



TESTIMONY IN SUPPORT OF SB 658 / HB 771

Human Relations – Patterns and Practices of Civil Rights Violations – Remedies

TO: Members of the Senate Judicial Proceedings and House Judiciary Committees

FROM: **Heather Warnken, Center for Criminal Justice Reform, Univ of Baltimore School of Law**

DATE: February 27, 2023

My name is Heather Warnken and I am the Executive Director of the University of Baltimore School of Law’s Center for Criminal Justice Reform, testifying in support of SB 658 / HB 771.

Our center works to improve public safety and address the harm and inequity caused by the criminal legal system. It is undeniable that we have a long way to go in this country and indeed this state in addressing both of these goals. By authorizing the state Attorney General to investigate and initiate actions to remedy unlawful patterns and practices of rights violations against our residents, this bill represents a meaningful and much needed additional tool for change.

The similar power bestowed in the U.S. Department of Justice since 1994, authorizing the Civil Rights Division to conduct pattern or practice investigations and compel corrective action, has in many places been impactful in holding police departments and other government entities accountable. This power has undeniably mitigated substantial harm.¹ However, the reach and results have often been slow and far from perfect, as demonstrated by the current implementation process surrounding the Baltimore Police Department consent decree. Three of the main reasons for USDOJ’s limitations are:

- 1) lack of sufficient resources to reach all of the jurisdictions where such investigations are needed (currently the DOJ Civil Rights Division has the ability to investigate less than .02% of the country’s approximately 18,000 state and local law enforcement agencies each year)²;
- 2) lack of stability in this work as a priority (discussed further below); and
- 3) lack of proximity and sufficient ongoing connection to the *community* as a necessary partner in diagnosing systemic deficiencies and identifying the actions needed to overcome them.

Residents bearing the brunt of widespread rights violations are the most important voices in this process. They must continue to have a meaningful seat at the table in designing legally enforceable remedies, and in the relentless follow-through necessary to implement, measure and sustain real change.

¹ https://socialchangenyu.com/wp-content/uploads/2019/12/Brianna_Hathaway_RLSC_44.1.pdf;
<https://www.americanprogress.org/wp-content/uploads/2021/07/PatternPractice-factsheet1.pdf>.

² https://socialchangenyu.com/wp-content/uploads/2019/12/Brianna_Hathaway_RLSC_44.1.pdf.

Culture eats policy for breakfast. As documented extensively in the literature and lived experiences of disproportionately Black and brown Marylanders for decades, changing the culture within policing and corrections that allows patterns and practices of civil rights violations to persist is complex, often uphill work. Even the most thorough consent decrees are only as good as their implementation, and the staying power of any progress achieved.

Our center firmly believes that placing this authority in the hands of the state Attorney General, elected by and for the residents of Maryland, is not only needed, but will enhance the potential effectiveness of such authority as a tool for change. This change must be measured not in numeric counts of updated policies and procedures intended to correct systemic problems, but in the lives of the residents able to say whether they actually did.

As stated by author Brianna Hathaway in an instructive law review article analyzing pattern or practice authority at the state and federal level, state-led pattern or practice investigations:

“could shrink [the democratic deficit which occurs when unelected federal officials lead this work,] and allow for more bottom-up reform and accountability. State investigations could be a model of “democratic experimentalism,” which seeks to improve governmental effectiveness by encouraging the participation of and information-sharing with local stakeholders.”³

Furthermore, “[s]tate power could restore the political legitimacy of a reform process that is often mistrusted by both law enforcement and the public.”⁴ This is definitely needed in Maryland, as evidenced by frustration by some constituents with the consent decree process in Baltimore.⁵

Another advantage the state Attorney General will have in utilizing the tools created by SB 658 is greater stability. In addition to lack of sufficient resources, USDOJ’s exercise of this authority in meeting the vast need for this work across the country has been hampered by shifts in departmental priorities that occur with changes in political leadership. During my own time at the Department of Justice (where I spent five and half years spanning three presidential administrations), I experienced firsthand the fluctuation and turbulence surrounding agency-wide efforts on these issues. Unlike USDOJ’s leadership, who report to the Chief Executive, the Maryland Attorney General is elected by the people and sworn to protect the rights of all Marylanders, thereby more insulated, relatively speaking, from shifting priorities that occur at the state and federal level.

Attorneys General in other states have already been able to step into the gap on multiple occasions, including in Illinois when a DOJ consent decree addressing an investigation of the Chicago Police

³ https://socialchangenyu.com/wp-content/uploads/2019/12/Brianna_Hathaway_RLSC_44.1.pdf.

⁴ Id.

⁵ See for example, Warnken et al, *Victim Services Capacity Assessment Report*, USDOJ National Public Safety Partnership, pg 12.

https://www.baltimorepolice.org/sites/default/files/2022-08/PSP%20Victim%20Services%20Assessment%20FINAL_B.pdf.

Department was derailed by the results of a national election.⁶ California is another example, where the first such state law authorizing this power in the Attorney General’s office was enacted in 2000, creating opportunities to address unmet needs in diverse jurisdictions that likely would not have been pursued otherwise by USDOJ.⁷

Furthermore, “this system not only allows states to learn from the federal government’s past pattern-or-practice cases, but it also promotes interstate collaboration to create institutional change. [S]tate attorneys general have used their powers before to work with each other to drive national reform. Structurally, the NAAG often facilitates multistate investigations and litigation to promote policy reform. The ability of state attorneys general to pool resources and information could be leveraged to investigate police misconduct and attain national police reform.”⁸

Creating this authority in the state Attorney General is also critical to promote public safety. Despite the pushback from some that such investigations can “tie the hands of officers,” hampering enforcement activities needed to address violent crime, the research is clear that this is not the case, and in fact, the opposite is often true. Unconstitutional policing and correctional practices which degrade and violate the rights of our fellow citizens demand our attention because they are untenable and unlawful, full stop. However, these practices also demand our attention because they undermine public safety, through erosion and severance of public trust in our institutions.

The legitimacy of the criminal legal system in the eyes of many Marylanders, especially Black, brown and low income residents living in highly policed and over incarcerated communities, is already in crisis. Trust and collaboration between community members and police and prosecutors who investigate and try cases is frayed, as demonstrated in part by abysmally low clearance rates in Baltimore and other jurisdictions throughout the state.⁹ Identifying and rooting out patterns and practices of rights violations is a significant part of the work of improving the community relationships needed to solve crime.

This tool has also been demonstrated as effective for improving policing in other ways which contribute to public safety; for example, ushering in the resources and technical support needed to modernize and humanize the process of a department’s data collection. Policing and corrections data are notoriously lacking in quality and transparency in too many jurisdictions throughout Maryland. Better, more accurate data not only leads to improved accountability in how residents are treated, but provides vital information for understanding public safety challenges, and developing solutions more calibrated to existing violence and community needs.

⁶ https://socialchangenyu.com/wp-content/uploads/2019/12/Brianna_Hathaway_RLSC_44.1.pdf.

⁷ Id.

⁸ Id.

⁹ BPD homicide clearance rates dropped again in 2022, down to 36%, from 42% the previous year, and is even lower for nonfatal shootings. This includes cases where any arrest was made or the case was “cleared by other means” like the suspect is subsequently murdered.

Rooting out systemic rights violations also saves vital government resources desperately needed for more effective public safety efforts. Payouts to victims of grievous rights violations have reached astounding totals, including for example, \$16 million and counting paid just to the limited known victims of the Gun Trace Task Force in Baltimore, or the recently announced \$7 million settlement pending for the brutal beating experienced by a single victim in Baltimore’s jail in 2014 (an institution struggling to address its documented widespread rights violations and deficiencies).¹⁰

These totals do not take into account the significant resources wasted on prosecutions dropped and cases overturned in the aftermath of widespread misconduct, such as the 800 convictions subsequently reversed after a review of existing cases involving members of the disgraced Gun Trace Task Force.¹¹

Numerous protections uniquely available to officers, such as wide legal latitude to employ force and qualified immunity, have created a public perception - and often reality - that police and corrections officials are untouchable, even for the most egregious harm, and even when that harm is widespread.¹² Especially given the relative rarity of consequences for misconduct by police and correctional officers (even via internal departmental discipline),¹³ the need for a heightened role for the state Attorney General in identifying and remedying patterns or practices of harm is clear.

According to scholar Joanna Schwartz, “to successfully facilitate reform, it is necessary to have (1) leverage to enable the reformer to place pressure on law enforcement agencies to change their behavior; (2) motivation to ensure that the reformer stays committed to her goals; and (3) resources, such as time, money and personnel, to implement institutionalized reform. These factors come into play on all levels of government. Combined, they influence the ability to effectively police the police.”¹⁴

The state Attorney General is already well positioned on (2) and (3), and SB 658 empowers this office with (1), the leverage needed to effectuate real change. For these reasons, we urge a favorable report.

¹⁰ In August 2022, the ACLU National Prison Project published a letter following a visit to the Baltimore Central Booking and Intake Center, stating, “people in [Baltimore Central Booking and Intake Center] IMHU are held in the harshest and most deprived conditions we have ever encountered in any prison or jail in the United States, including in death row and ‘supermax’ units.

www.aclu.org/cases/duvall-v-hogan?document=duvall-v-hogan-report-plaintiffs-counsel-august-2-3-2022-jail-visit;
<https://www.baltimoresun.com/news/crime/bs-md-cr-million-dollar-settlement-recommended-for-closed-baltimore-jail-lawsuit-20230222-y5w2v3jo5ncjiboyooisv4dsq-story.html>.

¹¹

<https://www.baltimoresun.com/news/crime/bs-md-ci-cr-memphis-baltimore-flex-units-20230204-klstyuvgd5atxoyrqcprljc5ia-story.html>.

¹² <https://harvardlawreview.org/2017/06/why-do-courts-defer-to-cops/>;
<https://www.nytimes.com/2017/05/31/us/police-shootings-trial-jury.html>;

<https://columbialawreview.org/content/police-suspects/>.

¹³ <https://www.chicagotribune.com/news/ct-chicago-police-misconduct-settlements-met-20160129-story.html>;
<https://www.audacy.com/wcbs880/articles/nypd-paid-nearly-69-million-in-settlements-in-2019>.

¹⁴ https://socialchangenyu.com/wp-content/uploads/2019/12/Brianna_Hathaway_RLSC_44.1.pdf.