA, only 46 percent of cases ended with a guilty verdict or a guilty plea. The year after, that number jumped to 64 percent. This wasn't exactly an unexpected consequence. Several councilmembers were sure to clarify that despite reducing criminal penalties, the MSA was tough on crime. Even though the maximum sentence for most of these crimes used to be one year, the actual sentence was already generally less than 180 days. Thus, explained Harold Brazil—then-Ward 6 councilmember and one of the Act's co-sponsors—the MSA would mean 'misdemeanants would actually do more time.' 'Crime in our society…[is] out of control,' Brazil argued at a Council hearing on April 12, 1994. 'Years and years of leniency and looking the other way and letting the criminal go has gotten us into this predicament.'").

there is no record as to the reason for choosing one charge over another.[170] However, there are two examples that indicate the impact of this practice.

One example of how restriction of jury demandability distorts charging is the use of attempt charges to avoid jury trials in threat cases. D.C. Code § 22-407 criminalizes threats to do bodily harm.[171] Because the authorized maximum penalty for threats to do bodily harm is six months, a criminal defendant charged with the offense is entitled to a jury trial.[172] The District's attempt statute, however, has a maximum authorized penalty of 180 days for non-crime of violence offenses, making an attempted threat to do bodily harm non-jury demandable.[173] Although it is legally possible to attempt a threat without actually completing a threat, the likelihood of this factual scenario both occurring and resulting in prosecution is exceedingly low.[174] Nonetheless, of the 6,556 charges brought under D.C. Code § 22-407 between 2009 and 2018, 56% were for attempted threats rather than completed threats.[175] As there is no practical difference in the authorized imprisonment penalty between the attempt and completed offense (the difference between 6 months and 180 days), such a high percentage of charges for attempted threats of bodily injury suggests charging decisions may be based on jury demandability rather than how the facts fit the law.

Another example of example of how restriction of jury demandability distorts charging is evidenced by the shift in the number of charges brought under D.C. Code § 22-405(b)—assault on a police officer (APO)—before and after the offense became jury demandable. In 2016, the D.C. Council passed the Neighborhood Engagement Achieves Results (NEAR) Act, which split the existing 180-day, non-jury demandable APO offense into a new APO offense and a resisting arrest offenses and increased the penalty for both to six months.[176] The apparent legislative purpose of this shift was to make sure that these offenses were decided by juries rather than judges.[177] But charging data suggests that this has not been the effect of the law. The number of charges for violations of D.C. Code § 22-405(b) remained relatively consistent within the range of 1,592 and

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[170] *But, see* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Reviewing more than 500 cases from 2019, City Paper found that over the course of one month, prosecutors dodged jury trials more than 24 times a week by taking a crime that is jury-demandable and charging it as another, counterintuitive crime that's not.").

[171] D.C. Code § 22-407 ("Whoever is convicted in the District of threats to do bodily harm shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year.").

[172] D.C. Code § 22-407; D.C. Code § 16-705.

[173] D.C. Code § 22-1803; D.C. Code § 16-705.

[174] *See Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001) (holding that "if a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense" but recognizing that "[a]s a practical matter, such unconsummated threats may be unprovable").

[175] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Also, of the 1,869 convictions under D.C. Code § 22-407 between 2009 and 2018, 72% were for attempted threats rather than completed threats. *Id.*

[176] Neighborhood Engagement Achieves Results Amendment Act of 2016 (effective June 30, 2016), D.C. Law 21-125.

[177] *See* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Ward 5 Councilmember Kenyan McDuffie, who wrote the NEAR Act, tells City Paper that the goal was the make the crime jury-demandable."); Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17.

1,712 for every two-year period between 2009 and 2016.[178] However, after the NEAR Act, for the period of 2017 to 2018, the combined number of charges for APO[179] and resisting arrest[180] dropped by about a thousand charges to a mere 529[181] This represents a more than 66% decrease in charging from the previous years. However, the number of charges brought for violations of D.C. Code § 22-404(a)—simple assault—saw a corresponding uptick with the passage of the NEAR Act. For two-year periods between 2009 and 2016 simple assault charges were in the range of 3,221 to 3,865, but rose about a thousand charges to 5,282 for the period of 2017 to 2018.[182] The elements of the simple assault offense are identical to the prior APO offense, except that the complainant's status as a law enforcement officer need not be proven. And the NEAR Act did not explicitly preclude prosecutors from using their discretion to charge what previously had been an APO case as a simple assault. As there is no practical difference in the authorized imprisonment penalty between the revised offenses (revised APO and resisting arrest) and simple assault (the difference between 6 months and 180 days), the shift in charges so simple assault suggests these charging decisions may be based on jury demandability rather than how the facts fit the law.

The second main problem caused by the limitation of the right to a jury is that the maximum term of imprisonment is sometimes an inaccurate proxy for the real seriousness of a criminal charge to a particular person. Some offenses carry severe consequences for those charged despite having relatively low terms of incarceration yet are not afforded a jury trial.

One example of how an imprisonment penalty misrepresents the seriousness of a criminal charge is D.C. Code § 22-3010.01—misdemeanor sexual abuse of a child or minor—a 180-day offense that currently is not entitled to a jury trial.[183] But the offense is a "registration offense" under D.C. Code § 22-4001(8)(A).[184] Because of this, a person convicted of misdemeanor sexual abuse of a child or minor is subject to mandatory sex offender reporting requirements for ten years following their conviction or release.[185] The collateral consequences of sex offender registration—including burdensome restrictions on residency, internet usage, and access to public housing have been extensively documented.[186] The long-term and public nature of reporting requirements, the increased exposure to criminal liability for failures to report, and the additional social and structural consequences that accompany sex offender registration indicate that the seriousness of

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[178] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Specifically, the numbers were: 1,712 in 2009-2010, 1,592 in 2011-2012, 1,659 in 2013-2014, 1,697 in 2015-2016. *Id.*

[179] The 2017-2018 charges for the unrevised and revised APO, D.C. Code § 22-405, were 355, with 80 convictions (a 23% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[180] The 2017-2018 charges for D.C. Code § 22-405.01 were 174, with 25 convictions (a 14% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[181] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[182] The charges for D.C. Code § 22-404(a) were: 3,221 in 2009-2010, 3,506 in 2011-2012, 3,432 in 2013-2014, 3,865 in 2015-2016, and 5,282 in 2017-2018.

[183] D.C. Code § 22-3010.01. See also misdemeanor sexual abuse, D.C. Code § 22–3006, carrying a 180-day (non-jury demandable) maximum imprisonment penalty.

[184] D.C. Code § 22-4001(8)(A).

[185] D.C. Code § 22-4003.

[186] *See*, *e.g.*, Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 531, 532-539 (2007); Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (September 2007).

a misdemeanor sexual abuse or other charge involving sex offender registration may warrant elevated due process rights as a matter of policy.[187]

A second example of how imprisonment penalties do not accurately represent the seriousness of a criminal charge is when that charge could result in deportation. In 2018, an *en banc* decision of the D.C. Court of Appeals in *Bado v. United States* first held that a criminal defendant is entitled to a jury trial under the United States Constitution if charged with an offense that could result in deportation.[188] Although this decision addressed the fundamental issue of severe consequences resulting from juryless convictions, it has also produced its own set of challenges. As Senior Judge Washington noted in his concurring opinion, the court's decision created an odd dichotomy in which non-citizens are now entitled to more due process in the District's Superior Court than citizens for the exact same offense.[189] While the *Bado* decision extends jury demandability to relevant crimes for non-citizens, these non-citizens are in the difficult position of having to reveal their immigration status in open court in order to claim a constitutional right.[190]

The partial restoration of a jury right may have significant benefits to public safety insofar as this change in District law helps to restore community support for the criminal justice system.[191] In his concurring opinion to the *Bado* decision, Judge Washington urged the D.C. Council to adopt a full jury trial right and stating:

> Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial.[192]

However, the revised statute does not address all rights-based and other problems with restriction of jury-demandability. As long as the right to a jury trial is restricted for some charges and the prosecution of those charges require fewer resources or are more likely to result in a conviction, there will continue to be incentives to base charging decisions on jury demandability rather than what charge best fits the facts of the case at hand. In addition, as noted above, the revised statute's codification of the *Bado* holding requires non-citizen defendants to disclose their citizenship status in court in order to avail themselves of jury demandability. Finally, there may

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[187] The DCCA has previously held that, as a matter of law, a right to a jury does not exist for a charge of misdemeanor child sexual abuse under current law. *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008).

[188] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury.")

[189] *Bado v. United States*, 186 A.3d 1243, 1262 (D.C. 2018) (en banc) ("I write separately because I am concerned that our decision today, while faithful to the dictates of *Blanton*, creates a disparity between the jury trial rights of citizens and noncitizens that lay persons might not readily understand. That disparity is one that the legislature could, and in my opinion, should address. The failure to do so could undermine the public's trust and confidence in our courts to resolve criminal cases fairly.").

[190] This point previously has been raised the Public Defender Service for the District of Columbia, a CCRC Advisory Group Member. *See* CCRC Comments on First Draft of Report #41 Ordinal Ranking of Maximum Imprisonment Penalties, 2 (November 15, 2019).

[191] Tom R. Tyler et al., The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement, *Psychological Science in the Public Interest*, 16, 75-109. (Available at http://dx.doi.org/10.1177/1529100615617791.)

[192] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (en banc).

be significant judicial efficiency costs that arise from litigation over the right to a jury for specific charges and individual defendants—efficiency costs that would not exist if the District followed the majority of states in extending a right to a jury in every criminal case carrying an imprisonment penalty.

The revised statute is a compromise solution to restore jury demandability that mitigates the potential impact on judicial efficiency. The revised statute, however, should not be construed as a permanent judgment as to the appropriate balance between judicial efficiency and the right to a jury of one's peers. A future expansion of jury-demandability to all criminal offenses may be feasible and warranted in the near future.

Current as of February 19, 2020
RCC § 22E-4301. Rioting.

(a) *Offense*. An actor commits rioting when that actor:
  (1) Knowingly attempts or commits a District offense involving bodily injury, taking of property, or damage to property;
  (2) Reckless as to the fact 7 or more other people are each personally and simultaneously attempting or committing a District offense involving bodily injury, taking of property, or damage to property in the area perceptible to the actor.
(b) *No attempt liability*. The general attempt provision in RCC § 22E-301 does not apply to this section.
(c) *Penalties*. Rioting is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "bodily injury," and "property" have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes the rioting offense for the Revised Criminal Code (RCC). The offense proscribes knowingly participating in a group of eight or more people who are each personally engaging in a criminal harm involving injury, property loss, or property damage. The revised offense replaces D.C. Code § 22-1322 (Rioting or inciting to riot).*

Paragraph (a)(1) requires that the accused act "knowingly," a defined term,[193] which here means the person must be practically certain that he or she is personally attempting or committing a District crime involving bodily injury, taking of property, or damage to property.[194] A person who is engaging in conduct that is merely obnoxious, disruptive, or provocative is not liable for rioting.[195] "Bodily injury" is defined in RCC § 22E-701 and means physical pain, illness, or any impairment of physical condition. "Property" is defined in RCC § 22E-701 and means "anything of value." Conduct that threatens a non-criminal harm or a harm not involving bodily injury, taking of property, or damage to property[196] is not a predicate for rioting liability.

Paragraph (a)(2) requires proof that seven[197] or more persons are also engaged in riotous conduct at the same time, in the same place. The riotous conduct of other persons need not be the

[193] RCC § 22E-206.
[194] RCC offenses that involve bodily injury, loss of property, or damage to property include: Assault (RCC § 22E-1202), Robbery (RCC § 22E-1201), Murder (RCC § 22E-1101), Theft (RCC § 22E-2101), Arson (RCC § 22E-2501), Criminal Damage to Property (RCC § 22E-2503), and Criminal Graffiti (RCC § 22E-2504).
[195] The RCC does not outlaw "all 'offensive conduct' that disturbs 'any neighborhood or person.'" *See Cohen v. California*, 403 U.S. 15, 22 (1971); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression…[T]o justify prohibition of a particular expression of opinion, [the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").
[196] For example, the RCC criminal threats statute is not included in the scope of the revised rioting statute.
[197] The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense, RCC § 22E-4301 requires the defendant behave in a riotous manner with seven other

precise type of conduct the actor is engaged in, but must also be criminal harm involving bodily injury, taking of property, or damage to property.[198] The revised statute does not require that the eight people act in concert with one another[199] or organize together in advance.[200] However, the others' conduct must be in a location where the actor can see or hear their activities.[201] Paragraph (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22E-206, which here means the accused must disregard a substantial risk that seven or more persons are engaged in riotous conduct nearby. A person who is merely present in or near a riot is not criminally liable under the revised rioting statute,[202] nor is a person engaged in First Amendment activities or seeking to prevent criminal activities liable.[203]

Subsection (b) specifies that there is no attempt liability for the rioting offense as a whole. However, attempts to commit specified District crimes are part of the element specified in paragraph (a)(1).

Subsection (c) provides the penalty for this offense. [*See* Second Draft of Report #41.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised rioting statute changes current District law in four main ways.*

First, the revised rioting statute has only one gradation that addresses attempted and completed criminal harms involving bodily injury, taking of property, or damage to property. The current rioting statute addresses a "public disturbance" that involves "tumultuous and violent conduct" and is divided into two sentencing gradations.[204] The lower grade consists of such conduct that merely "creates grave danger of damage or injury to property or persons" or incites persons to such risk-creating behavior.[205] Limited case law indicates that this lower grade does

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riotous people nearby. However, the revised failure to disperse offense, RCC § 22E-4302, does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot.

[198] For example, a person may engage in rioting by spray painting graffiti on a building while a dozen others are breaking windows and assaulting a security guard nearby.

[199] The revised code does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).

[200] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular persons. The Defendant does not have to personally know or be acquainted with the other members of the assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

[201] Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[202] S*ee United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("The mere accidental presence of the Defendant among persons engaged in such a public disturbance, however, without more, does not establish willful conduct or involvement.").

[203] For example, the following persons are not liable under the RCC rioting statute: a journalist who is present to observe and report on riotous activities; a demonstrator (or counter-demonstrator) who decides to peacefully remain at a particular location in protest; a community leader who acts as a "counterrioter" and attempts to calm the crowd; or a local resident using public ways to leave and return home through a group engaged in riotous activity.

[204] D.C. Code § 22-1322(a).

[205] D.C. Code §§ 22-1322(b) and (c).

not include "minor breaches of the peace," but instead reaches "frightening group behavior" and "will usually be accompanied by the use of actual force or violence against property or persons."[206] The higher grade consists of inciting such conduct that actually causes "serious bodily harm or there is property damage in excess of $5,000."[207] The current statute's higher gradation has a maximum penalty twenty-times that of the lower gradation.[208] In contrast, the revised statute consists of one penalty gradation based on the attempt or commission of actual criminal harms involving bodily injury, taking of property, or damage to property. Revising the statute to require the attempt or commission of actual harms by the actor more clearly distinguishes rioting liability from minor breaches of the peace by a group, and, unlike the current statute, does not base the degree of punishment on the extent of others' misconduct.[209] Or, in the case of police-monitored crowds, such conduct may violate the RCC failure to disperse offense.[210] This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised statute requires eight people to form riot. The District's current rioting statute states that a riot is a "public disturbance involving an assemblage of 5 or more persons..."[211] Legislative history indicates that the threshold of five people was a subjective judgment based, in significant part, on administrative considerations that it is more convenient to prosecute five or more defendants together for the composite offense of rioting than to prosecute them separately for the underlying assault and property offenses.[212] In contrast, the revised statute raises the number of people that must be involved in riotous conduct to eight. This number excludes many common types of group misconduct from being categorized as a riot,[213] focusing the offense on large-scale events that may give rise to a mob mentality and overwhelm the ability of a few law enforcement officers to control the scene. This change improves the proportionality of the revised offense and reduces an unnecessary overlap between the composite offense of rioting and common occurrences of predicate offenses.

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[206] *United States v. Matthews*, 419 F.2d 1177, 1184-85 (1969) ("The conduct involved must be something more than mere loud noise-making or minor breaches of the peace. The offense requires a condition that has aroused or is apt to arouse public alarm or public apprehension where it is occurring. It involves frightening group behavior. Tumultuous and violent conduct will usually be accompanied by the use of actual force or violence against property or persons. At the very least it must be such conduct as has a clear and apparent tendency to cause force or violence to erupt and thus create a grave danger of damage or injury to property or persons.").

[207] D.C. Code § 22-1322(d).

[208] The maximum imprisonment penalty for violations of subsection (b) and (c) is 180 days, compared to a 10-year maximum for a violation of subsection (d).

[209] The felony gradation in subsection (c) of the current rioting statute does not specify any culpable mental state as to the amount of overall injury resulting from the riot. Strict liability for the results of the riot would mean that a person would be liable even if a factfinder found that the defendant could not and should not have been expected to know that the bad results could occur—the defendant is liable even for unforeseeable accidents that may arise from the unanticipated actions of others in the disorderly group.

[210] RCC § 22E-4302.

[211] D.C. Code § 22-1322(a).

[212] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people. There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses."); *see also United States v. Bridgeman*, 523 F.2d 1099, 1113 (D.C. Cir. 1975) (finding that the District's rioting statute was a codification of common law rioting except for its requirement of 5 participants).

[213] Common examples include a three-versus-three, mutually-agreed upon street fight and a five-co-defendant robbery.

Third, the revised statute eliminates incitement as a distinct basis for rioting liability.[214] Subsection (c) of the current rioting statute separately criminalizes behavior that "incites or urges other persons to engage in a riot," and subsection (d) imposes heightened liability for conduct that "incited or urged others to engage in the riot" and serious bodily harm or property damage in excess of $5,000 resulted.[215] The terms "incite" and "urge" are not defined in the statute or in case law.[216] Legislative history suggests that Congress' targeting of incitement as a form of rioting may have been based on an assumption about the operation of race riots in the 1960s—subsequently deemed erroneous—that they were premeditated and orchestrated.[217] Regardless, legislative history suggests that both "incite" and "urge" were understood as terms "nearly synonymous with 'abet'" and refer to words or actions that "set in motion a riotous situation."[218] In contrast, under the revised statute, a person who "incites" or "encourages" rioting is only liable if his or her conduct suffices to meet requirements for liability as an accomplice[219] or is part of a criminal conspiracy.[220] The revised statute relies on general provisions regarding accomplice and conspiracy liability to more precisely establish the limits of what instances of "incitement" or "urging" are criminal, and to provide a proportionate penalty for acting as an accomplice or co-conspirator. This change improves the clarity, consistency, and proportionality of the revised offense.

Fourth, the revised offense bars any attempt liability. Under current law, rioting or inciting to riot is subject to the general attempt statute.[221] In contrast, under the revised offense, even if a person satisfies the required elements for attempt liability under RCC § 22E-301 as to rioting, that person has committed no offense under the revised code. Completed rioting is already an inchoate crime, closely related to predicate offenses involving bodily injury, taking of property, and damage to property, for which the RCC provides separate liability. This change improves the proportionality of the revised statute.

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[214] Speech that incites violence as punished as disorderly conduct. RCC § 22E-4001(a)(2)(B). Abusive speech that is likely to provoke violence is punished as disorderly conduct. RCC § 22E-4001(a)(2)(C).

[215] D.C. Code § 22-1322(c).

[216] *But see United States v. Jeffries*, 45 F.R.D. 110, 117 (D.D.C. 1968) ("In the District of Columbia riot statute speech is only regulated under (b) where it is so closely brigaded with illegal action as to be an inseparable part of it.") (citing *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Com. of Massachusetts*, 383 U.S. 413, 426 (1966) (J. Douglas concurring)).

[217] In support of the Anti-Riot Act, Rep. Joel Broyhill testified that recent District riots were premeditated, proclaiming, "These outbreaks of lawlessness that have become a scourge throughout this nation are not spontaneous in their origin. They are conceived in the twisted minds of the hate-mongers, a trained cadre of professional agitators who operate in open defiance of law, order, and decency…They plot the destruction…with zeal and devotion to stealth and secrecy." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 7. However, in 1968, President Johnson's "Kerner Commission" completed an in-depth study of riots in ten American cities. One of the commission's key findings was that "The urban disorders of the summer of 1967 were not caused by, nor were they the consequence of any organized plan or 'conspiracy.'" National Advisory Commission on Civil Disorders Report, February 29, 1968, at Page 4.

[218] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Pages 23-25.

[219] *See* RCC § 22E-210.

[220] *See* RCC § 22E-303.

[221] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both.").

Beyond these changes to current District law, one other aspect of the revised rioting statute may be viewed as a substantive change of law.

The revised statute does not require that rioting occur in a public location. The current rioting statute defines rioting as a "public disturbance," but does not explain whether the term "public" refers to the character of the location of the riot or to the persons whose tranquility is disturbed. There is no case law on point.[222] In contrast, the revised statute provides that where eight or more people are simultaneously engaging in conduct that causes injury or damage, that group conduct amounts to a riot, irrespective of where it occurs. Such disturbances, whether in a sports arena or Congress,[223] run a similar risk of escalating into mob-like action. This change clarifies the revised statute and eliminates an unnecessary gap in liability.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute clarifies that an unlawful taking of property may be a predicate for rioting liability. The current rioting statute[224] criminalizes "tumultuous or violent conduct or the threat thereof [that] creates grave danger of damage or injury to property or persons." District case law has established that this reference to "injury to property" includes "either actual physical damage to property or the taking of another's property without the consent of the owner."[225] The revised rioting statute specifically refers to conduct that not only involves unlawful "damage" to property but also unlawful "taking" of property. This change clarifies the revised statute.

Second, the revised rioting statute replaces the archaic term "assemblage" with a reference to other persons being in a location where the actor can perceive them at the time of the target conduct, and requires a culpable mental state of recklessness as to their activities. The current law defines a riot as an "assemblage of 5 or more persons,"[226] but does not define "assemblage." District case law, however, has held that an "assemblage" refers to a group of people in close physical proximity to the defendant such that the person could "could reasonably have been expected to see or to hear" their action.[227] The revised statute codifies and clarifies this requirement as to others nearby activities by using the standard culpable mental state definition of "reckless." The actor need not be practically certain as to the scope and nature of others' activities, but must be aware of a substantial risk as to the others' numbers and conduct. No special connection or common purpose is required of the other persons engaged in unlawful conduct. This change clarifies and improves the consistency of the revised statute.

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[222] *But see, e.g., Ramsey v. United States*, 73 A.3d 138, 147 (D.C. 2013) (reversing a conviction for disorderly conduct, with an element that location of the offense be open to the general public, where the defendant was alleged to have attempted to urinate in a secluded, dark alley, away from any businesses, residences, or people).

[223] *See, e.g.,* United States House of Representatives, *The Most Infamous Floor Brawl in the History of the U.S. House of Representatives: February 06, 1858*, History, Art, and Archives (available at https://history.house.gov/Historical-Highlights/1851-1900/The-most-infamous-floor-brawl-in-the-history-of-the-U-S--House-of-Representatives/).

[224] DC Code § 22-1322.

[225] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969).

[226] D.C. Code § 22-1322(a).

[227] *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

Third, the revised statute requires a culpable mental state of knowledge for an actor engaging in the riotous conduct. The current rioting statute specifies that a person must "willfully" engage in, incite, or urge a riot,[228] however, the current statute does not define "willfully." District case law states that "willfulness" is required of each of the other riot participants also.[229] The RCC clarifies this culpable mental state requirement as to riotous activities by using the standard definition of knowledge[230] as the culpable mental state for paragraph (a)(1). Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[231] This change clarifies and improves the consistency of the revised statute.

Relation to National Legal Trends. *The revised rioting statute's above-mentioned substantive changes to current District law have mixed support in national legal trends.*

First, defining rioting as a form of group disorderly conduct is consistent with criminal codes in a minority of reform jurisdictions. Of the twenty-nine states (hereafter "reform jurisdictions") that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part,[232] all but two have a rioting statute.[233] Six of these twenty-seven reform jurisdictions with a rioting statute explicitly define rioting as disorderly conduct in a group similar to the RCC.[234] Similarly, the MPC defines rioting as disorderly conduct in a group.[235] The remaining twenty-one rioting statutes do not reference "disorderly conduct",[236]

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[228] D.C. Code § 22-1322.

[229] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("[Willfully] means the Defendant and at least four members of the assemblage participated in the public disturbance on purpose, that is, that each knowingly and intentionally engaged in tumultuous and violent conduct consciously, voluntarily and not inadvertently or accidentally.").

[230] RCC § 22E-206.

[231] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (a defendant generally must "know the facts that make his conduct fit the definition of the offense," even if he does not know that those facts give rise to a crime. (Internal citation omitted)).

[232] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[233] All reform jurisdictions except Washington and Wisconsin criminalize engaging in a public riot. Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Me. Rev. Stat. tit. 17-A, § 503; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.J. Stat. 2C:33-1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Ohio Rev. Code Ann. § 2917.03; Or. Rev. Stat. Ann. § 166.015; 18 Pa. Cons. Stat. Ann. § 5501; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104. Washington has a related offense called Criminal Mischief. Wash. Rev. Code Ann. § 9A.84.010.

[234] Delaware, Hawaii, Maine, New Jersey, Ohio, and Pennsylvania. Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; Me. Rev. Stat. tit. 17-A, § 503; N.J. Stat. § 2C:33-1; Ohio Rev. Code Ann. § 2917.03; 18 Pa. Cons. Stat. Ann. § 5501.

[235] Model Penal Code § 250.1. Riot; Failure to Disperse.

[236] Case law research was not performed to determine how many states have held that disorderly conduct is a lesser-included offense of rioting.

but instead refer to "tumultuous or violent conduct" or a "disturbance of public peace" or similar language without specifying how such conduct relates to disorderly conduct.[237]

Second, eliminating incitement as a distinct basis for rioting liability is broadly supported by criminal codes in reform jurisdictions. Only eleven reform jurisdictions distinctly criminalize incitement to riot at all.[238] Nine of those eleven states punish incitement as a misdemeanor or lower-level felony as compared to the 10-year penalty in the District.[239] Only the Dakotas have a maximum penalty for incitement that is as high as the District of Columbia's current law.[240] The MPC rioting statute does not include an incitement provision.[241]

Third, the revised rioting statute's single gradation structure is consistent with approximately half of the criminal codes in reformed jurisdictions and the MPC.[242] Fifteen reform jurisdictions have multiple gradations of rioting in a public place.[243] Most of these jurisdictions grade more severely either on the presence or use of a dangerous weapon during the rioting,[244] or on the infliction of physical injury or substantial property damage.[245]

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[237] Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Or. Rev. Stat. Ann. § 166.015; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104.

[238] Alabama, Arkansas, Colorado, Connecticut, Kansas, Kentucky, Montana, New York, North Dakota, South Dakota, and Tennessee. Ala. Code § 13A-11-4; Ark. Code § 5-71-203; Colo. Rev. Stat. Ann. § 18-9-102; Conn. Gen. Stat. Ann. § 53a-178; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. Ann. § 525.040; Mont. Code Ann. § 45-8-104; N.Y. Penal Law § 240.08; N.D. Cent. Code Ann. § 12.1-25-01; S.D. Codified Laws §§ 22-10-6, 22-10-6.1; Tenn. Code Ann. § 39-17-304.

[239] Alabama punishes incitement as a misdemeanor. Ala. Code § 13A-11-4. Arkansas punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Ark. Code § 5-71-203. Colorado punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Colo. Rev. Stat. Ann. § 18-9-102. Connecticut punishes incitement as a misdemeanor. Conn. Gen. Stat. Ann. § 53a-178. Kansas punishes incitement as a low-level felony. Kan. Stat. Ann. § 21-6201. Kentucky punishes incitement as a misdemeanor. Ky. Rev. Stat. Ann. § 525.040. Montana punishes incitement outside a correctional institution as a misdemeanor. Mont. Code Ann. § 45-8-104. New York punishes incitement as a misdemeanor. N.Y. Penal Law § 240.08. Tennessee punishes incitement as a misdemeanor. Tenn. Code Ann. § 39-17-304.

[240] The rioting statutes in the Dakotas each include an additional limitation. North Dakota punishes incitement as a Class B felony only if: (1) the person incites five or more people or (2) the riot involves 100 or more people. N.D. Cent. Code Ann. § 12.1-25-01. South Dakota punishes incitement as a Class 2 felony only if the person also engages in rioting himself. S.D. Codified Laws §§ 22-10-6, 22-10-6.1.

[241] Model Penal Code § 250.1. Riot; Failure to Disperse.

[242] *Id*.

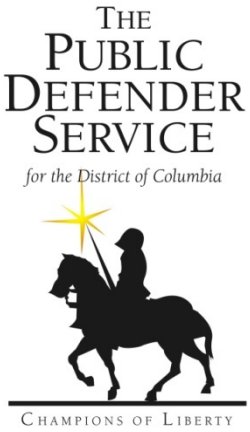
[243] Arkansas, Colorado, Connecticut, Illinois, Indiana, Kentucky, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, South Dakota, Tennessee, and Utah. Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b); Ind. Code Ann. § 35-45-1-2(Sec. 2); Ky. Rev. Stat. § 525.020; Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); N.Y. Penal Law § 240.06; N.D. Cent. Code Ann. § 12.1-25-01(4); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3). Some states recognize that a penal institution is not a public place or punish prison rioting as a distinct offense. *See* N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-301(3); Wash. Rev. Code Ann. § 9.94.010.

[244] Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Ind. Code Ann. § 35-45-1-2(Sec. 2); Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Utah Code Ann. § 76-9-101(3).

[245] Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b)(3); Ky. Rev. Stat. § 525.020; N.H. Rev. Stat. § 644:1(IV); N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3).

Finally, there is strong support in revised statutes for requiring at least recklessness as to the predicate conduct. A majority of the 27 reform jurisdictions that outlaw rioting require at least recklessness as to whether the actor's conduct causes public alarm.[246]

[246] Ala. Code § 13A-11-3 ("intentionally or recklessly"); Ariz. Rev. Stat. Ann. § 13-2903 ("recklessly"); Ark. Code Ann. § 5-71-201 ("knowingly"); Conn. Gen. Stat. Ann. § 53a-176 ("intentionally or recklessly"); Del. Code Ann. tit. 11 § 1302 ("with intent to…"); Haw. Rev. Stat. Ann. § 711-1103 ("with intent to…" or with a weapon); 720 Ill. Comp. Stat. Ann. 5/25-1 ("knowing or reckless"); Ind. Code Ann. § 35-45-1-2 ("recklessly, knowingly, or intentionally"); Ky. Rev. Stat. § 525.030 ("knowingly"); Me. Rev. Stat. tit. 17-A, § 503 ("with intent to…" or with a weapon); Minn. Stat. Ann. § 609.71 ("by an intentional act"); Mo. Ann. Stat. § 574.050 ("knowingly"); Mont. Code Ann. § 45-8-103 ("purposely and knowingly"); N.H. Rev. Stat. § 644:1 ("purposely or recklessly"); N.J. Stat. 2C:33-1("with purpose to…"); N.Y. Penal Law § 240.05 ("intentionally or recklessly"); Ohio Rev. Code Ann. § 2917.03 ("with purpose to…"); Or. Rev. Stat. Ann. § 166.015 ("intentionally or recklessly"); 18 Pa. Cons. Stat. Ann. § 5501 ("with intent to…" or with a weapon); Tenn. Code Ann. § 39-17-302 ("knowingly"); Tex. Penal Code Ann. § 42.02 ("knowingly"); Utah Code Ann. § 76-9-104 ("knowingly or recklessly"). Case law research was not performed to determined the culpable mental states where statutes were silent in Alaska, Colorado, Kansas, North Dakota, and South Dakota.



TESTIMONY OF THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA

concerning

THE COMPREHENSIVE POLICING AND JUSTICE AMENDMENT ACT OF 2020

BILL 23-0882
Presented by

Katerina Semyonova

before

COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Charles Allen

October 15, 2020

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Thank you for the opportunity to testify on Bill 23-0882, the Comprehensive Policing and Justice Amendment Act of 2020. I am Katerina Semyonova, Special Council to the Director on Policy and Legislation at the Public Defender Service for the District of Columbia. PDS strongly supports this bill and appreciates the work of this Committee in enacting its emergency and temporary versions. PDS makes a number of recommendations for amending the language of the bill including: expanding the ban on neck restraints, making Metropolitan Police Department (MPD), Department of Corrections (DOC), and Department of Youth Rehabilitation Services (DYRS) employees mandatory reporters of abuse by staff, expanding access to body worn camera, allowing the Office of Police Complaints (OPC) to receive anonymous complaints, requiring OPC to make recommendations for action on sustained complaints, improving transparency of OPC findings, clarifying the qualifications of the attorney member to be appointed to the Use of Force Review Board, ensuring the right to a jury trial in all misdemeanor cases where the prosecution relies on police testimony, and eliminating consent searches in traffic stops. PDS also proposes four ways that the Council can more broadly achieve the purpose of this legislation: limiting pretextual police stops, reforming field arrest and citation and release practices, eliminating the "high crime area" basis for stop and frisk, and requiring consultation with counsel before any interrogation of youth who are under age 18.

PDS commends the Council and the Mayor for unanimously passing policing reforms through the temporary and emergency versions of this legislation. These reforms begin to address the danger that policing too often poses to the District's Black residents by banning neck restraints, legislating standards for the deadly use of force, and requiring

affirmative consent for searches. They also enhance training of police officers, make reforms to the Use of Force Review Board, and provide for more transparency in police conduct through the release of body worn camera footage in instances of substantial use of force or officer-involved killings.

Nonetheless, there is much more work to be done. The most recent data that MPD was compelled to provide through the NEAR Act showed that 72% of the individuals that MPD stopped during the reported period were Black.[1] Black youths made up nearly 89% of the people under 18 who were stopped and were stopped at 10 times the rate of their white peers.[2] MPD's Narcotics Special Investigation Division (NSID) reported 94% of the individuals who were searched or who had their property searched during the time reported were Black.[3] NSID reported that 100% of its use of force incidents were against Black residents.[4] Many of these stops, arrests, and searches create police or court records that then hinder Black residents from advancing in education, obtaining gainful employment, and securing stable housing. Thus, the targeting of Black residents for police enforcement helps drive a disparity in wealth that has amounted to white households in DC having a financial net worth that is more than 81 times greater than the

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[1]MPD Stop Data Report, February 2020. Available at: https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Stop%20Data%20Report.pdf

[2] NEAR Act data analysis by the ACLU. Available at: https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf

[3] A Limited Assessment of Data and Compliance from August 1, 2019 - January 31, 2020, MPD Narcotics and Specialized Investigations Division Available at: https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/National%20Police%20Foundation%20MPD%20NSID%20Report%20September%202020%20Final.pdf

[4] *Id*.

net worth of Black households.[5] Addressing the systemic and race-based inequality and terror caused by policing will require much legislation and policy change. As the Council moves forward with this reform, PDS urges the Council to employ a public health approach and to consider practices such as Justice Reinvestment[6] that look at the billions of dollars spent on incarceration and policing and examine how those dollars could be better deployed to improve lives in the most-heavily impacted communities through education, jobs, housing, and medical and mental health care.

With respect to changes to the language of the Comprehensive Policing and Justice Amendment Act of 2020, PDS recommends extending the prohibition on the use of neck restraints to all DYRS and DOC staff. PDS also recommends including a mandate that an officer or staff member who witnesses the use of a neck restraint attempt to stop that officer or staff member.

Further, the Council should create an affirmative duty for all MPD, DOC, and DYRS staff, and prosecutors to report violent conduct, including neck restrains, unlawful threats, and known violations of constitutional rights committed by staff members to their agency's chain of command and for violations by MPD, to OPC. Many professions, such as teachers, social workers, and doctors, have mandatory reporting requirements because their professions lead them to learn of abuse that is often hidden from public view.[7] Correctional officers are already required to report instances of sexual abuse that occur

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[5] Urban Institute, Research Report, The Color of Wealth in the Nation's Capital, 2016. Available at: https://www.urban.org/sites/default/files/publication/85341/2000986-2-the-color-of-wealth-in-the-nations-capital_8.pdf

[6] https://chicagosmilliondollarblocks.com/

[7] D.C. Code § 4–1321.02, Persons required to make reports; procedure.

hidden behind prison walls around the country.[8] Police officers should not be treated any differently. When a police officer witnesses a fellow police officer abusing their authority, they should be required to make an immediate report. When corrections staff abuse residents in their custody, at times the only way to ensure prompt reporting of the abuse and to prevent further abuse is through mandated employee reporting. To protect District residents and to assist the District in identifying abusive actors within MPD, DOC, and DYRS, staff at those agencies and prosecutors who see abuse, including on body worn camera footage, should be required to report it to agency leadership and to OPC.

Section 103 of the Comprehensive Policing and Justice Amendment Act requires MPD to release the "body-worn camera recordings of all officers who committed the officer-involved death or use of force." While this section has already resulted in greater transparency regarding officer caused deaths, limiting the disclosure to the officers who committed the death or serious use of force may provide only a partial picture of the circumstances leading up to the officer-involved death. In the interests of accountability and transparency, MPD should be required to release the body worn camera of "<u>all officers at the scene prior to and during the officer-involved death or serious use of force</u>." PDS also recommends that the Council codify the definition of "serious use of force" rather than incorporating an MPD general order, which could change without notice to the public. If the Council incorporates the definition from MPD General Order

[8] There are already some mandatory reporting requirements that apply to DOC and DYRS. Pursuant to the federal Prison Rape Elimination Act regulations at 28 CFR § 115.61, staff in jails and prisons are already required to "report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility." Prisons and jails must designate an individual to whom sexual abuse and harassment is reported. PREA is enforced at local facilities including DOC and DYRS through federal grant programs.

901.07[9], it should include all body strikes with an impact weapon, rather than just strikes of the head, and instances of sexual abuse such as committed during searches by then MPD Officer Sean Lojacono.[10]

PDS believes that there are three changes that the Council can make to section 105 of the Comprehensive Policing and Justice Reform Amendment Act regarding OPC that would have an immediate and large impact in promoting police accountability. First, individuals should be able to submit anonymous complaints.[11] If allowing the submission of all anonymous complaints presents a budgetary hurdle, then at a minimum, individuals should be able to anonymously submit video to OPC through OPC's website and OPC should use that video as the basis of the complaint. Nationwide, bystander video has been sufficient time and again to expose abuse by police and to raise the need for investigation and action. Once video is submitted to OPC, OPC can investigate the complaint by pulling body worn camera for the incident and interviewing involved police officers. The

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[9] MPD General Order 901.07 provides the following definition of "serious use of force." PDS recommends defining the term in the bill and adding the underlined language.

Serious use of force – actions by members including: a. All firearm discharges by a member with the exception of range and training incidents, and discharges at animals; b. All uses of force by a member resulting in a serious physical injury; c. All head and body strikes with an impact weapon; d. All uses of force by a member resulting in a loss of consciousness, or that create a substantial risk of death, serious disfigurement, disability or impairment of the functioning of any body part or organ; e. All incidents where a person receives a bite from an MPD canine; f. All uses of force by an MPD member involving the use of neck restraints or techniques intended to restrict a subject's ability to breathe; ~~and~~ (g) all instances of sexual abuse; ~~g~~ (h) All other uses of force by a member resulting in a death.

[10] Video of then MPD Officer Sean Lojacono conducting an invasive and an unconstitutional search is available at: https://www.aclu.org/press-releases/aclu-dc-settles-case-against-dc-police-officer-anal-search-during-stop-and-frisk.

[11] Various cities allow the submission of anonymous complaints including Seattle (https://www.seattle.gov/opa/complaints/file-a-complaint/anonymous-complaint-form), Baltimore (https://www.baltimorecountymd.gov/Agencies/police/complaints.html), and Miami (https://miamiflpd.mycusthelp.com/WEBAPP/_rs/(S(5bjyoejoedl4loztkdzep2di))/RequestOpen.aspx?rqst=37&anon=1). Chicago won through arbitration the right to have individuals submit anonymous complaints against supervisory officers. See https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2020/june/PoliceUnionContracts.html

investigation could still be closed if it does not yield proof of a violation, but police should not be shielded from accountability simply because an individual wants or needs to remain anonymous.

Second, OPC should be required to increase the public accessibility of its information.[12] Each time OPC sustains an allegation against a police officer, the officer's name should be included in publicly available documents on OPC's website. Documents currently posted on the OPC's website do not reveal the officer's name, regardless of whether the complaint was sustained. As a result, District residents rarely have information about officers that police their communities, and defense lawyers typically have to wait until just weeks before trial to receive critical information about officer misconduct.[13]

Third, when OPC sustains an allegation against an officer, OPC should make a recommendation to MPD for the action that should be taken. Similar to the Use of Force Review Board's classification of serious use of force incidents, OPC should make a non-binding recommendation directly to MPD regarding any further action that should be taken by MPD. Having OPC recommend action ensures that an outside entity makes an

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[12] See Mitch Ryals, *D.C. Office of Police Complaints' Records Leave Much to be Desired,* Washington City Paper, September 3, 2020. Available at: https://washingtoncitypaper.com/article/308805/d-c-office-of-police-complaints-records-leave-much-to-be-desired/

[13] Defense counsel in criminal cases receive information about police misconduct, including past violence and dishonesty, through disclosures from the United States Attorney's Office of information stored in MPD's Personnel Performance Management System (PPMS). USAO's stated policy is that they provide such police misconduct information two weeks before trial in most cases. When the material is provided, USAO requests, and DC Superior Court Judges almost universally grant, protective orders that prevent defense counsel from revealing any misconduct information contained in the PPMS files. Defense counsel are prevented by these protective orders from revealing to the public or to other interested parties, including other defense attorneys who may have cases involving the same officers, the materials contained in the PPMS files.

independent assessment of the gravity of the officer's conduct and the intervention warranted.[14] It would also encourage resident participation in the OPC investigation by connecting that investigation to a final, albeit non-binding, recommendation.

With respect to Section 106, the Use of Force Review Board Membership Expansion, PDS recommends clarifying the qualifications of the attorney member. The bill provides for appointing "one member of the District of Columbia Bar in good standing." There are tens of thousands of lawyers in the District whose legal expertise will have little connection to evaluating the use of force by police. Rather than general legal training, it would be useful for the appointee to be a "District resident who is a member of the District of Columbia Bar in good standing who has experience, within 10 years of their appointment, filing civil rights or Section 1983 actions."

Section 113 of the Comprehensive Policing and Justice Amendment Act gives a defendant a right to a jury trial when the defendant is charged with simple assault, resisting arrest, or threats, and the alleged victim of the offense is a police officer. This is an expansion of the NEAR Act's creation of a jury trial right for charges of assault on a police officer.[15] In response to the NEAR Act, the United States Attorney's Office began charging nearly all misdemeanor assault on a police officer allegations as simple assault, thereby eviscerating a defendant's right to have a jury of their peers decide the credibility and actions of the police officer. Allowing a defendant to elect a jury trial in simple assault, threats, and resisting arrest cases where the complainant is a police officer will close this

[14] The Civilian Complaint Review Board (CCRB) in New York City issues a recommendation at the end of its review process. See CCRB Rules: https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/CCRB_CharterCh18A.pdf.

[15] Neighborhood Engagement Achieves Results Amendment Act of 2016, D.C. Act 21-356.

single loop hole, but may invite prosecutors to find others. If the Council's goal is to provide for community accountability of police-resident interactions by allowing defendants to be judged by juries in cases that rely on the claims of police officers, then a jury trial should be provided in every misdemeanor case "where a police officer is called to establish an element of the offense."[16]

Given the concerns expressed by then DC Court of Appeals Chief Judge Washington in *Bado v. United States*, the Council should go much farther in extending jury trial rights. As Chief Judge Washington wrote:

> "[T]he Council could reconsider its decision to value judicial economy above the right to a jury trial. Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial. This may be an important message to send at this time because many communities, especially communities of color, are openly questioning whether courts are truly independent or are merely the end game in the exercise of police powers by the state. Those perceptions are fueled not only by reports that police officers are not being held responsible in the courts for police involved shootings of unarmed suspects but is likely also promoted by unwise decisions, like the one that authorized the placement of two large monuments to law enforcement on the plaza adjacent to the entrance to the highest court of the District of Columbia."[17]

All offenses that permit a maximum punishment that includes incarceration should be jury demandable, as they are in many other jurisdictions.[18] Or the District should return to the

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[16] A jury trial would not be necessary if the only element an officer is called to establish is that the alleged offense took place in the District of Columbia.

[17] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018).

[18] For example, California provides a right to trial by jury for misdemeanor and felony offenses. California Constitution Article 1 § 16. Colorado guarantees the right of jury trial to all individuals accused of an offense other than a noncriminal traffic infraction, municipal or county ordinance. Colorado Revised Statutes Title 16 Criminal Proceedings § 16-10-101 Jury trials. In Illinois, every person accused of an offense shall have the right to a trial by jury unless the offense is an ordinance violation punishable by fine only. Illinois Compiled Statutes 5/103-6. Maine requires jury trials for all criminal prosecutions except decriminalized traffic offenses. Maine Constitution Article 1 § 6.

jury trial rights that preceded the Council's passage of the Misdemeanor Streamlining Act[19] in 1994, when the Council prioritized the speed at which cases move through the system over an individual's right to a jury trial.

Section 110 of the Comprehensive Policing and Justice Amendment Act of 2020 provides additional procedural protections for consent searches. However, this section does not address the additional scrutiny and harassment that consent searches, particularly in the context of traffic stops, create for the Black drivers in the District.[20] The availability of consent searches provides an incentive for police to stop drivers, and to make discretionary and discriminatory decisions about who to stop given that, if you follow any driver for long enough it is easy to find some infraction.[21] Stopped drivers, pulled over at the side of the road, are not free to leave.[22] Officers asking for permission to search may also, intentionally or unintentionally, create the impression that the traffic stop will be over sooner, or will terminate with a better result, such as with a warning rather than a fine, if the driver consents to a search. Given this dynamic, and the higher rates of stops of Black drivers, even with the added protections of Section 110, consent searches during traffic stops can never be truly voluntary. Rather than allowing police to ask

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[19] Omnibus Criminal Justice Reform Act of 1994, D.C. Law § 10–151, 41 D.C. Reg. 2608 (effective Aug. 20, 1994).

[20] NEAR Act data analysis by the ACLU. Available at: https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf

[20]https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/National%20Police%20Foundation%20MPD%20NSID%20Report%20September%202020%20Final.pdf

[21] See David A. Harris, Car Wars: The Fourth Amendment's Death on the Highway, 66 Geo. Wash. L. Rev. 556, 567_68 (1998) (describing how officers need simply follow motor vehicle for short periods of time in order to detect an infraction).

[22] D.C. Code § 50–2201.05b. Fleeing from a law enforcement officer in a motor vehicle.

for consent to search, the Council should ban MPD from asking for consent to search during routine traffic stops when there is no other reasonable articulable suspicion of criminal activity. In 2002, the New Jersey Supreme Court banned police from seeking consent to search lawfully stopped drivers or vehicles, for example drivers stopped for speeding, unless law enforcement had reasonable articulable suspicion of criminal wrong doing.[23] The Minnesota Supreme Court held that under the state constitution, police could not extend a valid traffic stop to request consent to search when the request was not supported by independent reasonable articulable suspicion.[24] Rhode Island legislated the same reform.[25] The Council should follow these precedents.

PDS also urges the Council to expand the reach of the Comprehensive Policing and Justice Amendment Act of 2020 through the enactment of a number of additional measures. Like the Virginia Assembly and the Virginia Senate, the Council should pass legislation that would limit the bases for what are often pretextual stops.[26] The Virginia Senate's bill prohibits stopping drivers for infractions that include failing to use a seatbelt, having broken head or tail lights, and violations of the state's window tint

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[23] State v. Carty, 170 N.J. 632, 790 A.2d 903 (N.J. 2002).

[24] *Minnesota v. Mustafaa Naji Fort*, 660 N.W.2d 415 (Minn. 2003).

[25] Rhode Island Statute § 31-21.2-5(b) "No operator or owner-passenger of a motor vehicle shall be requested to consent to a search by a law enforcement officer of his or her motor vehicle, that is stopped solely for a traffic violation, unless there exists reasonable suspicion or probable cause of criminal activity."

[26] Ned Oliver, *Virginia Lawmakers Pass Bill Limiting Pretextual Traffic Stops, Barring Searches Based on Smell of Marijuana*, Virginia Mercury, October 2, 2020. Available at: https://www.virginiamercury.com/2020/10/02/virginia-lawmakers-pass-bill-banning-pretextual-traffic-stops-and-searches-based-on-the-smell-of-marijuana/

requirements.[27] Instead, these infractions could only be cited if the driver is pulled over for another infraction.

Countless Black motorists in the District have been pulled over for window tinting that appears to be too dark.[28] A 2013 report of the Police Complaint Board found that 97% of police complaints about window tint were filed by African-American drivers and all but one of the 77 complaints received occurred east of Rock Creek Park. Each stop for an alleged window tint violation creates a potentially coercive police interaction that could be dangerous to the vehicle occupants. While the Council's passage of affirmative consent requirements may decrease MPD's incentive to initiate these stops, pretextual stops remain a legal way for police to harass Black residents and seek to bring charges against them. To rectify this the Council should, like Virginia, make tint violations only a secondary offense and to the extent that general equipment violations are a priority, it should delegate the enforcement of these regulations to the District Department of Transportation which could issue citations while also conducting checks of parked cars for residential parking permit violations, expired registrations, and meter violations.

Another meaningful step forward would be eliminating the ability of law enforcement officers to use an individual's presence in a "high crime area" as part of the legal calculus to support a *Terry* stop – meaning a stop and frisk of an individual.[29] While

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[27] Virginia Senate Bill 5029, available at: https://legiscan.com/VA/text/SB5029/2020/X1.

[28] A 2013 report of the Police Complaint Board found that 97% of police complaints about window tint were filed by African-American drivers and all but one of the 77 complaints received occurred east of Rock Creek Park. Available at: https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Window%20tint%20policy%20recommendation%20FINAL.pdf

[29] *Illinois v. Wardlow*, 528 U.S. 119 (2000).

presence in a "high crime area" alone cannot be the sole reason for a stop, it is one of various, typically subjective, factors that the court considers when determining whether a *Terry* stop is justified, including time of day[30], flight,[31] furtive gestures[32], and nervousness[33]. Though it is cited with astonishing frequency by officers as one reason for a *Terry* stop, neither the Supreme Court nor the District of Columbia Court of Appeals (DCCA) has precisely defined what constitutes a "high crime area." In one case, the DCCA upheld a denial of a suppression motion, in part, on the basis that the "Georgia Avenue corridor" was a "high everything" area.[34] Until changed by the Council, the justification of "high crime area" will continue to serve as a basis for stopping and frisking Black residents since "high crime" maps onto high policing, high arrest rates, poverty, and, most alarmingly, race.

The Council made an analogous change when it decriminalized the possession of small amounts of marijuana and prohibited law enforcement from using the odor of burnt marijuana and the possession of small amounts of marijuana from "individually or in combination with each other, constitut[ing] reasonable articulable suspicion of a crime."[35] The Council justified this law in large part on the basis of the discriminatory enforcement of marijuana laws against Black residents.[36] The same justification merits

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[30] *Henson, 55 A.3d 859 (D.C. 2012).*

[31] *Id.*

[32] *Jackson v. United States*, 56 A.3d 1206, 1210 (D.C. 2012) (discussing furtive gestures).

[33] *Singleton v. United States*, 998 A.2d 295, 301-02 (D.C. 2010).

[34] *James v. United States*, 829 A.2d 963, 964 (D.C. 2003).

[35] Marijuana Possession Decriminalization Amendment Act, D.C. Law 20-305, codified at D.C. Code § 48-921.02.

[36] From 2009 to 2011, nine out of ten individuals arrested in the District for possessory drug offenses were Black. Committee Report, D.C. Marijuana Possession Decriminalization Amendment Act. Available at: https://lims.dccouncil.us/downloads/LIMS/29565/Committee_Report/B20-0409-CommitteeReport1.pdf

adding a section (4) to D.C. Code 48-921.02a, prohibiting the consideration of: the defendant's presence in a high crime area.

As part of comprehensive reform, the Council should also address the District's arrest and citation release practices. Under current law, MPD has only narrow authority to perform "field arrests" which while called "arrests" do not involve taking an individual into custody at all. Instead, field arrests result in a ticket that requires the individual to appear at the MPD district at a later time to complete the booking process.[37] In addition to field arrests, MPD can also perform a citation release. With a citation release, an individual is seized and taken to an MPD district for processing but is then released with a summons to appear in court on a specific date at which time the prosecuting authority will make a charging decision. As with field arrests, the offenses eligible for citation release are too narrow and have standards that provide too much discretion to law enforcement about whether to utilize citation release or whether to perform a full arrest including detention and transport to court. Even the expanded citation release provisions in effect during the pandemic are too narrow and allow for arrest for offenses that do not pose any public safety risk. The murder of George Floyd, which was precipitated by an arrest for allegedly passing a bad check and which prompted the Council's consideration of comprehensive policing reform, should also be a clarion call for the District to reform the laws surrounding when and for which offenses the police can take physical custody of individuals.

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[37] D.C. Code § 23-584. The offenses that are currently eligible for field arrest are determined entirely by MPD. That list fails to include many commonly charged minor offenses like shop lifting.

Finally, PDS recommends reforming police interactions with youth under age 18 by taking a realistic and developmentally appropriate approach to interrogations. Rather than giving the same standard *Miranda*[38] warning to adults and to youth as young as age 10, the Council should require a more protective and youth-centered approach to any questioning of youth under age 18. Such legislation should require that MPD adequately warn the child about the implications of making any statement, give the child an opportunity to confer with counsel regarding any waiver of those rights, and provide the assistance of counsel for any waiver. No child under age 18 should waive the right to the presence of counsel during interrogation without first having the assistance of counsel in that decision.

PDS thanks the Council and the Judiciary Committee for its extensive efforts in aiming to create a more just and safer community through these reforms. PDS stands ready to assist the Council as this legislation moves forward.

[38] *Miranda v. Arizona*, 384 U.S. 436 (1966).

BEFORE THE
COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCILMEMBER CHARLES ALLEN, CHAIRMAN

PUBLIC HEARING
on

Bill 23-0723, the "Rioting Modernization Amendment Act of 2020"
Bill 23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020"
Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

STATEMENT OF ELANA SUTTENBERG
SPECIAL COUNSEL TO THE UNITED STATES ATTORNEY
UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA

Thursday, October 15, 2020, 9:00 a.m.

Virtual Hearing via Zoom

Chairman Allen and Members of the Council:

My name is Elana Suttenberg, and I am the Special Counsel for Legislative Affairs at the United States Attorney's Office for the District of Columbia. I thank you for the opportunity to appear today to share the Office's views regarding the proposed legislation.

As members of this community, we remain deeply disturbed by the death of George Floyd, and the circumstances surrounding his death. We support the fair and equitable treatment of individuals, regardless of race. In this time, we recommit ourselves to our duty as prosecutors—that is, to uphold the Constitution and the laws of the District of Columbia, and to serve justice for all. We support many of the goals of these bills, which include ensuring accountability for police misconduct, and we commend the Council for its role in furthering this goal.

Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

As to Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020," we have several concerns regarding proposals in this bill relating to body-worn camera (BWC) footage. First, the bill proposes prohibiting MPD members from reviewing their BWC recording or BWC recordings that have been shared with them to assist in initial report writing. It bears emphasizing that, before this same change was implemented by the Council's emergency legislation, MPD members were generally permitted to review their BWC recording or BWC recordings that had been shared with them to assist in initial report writing, but were precluded from reviewing their own BWC recording before writing an initial report *where a police shooting was involved*. As detailed in our June 8, 2020 letter to the Council regarding the emergency legislation, we support expanding that exception (that is, the preclusion of review) to encompass cases involving officer conduct that results in serious bodily injury or death, even where there is no firearm involved.

Our concerns, therefore, only apply to cases that do *not* involve a police shooting, or officer-involved death or serious bodily injury. These include homicides, sexual abuse, domestic violence, robberies, burglaries, assaults, and other violent crimes committed by civilians against other civilians.

Our primary objective is to ensure the accuracy of the initial police report. Particularly in less serious cases, where a detective may not be assigned, the initial police report is a crucial way to inform prosecutors, the defense, and judges about the facts of the case. Officer accuracy in report writing is paramount, and we are concerned about any change in law that could infringe on accuracy. Frequently, the language in the initial police report is the same language used in a

Gerstein affidavit filed in court or in an arrest or search warrant, upon which judges rely when making decisions that affect a person's liberty and privacy.[1]

Further, BWC footage may contain exculpatory material that is favorable to a defendant. This could include exculpatory statements made by civilian witnesses, exculpatory evidence captured on video, exculpatory suspects that could exonerate the accused, and misidentification of an arrestee. The law should encourage police to discover and capture exculpatory material at the earliest opportunity, and should not prohibit police from reviewing BWC footage where exculpatory material may exist.

Moreover, if officers are not permitted—outside of the context of officer conduct that results in serious bodily injury or death—to review BWC footage before writing a report, officers may be incentivized to write very brief initial reports that do not contain meaningful details, to the detriment of prosecutors seeking to make just charging decisions, defense counsel arguing probable cause and release conditions, and judges making probable cause and hold determinations.

Finally, the Police Executive Research Forum (PERF) clarified in a letter to this Committee that it continues to recommend that officers be allowed to view BWC recordings before writing an initial police report. We agree with PERF on this issue, and appreciate PERF resolving any ambiguity as to their current position.

Second, the bill proposes requiring the Mayor, within 5 business days after an officer-involved death or the serious use of force, to publicly release the names and BWC recordings of all officers who committed the officer-involved death or serious use of force, with certain exceptions. The Mayor would retain discretion to release other BWC recordings in matters of significant public interest.

We are concerned that this modification would, in fact, make it *more* difficult to investigate a serious officer-involved death or serious use of force. Such a result, of course, would be contrary to our shared goal of ensuring officer accountability for misconduct. Once the BWC footage is public, both the officer involved and any civilians involved would be able to watch it. The early publication of BWC could, in certain situations, create a narrative that makes it difficult to conduct an investigation, as it may lead witnesses to a conclusion that affects their testimony, or otherwise influence witness testimony. In our June 8, 2020 letter to the Council, we expressed concern about the initial proposal that BWC footage must be released 72 hours following an incident. This proposal has now been modified to mandate release after 5 business days, rather than 72 hours. Although 5 business days could allow for more investigation than 72 hours, it would still be very difficult for our office to conduct a full investigation within 5

[1] A *Gerstein* affidavit, which is sworn to by a law enforcement officer, is a document filed in court setting forth the facts of a cases that provides a basis for the judicial finding of probable cause. A judicial finding of probable cause is required for pretrial detention.

business days, as a full investigation could include all relevant parties, including involved civilians, testifying before the grand jury.

Because there are situations where it could be appropriate for the Mayor, in consultation with the relevant agencies, to release BWC footage, the Mayor should have discretion to release BWC footage at an appropriate time, balancing the needs of the community to see the footage with the needs of prosecutors to accurately investigate what happened, and the security and privacy rights of civilian witnesses who may be depicted in the footage.

Bill 23-0723, the "Rioting Modernization Amendment Act of 2020"

As to Bill 23-0723, the "Rioting Modernization Amendment Act of 2020," we agree in principle with what we understand the Judiciary Committee Chairman's goal to be in proposing an amendment to the rioting statute: to clarify the current statute so that it is clear to all and to ensure that it provides for public safety by appropriately capturing rioting versus otherwise protected conduct. We have several concerns, however, with this amended offense as drafted.

Under current law, a "riot" is "a public disturbance involving an assemblage of 5 or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger or injury to property or persons." D.C. Code § 22-1322(a). A person can be liable for the offense of rioting either for "willfully engag[ing] in a riot" or for "willfully incit[ing] or urg[ing] other persons to engage in a riot." D.C. Code §§ 22-1322(b) and (c).

Further, under current law, a riot is a group activity, and the presence of a "riot" must first be established. The subsequent question of whether a particular person is "engaging" in a riot is an individualized determination. Courts have upheld a wide range of behavior as "engaging" in a riot. In *Matthews v. United States*, 419 F.2d 1177 (D.C. Cir. 1969), the Court of Appeals for the D.C. Circuit held that a defendant who took liquor from a liquor store during a riot was deemed to have engaged in the riot. In *Carr v. District of Columbia*, 587 F.3d 401, 406 (D.C. Cir. 2009), the D.C. Circuit stated that "if members of the crowd were cheering acts of violence committed by other marchers, they would be engaging in criminal conduct" under the rioting statute.

The proposed bill would modify the rioting statute to create liability for rioting where 10 or more people are each committing or attempting to commit a specified criminal offense in the area perceptible to one another. By changing the law in this manner, it would be more difficult to establish both that a riot exists and that an individual is engaging in a riot—even under circumstances where most members of our community would agree that the conduct at issue constituted rioting.

This is the case because the bill would change the offense of rioting by making rioting liability contingent upon each individual's criminal or attempted criminal conduct, rather than contingent upon each individual's willful participation in the group activity. In other words, to

prove rioting under this bill, we would first have to prove that the defendant engaged in the underlying criminal conduct (for example, an assault, destruction of property, etc.), and then also prove that nine (9) other individuals engaged in underlying criminal conduct in the area perceptible to one another. Because this rioting bill provides the same maximum penalty as the penalty for much of the underlying criminal conduct on which the amended offense would rely, and creates additional elements to prove, there would be little incentive for prosecutors to charge a defendant with the offense of rioting. Rather, where appropriate, prosecutors likely would charge the defendant only with the underlying criminal conduct, such as assault or destruction of property.

Further, this proposal would remove liability for inciting or urging others to engage in a riot. This means that a person who organizes and coordinates a violent riot, but does not physically participate in it, would have no liability under this provision. Although other theories of accomplice liability could potentially apply, we believe that specific provisions for inciting a riot are warranted. Dispensing with specifically enumerated criminal liability for inciting others to riot will create gaps in the ability of law enforcement to address situations where a person or persons are actively encouraging others toward criminal behavior, and may reduce law enforcement's ability to thwart such rioting behavior before it even begins.

Moreover, this proposal limits rioting to a misdemeanor offense, and eliminates a felony gradation of rioting. Under current law, felony liability attaches where, "in the course and as a result of a riot[,] a person suffers serious bodily harm or there is property damage in excess of $5,000." D.C. Code § 22-1322(d). We recommend that the rioting statute maintain felony liability based on the level of bodily harm or the amount of property damage incurred.

Finally, the bill appears to use some language from the draft recommendations of the Criminal Code Reform Commission (CCRC). Without the context of the CCRC's full recommendations, however, this language creates gaps in liability. For example, the bill references "a criminal offense that causes or would cause . . . [b]odily injury." Under the CCRC's recommendations, the corollary offense to simple assault would require "bodily injury." Under current law, by contrast, simple assault does *not* require bodily injury as an element of the offense, *see* D.C. Code § 22-404(a)(1), although felony versions of assault do require various levels of bodily injury, *see* D.C. Code § 22-404(a)(2) (assault with significant bodily injury); D.C. Code § 22-404.10 (aggravated assault, which requires serious bodily injury). Because simple assault under current law does not require "bodily injury" as an element of the offense, simple assault would not constitute "a criminal offense that causes or would cause . . . bodily injury" under this bill. Thus, under this bill as drafted, a defendant who commits simple assault would not be liable for rioting—a result that we do not believe would be intended by the drafters.

* * *

The U.S. Attorney's Office for the District of Columbia looks forward to continuing to work with the Council, the community, and other stakeholders to ensure that our laws are just and equitable.

U.S. Department of Justice

Michael R. Sherwin
Acting United States Attorney

District of Columbia

Judiciary Center
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October 14, 2020

The Honorable Charles Allen
Chairman
Committee on the Judiciary and Public Safety
Council of the District of Columbia

Dear Chairman Allen,

In anticipation of the October 15, 2020, public hearing before the Committee on the Judiciary and Public Safety, your office inquired of the U.S. Attorney's Office for the District of Columbia (USAO) as to the number of arrests from 2015–2020 for violations of the following offenses and the charging decisions in those cases. Below please find the following information responsive to your request. We are providing this information with the caveat that our case management system, which is supplied in part with data from external partners, may not capture every instance in which these charges were presented to us or in which we filed charges.

1. D.C. Code §§ 22-1322(b) (Rioting), 22-1322(c) (Inciting to Riot), and 22-1322(d) (Felony Rioting)

The below chart represents arrests presented to USAO for violations of D.C. Code §§ 22-1322(b), 1322(c), and 1322(d). "Papered case" means that USAO papered an offense based on that arrest, which could be the same offense as the arrest charge, or which could be a different offense from the arrest charge. "No papered case" means that USAO did not paper an offense based on that arrest. "RIP cases" are papered cases processed under USAO's Rapid Indictment Program.

	2015	2016	2017	2018	2019	2020	TOTAL
Arrests	2	5	230	2	0	111	350
Papered Cases	2	0	230	0	0	46	278
No Papered Cases	0	0	0	0	0	65	65
RIP Cases	0	0	0	0	0	0	0
TOTAL	2	0	230	0	0	111	343

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 22-1322(b), regardless of the arrest charge.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	2	0	193	0	0	3	198

Our case management system does not track charges for violations of D.C. Code § 22-1322(c), so we are unable to provide information about the number of separate USAO charges for violations of D.C. Code § 22-1322(c).

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 22-1322(d), regardless of the arrest charge. There are more total charges for both felony and misdemeanor rioting than there are arrests for rioting because, in some instances, USAO charged both felony rioting and misdemeanor rioting.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	0	0	234	0	0	1	235

2. D.C. Code § 22-3312.03 (Wearing hoods or masks)

The below chart represents arrests presented to USAO for violations of D.C. Code § 22-3312.03. "Papered case" means that USAO papered an offense based on that arrest, which could be the same offense as the arrest charge, or which could be a different offense from the arrest charge. "No papered case" means that USAO did not paper an offense based on that arrest. "RIP cases" are papered cases processed under USAO's Rapid Indictment Program.

	2015	2016	2017	2018	2019	2020	TOTAL
Arrests	1	6	8	7	7	4	33
Papered Cases	0	3	5	2	5	2	17
No Papered Cases	1	0	3	2	1	2	9
RIP Cases	0	1	0	1	0	0	2
TOTAL	1	4	8	5	6	4	28

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 22-3312.03, regardless of the arrest charge.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	4	1	0	1	3	0	9

3. D.C. Code § 5-115.03 (Neglect to make arrest for offense committed in presence)

The below chart represents arrests presented to USAO for violations of D.C. Code § 5-115.03.

	2015	2016	2017	2018	2019	2020	TOTAL
Arrests	0	0	0	0	0	0	0
Papered Cases	0	0	0	0	0	0	0
No Papered Cases	0	0	0	0	0	0	0
RIP Cases	0	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0	0

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 5-115.03, regardless of the arrest charge.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	0	0	0	0	0	0	0

4. D.C. Code § 22-405 (Assault on member of police force, campus or university special police, or fire department)

The below chart represents arrests presented to USAO for violations of D.C. Code § 22-405. "Papered case" means that USAO papered an offense based on that arrest, which could be the same offense as the arrest charge, or which could be a different offense from the arrest charge. "No papered case" means that USAO did not paper an offense based on that arrest. "RIP cases" are papered cases processed under USAO's Rapid Indictment Program. There are more

papered/no papered cases than there are arrests because, in certain situations, more than one case was papered based on a single arrest.

	2015	2016	2017	2018	2019	2020	TOTAL
Arrests	**784**	**1175**	**864**	**818**	**842**	**607**	**5090**
Papered Cases	**551**	**887**	**649**	**594**	**590**	**456**	**3727**
No Papered Cases	**234**	**284**	**251**	**225**	**270**	**137**	**1401**
RIP Cases	**42**	**68**	**32**	**44**	**42**	**15**	**243**
TOTAL	**827**	**1239**	**932**	**863**	**902**	**608**	**5371**

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 22-405(b), regardless of the arrest charge.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	**745**	**514**	**135**	**24**	**24**	**133**	**1575**

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 22-405(c), regardless of the arrest charge.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	**49**	**65**	**36**	**48**	**32**	**21**	**251**

5. D.C. Code § 22-407 (Threats to do bodily harm), D.C. Code § 22-405.01 (Resisting arrest), and D.C. Code § 22-404(a)(1) (Simple assault), but only for those cases where the victim-complainant is a law enforcement officer, if your data system can easily sort out those cases.

As anticipated in the inquiry, our case management system is unable to easily sort out these cases, so we are not able to provide information responsive to this request.

We hope this information is helpful to you and the Committee on the Judiciary and Public Safety.

Sincerely,

Elana Suttenberg
Special Counsel for Legislative Affairs
United States Attorney's Office
for the District of Columbia