

MAY 2017



Accountability in Virginia Policing

An Agenda for Reform

Trust is dependent on the culture within both the community and the law enforcement agency. Technology won't solve problems such as racial profiling, excessive use of force or police abuse. The primary focus of police reform must be on policies and practices that enhance professionalism, transparency and accountability.



Proposals for Reform



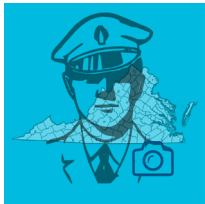
Enhance professionalism

Require all police and sheriff's departments to be accredited. Strengthen professional standards for officers and require decertification for misconduct. Increase pay.



End policing of low-level offenses

Legalize marijuana possession for adults, identify alternatives to prosecuting offenses like disorderly conduct, panhandling and trespassing by mentally ill or homeless people.



Implement statewide standards for use-of-force & body-cam policies

Ensure that use-of-force policies recognize preservation of life is paramount and all body-cam policies have certain identical provisions across jurisdictions.



Abolish policing for profit

End civil asset forfeiture in the absence of a criminal conviction. Fund law enforcement with general fund dollars not fines and forfeitures.



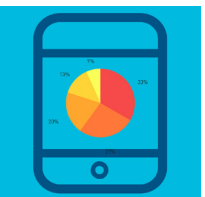
Establish civilian authority over policing

Require approval by governing body of acquisition of military equipment or surveillance technology. Empower a civilian review board to examine police misconduct.



Independent investigations & prosecutions

Independent investigators and prosecutors must investigate and prosecute cases in which a law enforcement or correctional officer is involved in an incident in which a person in custody is seriously injured or killed.

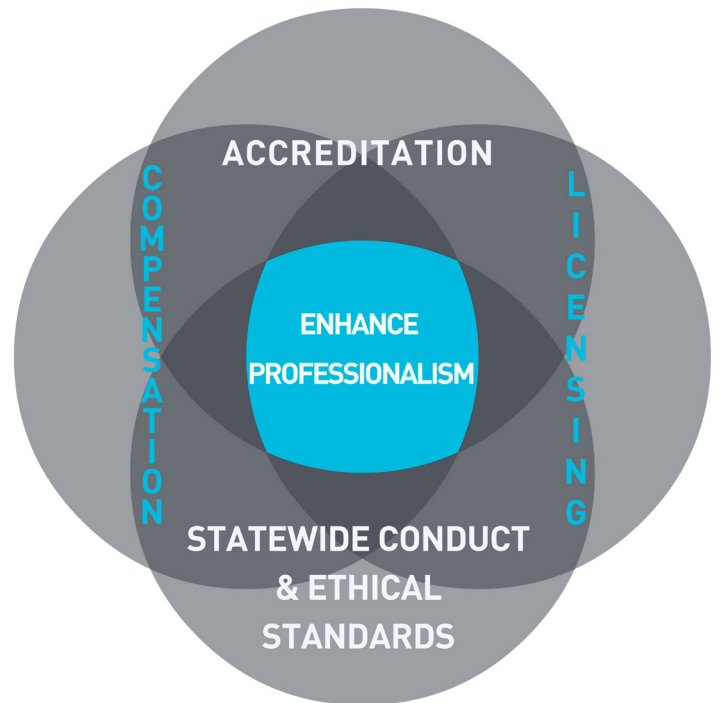


Require transparency

Require collection and public release of data on critical policing activity such as stop and frisk, use of force and arrests with demographic breakdown.

Professionalize Police and Law Enforcement Agencies

We need to look carefully at how we “license” police in Virginia. Unlike medical doctors and lawyers, people who are certified as qualified to serve as law enforcement officers in the Commonwealth cannot lose their certification for unethical behavior or police “malpractice.” Someone can violate departmental use-of-force policies, get fired, and maintain the certificate that allows them to be hired at another law enforcement agency. In Virginia, you can only lose your certificate if you are convicted of a felony or certain misdemeanors or fail to do mandatory training. You cannot lose it for misconduct. That needs to change.



To make that change possible, there need to be statewide conduct and ethical standards for ‘licensed’ law enforcement officers that are uniform across all Virginia jurisdictions, as there are for lawyers, doctors, accountants and engineers. The standards should be developed by the Department of Criminal Justice Services with participation by law enforcement officials, members of the public and experts on professional licensing. The standards must be clear and specific enough to apprise officers of the conduct that could result in decertification. They must not be vague entreaties to avoid “moral turpitude” or “conduct unbecoming,” but focus on serious misconduct like violations of use-of-force policies.

In addition, departments and other certified officers should be required to report to the Department of Criminal Justice Services any observed violations of the professional standards of conduct that result in departmental disciplinary action including suspension or termination. Decertification proceedings should be initiated upon receipt of such reports, and officers should have a right to a hearing with appropriate due process.

All law enforcement agencies in the Commonwealth need to be accredited by state or national accrediting bodies. As of 2015, the Department of Criminal Justice Services reported that 127 law enforcement agencies in Virginia were at some stage of the accrediting process. In all, 28 agencies in Virginia have been awarded accreditation by the national Commission on Accreditation of Law Enforcement and six others are in the process of gaining accreditation. While accreditation is not an absolute guarantor of professional policing, it is a step in the direction of assuring uniform quality across all law enforcement agencies in Virginia. Funding should be offered as an incentive to encourage departments to seek accreditation.

Finally, we must recognize that you get what you pay for. Professional policing should be rewarded with professional compensation.

Alternatives to Criminalization of Low-level Offenses

One lesson of Baltimore, as detailed in the Department of Justice report on the causes and consequences of the in-custody death of Freddie Gray, is that we must revisit the “holy grail” of zero tolerance or broken windows policing. The experience in Baltimore (and the recent reexamination of stop and frisk in NYC) shows that this approach does not keep us safer. It does result, however, in communities of color and impoverished communities experiencing policing differently than other communities and disparate rates of incarceration for low-level offenses like marijuana possession, trespass, loitering, walking with an open container and disorderly conduct. For example, black people in Virginia are 2.8 times more likely to be arrested for marijuana possession than white people even though usage rates are roughly equal.

Blacks are **2.8** times more likely than whites to be arrested for marijuana possession

Arrest Rates



**Arrest rates are based on Virginia’s total marijuana arrests in 2010*

ACLU Report: The War on Marijuana in Black and White

Law enforcement officers and prosecutors have enormous discretion in enforcing such offenses. The subjective exercise of this discretion can undercut community trust where it is perceived to be tainted by implicit or explicit bias.

We should start by examining the benefits of decriminalizing and, ultimately, legalizing marijuana possession by adults. Marijuana enforcement has created a civil rights crisis, characterized by racially disparate policing and prosecution, rising numbers of people needlessly mass incarcerated, and long-term collateral consequences for the people and communities in which discretionary enforcement of the marijuana prohibition takes place.

We must recognize that law enforcement cannot solve community problems arising from poverty, drug use, mental illness and other social ills. We can’t arrest our way out of a public health problem or school discipline issue. We must identify and fund a holistic approach to education, mental health care and drug treatment and economic health programs as an alternative to criminalization of behaviors associated with homelessness, mental illness or drug abuse, what have been called “quality of life offenses.”

Uniform Statewide Standards for Policing



It is time to come to grips with the reality that there are some principles of policing that cannot and should not vary depending on which side of a jurisdictional line you are on. For example, there should be an accepted set of principles embodied in all use-of-force policies statewide. In addition, there should be uniform rules on the use of body-cameras (regardless of where one lives or by whom one is policed) that protect the rights of individuals being policed and the public's right to know.

It is time to come to grips with the reality that there are some principles of policing that cannot and should not vary depending on which side of a jurisdictional line you are on.

The following principles should be mandatory components of all departmental use-of-force policies:

- **Sanctity of Life:** The protection of the public shall be the cornerstone of any use-of-force policy, meaning perseverance of life is paramount in dangerous situations.
- **De-escalation:** Whenever reasonable, police should de-escalate, or slow down situations to minimize the use of force. Officers shall be trained to consider what factors may contribute to a lack of compliance, such as language barriers, drug and alcohol use or a mental crisis.
- **Duty to Intervene:** Officers at a scene where physical force is used must intervene if it is inappropriately applied, or used when it is no longer needed. Officers will be held responsible if they witness inappropriate use of force and do not try to stop it.
- **Duty to Report:** Officers must report misconduct at the scene of an incident, including inappropriate use of force, to their supervisor and internal affairs as soon as possible.

In addition, there are four areas in which all body worn camera (BWC) policies must be uniform across the Commonwealth:

- **Deployment:** Rules governing when law enforcement officers are recording civilian encounters and what notice requirements govern their deployment;
- **Retention:** Rules governing how long data is stored;
- **Access:** Rules and laws governing individual and public access to data collected by BWCs; and
- **Compliance:** Rules governing consequences of failure to comply with provisions of policies assuring transparency and accountability in the use of BWCs, including possible decertification as a law enforcement officer.

DEPLOYMENT	RETENTION
ACCESS	COMPLIANCE

Abolish Policing for Profit



The lesson of Ferguson is that it is past time to reconsider Virginia's ever-increasing move to a fee-based criminal justice system. When fines and forfeitures become a base revenue for agencies and localities, when they become part of the architecture of law enforcement agency budgets, the inevitable move toward policing for profit has begun. As the Justice Department found in Ferguson, where fines and costs made up as much as 20 percent of a law enforcement agency's budget, an emphasis on revenue generation is inherently corrupting. In addition, it leads to jails occupied in significant numbers by people (disproportionately people of color) who are there simply because they cannot afford to pay the fines and costs associated with moving violations and other minor offenses.

“Virginians must accept that public safety should be a general fund priority, and we all need to support adequate funding for police not dependent on fines, forfeitures, and costs.”

Local law enforcement and the localities they serve have opposed any effort to limit dependence on fines and forfeitures as a revenue source or to rein in civil asset forfeiture. This is in part because the legislature has failed to live up to the promise made when the moratorium on annexation was put in place, that, pursuant to HB 599, 30 percent of the cost of local law enforcement would come from state general fund dollars. Now the amount covered is less than half that. Virginians must accept that public safety should be a general fund priority, and we all need to support adequate funding for police and courts not dependent on fines, forfeitures, and costs.

Taxpayers and law enforcement should come together to demand that communities and the Commonwealth commit to base funding of law enforcement that ensures best practices policing can be implemented across Virginia. To do otherwise is to accept a model of police revenue generation that can only lead us away from best practices policing to the kind of intentional deprivations of civil rights that existed in Ferguson.



Want to help support criminal justice reform now?
Follow the ACLU of Virginia on social media and share our content, sign for our Action Alerts and download and use our free Mobile Justice smartphone app at acluva.org.



Establish Civilian Authority over Policing



Meaningful civilian oversight of policing includes both proactive and after-action components. Civilian oversight should not emphasize “after-action” review to the exclusion of such proactive oversight.

Civilians acting through the local governing body (or other agencies, such as the Compensation Board, with authority to approve expenditures of public funds) should have a role in reviewing in advance policies that guide the acquisition and deployment of police equipment.

This includes:

- **Body-cams and Tasers,**
- **Military style weapons and vehicles,**
- **Drones or surveillance equipment, and**
- **New technologies such as license plate readers, red light cameras, cell-site simulators or other devices)**

This prior review should include careful documentation, review and authorization of the budget for equipment.

Civilians should also have a role in advance review of policies and procedures governing the use of force (including by individual officers or teams of officers, e.g., SWAT teams) and the use of body-cameras. Just as the U.S. military must get civilian approval to buy its weapons and implement “rules of engagement,” so, too, should state and local police and sheriff’s offices be required to get civilian approval of weapons’ acquisitions and deployment and “use-of-force” policies. Virginians should expect their elected officials will exert authority and exercise control over the policies guiding their law enforcement officers as they go about their duties.

With respect to after-action review, civilian review boards will need to have adequate funding, staffing, and investigative and disciplinary authority to be effective.

Civilian review authorities should be empowered, at a minimum to hear complaints involving alleged:

- (1) excessive and/or improper use of force;**
- (2) abuses of power, including stop-and-frisks and/or unlawful searches or seizures; and**
- (3) misconduct including unprofessional or unethical behavior, foul language and/or discriminatory statements.**

Civilian oversight entities should be comprised primarily of lay representatives who reflect the diversity of the community served by the law enforcement agency. Civilian representatives should live or work in the jurisdiction which the agency

polices, should have a legal, law enforcement, human resources or civil rights background, and should not be an employee of the jurisdiction or have been an employee of the jurisdiction for seven years or more prior to their appointment.

To be effective, civilian review needs sufficient funding to have a staff that includes investigators, attorneys, community liaisons, and the administrators to ensure effective day-to-day operations. The professional staff would also investigate and make recommendations regarding all complaints.

Civilian review should include investigatory and disciplinary authority. Investigatory authority includes the power to subpoena witnesses and documents, including documents relating to internal department policies and standards. Disciplinary authority includes the power to recommend a disciplinary action taken from a range of options developed in collaboration with the leadership of the law enforcement agency, representatives of rank and file officers, and other stakeholders. Recommended discipline should follow guidelines that factor in the officer's past disciplinary record, and should not be subject to amendment by the law enforcement agency unless a clear error in the investigation is discovered. In addition to the power to investigate and recommend the discipline of individual officers, civilian review should also include the authority to investigate and make public recommendations regarding policing policies and practices.

Civilian review's procedures should ensure the due process rights of law enforcement personnel, including the right to counsel during all stages of the investigation and discipline stages for any officer under investigation. In addition, prior to a decision to recommend discipline, the accused officer should have the right to a hearing that includes the opportunity to present and challenge evidence surrounding the alleged misconduct and offer defenses to the alleged action. If discipline is recommended, the officer should have the right to appeal as established under Virginia law.

By increasing transparency and accountability of law enforcement agencies, effective civilian review can enhance trust between law enforcement and the people they serve.



Independent Investigations & Prosecutions



According to the Final Report of the President’s Task Force on 21st Century Policing (2015), “external and independent criminal investigations in cases of police use of force resulting in death, officer-involved shootings resulting in injury or death, or in-custody deaths” are crucial in developing and maintaining the trust of communities served. Investigators involved in these investigations also must be trained and experienced in investigating officer-involved use of force to maintain “internal legitimacy and procedural justice.”

The establishment of an independent statewide team of investigators and prosecutors to review all in-custody deaths and instances of serious bodily injury in Virginia is the most effective way to achieve these twin objectives. Getting such investigations and prosecutions out of the hands of colleagues in their departments and prosecutors with whom they work daily is critical to the public’s perception of any investigation as objective, thorough and credible. At the same time, it is critical to an officer’s faith in the fairness of the investigative process that the people doing the investigation be well-versed in the special nature of the life and death situations they face and the training they receive. The relative rareness of in-custody deaths and serious bodily harm make it possible for a single statewide team or task force to be trained and ready to respond to such incidents when they occur quickly and effectively.

Other states already require independent investigations of serious officer-involved incidents.

The Task Force on 21st Century Policing gave several examples illustrating how a state might both build public trust and earn the confidence of law enforcement officers, including:

- 1) Create multi-agency task forces comprising state and local investigators; or**
- 2) refer investigations to neighboring jurisdictions or to the next higher levels of government (many small departments may already have state agencies handle investigations).**

The Task Force also recommended that independence be coupled with transparency in Action Item 2.2.5: “Policies on use of force should clearly state what types of information will be released, when, and in what situation, to maintain transparency. This should also include procedures on the release of a summary statement regarding the circumstances of the incident by the department as soon as possible and within 24 hours. The intent of this directive should be to share as much information as possible without compromising the integrity of the investigation or anyone’s rights.” (Interim Report of the President’s Task Force on 21st Century Policing (2015, p. 22.)

In its advocacy for a proposal under consideration in California, the American Civil Liberties Union of California pointed out that “[t]here is a growing appetite, both at the national and local level, to create a better and more transparent system for [investigating and prosecuting officer involved incidents] that is fair to families, communities, and the police in order to restore public trust.” It is difficult, if not impossible for local police and sheriff’s departments to objectively investigate “their own,” or for local Commonwealth’s Attorneys to maintain their objectivity in evaluating the evidence presented in a case involving people with whom they have a close working relationship and on whom they depend to develop effective prosecutions in other cases.

Friends shouldn’t investigate friends. An independent team should investigate any death or serious injury in custody.

It is time for Virginia to recognize that the current system is not working and that change is needed if trust is to be restored. Given Virginia’s size and the relatively few number of cases, establishing a single investigative and prosecutorial team to evaluate these incidents and bring cases where warranted will be cost-effective and assure both the independence the public wants and needs and the confidence in the professionalism of the team that officers want and deserve.



Save the Date!

Reforming Police Practices in Virginia

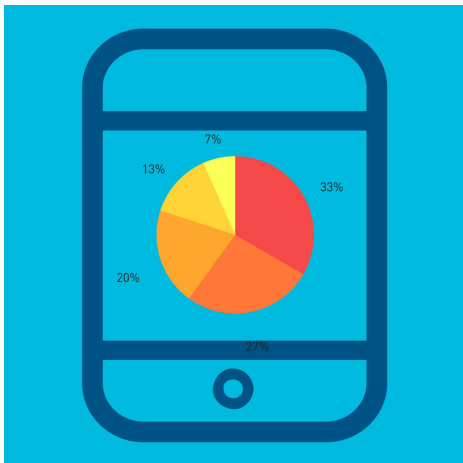
ACLU of Virginia Annual Meeting

Saturday, Sept. 9, 2017, 1-4 p.m.

Richmond, Va.

The event will feature a panel discussion on the current status of police practices, the need for reform, and what individuals can do in their communities to push for reform.

Require Transparency



For too long, the default response of law enforcement agencies in Virginia when asked to disclose information about their operations has been an unequivocal “no.” It is time for state and local law enforcement agencies to move away from a culture of secrecy and toward a culture of transparency which affirms they should and will release as much information as possible, as soon as possible, rather than defend a decision to disclose as little as possible for as long as possible.

Pillar One of the six pillars of 21st Century Policing identified in the Report of the President’s Task Force is “building trust and legitimacy.” Without the trust of the policed, policing cannot be effective. Building a culture of transparency and accountability was identified by the Task Force as essential to this goal.

The Task Force recommended (Action Item 1.3.1) that “to embrace a culture of transparency, law enforcement agencies should make all department policies available for public review and regularly post on the department’s website information about stops, summonses, arrests, reported crime, and other law enforcement data aggregated by demographics.” Despite this strong recommendation, Virginia law enforcement agencies continue to resist making policies accessible or seeking public review of the policies before their adoption, and are particularly reluctant to collect and aggregate by demographics data on stops, arrests and use of force.

Rather than rely on liberal exceptions to the Virginia Freedom of Information Act to deny the public access to their records, law enforcement agencies should embrace the underlying policy of the Act that favors public disclosure of information:

“Virginia Freedom of Information Act, §2.2-3700. Policy. The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law. This chapter shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.”

To the extent law enforcement is unwilling to do so voluntarily, the legislature should take action to mandate the collection and dissemination of data on stops, summonses, arrests and use of force aggregated by demographics by every Virginia law enforcement agency. In the absence of legislative action, local boards of supervisors, and city and town councils should pass ordinances requiring the collection and publication of such information by the agencies within their jurisdictions, including sheriff’s departments whose receipt of supplemental budget support should be conditioned on their adoption of such policies.