

TRANSFORMING THE SYSTEM



CREATING FAIR AND EFFECTIVE

Policing Practices

To work for all of us, policing practices should ensure equal justice and be supported by evidence. Nonetheless, some police departments have a history of policing in inequitable ways that frequently alienate and actively harm low-income communities and communities of color, relying upon practices that have questionable effectiveness at decreasing crime⁸¹ and proven effectiveness at alienating communities. The rise of the Movement for Black Lives and Black Lives Matter and the spate of police-involved shootings demonstrate that the need for police reforms that foster positive community and police relations is critical.

Police officers should strive to reduce and prevent crime, while respecting the rights of the communities they aim to serve.⁸² This is what increases community safety. Fair and effective policing practices also promote officer safety by fostering positive relationships with the community and allowing for a collaborative approach to policing.⁸³ An approach that encourages positive community relations should be a priority.

Federal and local governments should take affirmative steps to ensure that police adhere to practices that are data-driven, fair, and effective, eliminate racial disparities and profiling in policing, incentivize data-supported methods, and encourage officer accountability.

Evidence-backed policing practices that promote safe communities should be rewarded and incentivized. Currently, many police departments evaluate police officers with volume-based measures, which encourage police officers to meet informal or formal arrest quotas.⁸⁴ These

81 See Anthony A. Braga & Brenda J. Bond, *Policing crime and disorder hot spots: A randomized controlled trial*, 46 *Criminology* 577, 579 (2008) (“[G]iven the strong influence of broken windows on the policing field, remarkably little solid research evidence is found on the crime-control benefits of policing disorder.”).

82 See *Talking About Policing Issues*, The Opportunity Agenda (Jan. 2016), https://opportunityagenda.org/files/field_file/2016.02.03%20-%20Talking%20Policing%20Issues%20-%20FINAL.pdf (accessed 25 July 2016); *Talking About Policing Issues: Border Communities*, The Opportunity Agenda (Feb. 2016), https://opportunityagenda.org/files/field_file/2016%20Policing%20and%20Border%20Communities.pdf

83 This approach is frequently described as “community policing.” Gary Cordner, *Community Policing*, *The Oxford Handbook of Police and Policing* 148 (2014) (acknowledging that community policing has a very fluid definition and has been interpreted very differently across jurisdictions). To the extent that it is a form of policing committed to improving community relationships and promoting democracy, it may be consistent with promoting fair policing practices.

84 See Coke, *supra* note 401, at 21.

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quotas promote criminalization for minor misconduct when alternative diversion⁸⁵ programs may be more suitable.⁸⁶

Policing practices should instead incentivize transparency and focus on diversion and alternative forms of policing that de-emphasize criminalization in line with a federal and local commitment to eliminate mass incarceration.⁸⁷

Adopting a human rights approach to policing

Policing should be fair and consistent with human rights values.⁸⁸ Police departments should strive for positive community relationships. Images of militarized police fueled community outrage about abusive police practices and encouraged the perception that police considered the community its “enemy” during public protests. This perception is unhealthy, and police should aim to eliminate the harms of an unnecessarily militarized police force. Police departments should eliminate militarized tactics that decrease their legitimacy in the communities they serve.⁸⁹

Furthermore, police practices should explicitly seek to eliminate racial bias and disparate treatment of individuals and communities.⁹⁰ There has been substantial research demonstrating that implicit bias infuses all parts of our everyday interactions.⁹¹ Consequently, it is important to critically examine our biases and reduce their impact on our ordinary interactions. This is especially the case for police officers because they maintain close community relationships, and for their own safety and the safety of the community must ensure that these relationships are positive. There should be regular, thorough training to sensitize police to implicit biases as well as explicit bans on racial profiling in police department policies and manuals.

85 See Center for Health & Justice at TASC, *A National Survey of Criminal Justice Diversion Programs and Initiatives 4* (Dec. 2013) [hereinafter CHJ], at 6.

86 See Coke, *supra* note 401, at 21; and CHJ, *supra* note 84, at 6.

87 See generally CHJ, *supra* note 84.

88 See Chandra Bhatnagar, American Civil Liberties Union & Rights Working Group, *The Persistence of Racial and Ethnic Profiling in the United States A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination*, (August 2009) (discussing racial profiling in the United States and the nation's failure to fully comply with the International Convention on the Elimination of All Forms of Racial Discrimination).

89 Zoe Mentel, U.S. Department of Justice, Office of Community Oriented Policing Services, *Racial Reconciliation, Truth-Telling, and Police Legitimacy* (2012).

90 See generally The Center for Popular Democracy, *Building Momentum from the Group Up: A Toolkit for Promoting Justice in Policing 5* (June 2015) [hereinafter CPD] (“Police and prisons have become the government’s answer to nearly every social problem in low income communities of color. The criminalization of poverty, mental illness, perceived anti-social behavior, and drug addiction has led to mass incarceration.”).

91 A large body of research explores the nature of “implicit bias,” unconscious attitudes that are presumably shaped in part by media consumption. Experiment after experiment demonstrates that white Americans tend to have unconscious biases against African Americans. For instance, whites tend to more easily associate negative words such as terrible, failure, horrible, evil, agony, nasty, and awful with unknown black faces, as opposed to white faces. To a lesser degree blacks too tend to show this bias against unknown faces of their own race.

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The **Congress, and state and local legislatures**, should pass legislation that:

- ▶ Prohibits profiling practices, which include the profiling of individuals due to race, religion, sex, gender, gender identity/expression, age, housing status, sexual orientation, HIV status, ethnicity, sexuality, immigration status, national origin,⁹² and religious affiliation;⁹³
- ▶ Requires officer trainings on the best practices and principles of engaging with community members of different genders,⁹⁴ sexualities, and races;
- ▶ Requires officer trainings on implicit bias and the value of incorporating human rights practices into policing;⁹⁵
- ▶ “Requires current and prospective police officers to undergo mandatory implicit racial bias testing, including **testing for bias in shoot/don’t shoot decision-making**, and develop a clear policy for considering an officer’s level of racial bias in:
 - ▶ law enforcement certification
 - ▶ the hiring process
 - ▶ performance evaluations
 - ▶ decisions about whether an officer should be deployed to communities of color”;⁹⁶
- ▶ Prohibits the local policing of immigration matters;⁹⁷

92 See CPD, *supra* note 89, at 20. See also Coke, *supra* note 401, at 21.

93 For more information concerning the impact of programs that call for the blanket profiling of the Muslim community, see Muslim American Civil Liberties Coalition: CUNY’s Creating Law Enforcement Accountability & Responsibility; Asian American Legal Defense and Education Fund; *Mapping Muslims: NYPD Spying and Its Impact on Muslim Americans 4* (2013). (“[S]urveillance of Muslims’ quotidian activities has created a pervasive climate of fear and suspicion, encroaching upon every aspect of individual and community life. Surveillance has chilled constitutionally protected rights—curtailing religious practice, censoring speech, and stunting political organizing.”)

94 National Coalition of Anti-violence Programs (NCAVP), *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-infected Hate Violence in 2012* (2013). (“Transgender people were 3.32 times as likely to experience police violence compared to cisgender survivors and victims. Transgender people were 2.46 times as likely to experience physical violence when interacting with the police compared to cisgender survivors and victims. Transgender communities’ experience of discriminatory and violent policing can be a barrier to accessing emergency support in the aftermath of violence, placing transgender people at greater risk when they do experience violence.”)

95 See *e.g.*, *Training*, Campaign Zero, <http://www.joincampaignzero.org/solutions/#train> (accessed 7 July 2016); Coke, *supra* note 87, at 21.

96 *Training*, Campaign Zero, <http://www.joincampaignzero.org/train> (accessed 27 June 2016).

97 See Annie J. Wang and Juhu Thukral, Opportunity Agenda, *Focus on Opportunity: Immigration Policy Solutions*, 5 (May 2012).

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- ▶ Adopts performance metrics that evaluate police officers based on data that documents demographic information and evaluates officers' tendency for profiling practices.
- ▶ Our Communications Institute Fellow Philip Atiba Goff has written extensively on implicit bias trainings and working with police department to effectuate reforms.⁹⁸

The **Department of Justice** should:

- ▶ Require that law enforcement agencies provide disaggregated demographic data on police interactions with individuals and communities in all funding applications, including data on searches, stops, frisks, searches, summonses, tickets, arrests, and complaints;⁹⁹
- ▶ Require that law enforcement agencies seeking funding have policies that explicitly ban biased policing and profiling and provide trainings on reducing officer reliance on profiling;¹⁰⁰ and
- ▶ Implement the recommendations of the Law Enforcement Equipment Working Group, including recalling federally funded military weapons from local police departments.¹⁰¹

98 See e.g., Philip Atiba Goff & M. C. Jackson. "Ain't I A Woman: Towards An Intersectional Approach To Person Perception And Group-Based Harms," 59 *Sex Roles* 392 (2008); Philip Atiba Goff, et al., "Not Yet Human: Implicit Knowledge, Historical Dehumanization, And Contemporary Consequences," 94 *J. of Personality and Social Psych.* 292 (2008); Philip Atiba Goff, et al., "The Space Between Us: Stereotype Threat And Distance In Interracial Contexts," 94 *J. of Personality and Social Psych.* 91 (2008); Philip Atiba Goff, et al., "Concern for the In-Group and Opposition to Affirmative Action," 90 *J. of Personality and Social Psych.* 961 (2006);.

99 See generally, Tanya E. Coke, National Association of Criminal Defense Attorneys, *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System* 30 (2013), http://www.ushrnetwork.org/sites/ushrnetwork.org/files/2013_racial_disparity_report.pdf; and *Training*, Campaign Zero, <http://www.joincampaignzero.org/train> (accessed 27 June 2016).

100 See End Racial Profiling Act of 2015, H.R. 1933, 114th Cong. (2015); see also Chandra Bhatnagar, American Civil Liberties Union & Rights Working Group, *The Persistence of Racial and Ethnic Profiling in the United States: A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination* (August 2009) (discussing racial profiling in the United States and the nation's failure to fully comply with the International Convention on the Elimination of All Forms of Racial Discrimination).

101 Law Enforcement Equipment Working Group, Recommendations Pursuant to Executive Order 13688, Federal Support for Local Law Enforcement Equipment Acquisition, https://www.whitehouse.gov/sites/default/files/docs/le_equipment_wg_final_report_final.pdf, (accessed 7 July 2017); and Implementation of Recommendations, Federal Support for Local Law Enforcement Acquisition (October 1, 2015), <https://www.bja.gov/programs/LEEWG-Implementation-Plan.pdf>. See also *Training*, Campaign Zero, <http://www.joincampaignzero.org/train> (accessed 27 June 2016). ("The events in Ferguson have introduced the nation to the ways that local police departments can misuse military weaponry to intimidate and repress communities. Last year alone, militarized SWAT teams killed at least 38 people."), <http://www.joincampaignzero.org/solutions/#train>. See also CPD, supra note 89, at 40-41.

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Congress should:

- ▶ Severely limit the transfer and use of military equipment to local law enforcement;
- ▶ Adopt and implement the Stop Militarizing Law Enforcement Act of 2015, H.R. 1232,¹⁰² which has been introduced to the House and prohibits the transfer by the Department of Defense of military equipment that is not suitable for law enforcement purposes; and
- ▶ Create a mechanism for investigating complaints and issuing sanctions regarding inappropriate use of equipment and tactics during mass demonstrations.

Law enforcement agencies, including local and state police departments and sheriff's offices, should create policies that do the following:

- ▶ Train all police officers on appropriate community interactions and de-escalation tactics;¹⁰³
- ▶ Ensure that police officers employ the practice of explaining to residents what they are doing whenever they act, particularly during an encounter that has occurred as a result of the initiative of the police officer, and especially when communities of color or their members are the target;¹⁰⁴
- ▶ Require that police officers in supervisory roles emphasize protection of human rights by words and actions, leading by example and not tolerating denigrating language or racial/ethnic insensitivities;¹⁰⁵
- ▶ Create early warning systems for detecting patterns of behavior, such as complaints filed against officers or personal hardships like divorce, which indicate potential vulnerabilities for the officer and the department. The primary purpose of such systems is not to punish but to provide counseling to officers so as to reduce their level of risk as well as risk to residents and communities;¹⁰⁶

102 Stop Militarizing Law Enforcement Act of 2015, H.R. 1232.

103 *Final Report of the President's Task Force on 21st Century Policing* 85 (May 2015).

104 *Ibid.*

105 *Ibid.*

106 *Ibid.*

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- ▶ Improve the overall effectiveness of internal affairs divisions by having policing administrators routinely examine their disciplinary procedures;¹⁰⁷
- ▶ Prohibit the interrogation of individuals with mental health issues and children under the age of 18 without a legal guardian or counsel present;
- ▶ Encourage police officers to release people accused of less serious actions, issuing warnings instead of immediately turning to arrest;¹⁰⁸
- ▶ Establish robust pre-booking diversion programs, such as programs that divert individuals to mental health providers, housing referral programs, and drug treatment programs;¹⁰⁹
- ▶ Train police officers to determine when diversion is appropriate and reward police officers who divert individuals from jail;
- ▶ Encourage referral to external mental health programs where appropriate;¹¹⁰
- ▶ Eliminate volume-based performance metrics for police, which may create informal and/or formal arrest quotas;¹¹¹
- ▶ Thoroughly train police on the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement** and require them to following these guidelines;¹¹²
- ▶ Strongly discourage the use of force against pregnant women and children;
- ▶ Eliminate surveillance of communities based on stereotypes, such as an NYPD program that infiltrated and engaged in surveillance of the Muslim community in New York City solely because of their religion;¹¹³

107 Ibid.

108 Ibid.

109 See Hallie Ryan, Lawyers' Committee for Civil Rights Under Law, *Unequal Justice: Mobilizing the Private Bar to Fight Mass Incarceration* 58 (April 2015); Department of Justice, *Smart on Crime: Reforming the Criminal Justice System for the 21st Century* (August 2013); Tanya Coke, National Association of Criminal Defense Attorneys, *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System* 3 (2013).

110 Marlee E. Moore & Virginia Aldigé Hiday, "Mental Health Court Outcomes: A Comparison of Re-arrest and Re-arrest Severity between Mental Health Court and Traditional Court Participants," 30 *Law and Human Behavior* 659 (2006).

111 Chettiar, et al., *supra* note 37, at 30.

112 Department of Justice, "Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence" (2015).

113 Compare *Raza et al. v. City of New York et al.*, No. 1:2013cv03448—Document 28 (E.D.N.Y. 2013) (alleging that the NYPD "engaged in an unlawful policy and practice of religious profiling and suspicionless surveillance of Muslim New Yorkers").

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- ▶ Emphasize the importance of avoiding offensive or harsh language in the field to avoid escalation of minor situations, and adopt policies directing officers to speak to individuals with respect.

Adopting policing approaches that promote police legitimacy and community trust

George L. Kelling and James Q. Wilson popularized the controversial strategy known as “broken windows policing” in a 1982 piece in the *Atlantic Monthly*, where they theorized that the policing of “public disorders,” such as loitering and nuisance offenses, reduces the incidence of serious and violent crimes.¹¹⁴ Disorder policing approaches range from highly aggressive order maintenance strategies, including misdemeanor arrests and stop-question-frisks, to problem-oriented and community-coordination strategies. This style of policing has been widely adopted although the data on its efficacy is mixed.¹¹⁵ For example, “after reviewing a series of evaluations on the role disorder policing may have played in New York City’s crime drop during the 1990s, the National Research Council’s Committee to Review Police Policy and Practices concluded that these studies did not provide clear evidence of effectiveness.”¹¹⁶

This strategy is highly controversial because it has at times been used as a method for surveilling communities of color, fostering community mistrust of law enforcement,¹¹⁷ and encouraging racial profiling. A 2015 systemic review and meta-analysis of police disorder programs highlights the weaknesses of broken windows policing:

Aggressive order maintenance strategies that target individual disorderly behaviors do not generate significant crime reductions. In contrast, community problem-solving approaches that seek to change social and physical disorder conditions at particular places produce significant crime reductions. These findings suggest that, when considering a policing disorder approach, police departments should adopt a “community

114 James Q. Wilson & George L. Kelling, “Broken Windows,” 249 *Atlantic Monthly* 29 (1982).

115 Anthony A. Braga & Brenda J. Bond, “Policing crime and disorder hot spots: A randomized controlled trial,” 46 *Criminology* 577, 579 (2008) (noting the lack of strong empirical support for broken windows policing as a blanket policy).

116 Anthony A. Braga et al., “Can policing disorder reduce crime? A systematic review and meta-analysis,” 52 *Journal of Research in Crime and Delinquency* 567, 568 (2015).

117 Tom R. Tyler & Jeffrey Fagan, “The impact of Stop and Frisk policies upon police legitimacy,” in Nancy La Vigne et al., Urban Institute, *Key Issues in the Police Use of Pedestrian Stops and Searches* 30 (2012).

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coproduction model” rather than drift toward a zero-tolerance policing model, which focuses on a subset of social incivilities, such as drunken people, rowdy teens, and street vagrants, and seeks to remove them from the street via arrest. In devising and implementing appropriate strategies to deal with a full range of disorder problems, police must rely on citizens, city agencies, and others in numerous ways. A sole commitment to increasing misdemeanor arrests stands a good chance to undermine relationships in low-income, urban communities of color, where coproduction is most needed and distrust between the police and citizens is most profound.¹¹⁸

“Broken windows” policing should not be adopted; instead, policing should enhance the community space rather than systematically target individuals who live in a particular neighborhood.¹¹⁹ For example, securing abandoned buildings, lighting dark passages, and fostering a cooperative relationship with the community in crime hot spots has actually been proven to be more effective at reducing crime than harsh policies that marginalize communities, such as stop and frisk and zero tolerance.¹²⁰ Aggressive policing tactics have minimal impact on reducing crime but tremendous impact on reducing police legitimacy and community trust. In fact, the Office of Inspector General for the NYPD found that issuing summonses did not reduce crime, finding “no empirical evidence demonstrating a clear and direct link between an increase in summons and misdemeanor arrest activity and a related drop in felony crime.”¹²¹

Law enforcement agencies and police departments should:

- ▶ Rely upon collaborative approaches that respect the dignity of individuals within the community, focus on problem-solving, and are generally more community-centered and build community trust. Tactics might include relying upon the use of structural and environment strategies to reduce crimes, such as adding lighting in hot spot areas, securing abandoned buildings, and building partnerships with community members to

118 Ibid. at 581.

119 Anthony A. Braga et al., “Can policing disorder reduce crime? A systematic review and meta-analysis,” *52 Journal of Research in Crime and Delinquency* 567, 568 (2015).

120 Ibid.

121 New York City Department of Investigation Office of the Inspector General for the NYPD (OIG-NYPD), *An Analysis of Quality-of-Life Summonses, Quality-of-Life Misdemeanor Arrests, and Felony Crime in New York City, 2010-2015* (2016), http://www.nyc.gov/html/doi/downloads/pdf/2016/Jun16/pr18oignypd_qualityoflife_report_62216.pdf.

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address specific crimes. The widespread and systematic use of increasing police-civilian encounters through stop, frisk, and questioning, misdemeanor arrests, and summonses for less serious offenses should be prohibited;

- ▶ Seek community input to determine appropriate policing strategies and tactics; and
- ▶ Ban tactics that rely on aggressive policing tactics, including the stopping, questioning, and frisking of individuals, systematic arrests for less serious crimes, and the questioning of individuals because of their physical location at the time of questioning.¹²²

Establishing a national “use of force” guidelines

Use of excessive force erodes public confidence in the police, decreases legitimacy, and gives the impression that police view themselves as above accountability. “[U]se of force by law enforcement officials should be exceptional.”¹²³ Accordingly, strong standardized “use of force” policies that are infused into police culture through adequate training, monitoring, and accountability should be adopted. A national standard for use of force with a standard policy and protocol should aim to greatly reduce instances of excessive force.

To this end, **Congress and the Department of Justice** should:

- ▶ Adopt clear and comprehensive¹²⁴ use of force policies, which should include training that emphasizes de-escalation, proper use of equipment and weapons, and respect for gender identification. Moreover, these policies should prohibit the use of racial profiling and incorporate performance measures and investigations (internal and external) of officer-related use of force (particularly shootings and in-custody deaths);
- ▶ Establish a National Use of Force Handbook that outlines recommendations that ensure compliance with constitutional and statutory obligations, encourages community

122 Anthony A. Braga et al., “Can policing disorder reduce crime? A systematic review and meta-analysis,” 52 *Journal of Research in Crime and Delinquency* 567, 568 (2015). See also American Civil Liberties Union of New Jersey, “Selective Policing: Racially Disparate Enforcement of Low-Level Offenses in New Jersey” (2015). (“The study data revealed a clear pattern of Black and Hispanic/Latino communities disproportionately bearing the brunt of policing practices that focus on a strict enforcement of low-level offenses.”)

123 United Nations Human Rights Office of the High Commissioner, *Code of Conduct for Law Enforcement Officials*, Adopted by General Assembly resolution 34/169 of 17 December 1979, Art. 3 Commentary.

124 See CPD, *supra* note 89, at 43.

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legitimacy, and requires that applicants for federal funds comply with these guidelines. The recommendations must be consistent with the Police Executive Research Forum Use of Force Principles;¹²⁵

- ▶ Require that police departments that receive federal funds conduct non-punitive peer reviews of incidents involving use of force, separate from criminal and administrative investigations. For example, following each incident of force, police peers should review the incidents and provide feedback to the officer involved in the incident. To foster honest critique, this feedback should not be punitive.

Local governments and police departments should ensure that:

- ▶ Police are thoroughly trained on the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement**¹²⁶ and required to follow the guidelines, which include provisions on policing individuals with various gender expressions and responding to domestic disputes;
- ▶ Police leadership strongly discourage the use of force against pregnant women and children, creating clear and objective standards for the very rare situations in which it may be allowed; and
- ▶ Improve management by creating a Use of Force Management Institute for police leaders and a Use of Force Management publication for city officials.¹²⁷

Further, **law enforcement agencies** should adopt the Use of Force principles recommended by the Police Executive Research Forum.¹²⁸ These principles include:

- ▶ Placing the “sanctity of human life” at the heart of the agency’s work;

¹²⁵ Police Executive Research Forum, *Guiding Principles on the Use of Force* (Jan. 29, 2016).

¹²⁶ Department of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence* (2015).

¹²⁷ *Emerging Use of Force Issues: Balancing Public and Officer Safety*, Report from the International Association of Chiefs of Police/COPS Office Use of Force Symposium 8–9 (May 2012).

¹²⁸ Police Executive Research Forum, *Guiding Principles on the Use of Force* (Jan. 29, 2016).

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- ▶ Adopting policies that require reasonableness and proportionality;
- ▶ Formally adopting de-escalation as an agency policy;
- ▶ Adopting a Critical Decision-Making Model, which requires officers to quickly collect information, assess threats, consider agency policy, and adopt options that allow for the best course of action, and reassessment;
- ▶ Requiring officers to intervene to prevent other officers from using excessive force;
- ▶ Requiring officers to promptly provide medical assistance to injured persons;
- ▶ Banning shooting at vehicles;
- ▶ Prohibiting the use of deadly force on persons who pose a danger only to themselves;
- ▶ Documenting use of force incidents and ensuring that the practices are non-discriminatory;
- ▶ Ensuring that use of force incidents resulting in serious bodily harm or death are reviewed by specially trained personnel;
- ▶ Ensuring transparency in practices;
- ▶ Ensuring that the training academy reflects these values;
- ▶ Replacing unproven and ineffective force guidelines, such as the “21 foot rule” and “drawing a line in the sand,” with effective guidelines to reduce the use of force, such as “Distance, Cover, and Time”;¹²⁹
- ▶ Ensuring that there is substantial scenario-based training, which challenges officers and reflects real-world circumstances;
- ▶ Mandating comprehensive training for interacting with individuals who have mental health issues;
- ▶ Requiring public education that teaches communities how to communicate with the police about individuals with mental health issues.

129 Police Executive Research Forum, Use of Force: Taking Policing to a Higher Standard, 30 Guiding Principles Standard (Jan. 29, 2016).

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Ensuring that police union contracts promote fairness

Unions have played a significant role in improving work conditions and ensuring that civil servants are paid fair wages; they have been critical in contributing to the growth of the middle class in the United States.

However, given the unique role that police play in society as beneficiaries of the legal authority to use force to enforce the law, the police have a special responsibility to maintain community relationships that promote legitimacy. Contracts between municipal bodies and police unions must not only acknowledge this special role, but also foster police compliance with civil rights and human rights standards to ensure that these contracts are valid in both the constitutional sense and the community accountability sense.

To this end, **state legislatures** should pass legislation to promote accountability in policing, including in police union contracts, that:

- ▶ Requires police departments to retain the personnel files of police officers who have been investigated for excessive force and/or deadly force;¹³⁰
- ▶ Requires civilian review for instances in which officers have been accused of improperly using deadly and/or excessive force;¹³¹
- ▶ Permit mayors to terminate police officers for gross misconduct, including multiple excessive force investigations;¹³²
- ▶ Voids union contract provisions that are inconsistent with the legislation;¹³³
- ▶ “Removes barriers to effective misconduct investigations and civilian oversight, including allowing officers to wait 48 hours or more before being interrogated after an incident, and other barriers that:

130 *Final Report of the President's Task Force on 21st Century Policing* 85 (May 2015).

131 *See Ibid.*

132 *See Ibid.*

133 *See Ibid.*

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- ▶ Prevent investigators from pursuing other cases of misconduct revealed during an investigation;
- ▶ Prevent an officer's name or picture from being released to the public;
- ▶ Prohibit civilians from having the power to discipline, subpoena or interrogate police officers;
- ▶ State that the Police Chief has the sole authority to discipline police officers;
- ▶ Enable officers to appeal a disciplinary decision to a hearing board of other police officers;
- ▶ Prevent an officer from being investigated for an incident that happened 100 or more days prior;
- ▶ Allow an officer to choose not to take a lie detector test without being punished, require the civilian who is accusing that officer of misconduct to pass a lie detector first, or prevent the officer's test results from being considered as evidence of misconduct."¹³⁴

Promoting accountability

Police officers should be accountable public servants who work collaboratively, transparently, and fairly with the communities they serve. Too often, police departments and officers violate their role in the community and abuse their power by engaging in acts of excessive force; acting in a militarized manner; abusing asset forfeiture policies; and routinely stopping and frisking entire communities, among other practices that treat individuals, as Supreme Court Justice Sonia Sotomayor decried, "not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."¹³⁵

Too often, the police have not been held accountable, and this lack of accountability has eroded community trust and fostered suspicion and resentment. In order to restore police legitimacy, there should be structures in place to promote responsible, accountable policing and measures to ensure that police are held accountable for their actions when they deviate from that standard.

¹³⁴ *Fair Police Contracts*, Campaign Zero, <http://www.joincampaignzero.org/contracts> (accessed 27 June 2016).

¹³⁵ *Utah v. Strieff* No. 14–1373 (June 20, 2016) (dissenting).

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There are generally four mechanisms for holding law enforcement accountable: community-based, political, civil, and criminal.

Community-based accountability

Creating an accountable police force starts by implementing policies that make them directly responsible to the people they serve. Civilian oversight, both on a policy level and for specific review of complaints and disciplinary measures, creates direct accountability that also provides the opportunity for police to learn from and build relationships with those they serve.¹³⁶ In Berkeley, CA, the Police Review Commission holds bimonthly meetings that are open to the public, where representatives of community organizations “voice criticisms, make proposals, and introduce resolutions to review or reform specific police policies.”¹³⁷ Civilian review boards also keep police accountable when used in a disciplinary fashion. However, communities must work to overcome the practical obstacles to the creation and effective implementation of civilian review boards, namely resistance from police departments. Community representatives and municipalities should work together to create civilian review boards that are independent, transparent, and representative, with adequate resources and outreach.¹³⁸ Ideally, they should have the power to conduct investigations and hearings, compel police cooperation, determine appropriate disciplinary action, and conduct statistical analysis of infractions.¹³⁹

Creating clear procedures by which police officers provide information to and are transparent about their practices with the community creates the basis for mutual respect. This can include policies that require police officers to provide their name, badge number, and an informative card on how to report complaints to people with whom they interact. This can also include wearing body cameras with adequate privacy protections for the public and strengthening the right of civilians to record police interactions.

136 Civilian Review Boards can vary. See Civilian Review Boards, the CATO Institute’s National Police Misconduct Reporting Project, <http://www.policemisconduct.net/explainers/civilian-review-boards/>, (accessed 27 June 2016).

137 *Fighting Police Abuse: A Community Action Manual*, ACLU, <https://www.aclu.org/fighting-police-abuse-community-action-manual#controlling>, (accessed 27 June 2016).

138 Civilian Review Boards, the CATO Institute’s National Police Misconduct Reporting Project, <http://www.policemisconduct.net/explainers/civilian-review-boards/>, (accessed 27 June 2016).

139 See e.g., *Fighting Police Abuse: A Community Action Manual*, ACLU, <https://www.aclu.org/fighting-police-abuse-community-action-manual#controlling>, (accessed 27 June 2016); Civilian Review Boards, the CATO Institute’s National Police Misconduct Reporting Project, <http://www.policemisconduct.net/explainers/civilian-review-boards/>, (accessed 27 June 2016).

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Political accountability

Political measures can influence the ways police departments are structured and behave. “Political checks,” both on a national and local level, including contingent federal funding, internal review, and increased reporting, can make police departments and officers more accountable. These measures can work in tandem with civil and criminal lawsuits to pressure police departments into adopting best practices.

One key political tactic is enhancing federal oversight of police departments by using Title VI of the Civil Rights Act of 1974. Currently, the Department of Justice Office of Civil Rights becomes involved in a police department when a complaint is made. Where they find that an entire police department has engaged in a “pattern or practice” of violating the civil rights of the community, the DOJ commences or threatens litigation against the offending jurisdictions, which often results in consent decrees that reform police practices in the jurisdiction. By enforcing Title VI, the DOJ can require reforms in the hundreds of police departments that receive federal funds:¹⁴⁰ \$3.8 billion is given to state and local governments each year in federal criminal justice grants.¹⁴¹ Since Title VI prohibits recipients of federal funds, including police departments, from discriminating based on race, color, or national origin, the DOJ could require police departments to “show specific, demonstrable evidence of proactive efforts to address and overcome racially biased policing when those departments apply for federal funds, undergo evaluations, submit reports, and are audited for compliance with federal civil rights law.

Better still, it can **reward and incentivize** the departments that combine public safety and civil rights protections most effectively.¹⁴² The demonstrable evidence of such policy changes can include the type of policy changes police departments provide in consent decrees with the federal government, including training in civil rights and de-escalation, stronger scrutiny of racial inequities and excessive force, and greater community accountability and oversight.¹⁴³ Thus, the DOJ can proactively encourage these reforms, providing adequate guidance and resources,¹⁴⁴ rather than reacting to abuses in a piecemeal fashion.

Police officers can also be made subject to “political” checks, such as peer reviews during incidents of misconduct and internal disciplinary panels. While these checks may exist, they are

¹⁴⁰ Alan Jenkins, “DOJ Shouldn’t Wait for the Next Crisis in Policing,” *Huffington Post* (June 18, 2015), http://www.huffingtonpost.com/alan-jenkins/doj-shouldnt-wait-for-the_b_7613100.html.

¹⁴¹ Ibid. Michele L. Jawando and Chelsea Parsons, *4 Ideas That Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations*, Center for American Progress (Dec. 18, 2014), <https://www.americanprogress.org/issues/civil-liberties/report/2014/12/18/103578/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/>.

¹⁴² *Jenkins*, *supra* note 139.

¹⁴³ Ibid.

¹⁴⁴ Jawando, *supra* note 222.

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often missing the necessary transparency¹⁴⁵ that can reassure the public that internal procedures are thorough and fair. At the same time, by regularly providing data to the public on the disciplinary dispositions of all misconduct complaints it will be easier to identify and address systemic problems in those processes.¹⁴⁶ Internal police procedures can also reflect a commitment to accountable, fair, and unbiased policing. Police departments can require implicit bias training and develop a policy to consider an officer's racial bias and record when hiring, certifying, deploying, or evaluating police officers.¹⁴⁷

Civil lawsuits

Police officers can also be held accountable through civil lawsuits. These include state causes of action and federal lawsuits brought pursuant to 42 U.S.C. 1983, the federal statute that prohibits constitutional violations by those operating under the "color of state law." These lawsuits can be brought against individuals who have deprived an individual of their rights¹⁴⁸ acting in an official capacity, whether or not their actions are sanctioned by the state and whether or not they're "off-duty."¹⁴⁹ Government entities can also be found liable under 1983, where they caused the constitutional violation to occur with an official policy or regulation.¹⁵⁰ Civil lawsuits are a primary mechanism to hold police officers and departments accountable for their actions: while the federal government typically **investigates a handful** of police departments each year, "private litigants filed over 15,000 cases in federal district courts to enforce civil rights, and incarcerated individuals filed well over 30,000 civil rights claims in 2013 alone."¹⁵¹ Indeed, "Section 1983 litigation is by far the most-used vehicle for the enforcement of constitutional rights against police officers and other government officials."¹⁵² "In order to truly hold police

145 Written Testimony Of Darius Charney Center for Constitutional Rights to the President's Task Force on 21st Century Policing, Listening Session on Policy and Oversight (Jan. 30, 2015), <http://www.cops.usdoj.gov/pdf/taskforce/submissions/Charney-Darius-Testimony.pdf>.

146 Ibid.

147 *Training*, Campaign Zero, <http://www.joincampaignzero.org/train>, (accessed 27 June 2016).

148 42 U.S.C. sec. 1983; *Double Exposure: Civil Liability and Criminal Prosecution in Federal Court for Police Misconduct*, FBI Law Enforcement Bulletin 23-32 (May 2008).

149 See *United States v. Tarpley*, 945 F.2d 806, reh'g. denied (5th Cir. 1991), cert. denied, 504 U.S. 917 (1992) (holding that the presence of police and the air of official authority meant he was acting under the color of law even if he was off-duty); and *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943). (holding that a Sheriff cannot divorce himself from his official capacity merely by removing his badge of office)

150 See *Monell v. Department of Social Services*, 436 U.S. 658 (1978); R. Schott, *Double Exposure: Civil Liability and Criminal Prosecution in Federal Court for Police Misconduct*, FBI Law Enforcement Bulletin 23-32 (May 2008).

151 Lynda G. Dodd, *What's Missing in the Police Reform Debate? (Part 1)*, Balkinization (Oct. 19, 2015), <http://balkin.blogspot.com/2015/10/whats-missing-in-police-reform-debate.html>

152 Ibid.

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accountable for bad acts, civilians must be able to bring, and win, civil rights suits themselvesé [I]n order to both bring and win civil rights suits, civilians need a level playing field in court.”¹⁵³

Yet the Court has created significant obstacles to plaintiffs looking to hold public officials accountable, including immunizing prosecutors and police officers to different degrees and limiting the liability of municipalities and state bodies.¹⁵⁴ To overcome these obstacles, advocates need to utilize a long-term public campaign to prepare the way for legislation that minimize the hurdles plaintiffs face in 1983 cases.

Criminal Prosecutions

Criminal lawsuits use the criminal justice system to hold officers accountable. The problems can be seen in highly publicized actions in which states attorneys delay in charging officers who have killed unarmed individuals and fail to secure indictments after officers have been charged with a crime. Critics attribute these failures to laws and policies that are overly deferential to police officers, incestuous relationships between prosecutors and police officers, and discriminatory jury selection practices. “The perception, real or perceived, is that local prosecutors have far too great of an interest to protect and justify the actions of local law enforcement. The perceived bias in the system has led to the erosion of trust that is needed to build public safety between law enforcement and local communities, suggesting that viable alternatives should be considered.”¹⁵⁵

Advocates have called for independent prosecutors to address this injustice.¹⁵⁶ Independent or special prosecutors can provide state attorneys general with “additional prosecutorial authority over fatalities involving police”; “permanent ‘special prosecutors’ that are housed within the state office of the attorney general to provide a level of insulation from local law enforcement” can be created; or a system of “automatic referral outside the jurisdiction in fatal cases involving police” can be initiated.¹⁵⁷ Key to independent prosecutors is that an investigation is conducted by a neutral prosecutor who does not typically work with the police department subject of the investigation.

153 Ibid.

154 *Plumhoff v. Rickard* 134 S.Ct. 2012 (2014); see also, Erwin Chemerinsky, “How the Supreme Court Protects Bad Cops,” *The New York Times* (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html?_r=0.

155 Jawando, *supra* note 222.

156 See *Enhancing Prosecutorial Integrity*. NEEDS MORE INFO

157 Jawando, *supra* note 222.

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Individual officers can also be found criminally liable under 18 U.S.C. 242; Section 242 is the criminal complement to 1983, which allows for criminal prosecution against an official who deprives people of their rights under the color of state law (while working in their official capacity). However, there are similar obstacles to implementation that limit Section 242's ability to hold officers accountable. In particular, it requires a police officer to act "willfully" when engaging in misconduct, a standard so high as to all but ensure that prosecutions are rarely pursued. By changing the criteria for criminal prosecution against police departments to "reckless," police officers can be prosecuted appropriately for their actions.

The chart below outlines the four primary mechanisms for holding police accountable. In addition to the recommendations above, a holistic approach to police officer accountability may reduce incidents of misconduct.

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To promote accountability, **local, state, and county legislatures** should pass legislation that calls for the following:

- ▶ Establishment of an independent special investigator or prosecutor office responsible for investigating instances where police have seriously injured or killed civilians;¹⁵⁸
- ▶ Inclusion of victim advocate statements by survivors of police violence, including family members of individuals who are victims of police violence, during grand jury hearings;¹⁵⁹
- ▶ Passing legislation reducing the standard for qualified immunity;¹⁶⁰
- ▶ Changing the *mens rea* for criminal liability under 18 U.S.C. 242 to recklessness;¹⁶¹
- ▶ Requiring that even where civil judgments are paid through municipal insurance payments that police departments must pay at least half of the civil judgment from their budget's insurance liability;
- ▶ Providing a negligent hiring cause of action against police departments that should have known that a particular officer would be likely to engage in unconstitutional conduct;¹⁶²
- ▶ Requiring that police provide name, badge number, and "a card with instructions for filing a complaint to the civilian oversight structure"¹⁶³ before conducting a search;¹⁶⁴
- ▶ Require a regular survey (see, for example: **Milwaukee survey**) to be fielded to the community to gauge their experiences and perceptions of the police and use this information to inform:

158 Coke, *supra* note 87, at 21. Newark's civilian review board may provide some model language:

"This Civilian Complaint Review Board (CCRB) will have independent authority to investigate police misconduct, subpoena data and testimony from the department, audit the department's policies and practices, and determine disciplinary decisions that, barring a 'clear error' in the board's investigation, will have to be carried out by the police director. The police department will also have to report racial and demographic information to the board regarding police activities, including stop and frisk." <http://www.policylink.org/blog/newark-community-oversight-pdf>.

159 *Victim Impact Statements*, National Center for Victims of Crime, <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victim-impact-statements> (accessed 26 July 2016).

160 See Erwin Chemerinsky, "How the Supreme Court Protects Bad Cops," *The New York Times* (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html?_r=0; David A. Graham, "What Can the U.S. Do to Improve Police Accountability?," *Atlantic Monthly* (Mar. 8, 2016), <http://www.theatlantic.com/politics/archive/2016/03/police-accountability/472524/>; Sam Wright, "Want to Fight Police Misconduct? Reform Qualified Immunity Above the Law," (Nov. 3, 2015), <http://abovethelaw.com/2015/11/want-to-fight-police-misconduct-reform-qualified-immunity/>.

161 Michael J. Pastor, "A Tragedy and a Crime? Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations," 6 *N.Y.U.J. Legis. & Pub. Pol'y* 171 (2002-2003). Richard M. Thompson, *Police Use of Force: Rules, Remedies, and Reforms* 26 (2015); Alison L. Patton, "The Endless Cycle of Abuse: Why 42 U.S. C. § 1983 Is Ineffective in Deterring Police Brutality," 44 *Hastings L.J.* 753, 756 n.13 (1993).

162 Sean Douris, *Negligent Hiring: Passing Around the Bad Apple*, Hendon Media Group.

163 *Community Oversight*, Campaign Zero, <http://www.joincampaignzero.org/oversight>, (accessed 27 June 2016).

164 *Ibid.*

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- ▶ police department policies and practices
- ▶ police officer evaluations
- ▶ police officer pay incentives¹⁶⁵
- ▶ Requiring that police provide *Miranda* warnings prior to conducting a consensual search;¹⁶⁶
- ▶ Requiring the usage of body-worn cameras with applicable privacy protections, including creating protocols that indicate when cameras must be activated and guarding against the tampering of footage;¹⁶⁷
- ▶ Creating or strengthening independent and civilian review of police departments;¹⁶⁸
- ▶ Strengthening the community's right to record police officers to promote accountability and incentivize proper conduct by law enforcement officers;¹⁶⁹
- ▶ Requiring police departments to “develop and publicly report a strategy and timeline for achieving a representative proportion of police officers who are women and people of color through outreach, recruitment, and changes to departmental practices.”¹⁷⁰

The **Bureau of Justice Statistics** should collect data on police officers who have been arrested.

Congress should pass legislation requiring that all federal funding to law enforcement agencies be conditioned on police department compliance with the recommendations in this Report.

In addition, **law enforcement agencies, including local and state police departments, and sheriff's offices**, should incorporate these guidelines into their internal guidelines, manuals, policies, protocols, performance evaluations, and practices.

165 *Community Representation*, Campaign Zero, <http://www.joincampaignzero.org/representation>, (accessed 27 June 2016).

166 *Ibid.*

167 CPD, *supra* note 63, at 33.

168 Coke, *supra* note 87, at 21; CPD, *supra* note 63, at 27 (recommending a commission with full investigative powers to subpoena or compel testimony and documents).

169 CPD, *supra* note 63, at 32.

170 *Community Representation*, Campaign Zero, <http://www.joincampaignzero.org/representation>, (accessed 27 June 2016). The New York City Right to Know Act bill is an example of legislation that address this concern and is a “legislative package that aims to protect the civil and human rights of New Yorkers while promoting communication, transparency, and accountability in everyday interactions between the NYPD and the public.” Communities United for Police Reform, *Right to Know Act*, <http://changethenypd.org/RightToKnowAct>. It requires police officers to identify themselves

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The **defense bar and legal aid societies** should maintain a database of police officers who have repeatedly been accused of misconduct by their clients. This database should include information on the police officer's name, precinct, and a brief description of the incident.

Civil society, activists, and concerned community members should:

- ▶ Campaign to establish a civilian review board or agency in their communities, or to strengthen an already existing board or agency; and
- ▶ Collaborate with local defense bar and legal aid societies to demand that problematic police officers be held accountable.



For more information on the issue of police accountability and effective policing practices, check out:

Justin Hansford and Meena Jagannath's "**Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson**," in which they describe bringing a complaint against the United States before the Committee Against Torture following the events in Ferguson, MO.

Developed by activists, protesters, and researchers across the nation, **Campaign Zero** is a data-informed platform that presents "comprehensive solutions to end police violence in America."

Investigation of the Baltimore City Police Department, from the U.S. Department of Justice, Civil Rights Division, discusses the importance of positive community-police relationships and highlights how a "commitment to constitutional policing builds trust that enhances crime fighting efforts and officer safety [while] é frayed community relationships inhibit effective policing by denying officers important sources of information and placing them more frequently in dangerous, adversarial encounters."

Our former Communications Fellow Johnny Perez is a member of the **New York Advisory Committee to the U.S. Commission on Civil Rights**, which investigates violations of federal civil rights laws including abusive police practices.