

Changing the Law to Change Policing: First Steps

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SCHOOL of LAW

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Recent events have brought to the fore longstanding concerns about the nature of policing in the United States and how it undermines racial equity. As an institution, policing needs significant reconsideration. It is time to rethink the structure and governance of policing. It is also time to engage in a deeper conversation about the meaning of public safety. In the meantime, however, the following is a list of urgently-needed reforms, compiled by a small group of law school faculty, each of whom runs or is associated with an academic center devoted to policing and the criminal justice system. The reforms are not intended as an entire agenda for what ought to happen around policing, or what American policing should look like. Rather, they offer immediate, concrete steps federal, state, and local governments can take to address enduring problems in policing. The authors are scholars who are also deeply involved in the daily practice of policing, and included among them are the Reporters for the *American Law Institute's Principles of the Law: Policing*, which works with advisers from across the ideological spectrum in drafting high-level principles to govern policing, though the recommendations here go beyond the scope of the ALI project.

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FEDERAL REFORMS

1 Enforcing Constitutional Rights and Ensuring Adequate Remedies for Constitutional Violations:

Qualified immunity – Federal legislation should eliminate qualified immunity. Widespread indemnification would ensure that municipalities rather than officers bear the primary burden of increased liability, putting pressure to reform on actors who most influence officers. In addition, eliminating qualified immunity would force courts that now sometimes avoid constitutional questions to reach decisions that clearly establish the constitutional standards governing policing.

Municipal liability – The Supreme Court has interpreted the federal civil rights statute, 42 U.S.C. § 1983, to shield municipalities from liability for the actions of police officers that violate statutory or constitutional rights, unless what the officer did was official municipal policy. This likely is a misinterpretation of the original statute, and in any event should be reversed. Municipalities should be responsible for the actions of their officers, to ensure that individuals who are harmed are compensated properly, to provide an incentive to improve training programs, and to facilitate the injunctive relief necessary for meaningful agency-wide police reform.

Federal and State Enforcement to Remedy Patterns or Practices of Police Misconduct – 34 U.S.C. §12601 should be amended in three respects: first, to grant enforcement authority to states’ attorneys general. This will amplify enforcement authority and provide a buffer against a dramatic shift in enforcement when priorities at the federal level shift. Second 12601 should be amended to provide for subpoena power. This will mitigate the extent to which pattern or practice investigations are stalled or compromised by jurisdictions unwilling to provide documents and other information voluntarily during an investigation. Third, the statute should be modified to clarify that state and local prosecutors are “law enforcement officers,” within the meaning of the statute. Although the Department of Justice has taken this position in the past, its explicit adoption would facilitate protection of constitutional rights against infringement by prosecutors’ offices.

Protection of First Amendment rights – The Department of Justice should promote a national commitment to protection of the First Amendment right to protest by law enforcement, and it should use its authority under 18 U.S.C. § 242 to prosecute willful violations of the First Amendment, including at political protests. Federal law enforcement agencies should promote and model First Amendment protections by ensuring that all federal law enforcement officers on duty at protests are trained in policing public protests and that their agency and individual identity is made clear via uniform, nameplates, and other descriptors.

2 Regulating Specific Policies or Practices:

National Use of Force Standard – One of the areas of greatest concern in the country is police use of force, which typically is regulated at the state and local level. But Congress has power to enact laws to enforce the guarantees of the 14th amendment. The federal government could establish national standards for the use of force through statutes creating new criminal and civil actions for excessive force that impose liability beyond the very minimal constitutional floor, by making clear that use of force must be proportionate and necessary and that lethal force should be a last resort (see state level reforms, #1). Alternatively, Congress could impose conditions on federal spending grants and withhold funds to state and local agencies that do not meet federal standards on the use of force, or advance national use of force standards through a federal accreditation body.

No Knock Entries – Unless police knock and announce their presence before they enter a residence to search it or make an arrest, occupants may mistake the police for intruders and unnecessary harm to them or to the police can, and often has, resulted. Police should dispense with the constitutional knock-first requirement only when there is reason to believe doing so would allow evidence destruction or endanger the police, and even in that event, they should announce their presence upon entry. Although technically the standard for law enforcement action, this rule is regularly honored in the breach.

3 Promoting Uniform Standards, Recordkeeping, and Information Sharing:

Decertification database – The federal government should ensure that all policing agencies have access to accurate and timely information about officers who have been decertified by their states. If modeled after the National Practitioner Database, it would include other derogatory information, including firings, civil judgments, and criminal convictions that do not require decertification.

Data Collection – Congress should mandate data collection, including demographic information, for all enforcement actions, by any policing agency in the United States, including federal agencies.

Uniform Data standards – In its legislation regulating data collection, Congress should require the Department of Justice to develop national standards for collecting data on the use of force and other policing practices, just as it has done with respect to crimes for nearly a century with the Uniform Crime Reporting program. National classifications and compatible formats will allow agencies and communities to better assess and monitor the use of force and will improve research efforts.

4 Institutional Reforms:

Reconsider DOJ's conflicting roles in policing – Many U.S. Department of Justice components play a role in local policing, including working with local law enforcement on crime and terrorism, providing grants and technical assistance, enforcing civil rights laws, and funding research. DOJ entities playing these various roles sometimes take conflicting positions, do not coordinate adequately, and promote mixed messages. Congress should consider ways to rationalize policing policy, perhaps through a policing czar or Assistant Attorney General, to ensure that DOJ reduces harm and improves fairness, even as it works to make policing throughout the country more effective. Relatedly, some federal entity should have the authority to conduct pattern or practice investigations and undertake enforcement actions against federal law enforcement agencies.

Federal grant programs – Police departments should not be permitted to participate in any federal grant or equipment program without formal approval by the governing body of the jurisdiction. Otherwise, federal programs may serve to bypass usual political and budgetary decision-making about the amount and kind of policing that best will serve that community. In addition, in measuring the success or productivity of policing, federal programs should focus on improvements in public safety or welfare, not outcomes that measure intrusions such as arrests or property deprivations. The federal government should also end federal equitable sharing programs that encourage local and state law enforcement to engage in civil asset forfeiture.

National accreditation body – Congress should create a federal accreditation body to motivate state and local adoption of a number of measures described below. In order to be accredited, agencies should have to demonstrate both policies and compliance consistent with a number of substantive baselines, such as minimum use of force standard, use of tactical teams, and policies to ensure facilitation of community members' first amendment rights. Also critical to receiving accreditation should be conformity with the data collection measures described above and a provision tying future federal accreditation standards to evidence.

5 Regulation of Federal Policing Agencies:

Federal decertification – All federal agencies should have decertification standards, should decertify officers, and should contribute to the national decertification database.

Regulation of Federal Law Enforcement – Federal law enforcement should be required to implement at least the same standards and accountability measures recommended for state and local agencies. For example, federal law enforcement agents should be required to use body worn cameras when appropriate and to collect and analyze demographic data on enforcement interactions. Force standards and tactics restrictions recommended here for state and local agencies should apply to federal law enforcement agencies as well.

STATE LEVEL REFORMS

Some of these reforms, such as use of force policies and data collection, also could be pursued nationally. But in the absence of federal reform, the proposals below should be adopted at the state level.

1 Regulating Specific Policies or Practices:

For many policing policies or practices, it does not make sense to have every single agency develop its own policies from scratch, in part because the way the police interact with the public on fundamental issues ought not to fall below an acceptable floor from jurisdiction to jurisdiction (although jurisdictions could exceed these floors). One important role that states can play is in setting baseline requirements with which all police department policies must comply. States should consider:

Use of Force – States should regulate the use of force by statute and set minimum requirements for all agency use of force policies. State level policies should incorporate principles of necessity and proportionality, impose strict limits on the use of lethal and less-lethal weapons and techniques, and require de-escalation where possible, prior to resorting to force. (See *ALI Principles on the Use of Force*; *Camden County Police Department Use of Force Policy*.)

Use of Tactical Teams – Although tactical teams (e.g. SWAT) can play an important role in safely diffusing certain dangerous situations, which was their original purpose, they also have the potential to seriously increase the risk of injury or death, and should therefore only be used in situations that cannot be resolved using less intrusive means. Today tactical teams are overused. States should set minimum standards regarding the training, equipment, and deployment of tactical teams, and require agencies to maintain and report data on all deployments.

Use of Invasive Surveillance Techniques – Police increasingly rely on invasive surveillance techniques, including technology that monitors social media, tracks public travels, scans and mines databases, detects objects through walls, and records public activities. The information obtained through these techniques often is retained indefinitely by the police or by private companies under contract with the police department. State and local governments need to ensure that collection, maintenance, access, analysis and use of information obtained through surveillance technology is governed by policies that clearly delineate when it may occur, safeguard privacy, certify accuracy, prevent abuse, and require even-handed, non-discriminatory application of the rules.

Stops and Searches – States should consider measures to limit or regulate the use of traffic and pedestrian stops, as well as consent searches. Examples of possible measures include: limiting the use of reasonable suspicion stops for certain categories of offenses; requiring officers to inform individuals that they have a right to refuse consent to search; prohibiting the use of consent searches in the context of routine traffic stops absent reasonable suspicion to believe that the search will turn up evidence or contraband.

Arrests – Arrests impose substantial harm and are often unnecessary to promote public safety, even when criminal charges are appropriate. States should restrict arrests for low-level offenses and discourage arrests for other offenses where summonses and citations could replace them adequately. States should set standards for arrests, and demand that departments set standards for arrests, that clarify the circumstances under which arrests are appropriate and limit officer discretion to make arrests that do not serve public safety goals.

Body Cam Footage Release Policy – The country has spent a fortune on body cameras. Body cameras were adopted for police accountability, but quickly have become yet one more tool for surveillance and collecting evidence for prosecution. Body cameras fail entirely as an accountability mechanism without a sound policy for release of the video to the public after critical incidents. (See *Chicago's Video Release Policy*, or *LAPD's Video Release Policy* as examples)

Interrogations – In the absence of a recording, accounts of interrogation, by either the police or the suspect, cannot be corroborated and courts cannot fully evaluate the legality of the process. Just as depositions of litigants in civil cases always are transcribed, police interrogations always should be recorded, from start to finish, preferably with video capturing both the questioner and the person being questioned. Agencies should adopt interrogation policies that promote reliability, eliminate undue coercion, and treat persons with dignity and fairness.

2 Institutional Reforms:

Special independent investigators and prosecutors for critical incidents – Independent investigations and prosecutions of officers engaged in critical incidents are necessary to reduce conflicts of interest and promote public faith that officers are being held to the legal standards that the state has set for them. It is especially critical that states and agencies prepare in advance for independent investigators to respond quickly to the scene of critical incidents. Only this quick response can promote trust in subsequent state assessments about the lawfulness of police conduct.

Decertification – Officers who engage in serious misconduct or fail to meet ongoing requirements for certification and yet continue to serve pose a risk to the public, erode faith in government self-regulation, and undermine standards in policing. All states should decertify officers under these circumstances and should report those decertifications to the national decertification database. States should not limit decertifications to officers who have been convicted of a crime, because criminal convictions are too rare and limited in scope to serve as the sole professional licensing standard for police officers.

Unions – Police officers are entitled to unionize like all workers, but at least two related problems have emerged. First, bargaining sometimes leads to inappropriate limits on accountability for misconduct that affects the public safety of the community as a whole. Second, unions have sometimes used their power to promote statutory protections for officers, including Law Enforcement Bills of Rights, that interfere with accountability, for instance, mandating time delays before officers can be questioned after critical events such as officer involved shootings. The law governing union contracts, including the appropriate subjects of collective bargaining, should be reexamined, with unions participating in the conversation.

3 Data and Transparency:

Transparency – States should consider requiring agencies to make certain kinds of information available to the public on the department’s website, including: department policies, information regarding the agency’s use of various surveillance technologies, collective bargaining agreements, complaint data, and crime/call for service data.

Data Collection / Reporting – States should mandate data collection and reporting, including demographic information, for all enforcement actions, including stops, arrests, citations, searches, and uses of force.

4 Substantive Criminal Law and Enforcement Discretion:

Policing practices also are shaped profoundly both by the scope of substantive criminal law, and the authority that officers are given to take someone into custody (as opposed to issuing a citation, etc.). Too often, the machinery of criminal law is deployed to deal with social problems that are best addressed through other means. States should review their criminal codes and consider decriminalizing low-level offenses for which arrests and criminal penalties are inappropriate; adopt least intrusive intervention policies, by restricting arrests and overcharging; and discourage the excessive use of police stops to harass individuals or deter criminal activity, rather than to investigate it.

LOCAL LEVEL REFORMS

Although many of the various reforms discussed above should be adopted at the national or state levels, local agencies and legislatures can and should ensure in the meantime that their own policies and practices are consistent with the principles above on everything from data collection and transparency, to the use of force.

In addition, local legislatures should consider the following:

Accountability Systems – Local legislatures should ensure robust front-end and back-end accountability. Typically accountability has meant “back-end” accountability, which involves holding individual officers accountable for misconduct. Back-end accountability is all too often lacking around policing, and local jurisdictions should ensure there are adequate systems in place to investigate and adjudicate allegations of misconduct, and to proactively review all serious uses of force to ensure compliance with department policy.

Just as important, however, local jurisdictions should ensure that policing agencies are held accountable at the front-end (i.e. before things go wrong), which means formulating police department policies and priorities in a way that is transparent, evidence-based, and provides an opportunity for public input and debate. A number of jurisdictions have created regulatory bodies designed to promote front-end accountability in policing, including Inspectors General who can review existing policies and practices and identify shortfalls, as well as Commissions that can help facilitate greater community participation in police decision-making. Jurisdictions should ensure that these bodies are adequately resourced and staffed to actually regulate policing and ensure that the community has a voice in how it is policed.

Budgets – Local officials should review municipal and county budgets to ensure that there are adequate resources in place to pursue a holistic vision of public safety, and to address social problems--such as poverty or substance abuse--through mechanisms other than the criminal law. Legislatures also should ensure that cities and counties, not law enforcement agencies, control funding related to policing--for example funding that comes from federal grants. Legislative bodies should not simply approve police budgetary items in a pro forma fashion, but should invite public comment and debate, especially when things like surveillance technologies are the issue. And police should not be acquiring technologies or equipment off budget without legislative approval.

Municipal and County Codes – Local government leaders should review municipal and county codes and remove provisions that contribute to over-criminalization and encourage police involvement in situations that may be better handled by other agencies of government. Jurisdictions should pay special attention to provisions that may result in criminalization of poverty or status, or reflect anachronistic views or concerns.

Consolidation – One of the great obstacles to sound, quality policing is the sheer number of policing agencies in the country, many of them quite small. There simply is no way this many small agencies can adhere to the range of requirements that ought to govern policing agencies. One solution under consideration in a number of places is consolidating agencies so that they meet a minimum threshold of size and budget to operate in a safe fashion.