



TESTIMONY SUBMITTED BY
ELIZABETH RANDOL, LEGISLATIVE DIRECTOR
THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
TO THE SENATE JUDICIARY COMMITTEE AND SENATE LAW AND JUSTICE COMMITTEE
JOINT PUBLIC HEARING ON
ENSURING ACCOUNTABILITY AND EQUALITY IN
LAW ENFORCEMENT AND THE CRIMINAL JUSTICE SYSTEM

June 17, 2020

Our criminal legal system is a centuries old, calcified, but fine-tuned, machine that has been designed to absorb outrage and resist change. We use the term criminal legal system intentionally, because if race or wealth is a determining factor in this system, then it most certainly is not a just one. I want to begin by sketching the contours of this system, noting that every stage of this process is infected by disparate treatment of people of color—Black people in particular—and poor people. If we can't recognize the scale of the problem, then we won't accept the scale of the change necessary to fix it.

BACKGROUND

While we commonly place law enforcement at the beginning of this process, its real foundation begins with state legislatures. Last year, we released a report, [More Law, Less Justice](#), that traced the Pennsylvania legislature's rise over the last forty years as a bipartisan offense factory, with both parties churning out hundreds of new crimes and penalties that unnecessarily expand our crimes code.

In 1972, Pennsylvania enacted the modern crimes code, succinctly categorizing all criminal behavior into 282 offenses and sub-offenses. By 2010, the criminal code contained [636 offenses](#) and sub-offenses. Today, there are [more than 1,500](#) and counting.

Endlessly expanding the number of criminal offenses in state law isn't just unnecessary; it has real-world consequences:

- Each new crime created adds yet another point of contact between police and community members. It strains credulity to think that Pennsylvanians feel safer if police are on the lookout for people who:
 - [Taunt a police animal](#)—a felony of the third degree, punishable by seven years of incarceration.
 - [Damage a land marker](#)—a misdemeanor of the second degree, punishable by up to two years' incarceration.
 - [Duplicate a computer program](#) and give it to a friend, a felony of the second degree punishable by up to ten years' incarceration.
- Each duplicative offense adds to the arsenal prosecutors use to stack charges and leverage plea deals.
- Each new penalty and grading enhancement comes with longer jail or prison term, court debt that burdens those most who can least afford it, and guarantees a maze of collateral obstacles that follow people convicted of a crime.

The legislature's accelerating rate of criminal law amendments not only outpaces, but unravels its modest attempts to reform the system. Incremental advances are practically erased by the relentless march of overcriminalization, and this serial expansion of the criminal code creates a punitive ripple effect throughout our criminal legal system, starting with the police.

We have over-militarized our police departments, not just with weapons, but with a stockpile of offenses to enforce. Black, brown, and poor communities are alternately over- and under-policed, frequently ensnaring people through any number of failed or targeted practices—from [broken windows](#) policing, to [pretextual stops](#), to [stop and frisk](#)—often for actions or behavior that have no victims or that have no business being criminalized in the first place. And some are arrested for being too poor to pay court fines or costs, languishing in what amounts to [modern day debtors' prisons](#).

We have an epidemic of people in this country being held in [pretrial detention](#). Nationwide, approximately [70 percent](#) of people held in jail have not been sentenced. And the majority of these people, who should be presumed innocent, are held because they cannot pay cash bail. It is a system of wealth-based detention that disproportionately affects [people of color](#) and is responsible for the majority of those held in [Pennsylvania's jails](#).

It is a bit of a misnomer to refer to this stage as “pretrial,” since vanishingly few people ever see the inside of a courtroom. Well over [95 percent](#) of all cases in the U.S. are settled by plea bargains and in 2019, [96 percent](#) of Pennsylvania cases were settled by plea bargains. And this is due in large part to the outsized power and influence of prosecutors in this system.

District attorneys decide who will be detained in jail before their court date, and who will be sent to state prison. They decide what crimes to charge, and they control the plea deals offered. Prosecutors prefer [plea bargains](#); by avoiding the time and expense of a jury trial, it makes it faster and cheaper for prosecutors to close cases. And district attorneys use the powerful levers available to them to elicit guilty pleas, including pretrial detention, charge-stacking, mandatory minimums, and the notorious “[trial penalty](#),” which further erodes Americans’ Sixth Amendment constitutional right to a jury trial. Prosecutors’ singular focus on obtaining convictions and securing severe prison sentences, instead of addressing the root causes of crime, makes them the [single most important driver](#) of mass incarceration in the criminal legal system.

At this phase, the process is even [less transparent and perhaps more unaccountable](#) than law enforcement. Although the legislature could set [minimum transparency standards](#) for elected prosecutors, we don’t have any insight into how charging decisions are made, details of plea negotiations, and no accountability for prosecutors who violate even the most fundamental promise of their profession—the [obligation to disclose exculpatory evidence](#).

And for those who can’t afford private attorneys to represent them, they depend on the hard work of the overworked and underpaid public defenders of this Commonwealth, who represent the most vulnerable among us, and do so despite practicing in the *only* state that shamefully provides zero funding for [indigent defense](#).

Post-conviction, Pennsylvania has the dubious distinction of [incarcerating the most people in the Northeast](#). And if we aren’t incarcerating people, we replace it with mass [supervision](#). Ranking third in the U.S. for people under state supervision, [1 out of every 34](#) adults in PA is on probation or parole, a rate 36% higher than the national average. This rate is driven largely by the fact that we remain one of a handful of states that fails to limit the number of years a judge can sentence someone to probation—a system that disproportionately [traps](#) people of color in a cycle of probation-revocation-incarceration, sometimes forcing them to languish on probation for decades.

And finally once you’ve “paid your debt” to society, many can expect to owe decades of actual [court debt](#) for outstanding fines and costs. And to ensure that the burden of conviction hangs like an albatross around someone’s neck, PA welcomes people back into the community with a web of [879 collateral consequences](#) of conviction, including barriers to employment, denial of public housing, denial of student loans, disqualification from professional licensure or government contracts, among many, many others.

This is the context within which conversations about police practices are happening. Each part of this process is fueled, sustained, and reinforced by systemic racial disparities and efforts to reform it have been largely inadequate and ineffective. The ACLU's advocacy against police violence began in the 1920s, shortly after our founding, and continued over the last 100 years. And in Pennsylvania, that advocacy has manifested in our legislative work, our [Campaign for Smart Justice](#), and our legal advocacy, whether its challenging discriminatory [police hiring practices](#), racial profiling through [stop and frisk](#), [illegal enforcement of federal immigration law](#), and countless cases of protecting the right of the public to [legally record](#) on-duty police officers. To our great dismay, much of this has failed to create lasting change.

Sustainable change requires structural change. We need to stop throwing good money after bad—whether it's on [training](#) that doesn't work, increasing the [lethality](#) and [safety risks](#) of [police](#) departments through [excessive militarization](#), or expanding the police [surveillance state](#) through technology and data collection that is almost entirely [shielded from public disclosure](#). And we desperately need statutory changes that will recalibrate this system's most egregious power imbalances.

RECOMMENDATIONS

1 | Reduce contact between police officers and community members

A | Stem the tide of overcriminalization

The easiest fix here is to [stop passing legislation](#) that further bloats Pennsylvania's crimes code. In other words, legislators, please put down your pens. With rare exceptions, we have more than enough tools for law enforcement to protect public safety and hold people accountable. We don't need new crimes or new penalties. These bills only serve to create a more expansive and punitive environment that encourages needless contact with law enforcement, contact that too frequently turns lethal.

B | Decriminalize victimless crimes

According to the [FBI](#), of the 345,822 arrests in Pennsylvania in 2018, only 5.6 percent were arrests for the most serious offenses—murder, nonnegligent manslaughter, rape, robbery, and aggravated assault. Drug abuse violations topped the list at 18 percent of arrests (over 60,000).

The ACLU has long opposed the definition of behavior as criminal when such behavior, engaged either alone or with other consenting adults and does not in and of itself harm another person. The first step should be to [decriminalize drug possession](#). Black people are consistently arrested, charged and convicted of drug crimes including possession, distribution and conspiracy at far higher rates than white people. In fact, a [2020 ACLU report](#) found that marijuana possession arrests accounted for 42% percent of all drug arrests in [Pennsylvania](#), and despite having legalized medical marijuana, 56 of PA's 67 counties show racial disparities in marijuana arrests above the national average.

2 | Strengthen accountability

A | Criminal accountability: Update PA's statutory definition of use of force

Pennsylvania's [use of force statute](#) is too permissive and should be [reformed](#) to permit use of force when it is objectively reasonable, necessary, and proportional to effectively and safely resolve a conflict. Use of *deadly* force should be limited only to circumstances in which an officer has an objectively reasonable belief that deadly force is necessary to protect themselves or another person from someone who poses a current, active, and immediate threat of death and the officer has exhausted all reasonable alternatives to deadly force.

B | Civil accountability: End qualified immunity

[Qualified immunity](#) provides [special protection](#) for law enforcement officers, [shielding](#) them from being sued for violating someone's rights. Qualified immunity is a doctrine that has [no basis](#) in civil rights law, is improperly and inconsistently applied, and its purported benefits—to avoid second-guessing officers or

saddling them with distracting lawsuits—do not justify [trampling the civil rights](#) of people whom police officers are sworn to protect and serve. The Supreme Court has ([again](#)) refused to reconsider its qualified immunity doctrine; and while we await potential [federal reform legislation](#), states can begin [reforming state law](#) to allow people to file civil claims against police officers in their state courts.

C | Disciplinary accountability: Reform binding arbitration under Act 111

[Act 111 of 1968](#) trades the right to strike by public safety personnel for binding arbitration. Since public safety unions can't strike, arbitration plays a central role in settling disputes with management, including disciplinary action. But the [police grievance arbitration](#) process is broken. In Philadelphia, [90 percent](#) of officers who have been fired get their jobs back through arbitration, often with full benefits and backpay. Changing this process has proved [elusive](#), but reforming it is critical to holding officers accountable. Currently, officers can only be decertified for misconduct if they are found guilty of criminal charges, a low bar [compared to other states](#). Indeed, only [35 officers](#) have been decertified since 2015.

3 | Mandate standardized data collection and public transparency

A | Require reporting of police use of force incidents

Although the FBI maintains a national [use of force database](#), it is [incomplete](#), as it relies on data that is voluntarily submitted by police departments, which is often fragmented, stored in difficult-to-analyze forms, and nearly inaccessible to the public. There is [no requirement](#)—either at the state or federal levels—to report police use of force incidents. As a result, we must rely on independent data collection by [organizations](#) or [news outlets](#) to aggregate that data for us. But that data only includes incidents of *deadly use of force with firearms*.

The legislature should mandate *public reporting* that includes, at a minimum, *any* use of force that results in injury or death that involves the use of any kind of physical contact or weapon (i.e., personal body weapons, chemical agents, impact weapons, tasers, vehicles, K-9 bites, and firearms), the number of officers involved, their department, unit and assignment; and the demographics of the subject and officer (age, gender, race/ethnicity, disability, sexual orientation, gender identity). **Use of force reporting should follow and be based on reform to [Section 508](#), Pennsylvania's use of force statute.*

B | Make police disciplinary records publicly available

[Disciplinary records](#) for law enforcement in Pennsylvania are [shielded from public view](#). Even other law enforcement agencies cannot access this information, making it impossible to know [who they are hiring](#). As of 2015, [12 states](#) make this information publicly available. Legislators should follow [other states'](#) leads to [make public](#) records of investigations of officer-involved shootings, use of force incidents, and cases of sustained sexual misconduct and [dishonesty](#).

C | Make police-worn body camera footage subject to Right to Know requests

When [Act 22](#) enabled the use of police-worn body cameras in 2017, it armed law enforcement with a powerful tool of surveillance but [exempted the footage](#) from being accessible under Pennsylvania's [right to know law](#). So counterintuitive was this decision, that the Office of Open Records had to create a [dedicated webpage](#) to explain the Act's convoluted process to request body camera footage and to clarify that the office had no jurisdiction over requests or appeals of denials. The legislature should amend Act 22 to make police recordings subject to open records requests.