

# National Police Accountability Project

A Project of the National Lawyers Guild

## STATE POLICE USE OF FORCE LEGISLATION AND PUBLIC SAFETY

The viral video of Derek Chauvin brutally murdering George Floyd ignited a long overdue reckoning on policing. While the ensuing reform movement has sought to address police misconduct in its many forms, preventing future incidents of police brutality has been top of mind for advocates and lawmakers. There are a number of viable policy changes that would reduce police violence, including removing protections for officers who use unconstitutional force. However, one of the most direct ways to reduce police violence is to restrict and regulate policing practices.

Officers currently lack guidance about when force is necessary as well as what tactics and maneuvers are appropriate. The Supreme Court’s interpretations of the Fourth Amendment of the United States Constitution provide the only national standard for police officer use of force. The standard loosely authorizes force that is “reasonable under the totality of circumstances.”<sup>1</sup> Most states have enacted use of force standards but few provide more guidance than the Supreme Court rule and an increasing number of state courts have incorporated the federal framework into state jurisprudence.<sup>2</sup> Some police departments provide more explicit restrictions on when force can be used but these rules provide only piecemeal protection to civilians and are not legally binding.

Absent clear, legally enforceable guideposts, communities, in particular communities of color and people with disabilities, are vulnerable to serious injury and death in situations that should be deescalated. State legislation limiting force will protect members of the public from unwarranted physical harm.

Regulations on categorically dangerous policing practices—like chokeholds and shooting into fleeing vehicles— have a proven track record of reducing officer involved deaths without exposing police to danger.<sup>3</sup> Similarly, clear requirements to de-escalate and intervene accompanied by penalties for failure to do so have helped reduce police killings. States across the country have already recognized the benefit that clearer use of force guidelines can provide to members of the public and police, alike, and enacted comprehensive changes to their state use of force standards.<sup>4</sup>

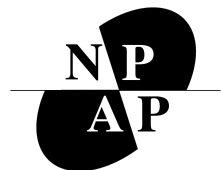
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<sup>1</sup> *Graham v. Connor*, 490 U.S. 386, 396-7 (1989).

<sup>2</sup> Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 Emory L. J. 521, 564-568 (2021).

<sup>3</sup> Samuel Sinyangwe, *Examining the Role of Use of Force Policies in Ending Police Violence*, The Use of Force Project 3 (Sept. 20, 2016)

<sup>4</sup> See *Eg.* CT H6462, WA H1310, WI S 121, UT H 237



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We strongly urge the adoption of state legislation that will eliminate harmful policing practices, mandate de-escalation, and create a duty to intervene.

### *Existing Use of Force Standards Fail to Inform Officers When Force Is Appropriate and Contribute to Police Harm*

The Fourth Amendment governs use of force against people who are at liberty—i.e. not incarcerated.<sup>5</sup> The text of the amendment does not explicitly prohibit government actors from using force but the Supreme Court has interpreted the prohibition on unreasonable seizures to prevent unlawful physical restraints.<sup>6</sup> The Court’s 1989 decision in *Graham v. Connor* created the enduring standard for permissible force, which held that officers’ conduct must be “objectively reasonable” under the totality of the circumstances known to the officer at the time.<sup>7</sup> The *Graham* decision articulated three factors to be weighed when evaluating the reasonableness of use of force: (1) the severity of the suspected crime; (2) whether the subject is actively resisting or attempting to flee; and (3) whether the subject is threatening officers or others.<sup>8</sup>

Police trainers, legal scholars, and advocates are all in agreement that the *Graham* factors do not provide adequate guidance or clarity to police officers about when and how to use force.<sup>9</sup> For instance, the Police Executive Research Forum explained that “the entire *Graham* decision is less than 10 pages,” and “offers little guidance, other than four sentences” on what an officer should consider when deciding whether to use force.<sup>10</sup>

Most existing state laws are similarly ill-suited to instruct police officers on when to use force. Only a handful of states currently have statutes that specify what force can be used and require de-escalation.<sup>11</sup> Until recently, almost no states had statutory restrictions on particular types of harmful policing techniques.<sup>12</sup> The few

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<sup>5</sup> *Graham v. Connor*, 490 U.S. 386, 388 (1989)

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

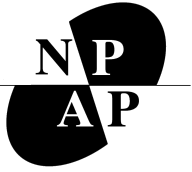
<sup>9</sup> Rachel Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119 (2008)

<sup>10</sup> *Critical Issues in Policing Series: Guiding Principles on Use of Force*, POLICE EXECUTIVE RESEARCH FORUM 16, March 2016,

<https://www.policeforum.org/assets/30%20guiding%20principles.pdf>.

<sup>11</sup> *Supra.*, Stoughton at 562.

<sup>12</sup> *Id.*



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states that have created more restrictive standards to use force have been undermined when state courts import *Graham* and other federal precedents into their interpretations of state statutes.<sup>13</sup> Without this guidance, police officers lack clear rules on when they can use force and what tactics are appropriate to control a situation.

Without federal or state legal standards, local police agencies are often solely responsible for developing standards for when and how officers can use force.<sup>14</sup> Many internal policies provide officers with excessive discretion.<sup>15</sup> For instance, approximately one-fourth of U.S. police agencies use a policy created by a corporation called Lexipol, which essentially parrots the *Graham* standard.<sup>16</sup> The Lexipol policy provides that force is appropriate “that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event.”<sup>17</sup> Lexipol guidance and other vague policies tacitly authorize the use of force in a variety of situations where it would cause more harm than it would prevent.

Some agencies have created effective restrictions, but limitations on employment consequences for policy violations have severely undermined their ability to enforce those standards.<sup>18</sup> Accordingly, even in states where the largest police agencies have adopted policies that go beyond *Graham*, there is value in creating a mechanism where victims of police violence can address concerns about their treatment through an independent body.

## *Certain Policing Tactics and Practices Are Unjustifiably Dangerous and Should Be Regulated by Statute*

While legal standards should provide police officers with some discretion, there are certain tactics and techniques that should be categorically banned or sharply restricted. A study of police use of force policies showed that departments that

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<sup>13</sup> *Id.* at 564-567.

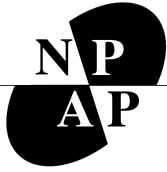
<sup>14</sup> Some states have empowered statewide police officer standards and training agencies to create statewide standards. *See Eg.* Cal Gov’t 7286.

<sup>15</sup> *See eg.* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 224–28 (2017).

<sup>16</sup> Ingrid Eagley and Joanna Schwartz, *Lexipol’s Fight Against Police Reform*, *Indiana Law Journal*, Forthcoming, June 17, 2021, <https://ssrn.com/abstract=3869120>

<sup>17</sup> *Id.*

<sup>18</sup> *See* Michael D. White, Henry F. Fradella, & Michaela Flippin, *How Can We Achieve Accountability in Policing? The (Not-So-Secret) Ingredients to Effective Police Reform*, 25 *Lewis & Clark L. Rev.* 405, 452 (2021).



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prohibit or heavily restrict specific dangerous police practices have 54% fewer killings per arrest than agencies with vague standards.<sup>19</sup> Specifically, departments with policies that prohibited or limited four or more high-risk maneuvers and required de-escalation killed fewer civilians.<sup>20</sup> The same study revealed departments with explicit bans on harmful policing tactics did not sacrifice officer safety and police officers in these jurisdictions were not injured or killed at higher rates.<sup>21</sup>

## Chokeholds

A diverse set of stakeholders have criticized neck restraints that restrict the flow of oxygen or blood to the brain and advocated for their prohibition. Supreme Court justices,<sup>22</sup> police chief associations,<sup>23</sup> and a number of civil rights organizations<sup>24</sup> all acknowledged the substantial danger associated with chokeholds long before the issue garnered national attention in 2020. There is strong empirical data to back up these concerns. Departments that have already enacted chokehold bans have fewer deaths caused by police than cities that have not adopted them.<sup>25</sup>

Many lawmakers started paying attention to the high risk of death presented by chokeholds after George Floyd's murder.<sup>26</sup> Even though chokeholds were banned in

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<sup>19</sup> *Analysis*, THE USE OF FORCE PROJECT, <http://useofforceproject.org/#analysis>, (last visited Sept. 25, 2021).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

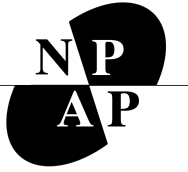
<sup>22</sup> *Los Angeles v. Lyons*, 461 U.S. 95, 116-17 (1983)(Marshall, J., joined by Brennan, J., Blackmun, J., Stevens, J., dissenting)(noting the number of deaths caused by LAPD officers who placed civilians in chokeholds and finding "it is undisputed that chokeholds pose a high and unpredictable risk of serious injury or death... an officer may inadvertently crush the victim's larynx, trachea, or thyroid").

<sup>23</sup> International Association of Chiefs of Police (IACP),  *Holding Facilities*, NATIONAL LAW ENFORCEMENT POLICY CENTER 3 n.1 (Oct. 2014)("[T]here is substantial danger associated with chokeholds and the[ir] use should be avoided except in extreme emergencies.").

<sup>24</sup> Will Peischel, *Activists Say Democrats' Proposed Chokehold Ban Won't Work*, MOTHER JONES, June 10, 2020, <https://www.motherjones.com/politics/2020/06/activists-say-democrats-proposed-chokehold-ban-wont-work/>.

<sup>25</sup> *Supra.*, Use of Force Project.

<sup>26</sup> Hameet Kaur and Janine Mack, *The cities, states and countries finally putting an end to police neck restraints*, CNN, Jun. 16, 2020, <https://www.cnn.com/2020/06/10/world/police-policies-neck-restraints-trnd/index.html>.



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only two states prior to the summer of 2020,<sup>27</sup> state legislators from both parties prioritized passing bans during the last legislative session.<sup>28</sup> For instance, California passed a bill that prohibits local police agencies from maintaining a use of force policy that authorizes the use of carotid restraints or chokeholds.<sup>29</sup> Texas amended its criminal procedure code to prohibit chokeholds and mandate officers to intervene when they observe another officer using excessive force.<sup>30</sup> New York and Washington passed bills banning chokeholds as well.<sup>31</sup> Legislators that have not already adopted chokehold bans can look to a number of other jurisdictions for models of how to eliminate the practice in their state.

## Prone Restraints

Restraining an individual in a face down position for an extended period of time disrupts the flow of oxygen and creates a strong likelihood that the restrained individual will lose consciousness and possibly fall into cardiac arrest.<sup>32</sup> The particular risk of suffocation created by prone restraint is called positional asphyxia. Despite the danger associated with prone restraints, they remain a common practice amongst police.

The strong likelihood of harm created by this method of restraint has been known by American police departments since the early 1990's and policing practice experts have been cautioning against their use for decades.<sup>33</sup> For instance, the International Association of Chiefs of Police (IACP) explained “there is considerable evidence,

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<sup>27</sup> Tennessee (TENN. CODE ANN. §38-3-121) and Nevada (NEV. REV. STAT. ANN. §289.810.1(a)).

<sup>28</sup> Farnoush Amiri, *George Floyd killing prompts some states to limit or ban chokeholds*, WKYC 3, May 23, 2021, <https://www.wkyc.com/article/news/nation-world/george-floyd-chokehold-bans/507-3cdf238f-8909-4594-b717-f07eae636e18>; see also *Senate Republicans to restrict choke holds in emerging police reform bill*, ASSOCIATED PRESS, June 15, 2020, <https://fortune.com/2020/06/15/senate-republicans-restrict-choke-holds-police-reform-bill-use-of-force/>.

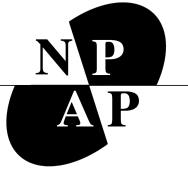
<sup>29</sup> California AB 1196.

<sup>30</sup> Texas SB 69.

<sup>31</sup> See New York S 6670B (felonizing police chokeholds), Washington HB 1310.

<sup>32</sup> Mary E. Helander and Austin McNeil Brown, *The Public Health Crisis of Law Enforcement's Over-Use of Force*, LERNER CENTER FOR PUBLIC HEALTH PROMOTION, July 28, 2020, <https://surface.syr.edu/cgi/viewcontent.cgi?article=1023&context=lerner>.

<sup>33</sup> See *eg.*, U.S. Dep't of Justice, Nat'l Law Enforcement Tech. Ctr. Bulletin: Positional Asphyxia—Sudden Death 2 (June 1995), <https://www.ncjrs.gov/pdffiles/posasph.pdf> (noting the risk of death when a person is held in a prone in a face-down position); IACP, Training Key No. 429, Custody Death Syndrome (1993).



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both in terms of expert opinion and actual field experience, that indicates that the practice of prone restraint does in fact lead to deaths among suspects in the custody of the police” and advised “a prohibition against unqualified use of this restraint procedure...should be included in all law enforcement agency policy.”<sup>34</sup>

Notwithstanding persistent admonitions from leading policing organizations, many law enforcement agencies do not regulate their officer’s use of prone restraints.<sup>35</sup> Without regulation, these incredibly dangerous holds are essentially sanctioned whenever an individual officer decides it is reasonable and for whatever duration they deem appropriate. A survey of police death cases reveals that police officers often fail to exercise this discretion appropriately, leading to lethal outcomes.<sup>36</sup>

Given the well-established threat of harm created by prone restraint holds and reticence of some police departments to regulate the practice, state lawmakers should strongly consider establishing a bright line rule against the procedure through legislation.

## Shooting into Fleeing Vehicles

Police policy experts have acknowledged the unique dangers created by an officer when they shoot into a moving vehicle and have accordingly recommended strict prohibitions on the tactic. IACP explained the “use of firearms under such conditions often presents an unacceptable risk to innocent bystanders... should the driver be wounded or killed by shots fired, the vehicle will almost certainly proceed out of control and could become a serious threat to officers and others in the area.”<sup>37</sup> PERF and the Police Foundation echoed concerns that shooting into a vehicle will

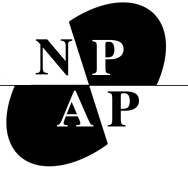
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<sup>34</sup> IACP, *The Prone Restraint—Still A Bad Idea*, 10 *Pol’y Rev.* 1 (1998); (“when it is necessary to use the weight of several officers in order to subdue an individual for handcuffing, the arrestee should be freed from that weight as soon as possible in order to allow him to breathe freely. In order to facilitate the individual’s breathing, he should also be rolled onto his side or into a sitting position as soon as possible”).

<sup>35</sup> See eg., Emily R. Siegel and Joseph Neff, *‘He Died Like An Animal’: Some police still ‘hogtie’ people despite risks*, NBC NEWS, May 24, 2021, <https://www.nbcnews.com/news/us-news/he-died-animal-some-police-still-hogtie-people-despite-risks-n1268032> (noting number of police departments that do not prohibit hogtie restraints that may cause positional asphyxiation).

<sup>36</sup> See eg. *McCue v. City of Bangor*, 838 F.3d 55 (1st Cir. 2016); *Estate of Aguirre v. City of San Antonio*, 995 F.3d 395 (5th Cir. 2021); *Hopper v. Plummer*, 887 F.3d 744 (6th Cir. 2018).

<sup>37</sup> *Use of Force, Concepts and Issue Paper*, International Association of Chiefs of Police Law Enforcement Policy Center, February 2006, <https://s3.documentcloud.org/documents/2303827/useofforcepaper.pdf>.



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cause the driver to lose control, creating a hazard for pedestrians, officers, and other vehicles.<sup>38</sup> Shooting at vehicles also creates a heightened risk that bullets will ricochet and hit a bystander.<sup>39</sup> In addition to the risks created to officers and bystanders, shooting into a vehicle is extremely dangerous to individuals in the vehicle since they are not only facing an injury from the shooting but a potential collision as well.

The harm is not hypothetical. There are many documented instances of police officers injuring or killing a bystander by shooting into a vehicle.<sup>40</sup> Court cases provide similar evidence that these shootings result in serious injuries and fatalities to drivers suspected of crimes.<sup>41</sup>

In light of these risks, experts have recommended policies that: (1) ban officers from shooting into a vehicle unless a person in the vehicle is threatening an officer or other person with deadly harm *by a means other than a vehicle*; and (2) require a police officer to remove themselves from the path of an oncoming vehicle.<sup>42</sup> Internal policies that vest officers with discretion to shoot into a moving vehicle even when the aforementioned conditions are not met create more harm than they avoid. These deficient policies can be supplanted by state legislation.

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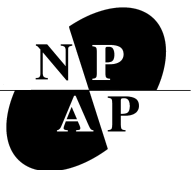
<sup>38</sup> John P. Gross, *Unguided Missiles: Why the Supreme Court Should Prohibit Police Officers from Shooting at Moving Vehicles*, 163 U. Pa. L. Rev. Online 135, 140 (2016).

<sup>39</sup> Jon Swaine et al., *Moving Targets*, GUARDIAN (Sept. 1, 2015), <http://www.theguardian.com/us-news/2015/sep/01/moving-targets-police-shootings-vehicles-the-counted>.

<sup>40</sup> See *Eg. Family speaks after innocent bystander killed by man fleeing Detroit police*, Jan. 19, 2020, (a man shot while fleeing police lost control of vehicle and struck bystander, killing him) <https://www.clickondetroit.com/news/local/2020/01/20/family-speaks-after-innocent-bystander-killed-by-man-fleeing-detroit-police/>; Richard Winton and Solomon Moore, *Proposed LAPD Rule Would Limit Firing at Moving Cars*, Feb. 11, 2005, <https://www.clickondetroit.com/news/local/2020/01/20/family-speaks-after-innocent-bystander-killed-by-man-fleeing-detroit-police/> (police officers shot and killed 13 year old while shooting into vehicle); *Rucker v. Harford County, Md.*, 946 F.2d 278, 280 (4th Cir. 1991)(an officer shot a bystander in an attempt to shoot into a fleeing vehicle driven by a carjacking suspect).

<sup>41</sup> See *Eg. Mullinex v. Luna*, 577 U.S. 7 (2015)(driver who was fleeing officers after he refused to be arrested on an outstanding warrant died after officer shot into his vehicle from an overpass); *Torres v. Madrid*, 141 S. Ct. 989 (2021); *Stoddard-Nunez v. City of Hayward*, 2020 U.S. App. LEXIS 18351 (9th Cir. 2020)(passenger of vehicle killed while fleeing police).

<sup>42</sup> See *Eg. IACP Model Policy on Use of Force*, 2006.



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### No Knock Raids

No-knock raids are another immensely dangerous policing tactic broadly authorized by Fourth Amendment jurisprudence that are almost never justifiable as a net benefit to public safety. Police departments that execute no-knock raids create a high risk of death, injury, and emotional trauma for the occupants of the home where they are searching. These raids also often compromise their own officer's safety.

While police agencies have different methods for conducting no-knock raids, the practice generally entails a 'dynamic entry' into the premises" where the police "use speed and surprise to secure an area before occupants have time to access weapons or otherwise resist."<sup>43</sup> Other common features of a no-knock raid include breaking down doors, detonating "explosive devices" such as flashbang or smoke grenades, and handcuffing residents while forcing them to lie prone on the floor.<sup>44</sup>

All of these features make the execution of a no-knock raid inherently dangerous. In addition to the risks related to paramilitary tactics used to accomplish no-knock raids, warning-less entries into a person's home add another level of danger for all parties involved. Most states recognize a right to use force against an intruder into one's home.<sup>45</sup> When police break into a person's home without knocking and announcing, the resident can reasonably mistake the officers for burglars or other violent intruders—and be more likely to return force.<sup>46</sup> This is particularly true when no-knock entries are conducted very early in the morning or late at night.<sup>47</sup> All of these features make the situation more dangerous for the residents and officers conducting the raid.<sup>48</sup> Between 2010 and 2016, at least 81 civilians died in no-knock and other similar raids across the country, and scores more were

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<sup>43</sup> Supra. note 14, at 257, n. 227.

<sup>44</sup> ACLU, *War Comes Home: The Excessive Militarization of American Policing* at 40 (2014), Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, Cato Institute at 4-5 (2006).

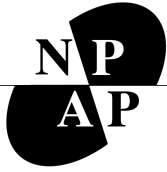
<sup>45</sup> Kolby K. Reddish, *A Clash of Doctrines: The Castle Doctrine and the Knock and Announce Rule*, 25 *Widener LJ*. 171, 173 (2016).

<sup>46</sup> Brian Dolan, *To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing*, 93 *St. John's L. Rev.* 201, 206 (2019).

<sup>47</sup> Supra, note 36, ACLU at 39

<sup>48</sup> *No Knock Warrants: How Common They Are and Why Police Are Using Them*, NPR, Jun. 12, 2020, <https://www.npr.org/2020/06/12/876293168/no-knock-warrants-how-common-they-are-and-why-police-are-using-them>.





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injured.<sup>49</sup> There have also been a number of documented deaths of police officers while executing no-knock warrants.<sup>50</sup>

As with other very dangerous policing tactics, officers have broad discretion and little oversight when they conduct no-knock raids.<sup>51</sup> The default rule is that police must “knock and announce” their presence and authority before entering a dwelling.<sup>52</sup> However, police can dispense of the knock and announce requirement where exigent circumstances exist or they obtained a no-knock warrant from a judge upon showing “that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation.”<sup>53</sup> Even though police must obtain a judge’s approval to execute a no-knock warrant, many studies have found that these applications are subject to very little scrutiny.<sup>54</sup>

The tragic killing of Breonna Taylor during the execution of a no knock warrant has brought new legislative scrutiny to the practice. Lawmakers in at least 39 states proposed legislation to regulate no-knock warrants with Virginia passing a wholesale ban in 2020.<sup>55</sup> Even regulation short of full repeal could significantly reduce police violence.

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<sup>49</sup> Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES, Mar. 18, 2017, <https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html>.

<sup>50</sup>The Justice Collaborative Institute, *End No-Knock Raids* (2020).

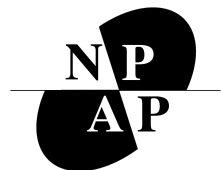
<sup>51</sup> See Eg. L. Joe Dunman, *Warrant Nullification*, 124 WV L Rev \_\_, 30-34 (2021)(forthcoming), available at <https://ssrn.com/abstract=3805913>.

<sup>52</sup> *Wilson v. Arkansas*, 514 U.S. 927 (1995).

<sup>53</sup> *Richards v. Wisconsin*, 520 U.S. 385 (1997).

<sup>54</sup> See Eg. L. Joe Dunman, *Warrant Nullification*, 124 WV L Rev \_\_, 30-34 [2021] [forthcoming], available at <https://ssrn.com/abstract=3805913> [collecting reported instances nationwide where judges spent minimal or no time at all reading warrant applications before signing them]; Mary Nicol Bowman, *Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny*, 47 Akron L Rev 431, 442-43, 461-63 [2014] [citing studies that show judges typically spend “between two and three minutes per warrant application” and that the warrant application process primes judges to defer to the police narrative of the case, which can often be incomplete or misleading]; Richard Van Duizend, L. Paul Sutton & Charlotte A. Carter, *The Search Warrant Process: Preconceptions, Perceptions, and Practices* 26 [1984] [same].)

<sup>55</sup> Tessa Duvall and Darcy Costello, *In cities and states across the U.S., Breonna’s Law is targeting deadly no-knock warrants*, THE COURIER JOURNAL, Mar. 17, 2021, <https://www.courier-journal.com/story/news/local/breonna-taylor/2021/03/12/spread-of-breonnas-law-across-us-has-become-policy-legacy/4642996001/>.



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### Police as Exclusive Responders to Situations Involving Mental Health Crisis

People living with serious mental illness are 16 times more likely to be killed during interactions with law enforcement than civilians without mental illness who are approached or stopped by the police.<sup>56</sup> Nationwide, more than 1 in 4 of the people shot and killed by police officers between 2015 and 2020 had a known mental illness.<sup>57</sup> The risk of death is even greater for people of color in crisis who are almost twice as likely as white residents in crisis to be killed by police.<sup>58</sup>

A significant portion of these lethal encounters begin as 911 calls from people concerned about the well-being of a loved one or neighbor living with a mental illness. An analysis of police-involved shooting deaths in 2015 showed that “in most cases, the police officers who shot [civilians with mental illness] were not responding to reports of a crime. More often, the police officers were called by relatives, neighbors or other bystanders worried that a mentally fragile person was behaving erratically.”<sup>59</sup> Far too often, when armed officers respond to these calls for help, situations that begin as medical crises quickly escalate into deadly tragedies.

Involving mental health workers to advise and co-respond with police to mental health service calls can significantly mitigate the dangers of these interactions. Many jurisdictions that dispatch mental health professionals trained in trauma-informed de-escalation in response to reports of individuals in crisis have seen a reduction in both officer and civilian injuries.<sup>60</sup>

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<sup>56</sup> Treatment Advocacy Center, *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters* 1, Dec. 2015.

<https://www.treatmentadvocacycenter.org/overlooked-in-the-undercounted>.

<sup>57</sup> National Alliance on Mental Illness, *988: Reimagining Crisis Response*,

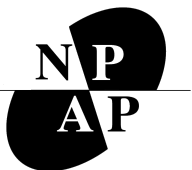
<https://www.nami.org/Advocacy/Crisis-Intervention/988-Reimagining-Crisis-Response>.

<sup>58</sup> Amudha Sairam, *Study of fatal police shootings reveals high risk for unarmed Black men*, The Daily Californian (Oct. 7, 2020), <https://www.dailycal.org/2020/10/07/study-of-fatal-police-shootings-reveals-high-risk-for-unarmed-black-men/>.

<sup>59</sup> Wesley Lowery, Kimberly Kindy, Keith L. Alexander, Julie Tate, Jennifer Jenkins, and Steven Rich, *Distraught People, Deadly Results*, The Washington Post (Jun. 30, 2015), <https://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results/>.

<sup>60</sup> *Assessing the Impact of Crisis Intervention Teams: A Review of Research*, International Association of Chiefs of Police and University of Cincinnati Center for Police and Research and Policy at 15,

<https://www.theiacp.org/sites/default/files/IDD/Review%20of%20CIT%20Evaluations.pdf>.



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Legislation that requires police officers to contact mental health workers where practicable can help ensure qualified professionals have a meaningful opportunity to de-escalate situations involving residents in crisis. States should also take steps to ensure municipalities have a funded network of mental health providers and civilian crisis responders to ensure local police agencies can meet their statutory obligation to include these professionals where they can.

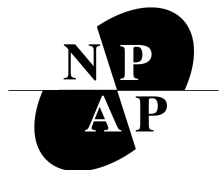
## *Summary of Recommendations for Legislative Proposal to Reduce Police Violence*

States can customize use of force legislation so that it comports with their existing statutory framework and focuses on the most harmful policing practices in their jurisdiction. However, there are several essential components of any effective force regulation regime.

- **Limitations on the Use of Specific Weapons and Techniques.** As discussed in more detail above, categorical restrictions or strict limitations on the use of specific tactics and techniques likely do not already exist in state use of force statutes and are an indispensable feature of effective force legislation. While the practices identified in this paper are of particular importance, there are many additional dangerous tactics that states can choose to regulate, including techniques law enforcement officers commonly use to respond to mass actions.<sup>61</sup>
- **Use of Force Standard.** Legislation should ensure that states have a use of force standard for civil liability, discipline, and decertification—in addition to a standard for criminal culpability. The standard should only authorize the minimal amount of force necessary to accomplish a lawful objective. Moreover, the standard should permit physical force only after a law enforcement officer has identified themselves, provided a verbal warning of intent to use force if compliance is not voluntarily given, and exhausted alternatives to force.
- **Standard for Use of Deadly Force.** A separate standard for lethal force should be included that explicitly prohibits deadly force against a person who only poses a risk to themselves or property. The deadly force standard should also incorporate express de-escalation requirements.
- **Duty to Intervene.** Legislating a requirement for police officers to intervene when they observe uses of force prohibited by the statute will promote a

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<sup>61</sup> Other examples of tactics that could be regulated or restricted include deploying canine or directing a canine to bite an individual, discharging kinetic impact projectiles, and using tear gas to disperse a crowd assembled for the purpose of participating in protected First Amendment activity.



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culture of police integrity and ensure there are consequences when law enforcement officers enable abuse through inaction.

- **Duty to Report.** Legislation should include a requirement for police officers to document and report prohibited uses of force to command-level supervisors. The reporting requirement will ensure that police executives, elected officials, and community members can analyze trends and identify areas for reform.
- **Training Requirements.** Without law enforcement agency involvement, police officers will be unable to meet the new requirements created by the statute. Legislation should include a requirement that the state Peace Officer Standards and Training Board (“POST”) or similar state agency incorporate new use of force standards into training.
- **Enforcement Mechanism.** Legislation should permit people harmed by violations of the statute to pursue relief through civil remedies. This could come in the form of a cause of action for violations of the statute or permitting the Attorney General to sue local police departments in state court. Additionally, violations of the statute should carry a potential penalty of decertification.

States that do not have any existing components of this framework can look at comprehensive bills passed in other states like Washington and Colorado as models. Additionally, NYU Policing Project has drafted model, template legislation that has many of the elements necessary to eliminate the harms associated with existing vague standards regulating use of force.

## CONCLUSION

Currently law enforcement officers are forced to navigate complex situations with virtually no guidance. The dearth of direction provided to police officers on when to use force and what techniques are permissible has resulted in tragic deaths, injuries, and trauma. We know from the implementation of municipal level restrictive policies that more specific regulation can reduce police violence. We also know that these restrictions do not come at the expense of officer safety. We urge state legislators to take action to enact statutes that would create explicit barriers to police uses of force and save lives. NPAP is eager to assist with these efforts. Please do not hesitate to contact us at [legal.npap@nlg.org](mailto:legal.npap@nlg.org) if you are interested in reducing police violence in your state.