



FRAMING PAPER

Policing 2016

To Deliver Safety, Police Need Legitimacy and Accountability

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Policing 2016: To Deliver Safety, Police Need Legitimacy and Accountability

In the past year, the US debate about policing has been driven by two separate, seemingly contradictory narratives. The first narrative, spurred by tragic police-involved deaths and protests throughout the nation, is that the police do not value the lives of people in certain communities. Though the specific demands of protesters are varied, they prominently feature calls for greater accountability for police use of force and a reassessment of the deployment of tactics that generate intensive police contact with residents of high-crime, high-poverty neighborhoods. These events have also put a spotlight on the longstanding mistrust of the police among African Americans. According to a recent poll, 88 percent of African Americans believe that police treat African Americans unfairly. A majority of white respondents (59 percent) agree.¹

The other narrative, driven partially in response to the protests but also by increased violence in a number of cities during 2015, is that these protests and criticisms of the police have discouraged police from proactive enforcement, such as broad-based firearm searches (often referred to as “stop and frisk”) or the aggressive prosecution of low-level offenses premised on the “broken windows” theory. Proponents of this argument hypothesize that this change in policing behavior, dubbed the “Ferguson Effect,” is reducing police officers’ ability to prevent crime, thereby making communities less safe.

Proponents of this second narrative have set up an implicit trade-off: communities can demand police accountability, but only at the cost of increased crime and reduced safety. This dichotomy is false: police officers can only control crime effectively when the community recognizes police actions as fair, neutral, and accountable. We know that people are more likely to obey the law and cooperate with the agents who enforce it when they view both as legitimate: seven of the eight methodologically rigorous studies assessing the relationship between legitimacy and compliance support this theory (Mazerolle et al. 2013a). Thus, policing that the community views as illegitimate and untrustworthy undermines its own effectiveness.

Regardless of whether the criticisms and demands people are making of policing are fair or constructive, building and maintaining community support for policing strategies and practices are necessary to combat crime and disorder. No response in the discussion of how to address violence could

be more damaging than to frame crime and violence reduction and building community trust in the legitimacy of law enforcement as opposing goals.

This tension poses a particular challenge for federal policymakers. As the most visible representatives of the American political order, they are expected to lay out strategies for dealing with pressing domestic issues. Yet their power to affect policing is greatly constrained. Policing in the United States is highly decentralized; over 15,000 city, county, and local police departments throughout the country are operated by local or state governments. The president and Congress have far fewer policy levers for direct action to change policing than mayors or governors do.

The leaders of local law enforcement agencies are either directly elected by local voters (in the case of sheriffs) or appointed and confirmed by mayors, city managers, or other local leaders. Local leadership plays the primary role in such critical policing reform areas as determining the emphasis placed on police misconduct and shaping civilian review boards. In addition, the power to appoint independent special prosecutors to investigate local police misconduct is vested primarily with the states (Congressional Research Service 2014). Within this framework, federal policymakers will need to consider how to most effectively leverage their circumscribed power to improve policy legitimacy and accountability.

As policing assumes a prominence it has not had on the national stage in more than two decades, policymakers and elected leaders can work within the divisive narrative that places safety and legitimacy in opposition or they can use their platform to reframe the issue, placing police and communities as partners in public safety, creating crime prevention strategies that build police legitimacy and accountability. Using federal tools to help police move toward this goal will require a multifaceted strategy that appreciates the limits of federal power. Plans that seek to alter the behavior of a meaningful number of police departments will need to rely on exhortation and incentives to encourage a national movement toward legitimate, accountable policing.

Legitimacy

Legitimacy is the belief that “the police ought to be allowed to exercise their authority to maintain social order, manage conflicts, and solve problems in their communities” (Tyler 2014, 9). Higher levels of legitimacy are associated with people complying with the law and cooperating with the police (Tyler and Fagan 2008). Such cooperation may include providing information on crimes or working with police to discourage disruptive and unlawful behavior by other residents. Building police legitimacy also helps

keep officers and residents safe by making conflict less likely and compliance more common in individual encounters.

Emphasizing legitimacy as a core policing goal has other important benefits. Because communities are the final arbiters of whether to grant legitimacy to a particular police action or the police generally, focusing on legitimacy empowers neighborhoods: their views of the police become a central metric by which success is judged. The trust and lines of communication built by an earnest focus on legitimacy can also help make communities more resilient so that tragic events don't trigger social unrest, as happened in Ferguson and Baltimore, where trust in the police and justice system was compromised.

Since legitimacy is essential to effective policing, it is important to assess the strategies police can use to build this resource. Core among these strategies is emphasizing procedural justice in police strategy and individual officer activity.

Building Legitimacy through Procedural Justice

Procedural justice involves adhering to four principles: treating people with dignity and respect, giving people "voice" during encounters, making decisions neutral, and conveying trustworthy motives. Many prominent police leaders already support procedural justice and the President's Task Force on 21st Century Policing endorsed its use, saying "law enforcement agencies should adopt procedural justice as the guiding principle for internal and external policies and practices to guide their interactions with the citizens they serve" (2015, 1). Police departments electing to do so can draw upon a substantial body of research on how make their operations more procedurally just (Mazerolle et al. 2013b).

Translating procedural justice principles into practice must happen at multiple levels, from street-level interactions with officers to strategic-level decisions by police leaders. At the officer level, training curricula such as the one created by the Chicago Police Department in collaboration with Yale University and replicated in Oakland and other cities² provide tools to make police interactions with civilians more respectful and procedurally just. This training is part of the "toolkit" of the recently established National Initiative for Building Community Trust and Justice, charged with devising, testing, and packaging strategies for improving relations between communities and the justice system.

At the strategic level, police forces can enhance their procedural justice and legitimacy by reassessing how they handle low-level crimes. Intensive enforcement of minor offenses generates long criminal records of minor offenses and associated financial penalties for neighborhood residents, and it creates numerous fraught encounters with the police. Since these "broken windows" efforts are

generally concentrated in low-income neighborhoods of color that are also experiencing serious violent crimes for which perpetrators are often not apprehended or punished, these activities create community perceptions of over-enforcement of minor offenses and under-enforcement of the more harmful offenses. Communities that see violent offenders go unpunished while minor offenses are heavily policed may begin to doubt the motives or sincerity of police who purport to be addressing violent crime. This does not mean that police should stop low-level enforcement: residents in these areas often place great importance on police addressing low-level crime and disorder problems. However, finding ways to address these problems while reducing the penalties associated with them may help improve community members' perceptions about police motives.

Concentrating resources on individuals most likely to participate in violence may also help build police legitimacy. Many of the most damaging crime issues, such as gun violence and open-air drug markets, involve a small number of identifiable people. This makes it possible to craft interventions such as those championed by the National Network for Safe Communities, interventions where police partner with communities to reduce crime through narrow, precise application of enforcement. Problem-oriented approaches such as situational crime prevention similarly focus on intervening in specific crime problems. Since broad enforcement of relatively minor offenses generates adverse consequences, police should take every opportunity to reduce crime, violence, and disorder using narrowly targeted strategies.

Police can improve their legitimacy in the communities they serve by reducing violent crime, limiting the impact of low-level enforcement activities, and giving officers the tools to facilitate procedurally just encounters. If these measures are deployed alongside strategies to improve accountability, they may provide police with a valuable resource for reducing crime and improving officer safety.

Accountability

Greater accountability from law enforcement has been a core demand of protestors in the past year. While holding police accountable for preventing crime is a longstanding practice, these new demands for accountability have focused primarily on police use of force and the deployment of respectful policing efforts. Communities want to know that excessive or unnecessary use of force will be recognized when it happens, and that this recognition will trigger consequences for the officer or officers involved, both in the interest of justice and to reduce the likelihood of future incidents. Many

groups feel that absent meaningful strategies for creating accountability, the police will operate from a position of impunity that threatens lives in their communities. A lack of accountability in turn can undercut the legitimacy of the police.

Creating this accountability requires developing mechanisms that community members, police leaders, and front-line officers see as fair and valid. As with interactions with the community, the mechanisms by which officers are held accountable for their actions should reflect the principles of procedural justice. Failure to treat officers in a procedurally just manner will undermine their support for treating civilians in the same way.

Creating Accountability through Data

Consistent and objective data on police legitimacy and trust is lacking, yet vital to promoting accountability, particularly around the use of force. There are no consistent national data on police-involved shootings. Based on efforts of media outlets such as the *Washington Post*,³ we know that hundreds of police-involved shootings happen each year. However, we know little about the circumstances of these shootings, or whether they are more or less prevalent than in past years. Longitudinal data could allow researchers to analyze trends and identify problem departments that display a pattern of misuse of force. Determining which departments have a pattern of overusing or misusing force may allow for either internal course correction by the department or an intervention by state and federal authorities.

Data can also help departments measure their own progress toward improving accountability and legitimacy. Tremendous data are available on crime trends and on measures of police activity such as arrests. Performance management systems such as CompStat have helped departments collect and use these data to manage department activities in the pursuit of strategic goals. If departments wish to reorient themselves to emphasize accountability and trust, systems must be in place that will allow them to assess their progress on these efforts the way CompStat lets them assess their progress on crime. Efforts such as Chicago's RespectStat are a good start (McCarthy and Rosenbaum 2015): surveying citizens who have had contact with the police can give leaders a sense of how their officers are interacting with the public. However, equipping and training departments across the country to measure and manage to trust and legitimacy is going to require long-term investment in data-collection infrastructure and data management training.

Although collecting data can help identify high-level trends, other tools are needed to promote accountability for individual incidents. Requiring officers to wear body cameras has been the most concrete and widespread policing policy change advanced to this end. One reason for this wide acceptance is that cameras offer potential benefits for both the police and the civilians they interact with: cameras can provide evidence of misconduct or exculpatory evidence to protect officers. Body cameras have also been posited to improve police-community interactions through a “civilizing effect:” when police and civilians know their actions are being recorded, both officers and members of the public are more polite. The research evidence to date provides some support for this: a study of police in Rialto, California, finds that complaints against officers wearing body cameras dropped 87 percent and use of force by those same officers dropped 59 percent (Barak, Farrar, and Sutherland 2015).

While footage from cameras will provide a new source of information about what happened during an interaction, cameras have many limitations. They can be switched off or they may capture too limited a view to fully understand what transpired in tense, complex, or volatile situations. These cameras will also not provide any contextual information that may be important to understanding an interaction: for example, if an officer has prior knowledge about someone that they are interacting with, that may affect the officer’s behavior on the scene of an incident, but that information will not appear in camera footage.

There is no silver bullet to deliver police accountability. Improvements in data collection and measurement will need to be implemented alongside technological advances like body cameras. State and federal agencies can assist with this process in two ways: by **supporting the creation of infrastructure** to collect and analyze the data necessary to identify problems and by **acting on that data** when police agencies engaged in particularly egregious conduct are unwilling or unable to modify their behavior.

Federal Reform Tools

Just as there is no silver bullet for creating legitimacy and accountability, no single federal mechanism can be relied upon to drive changes in policing. Federal policymakers, and the president in particular, have five primary tools for changing policing:

- shaping the public discourse and policy agenda;
- defining and promoting best practices;

- collecting data;
- providing funding, technical assistance, and material transfers; and
- litigating.

All but the last of these tools relies on encouragement and persuasion; they cannot force police agencies to change their practices. Litigation can force change, but it can be deployed in limited circumstances. Thus, federal reform plans must be strategic, and the federal government must clearly understand the power and limits of each tool it can bring to bear to encourage more legitimate, accountable policing.

Shaping the Public Discourse and Policy Agenda

By virtue of the office, the president has a voice that will be heard by almost every segment of American society. The president thus plays a central role in setting the policy agenda by choosing which issues should receive attention and how they will be framed, as when President Obama noted that both underpolicing and overpolicing are issues in many African American neighborhoods. This position, what Theodore Roosevelt first described as the “the bully pulpit,” gives presidents a tool with the potential to mobilize policymakers and the public behind a particular goal or objective. There is also some evidence that using presidential addresses to draw attention to crime control issues can encourage congressional activity (Oliver 2003).

The president also has the power to elevate voices representing his or her preferred law enforcement philosophy and orientation. This includes choosing the nation’s top law enforcement official, the Attorney General, as well as filling positions such as the director of the Office of Community Oriented Policing Services (COPS Office) and temporary ones such as the members of the President’s 21st Century Task Force on Policing. When the ability to set the agenda and elevate voices is used strategically, the president has a powerful tool for advancing a particular style of policing and energizing policymaker and public support for local reform.

Yet the bully pulpit has significant limitations. There is debate about how effectively presidential communication has driven policy, and some researchers have suggested that its impact on media attention and policy can be quite limited (Edwards 2003; Peake and Eshbaugh-Soha 2008). Complicating matters, in a politically polarized era presidential emphasis on a topic may have as much

power to galvanize resistance to a policy as support for it. However, the president and the executive agencies that report to him or her have a number of other tools for agenda setting.

Defining and Promoting Best Practices

Defining and promoting best practice fosters reform among law enforcement agencies that are committed to improving their practice; it also helps local reform advocates by providing a yardstick against which to measure local practice. Presidents can contribute to defining best practices for police departments in several ways. For one, they can respond to moments of crisis or challenge by creating a commission or task force to diagnose problems and put forward recommendations to address them. The President's Task Force on 21st Century Police and its final report are a recent example of a task force brought together in response to an urgent crisis that provided non-binding recommendations for reform.

Several agencies within the Department of Justice can play a role in defining best practices. The National Institute of Justice operates CrimeSolutions.gov, a database of evidence-based practices, and both the Bureau of Justice Assistance and the COPS Office maintain online resources and toolkits designed to help police agencies adopt best practices. The designation of best practices by federal agencies can encourage police agencies to adopt particular policies either out of a desire to improve their operations or to avoid the legal liabilities and potential for local or federal oversight and litigation that might result from the failure to use identified best practices (Pierce 2012; Walker 2006).

Federal best practice definitions are often incorporated into grant funding opportunities, which further encourages the dissemination and adoption of these ideas. For example, the Byrne Justice Assistance Grants (JAG) have had a subtle but important effect on the operation of states' justice systems (Chettiar et al. 2013). The federal government's role as a major funder of criminal justice research also allows it to fund pilot projects and evaluate the effectiveness of existing and innovative strategies, helping bridge the gap between accepted best practices and validated evidence-based practices.

Identifying and defining best practices through any of these mechanisms has had a mixed effect on police practice. Commissions and task forces have had some notable successes, including several from the late 1960s to early 1980s that helped push more law enforcement agencies to seek accreditation from outside authorities (Walker 1985). However, the impact of commissions, task forces, and best practice repositories depends on the orientation of individual police departments and their leaders. For

example, despite receiving the recommendations of the independent Christopher Commission in 1991, the Los Angeles Police Department failed to substantially reform its practices. Ten years later, the LAPD had to enter into a consent decree with the Department of Justice to avoid a lawsuit (Stone, Foglesong, and Cole 2009).

Collecting Data

Data collection offers another way for the president to set the agenda on policing and promote accountability. Credible national data on a number of crucial policing domains, such as police-involved shootings, doesn't currently exist, and only the federal government can collect it.

Executive orders and memoranda give the president substantial power to manage the operation and character of federal data collection activities. For example, President Obama has issued several executive orders designed to change the nature of government data collection, including Order 13642 in May 2013, which required that more government data be machine readable and open to the public,⁴ and a 2009 presidential memorandum designed to improve the quality of executive department data.⁵

The president can also require federal law enforcement agencies to collect data. President Clinton demonstrated this power in 1999 when he ordered the Secretaries of the Treasury and Interior as well as the Attorney General to devise data collection plans to assess racial profiling in federal law enforcement.⁶ Federal law enforcement agencies are a small subset of all American police departments, but having federal agencies collecting these data could encourage other departments to adopt similar data collection programs.

In addition, executive agencies have a number of statutory data requirements that the president could emphasize. The Violent Crime Control and Law Enforcement Act (VCCLEA) of 1994 required that the attorney general collect information on the use of excessive police force; however, as of 2015 no complete, verified data on police-related deaths exist. Through an executive order or memorandum, the president could have agencies prioritize these activities, though the lack of any statutory mechanism to force police to report could still pose a substantial obstacle to developing good data. Additionally, collecting valid and consistent data across the decentralized American law enforcement landscape will likely require substantial investments in data collection infrastructure. Federal funding could encourage such investments.

Data collection can encourage changes in local policing policy in several ways. Without data, it is difficult to identify worrying trends in local practices or high-performing police departments whose

practices might be emulated. Collecting data also informs the public policy dialogue by facilitating independent research and analysis of various policing and public safety questions. When police departments have pervasive problems, data collection can inform the targeting of federal litigation, leveraging lawsuits against particularly egregious offenders to encourage reform more broadly.

Providing Funding, Technical Assistance, and Material Transfers

Funding incentives and material transfers can be a powerful tool for encouraging or discouraging different policing strategies, and the federal government has several ways to deploy these incentives. Local police departments receive federal support through numerous avenues. Some, like the JAG program administered by the Bureau of Justice Assistance, provide funding assistance for a range of activities, while others, like the Department of Defense's 1033 program, transfer specific pieces of hardware to police, ranging from office supplies and furniture to small arms and armored vehicles. Executive agencies may also provide experts to help police departments learn new skills or build new infrastructure. Providing local police access to new free or low-cost capabilities and opportunities encourages their adoption.

The president can change how some of these programs operate. For example, President Obama signed an executive order in January 2015 that substantially modified the protocols the federal government uses to transfer equipment to state, local, and tribal law enforcement agencies.⁷ Through executive agencies, the president can also incentivize changes in policing practice by funding programs that support the adoption of best practices, though this will often require congressional support. For example, the Brennan Center recommended modifying the JAG program by replacing its performance measures with metrics that discourage overcriminalization and overincarceration (Chettiar et al. 2013). With the support of Congress, the program could be further modified to provide funding to grantees based on whether they achieve certain goals, such as reduced recidivism.

Congress also has the converse option at its disposal, withholding funds unless particular policies are enacted. Such requirements are in place for several programs including the Sex Offender Registration and Notification Act (SORNA), the Prison Rape Elimination Act (PREA), the NICS Improvements Amendments Act of 2007, and the Deaths in Custody Act. For example, states that fail to implement the SORNA requirements risk losing 10 percent of their Byrne Justice Assistance Grants.

However, these measures are not always enough to encourage compliance or organizational change. Even with the threat of withheld funds, by 2015 only 17 states had implemented the SORNA

requirements.⁸ Other attempts to leverage Byrne grant money have had similarly mixed effects. PREA, passed in 2003, requires a 5 percent cut in federal prison grant funding to states for noncompliance. However, by 2015 only two states were PREA compliant, and seven states had refused outright to comply with the law.⁹

Thus, although the promise of funding or the threat of withheld funding can encourage policy changes in state and local police agencies, it still does not provide the president or federal agencies with a tool for direct action.

Litigating

The federal government has four tools to mandate policy change when police misconduct is systemic or egregious. Under VCCLEA, the attorney general can sue police departments that engage in a pattern or practice of unconstitutional activities; such suits are generally resolved through a consent decree or memorandum of agreement. These agreements specify a series of reforms the local department agrees to carry out (Davis, Henderson, and Ortiz 2005). Most agreements also provide for a monitor to ensure the reforms are executed. If a local police department receives federal funding, the antidiscrimination provision of the Omnibus Crime Control and Safe Streets Act of 1968, or Title VI of the Civil Rights Act of 1964, also allows the attorney general to sue for discrimination based on race, color, sex, or national origin. Finally, two criminal civil rights laws, 18 U.S.C. §§ 241 and 242 that allow federal prosecutors to bring charges if officers intentionally use force to deprive someone of rights guaranteed by the Constitution or US law (Miller 1998).

While these laws allow federal authorities to act directly on local police agencies and in some cases, dictate organizational policy, they have a number of limitations. Though consent decrees brought through VCCLEA can result in substantial improvements to local police departments (Davis, Henderson, and Ortiz 2005; Walker and Macdonald 2009), resource constraints and political considerations limit the Department of Justice's use of the statute to a small number of departments.

The national impact of litigation is also bounded by the sheer number of police departments in the United States: 15,388 local police forces and sheriff's offices alone in 2013, with many more departments that have special jurisdictions like campuses, tribal areas, or airports. With such an array of departments, problems in smaller agencies such as Ferguson's are unlikely to come to light absent a terrible event such as Michael Brown's death and the subsequent activism and unrest (although better data might help here as well). The shooting of Samuel DuBose by a University of Cincinnati police officer

demonstrates another element of the decentralization challenge. The Cincinnati Police Department put many reforms in place through a federal consent decree, but the University of Cincinnati Police Department is a separate agency and therefore did not participate in the consent decree process.

For prosecutors, the structure of available laws, which emphasize the intent of the officer as an important element in determining illegality, poses a serious obstacle to successfully bringing charges (Hoffman 1993). Finally, while the launch of cases could encourage proactive reform, thus far most cases have been used reactively to high profile events, in part because of the difficulty of identifying bad actors in the absence of a specific complaint. Legal action thus provides a powerful, but limited tool for police reform.

Charting a Path Forward for Federal Police Reform

The past five years have seen the formation of bipartisan consensus on a number of issues in criminal justice. However, the country remains deeply divided about the proper role and orientation of the police. Too often in the debates on policing, the needs to reform policing and to reduce crime and violence are placed in opposition. However, this division is a false one: police legitimacy is a necessary precursor to successful, sustainable reductions in crime and violence.

Supporting this reorientation will require substantial federal support. However, federal influence over policing is considerably circumscribed compared with the vast power the federal government wields over taxes or the tremendous power the president commands in foreign affairs. For direct action to reform local policing, federal prosecutors can litigate, but even this tool is limited to the most problematic agencies. And, even if a substantial number of departments might be candidates for lawsuits, the limited resources available to the Department of Justice, the number of US police departments, and the challenges of identifying these offenders make this a tool that will have limited reach.

For these reasons, a reform strategy based on litigation, and by extension a federal reform policy based on direct action, will likely be ineffective, at least as long as the data continue to make it difficult to identify bad actors without a high-profile incident. The public has good reason to be skeptical of any federal policy proposal that promises a dramatic change in the nature of policing.

This does not mean that federal policymakers have no power to reform the charter of US policing or should be absolved of responsibility for contributing to more accountable, legitimate policing. Political

leaders, particularly federal ones, have a uniquely prominent platform from which to articulate a national vision of policing and its role in promoting safe communities for all. They have an opportunity to forcefully reject the false dichotomy of today's policing debate and to demand safety through legitimacy, rather than safety or legitimacy. They also have the incentives and resources to support police departments who emphasize legitimacy and the platform to elevate high-performing departments as examples to the field. How effectively they use those tools will be a key factor in determining the 21st-century character of American policing.

Notes

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2. Daniela Gilbert, Stewart Wakeling, and Vaughn Crandall, "Procedural Justice and Police Legitimacy: Using Training as a Foundation for Strengthening Community-Police Relationships" (working paper draft, California Partnership for Safe Communities).
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6. Memorandum on Fairness in Law Enforcement: Collection of Data, 35 Weekly Comp. Pres. Doc. 1067 (June 9, 1999).
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STATEMENT OF INDEPENDENCE

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