



MEMORANDUM

TO: The Pennsylvania Senate

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: October 15, 2022

RE: OPPOSITION TO HB 103 P.N. 3500 (SCHMITT)

Bill summary: [HB 103](#) (PN 3500) would amend [18 Pa.C.S. § 2702.1](#) to create **two new felony offenses** for assault of a peace officer,¹ which includes police officers, but also includes sheriffs, constables, park rangers, game wardens, waterways conservation officers, and more:

1. **F3:** A third-degree felony offense for the intentional **or attempted** act of throwing, tossing, spitting, or *expelling* saliva, blood, seminal fluid, urine, or feces that comes into contact with an officer, punishable by up to 7 years in prison and \$15,000 in fines.
2. **F2:** A second-degree felony offense if (1) a person knows, should have known, *or believed* that the fluid or material was infected by a [reportable](#) communicable disease; and (2) that the communicable disease was transmissible by the saliva or other bodily fluid that was used—**or attempted to be used**—against the officer, punishable by up to 10 years in prison and \$25,000 in fines.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 103.

Police are already granted special protections against assault under current law, but HB 103 would create two new felony offenses that only apply when committed against law enforcement.

The behavior criminalized by HB 103 could already be charged, and punished more severely, as an aggravated assault on a police officer under current law.²

Police already have special protections not afforded to most people. The threshold for assault is lowered in cases involving police, so when an otherwise misdemeanor simple assault is committed against a law enforcement officer, it is automatically considered an aggravated, second-degree felony offense. In other words, a simple assault against almost anyone else would result in up to 2 years incarceration. But against a police officer, that same simple assault can carry up to 10 years incarceration or **8 additional years in prison**.

¹ "Peace officer" is defined under [18 Pa.C.S. § 501](#) as "Any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses, or any person on active State duty pursuant to 51 Pa.C.S. § 508 (relating to active duty for emergency). The term "peace officer" shall also include any member of any park police department of any county of the third class."

² Aggravated assault offenses are designed to impose tougher penalties for actions that cause greater harm, injury, or risk of death. Pennsylvania law primarily distinguishes simple assault from aggravated assault based on intent and severity of the injury—a distinction intended to ensure that the punishment fits the crime:

- **Simple assault** ([18 § 2701](#)) is charged when someone [intentionally, knowingly, or recklessly](#) inflicts [bodily injury](#) on another person. Bodily injury is any physical impairment, including physical pain, and typically results in minor, non-permanent injuries like bruises or scratches. Simple assault is a second-degree misdemeanor, punishable by up to 2 years incarcerated and \$5,000 in fines.
- **Aggravated assault** ([18 § 2702](#)) is [intentionally, knowingly, or recklessly causing](#)—or attempting to cause—[serious bodily injury](#) to another person under circumstances that show an extreme indifference to human life. Serious bodily injury causes serious, permanent disfigurement, protracted loss or impairment of a bodily function, or creates a substantial risk of death. An aggravated assault that causes, or attempts to cause, **serious bodily injury** is graded as a first-degree felony, punishable by up to 20 years in prison and \$25,000 in fines. **In special cases, like those involving police officers**, aggravated assault that **does not involve** serious bodily injury is a second-degree felony, punishable by up to 10 years in prison and \$25,000 in fines.

HB 103 would create two new unnecessary and overly punitive offenses that dangerously expand police and prosecutorial power.

The bill sponsor argues there is a “[loophole](#)”³ in our criminal code that fails to punish someone who spits on or throws semen, urine, or feces on a police officer. It strains credulity to imagine an instance where someone has, for example, thrown feces at a police officer and walked because a district attorney couldn’t find an offense to charge them with. Surely that action would be considered simple assault against an officer, in which case, it would be considered an F2 aggravated assault—one degree higher than what HB 103 provides.

And for those who would argue that spitting on a cop should be a separate crime, should the penalty really be 3.5-7 years in prison? For spitting? And let’s be clear. Because HB 103 creates these new offenses under § 2702.1 (assault of a law enforcement officer) and **not** under § 2702 (aggravated assault), it’s altogether likely that someone could be charged with **BOTH offenses** for the same spitting or bodily fluids incident, i.e., charged with an F2 aggravated assault on a police officer **AND** with the bill’s new F3 assault of a law enforcement officer.

Any time a “new” crime is created, it gives prosecutors the power to stack charges for the same act. Prosecutors don’t consider offenses as either/or options—they view them as both/and. So for one action, DAs will charge every possible applicable offense, each with a separate term of incarceration. This gives prosecutors extraordinary, sometimes coercive, leverage to secure a plea deal—take the plea or go to trial and risk getting convicted of **all** the offenses the DA charged.

Offenses against police officers already carry serious penalties; creating new ones only expands police power to arrest and prosecutorial power to stack charges against defendants.

Despite a cosmetic amendment, HB 103 retains its problematic communicable disease provision.

Although the amended version of HB 103 eliminates the outdated, unscientific, and stigmatizing references to HIV and hepatitis B, that change is merely cosmetic. HB 103 includes a new second-degree felony offense for actual or attempted contact with bodily fluids that are or may be infected with a communicable disease.

HB 103 remains problematic because it:

- **Allows any “reportable disease” to trigger the felony charge:** HB 103 uses the list of reportable diseases by regulation⁴ to define the second-degree felony offense. There are [75 reportable diseases](#) on this list, including HIV, AIDS, all forms of hepatitis, influenza, chickenpox, whooping cough, and of course, COVID-19, creating a **dangerous expansion of police pretext to arrest**.
- **Still does not require proof of infection or transmission:** The second-degree felony penalty under HB 103 does not require proof that the defendant tested positive for a reportable, communicable disease, nor proof that the bodily fluid or material was actually infected. And the offense does not require that transmission occurred. **Arrests could be made and felony charges filed solely on an unsubstantiated, falsely perceived, or negligible risk of harm.**
- **Still does not require actual contact:** HB 103 defines the F2 charge to include even *attempted contact* with a police officer—no actual contact with saliva or bodily fluids is necessary.

³ Representative Louis Schmitt, Co-Sponsorship Memorandum: [Harassment of Law Enforcement Officer](#), December 9, 2020.

⁴ [28 Pa. Code § 27 B](#)

HB 103 could weaponize police interactions with the public, particularly during the pandemic.

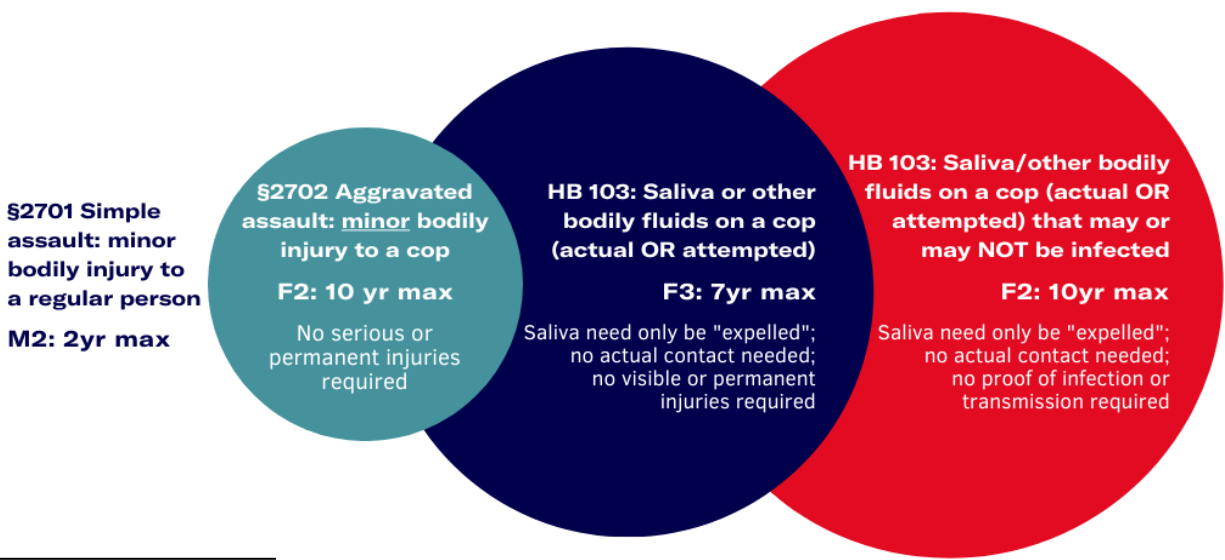
The persistence of COVID-19 uniquely compounds HB 103’s already fraught communicable disease provision. Because COVID-19 can be transmitted by droplets, merely "**expelling**" saliva could trigger a second-degree felony charge. It’s easy to imagine any number of saliva-expelling interactions with police, all of which would heighten the risk of a felony charge. This could include everything from someone yelling or speaking loudly with an officer, to protestors chanting in front of a police line, to a heated exchange while being questioned, to a person who becomes upset or angry during an arrest.

Furthermore, given the high rate of asymptomatic transmission of COVID-19, an officer or prosecutor could argue that the defendant “should have known” they could be infected. In this context, police could use the communicable disease provision and the specter of COVID-19—broadly and selectively—to justify use of force, arrest, or as pretext to arrest or shut down First Amendment protected speech, protest, and/or assembly.

HB 103 dangerously and recklessly expands special protections already afforded to police officers. As the offenses under HB 103 grow in severity, they also become increasingly riddled with caveats and vague thresholds. Under current law, serious bodily injury is not needed to charge a person with felony aggravated assault against an officer. HB 103 takes that a step further by creating an F3 offense for something as minor as **expelling** saliva on a cop. And HB 103’s communicable disease provision ratchets up the felony penalty yet again, this time for fluid that may not have been infected, may not have been transmitted, or did not even touch the officer. This creates a nearly undetectable felony offense—one that would be practically impossible to disprove or capture on a body cam. The legislature, repeatedly unwilling to fix our lethal force statute or reform Act 111 to prevent cops who violate a person’s constitutional rights from keeping their jobs, would make a mockery of police accountability with a bill that would imprison someone for the mere attempt to spit on an officer.

The creation of “new” crimes, especially those that criminalize behavior already chargeable under existing statutes, continues the [legislature’s relentless churn of overcriminalization](#) in Pennsylvania.⁵ And in our new normal under COVID-19, its communicable disease provision could be weaponized broadly against the public, including Black people, other people of color, and LGBTQ&T communities who are already over-policed, as well as those engaged in First Amendment protected speech, protest, or assembly.

For these reasons, we urge you to oppose House Bill 103.



⁵ ACLU of Pennsylvania, [More Law, Less Justice](#), June 2021.