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Public Trust and Law Enforcement—A Brief Discussion for Policymakers

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Summary

Events over the past several years involving conflict between the police and citizens have generated interest in what role Congress could play in facilitating efforts to build trust between law enforcement and the people they serve while promoting effective crime reduction. This report provides a brief overview of the federal government's role in police-community relations.

Despite what appears to be an apparent decreasing amount of trust between law enforcement and the public, Gallup poll data show that, overall, Americans are confident in the police; but, confidence in the police varies according to race, place of residence, and other factors.

If Congress concludes that low public ratings of the police are at least partially attributable to police policies, Congress may decide to address state and local law enforcement policies and practices they believe erode public trust in law enforcement. Federalism limits the amount of influence Congress can have over state and local law enforcement policy. Regardless, the federal government might choose to address issues related to promoting better law enforcement-community relations and accountability through (1) federal efforts to collect and disseminate data on the use of force by law enforcement, (2) statutes that allow the federal government to investigate instances of alleged police misconduct, and (3) the influence the Department of Justice (DOJ) has on state and local policing through its role as an enforcer, policy leader, convener, and funder of law enforcement.

There are several options policymakers might examine should they choose to play a role in facilitating better police-community relations, including the following:

- placing conditions on federal funding to encourage law enforcement to adopt policy changes to promote better community relations;
- expanding efforts to collect more comprehensive data on the use of force by law enforcement officers;
- providing grants to law enforcement agencies so they could purchase body-worn cameras for their officers;
- taking steps to facilitate investigations and prosecutions of excessive force by amending 18 U.S.C. §242 to reduce the *mens rea* standard in federal prosecutions, or place conditions on federal funds to promote the use of special prosecutors at the state level;
- funding Community Oriented Policing Services (COPS) hiring grants so law enforcement agencies could hire more officers to engage in community policing activities;
- increasing funding for federal support for law enforcement safety; and
- using the influence of congressional authority to affect the direction of national criminal justice policy.

Contents

Public Perception of Law Enforcement 2
Federalism and Congressional Control over State and Local Law Enforcement Policy 3
Overview of Federalism 4
Federalism and Local Law Enforcement 4
Federal Efforts to Collect Data on Law Enforcement's Use of Force 5
Uniform Crime Reports 6
Contacts between the Police and the Public 6
Death in Custody Reporting Program 7
Data from the Centers for Disease Control and Prevention 8
Authority for DOJ to Investigate Law Enforcement Misconduct 9
What Role Might the Department of Justice Play in Improving Police-Community Relations? 10
DOJ as Enforcer 11
DOJ as Policy Leader 12
DOJ as Convener 13
DOJ as Funder 14
Policy Options for Congress 15
Conditions on Federal Funding 15
Expanding Efforts to Collect Data on Police Use of Force 16
Promoting the Use of Body-Worn Cameras 18
Facilitating the Investigation and Prosecution of Excessive Force 20
Promoting Community Policing 21
Non-legislative Measures 23

Figures

Figure 1. U.S. Perceptions of Honesty and Ethical Standards of Police 3

Contacts

Author Information 24

Over the past couple of years there have been several high-profile incidents where police officers have been involved in the deaths of citizens. The deaths of Michael Brown in Ferguson, MO; Eric Garner in Staten Island, New York City; and Tamir Rice in Cleveland, OH, in 2014 touched off a series of demonstrations around the country protesting the treatment of people of color at the hands of law enforcement. In December 2014, two New York City police officers, Officers Rafael Ramos and Wenjian Liu, were ambushed and killed by a man who said he wanted retaliation for the deaths of Michael Brown and Eric Garner.[1] More recently, the release of dashcam footage of the shooting of Laquan McDonald in Chicago, IL, the bystander-recorded shootings of Walter Scott in North Charleston, SC, and Alton Sterling in Baton Rouge, LA, and the police-involved deaths of Jamar Clark and Philando Castile in the Twin Cities, MN, area continued the discussion about how police use force against minorities.

The slaying of five police officers and wounding of seven more in Dallas, TX,[2] along with the shooting deaths of three other officers in Baton Rouge, LA,[3] further highlights the long-simmering tensions between police officers[4] and minority communities. It has also generated interest in how to repair the apparently decreasing amount of trust between law enforcement and the public.

In the aftermath of the police response to August 2014 protests in Ferguson, MO, President Obama ordered a review of federal programs that provide equipment to state and local law enforcement. The Administration released a report on its review on December 1, 2014.[5] In addition to conducting the review, the Administration also announced additional steps to "strengthen community policing and fortify the trust that must exist between law enforcement officers and the communities they serve."[6]

Those steps included announcing the formation of a task force on "21st Century Policing," chaired by former Philadelphia Police Commissioner Charles H. Ramsey and Laurie Robinson, a former Assistant Attorney General for the Office of Justice Programs. The task force issued its final report in May 2015.[7]

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[1] Pervaiz Shallwani, "NYPD Shooting Suspect Referenced Garner, Brown Cases," The Wall Street Journal, December 21, 2014, http://www.wsj.com/articles/two-nypd-officers-shot-in-patrol-car-1419112127, accessed on July 8, 2016.

[2] According to the Dallas Police Department Chief, David O. Brown, "The suspect said he was upset about Black Lives Matter, he said he was upset about the recent police shootings. The suspect said he was upset at white people. The suspect stated he wanted to kill white people, especially white officers." USA Today Network, "5 police officers killed in Dallas ambush: What we know," http://www.usatoday.com/story/news/nation-now/2016/07/08/police-officers-killed-ambush-snipers-shooting-dallas-protest-violence/86840926/, accessed on July 8, 2016.

[3] Gavin Long shot and killed three Baton Rouge police officers in an apparent ambush on the morning of July 17, 2016. The officers were responding to calls of a man walking around openly carrying a firearm. It has been reported that Long posted videos online calling for violence against law enforcement. John Woodrow Cox, Mark Berman, and William Wan, "In Baton Rouge, 10 Minutes of Terror Leave Three Officers Dead and Three More Wounded," *Washington Post*, July 18, 2016.

[4] Police departments and police officers are a subset of "law enforcement," which includes sheriff's offices, state law enforcement agencies (e.g., state troopers), and special jurisdiction law enforcement agencies (e.g., transit police or university police departments). However, "police" and "law enforcement" will be used interchangeably in this report.

[5] Executive Office of the President, *Review: Federal Support for Local Law Enforcement Equipment Acquisition*, December 2014, http://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf.

[6] The White House, Office of the Press Secretary, *Fact Sheet: Strengthening Community Policing*, December 1st, 2014, http://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing (hereinafter, "*Strengthening Community Policing*").

[7] The task force was charged with identifying best practices and offering recommendations on how policing practices can promote effective crime reduction while building public trust. The task force's recommendations for promoting

In addition, as a part of its FY2016 budget request, the Administration proposed a $30 million program under the Office of Justice Programs to help local law enforcement purchase and deploy body-worn cameras.[8] The Administration requested another $10 million to study the effectiveness of body-worn cameras. Congress provided $22.5 million for FY2016 to help law enforcement agencies purchase body-worn cameras (P.L. 114-113).

Policymakers might have an interest in what role Congress could play in facilitating efforts to reestablish trust between police and the people they serve, as well as law enforcement's accountability for any excessive use of force.

This report provides a brief overview of police-community relations and how policymakers might be able to play a role in repairing what appears to be fraying trust between police and citizens. The report focuses solely on the relationship between the police and the communities they serve. It does not include a discussion of the lack of trust in or perceived discrimination by other parts of the criminal justice system (i.e., the grand jury system, prosecutions, or corrections). While there may be many factors that influence how different groups of people feel they are treated by the criminal justice system, a discussion of those factors is beyond the scope of this report.

The report starts with an overview of data on public opinion of law enforcement. It then provides a brief discussion of federalism and why Congress does not have the authority to directly change state and local law enforcement practices. Next, the report reviews federal efforts to collect data on law enforcement's use of force and federal authority to investigate instances of police misconduct. This is followed by a review of what role DOJ might be able to play in facilitating improvements in police-community relations or making changes in state and local law enforcement policies. The report concludes with policy options for Congress to consider should policymakers decide to try to influence state and local law enforcement policy.

Public Perception of Law Enforcement

Over the last two years, events in the United States have called attention to public opinion regarding police and their relationship with the people they serve. Overall, Americans express confidence in the police. In a 2015 Gallup poll, 52% of respondents reported having a "great deal" or "quite a lot" of confidence in the police, 30% reported having "some" confidence, and 16% reported having "very little" confidence.[9] If poll data are broken down demographically, however, confidence in the police varies according to race, income, and other categories.[10]

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effective policing and building public trust centered around six "pillars": Building Trust and Legitimacy, Policy and Oversight, Technology and Social Media, Community Policing and Crime Reduction, Officer Training and Education, and Officer Safety and Wellness. The task force also offered two overarching recommendations: the creation of a national task force to review and propose reforms for all elements of the criminal justice systems, and support for community-based initiatives that address issues such as poverty, education, and health and safety. President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing*, U.S. Department of Justice, Community Oriented Policing Services Office, May 2015.

[8] Body-worn cameras are mobile cameras that allow law enforcement officers to record what they see and hear. They can be attached to a helmet, a pair of glasses, or an officer's shirt or badge.

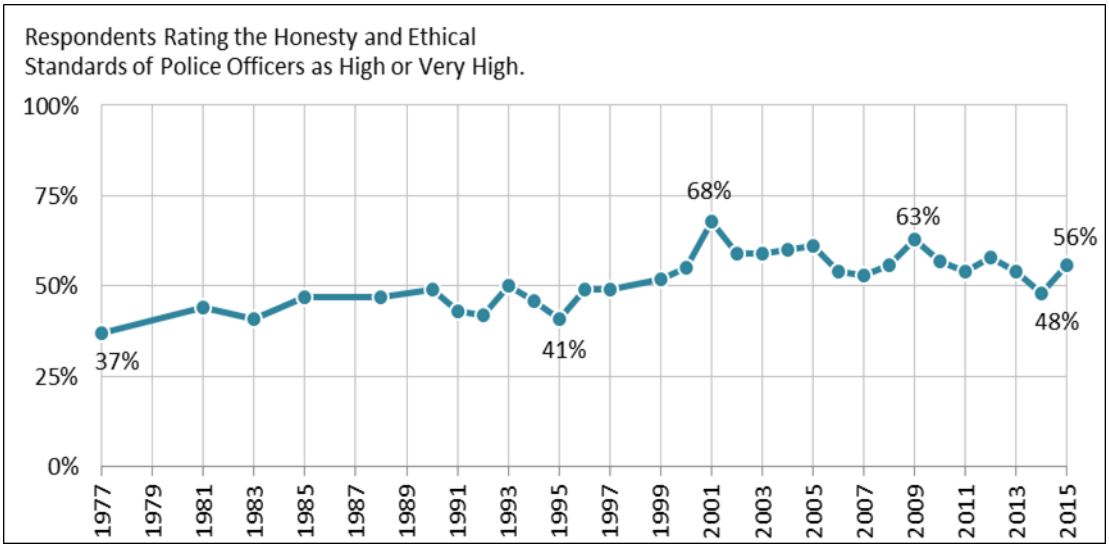
[9] The text of the question is "I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one—a great deal, quite a lot, some, or very little ... the police?" Two percent of respondents volunteered the response, "none." Gallup, *Confidence in Institutions*, June 2015, http://www.gallup.com/poll/1597/Confidence-Institutions.aspx.

[10] Gallup, *Urban Blacks in U.S. Have Little Confidence in Police*, December 8, 2014, http://www.gallup.com/poll/179909/urban-blacks-little-confidence-police.aspx.

Some of the larger contrasts in views of the police may be seen according to race and income. According to Gallup poll data, 30% of blacks in the United States have a great deal or quite a lot of confidence in the police while 57% of whites and 52% of Hispanics have these high levels of confidence. Confidence in the police also varies by income. For example, according to 2014-2015 data, 46% of Gallup poll respondents earning less than $30,000 reported having a great deal or quite a lot of confidence in the police while 63% of respondents earning $75,000 and over reported this level of confidence.[11]

In 2014, Americans' rating of the honesty and ethics of police declined, but in 2015, favorable ratings rebounded (**Figure 1**). A 2013 Gallup poll found that 54% respondents rated the honesty and ethical standards of police as "very high" or "high," but in 2014 this figure declined to 48%. In December 2015, this figure climbed to 56%. Gallup had attributed the 2014 decline to a 22-point drop in nonwhites' favorable ratings of police.[12] Favorability ratings have generally improved since 1977 when just 37% of respondents rated the honesty and ethical standards of police as very high or high,[13] but they have declined since reaching a peak of 68% in 2001.[14]

Figure 1. U.S. Perceptions of Honesty and Ethical Standards of Police



Source: CRS presentation of Gallup data from Jeffrey M. Jones, "Americans' Faith in Honesty, Ethics of Police Rebounds," Gallup, http://www.gallup.com/poll/187874/americans-faith-honesty-ethics-police-rebounds.aspx.

Federalism and Congressional Control over State and Local Law Enforcement Policy

Policymakers may have an interest in trying to help increase trust between law enforcement and certain communities, particularly in some urban areas. Policymakers may seek to increase law

[11] For a full demographic breakdown of the 2014-2015 poll data, see Gallup, *In U.S., Confidence in Police Lowest in 22 Years*, June 2015, http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx.

[12] Jeffrey M. Jones, "Drop Among Nonwhites Drives U.S. Police Honesty Ratings Down," Gallup, December 18, 2014.

[13] Gallup first asked this poll question in 1977.

[14] Jeffrey M. Jones, "Drop Among Nonwhites Drives U.S. Police Honesty Ratings Down," Gallup, December 18, 2014. For full demographic breakdowns of earlier polls, see the *Sourcebook of Criminal Justice Statistics*, http://www.albany.edu/sourcebook/tost_2.html#2_av.

enforcement's accountability for any excessive use of force and address state and local law enforcement policies they believe contribute to the lack of public trust in police. However, the United States' federalized system of government places limits on the influence Congress can have over state and local law enforcement policies.

Overview of Federalism

Federalism describes the intergovernmental relationships between and among federal, state, and local governments, with the federal government having primary authority in some areas and the other governments having primary authority in other areas.[15] Scholars have variously described these relationships as being primarily "dual," "cooperative," "creative," "coercive," or, more recently, "fragmented" federalism. Early characterizations of the American system described a dual federalism in which the federal and state governments were equal partners with relatively separate and distinct areas of authority. Scholars argue that American federalism is presently "more chaotic, complex, and contentious than ever before."[16] This has led to a fragmented federalism in which states and the federal government simultaneously pursue their own policy priorities, and policy implementation often occurs in a piecemeal, disjointed fashion.[17]

Federalism and Local Law Enforcement

Under the authority of the Spending Clause of the U.S. Constitution, Congress may choose to impose conditions on federal grant awards to state and local governments as a way to influence state and local policy.[18] As one scholar noted, congressional conditioning of federal grants related to state and local policing under the authority of the Spending Clause has been questioned:

> Law enforcement historically has been considered one of these attributes of state sovereignty upon which the federal government cannot easily infringe. Thus, Congress is greatly restricted in the degree to which it can regulate a state's administration of its local law enforcement agencies. Because of this limited power over the states, particularly in areas such as law enforcement, Congress cannot "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. Furthermore, even if Congress has the authority to regulate or prohibit certain acts if it chooses to do so, it cannot force the states "to require or prohibit those acts."[19]

In comparison, another scholar has suggested that federal grants to law enforcement agencies are a way to encourage police accountability and argued that "federal funds issued to states ... should be conditioned upon the enactment and implementation of police accountability measures aimed at institutional reform."[20]

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[15] James Q. Wilson and John J. Dilulio, Jr, *American Government Institutions and Policies* (Lexington, D.C.: Heath and Company, 1995), p. A-49.

[16] Cynthia J. Bowling and J. Mitchell Pickerill, "Fragmented Federalism: The State of American Federalism 2012-2013," *Publius: The Journal of Federalism*, vol. 43, no. 3 (June 2013), p. 315.

[17] Ibid, p. 317.

[18] Article I, Section 8, U.S. Constitution, known as the "Spending Clause," states that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."

[19] W. Paul Koenig, "Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with "Megan's Law"?, *The Journal of Criminal Law and Criminology*, vol. 88, no. 2 (Winter, 1998), p. 740-741.

[20] Kami Chavis Simmons, "Cooperative Federalism and Police Reform: Using Congressional Spending Power to

That same scholar also suggested that the use of federal grants to state and local law enforcement agencies can encourage a cooperative federalism relationship that entails federal-state collaboration and allows states some flexibility in implementing federal standards while reserving state and local abilities to enhance police accountability.[21] Another federalism scholar noted that cooperative federalism was "a pragmatic middle ground between reform and reaction that would not destroy the states but would still lower their salience from constitutionally coordinate polities to more congenial laboratories of democracy and administrators of national policy."[22]

While there is limited research on the evolving nature of federalism within law enforcement policy, the congressional use of federal grants to state and local law enforcement, and the cooperative federalism that generally exists through their use, suggest that the federalism relationship in this area may be less fragmented than in other policy areas. It is unclear how changes in federal interaction with state and local law enforcement might affect the nature of federalism outside this specific policy area.

Even though there are limits on how much influence Congress and the federal government can have on state and local law enforcement policy, the federal government does currently have some tools that might be used to promote better law enforcement-community relations and accountability. These include (1) federal efforts to collect and disseminate data on the use of force by law enforcement, (2) statutes that allow the federal government to investigate instances of police misconduct, and (3) the influence DOJ has on state and local law enforcement policies through its role as an enforcer, policy leader, convener, and funder of law enforcement.

Federal Efforts to Collect Data on Law Enforcement's Use of Force

The Michael Brown shooting in Ferguson, MO, has generated questions about why the federal government does not collect and publish data on the use of force by law enforcement. Former Philadelphia Police Chief Ramsey, one of the co-chairs of the President's Task Force on 21st Century Policing, stated "[p]ersonally, I think [how data on civilian and law enforcement officers' deaths are collected] ought to be pretty much the same. If you don't have the data, people think you are hiding something.... This is something that comes under the header of establishing trust."[23] It may be that the lack of reliable data on how often police use force and who they target fuels the public's mistrust of law enforcement. Without more comprehensive data to provide context in this area, the public is left to rely on media accounts of excessive force cases for information.

The federal government currently has several different programs that collect some data on law enforcement-involved shootings and the use of force. However, none of these programs collects data on every use of force incident in the United States.

Promote Police Accountability," *Alabama Law Review*, vol. 62, no. 2 (2011), p. 351. Police accountability may include appropriate oversight by state and local officials to reduce police misconduct and ensure measures are in place to prevent waste, fraud, and abuse of federal grant funds.

[21] Ibid, p. 357.

[22] John Kincaid, "From Cooperative to Coercive Federalism," *Annals of the American Academy of Political and Social Science*, vol. 509 (May, 1990), p. 141.

[23] Kevin Johnson, "Panel to Consider Tracking of Civilians Killed by Police," *USA Today*, December 12, 2014, http://www.usatoday.com/story/news/nation/2014/12/11/tracking-cop-deaths/20104193/.

Uniform Crime Reports

Currently, the Federal Bureau of Investigation (FBI), through the Uniform Crime Report (UCR), collects data on justifiable homicides by law enforcement officers.[24] However, the UCR only captures data on police-involved shootings where a law enforcement officer killed someone while that person was committing a felony. It does not collect data on shootings that do not result in a death, nor does it capture data in instances where an officer shoots at a suspect but does not hit him or her. Also, law enforcement agencies participate in the UCR program voluntarily, which means that justifiable homicides by law enforcement agencies are most likely undercounted.[25] One DOJ statistician has stated that "[t]he FBI's justifiable homicides [data] ... [has] significant limitations in terms of coverage and reliability that [are] primarily due to agency participation and measurement issues."[26]

Contacts between the Police and the Public

Section 210402 of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) requires the Attorney General to "acquire data about the use of excessive force by law enforcement officers" and to publish an annual summary of the data. DOJ has struggled to fulfill this mandate. In April 1996, the Bureau of Justice Statistics (BJS) and the National Institute of Justice (NIJ) published a status report on their efforts to fulfill the requirements of the act.[27] This report summarized the results of studies that examined the issue of police use of force. The report also highlighted difficulties in collecting use of force data, including defining terms such as "use of force," "use of excessive force," and "excessive use of force"; reluctance by police agencies to provide reliable data; concerns about the misapplication of reported data; the lack of attention to provocation in the incident leading to the use of force; and the degree of detail needed to adequately describe individual incidents.

In November 1997, BJS released a second report about its efforts: *Police Use of Force: Collection of National Data*.[28] This report described a pilot project, a survey of approximately 6,400 people who in the past year had an interaction with a law enforcement officer at their own initiative. The survey asked respondents about the types of interactions they had with law enforcement, both positive and negative. The pilot project eventually led to BJS's Police Public Contact Survey (PPCS). The report also noted that both BJS and NIJ had funded a National Police Use-of-Force Database Project. The project was administered by the International Association of Chiefs of Police (IACP), and it was developed as a pilot effort to collect incident-based use-of-force information from local law enforcement agencies. According to the Human Rights Watch, because data for the project were submitted voluntarily, the data were partial and

[24] A "justifiable homicide by a law enforcement officer" is when a law enforcement officer kills someone while that person is committing a felony.

[25] Wesley Lowery, "How Many Police Shootings a Year? No One Knows," *Washington Post*, September 8, 2014, http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/.

[26] Ibid.

[27] Tom McEwen, *National Data Collection on Police Use of Force*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 160113, Washington, DC, April 1996, http://www.bjs.gov/content/pub/pdf/ndcopuof.pdf.

[28] Lawrence A. Greenfield, Patrick A. Langan, and Steven K. Smith, *Police Use of Force: Collection of National Data*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 156040, Washington, DC, November 1997, http://www.bjs.gov/content/pub/pdf/puof.pdf.

inconclusive.[29] BJS reported that it had requested funding in FY1995, FY1996, and FY1997 to support its efforts to collect data pursuant to Section 210402, but it did not receive any.[30] The IACP published a report in 2001 using the data it collected through its National Police Use-of-Force Database Project.[31]

Even though DOJ does not publish annual data on the use of excessive force by law enforcement officers, it has attempted to implement the requirements of Section 210402 by collecting data on citizens' interactions with police—including whether the police threatened to use or have used force, and whether the respondent thought the force was excessive—every three years starting in 1996 through its PPCS.[32] One limitation of the PPCS is that it is a survey, so while it might be able to generate a reliable estimate of when citizens report law enforcement using force against them, it is not a census of all such incidents.

Death in Custody Reporting Program

DOJ also collected data on arrest-related deaths pursuant to the Death in Custody Reporting Act of 2000 (P.L. 106-297). The act required recipients of Violent Offender Incarceration/Truth-in-Sentencing Incentive grants[33] to submit data to DOJ on the death of any person who is in the process of arrest, en route to be incarcerated, or incarcerated at a municipal or county jail, state prison, or other local or state correctional facility (including juvenile facilities). The provisions of the act expired in 2006.[34] Congress reauthorized the act by passing the Death in Custody Reporting Act of 2013 (P.L. 113-242). The 2013 act requires states to submit data to DOJ regarding the death of any person who is detained, under arrest, in the process of being arrested, en route to be incarcerated, or incarcerated at a municipal or county jail, a state prison, a state-run boot camp prison, a boot camp prison that is contracted out by the state, any state or local contract facility, or any other local or state correctional facility (including juvenile facilities). States face up to a 10% reduction in their funding under the Edward Byrne Memorial Justice Assistance Grant (JAG) program if they do not provide the data.[35] The 2013 act also extends the reporting requirement to federal agencies.

BJS established the Death in Custody Reporting Program (DCRP) as a way to collect the data required by the Death in Custody Reporting Act of 2000, and it continued to collect data even though the initial authorization expired in 2006. According to BJS, the data "represent a unique national resource for understanding mortality in the criminal justice system."[36] BJS published a

[29] Human Rights Watch, Shielded From Justice: Police Brutality and Accountability in the United States of America, http://www.hrw.org/legacy/reports98/police/toc.htm.

[30] Ibid., p. 3.

[31] The International Association of Chiefs of Police, *Police Use of Force in America, 2001*, http://www.theiacp.org/Portals/0/pdfs/Publications/2001useofforce.pdf.

[32] The most recent data collected through the Police Public Contact Survey was from 2011.

[33] The Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) authorized funding for grants to states for building or expanding correctional facilities. To be eligible for funding under the program a state had to demonstrate it had increased the number of violent offenders who were arrested and sentenced to incarceration along with increasing the average length of violent offenders' sentences or that the state had implemented truth-in-sentencing laws which would require violent offenders to serve at least 85% of their sentences.

[34] H.Rept. 113-285.

[35] For more information on the JAG program, see CRS Report RS22416, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program: In Brief*, by Nathan James.

[36] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Deaths in Custody Reporting Program*, http://www.bjs.gov/index.cfm?ty=tp&tid=19.

report on arrest-related deaths for 2003-2009. In the report, BJS notes that "[a]rrest-related deaths are under-reported" and that the data are "more representative of the nature of arrest-related deaths than the volume at which they occur."[37] It was reported that BJS stopped publishing the arrest-related deaths data in 2009 because they were unreliable.[38]

Data from the Centers for Disease Control and Prevention

The Centers for Disease Control and Prevention (CDC) receives and publishes death certificate data voluntarily provided to it by all 50 states, the District of Columbia, and the territories.[39] For publication of national data on violent deaths, CDC codes the intent or *manner of death*, such as suicide, homicide, legal intervention, or unintentional (among others). *Legal intervention* is defined as "injuries inflicted by the police or other law-enforcing agents, including military on duty [excluding operations of war], in the course of arresting or attempting to arrest lawbreakers, suppressing disturbances, maintaining order, and other legal action."[40]

There are few published studies of deaths attributed to legal intervention in the United States.[41] The death certificate data used in such studies provide basic demographic information about the decedents and the locations of deaths attributed to legal intervention. However, they do not capture additional layers of information—such as basic information about the law enforcement officer, or the nature of the conflict—that could be helpful in crafting approaches to reduce lethal outcomes.

In 2002, CDC launched the National Violent Death Reporting System (NVDRS), which currently operates in 32 states.[42] Personnel in these states gather and link records from law enforcement, coroners and medical examiners, vital statistics, and crime laboratories, providing better quality information about the causes of and means to prevent violent deaths than is available from death certificates alone. NVDRS data have illuminated efforts to prevent suicide, intimate partner violence, and drug overdose, among other types of violent deaths. CDC has published analyses of NVDRS data on deaths due to legal intervention infrequently.[43]

President Obama sought an additional $20 million (above the prior level of about $3 million) for FY2014 to expand NVDRS to all 50 states following the school shooting in Newtown, CT, in

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[37] Andrea M. Burch, *Arrest-Related Deaths, 2003-2009—Statistical Tables*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 235385, Washington, DC, November 2011, p. 1, http://www.bjs.gov/content/pub/pdf/ard0309st.pdf.

[38] Wesley Lowery, "How Many Police Shootings a Year? No One Knows," *Washington Post*, September 8, 2014, http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/.

[39] Centers for Disease Control and Prevention (CDC), National Vital Statistics System, Mortality Data, http://www.cdc.gov/nchs/deaths.htm.

[40] Based on World Health Organization (WHO), International Classification of Diseases, 10th Revision (ICD-10), Y35(.0-.4), Y35(.6-.7), and Y89.0, http://www.who.int/classifications/en/. CDC excludes legal executions from this definition. Of note, some deaths initially classified as legal intervention are reclassified as homicides following investigation.

[41] See for example, Joanna Drowos, Charles H. Hennekens and Robert S. Levine, "Variations in Mortality from Legal Intervention in the United States–1999-2013," *Preventive Medicine*, vol. 81 (September 25, 2015), pp. 290-293.

[42] CDC, National Violent Death Reporting System (NVDRS), http://www.cdc.gov/violenceprevention/nvdrs/.

[43] For example, in its report on violent deaths for 2009 CDC reported on certain characteristics of the decedent, such as location of death and toxicology tests results. However, in its report on violent deaths for 2010 CDC grouped legal intervention deaths with homicides for analysis. CDC, "Surveillance for Violent Deaths—National Violent Death Reporting System, 16 States," reports for 2009 and 2010, http://www.cdc.gov/violenceprevention/nvdrs/publications.html.

2012.[44] Congress provided almost half of the requested increase for FY2014, supporting expansion of the system from 17 to 32 states, and sustained this funding level for FY2015 (P.L. 113-235). Congress increased funding to $16 million for FY2016 to include more states in the program (P.L. 114-113). The Administration requests a total of $23.6 million for FY2017 in order to expand NVDRS to all 50 states.[45]

Authority for DOJ to Investigate Law Enforcement Misconduct

The federal government has several legal tools at its disposal to ensure that state and local law enforcement practices and procedures adhere to constitutional norms.[46] The first is *criminal* enforcement brought directly against an offending officer under several federal civil rights statutes. Section 242 of Title 18 makes it a federal crime to willfully deprive a person of their constitutional rights while acting under color of law.[47] Similarly, Section 241 of Title 18 outlaws conspiracies to deprive someone of their constitutional rights.[48] These statutes, enacted during the Reconstruction Era following the Civil War, were primarily intended to safeguard rights newly bestowed on African Americans under the Fourteenth and Fifteenth Amendments.[49] In more recent years, these statutes have formed the basis of police excessive force criminal cases,[50] and form the legal justification for DOJ investigations into several recent police killings across the country.[51]

Arguably, the most contentious issue surrounding Section 242 has been its *mens rea*, or mental state, element. In the 1945 case *Screws v. United States*, the Supreme Court interpreted the predecessor of Section 242 to require that the officer have the *specific intent* of depriving the person of their civil rights.[52] Not a model of clarity, the lower courts have parsed *Screws* to require varying *mens rea* thresholds, with some instructing that the officer must act with "a bad

[44] See, for example, The White House, "Now Is the Time: The President's Plan to Protect our Children and our Communities by Reducing Gun Violence," January 2013, pp. 8-9, http://www.whitehouse.gov/issues/preventing-gun-violence.

[45] CDC, "Justification of Estimates for Congressional Committees, FY2017," February 2016, pp. 336-338, http://www.cdc.gov/budget/.

[46] In addition to legal enforcement by government actors, 42 U.S.C. §1983 provides a cause of action for private actors to vindicate violations of constitutional rights such as police use of unreasonable force. *See* Graham v. Connor, 490 U.S. 386 (1989).

[47] Ibid. "'Color of law' simply means that the person doing the act is using power given to him or her by a governmental agency (local, State, or Federal)." Department of Justice, Civil Rights Division, *Addressing Police Misconduct Laws Enforced by the Department of Justice*.

[48] 18 U.S.C. §241.

[49] See Edward F. Malone, *Legacy of Reconstruction: The Vagueness of the Criminal Civil Rights Statutes*, 38 UCLA L. Rev. 163, 164 (1990).

[50] See, for example, United States v. Bradley, 196 F.3d 762 (7th Cir. 1999); United States v. Reese, 2 F.3d 870 (9th Cir. 1993).

[51] See Paul Lewis, *Federal Officials May Use Little-Known Civil Rights Statute in Police Shooting Cases*, The Guardian (Dec. 24, 2014), http://www.theguardian.com/us-news/2014/dec/24/federal-review-michael-brown-eric-garner-crawford-hamilton.

[52] Screws v. United States, 325 U.S. 91, 101 (1945).

purpose or evil motive,"[53] while others require a less stringent "reckless disregard" standard.[54] Some view the intent threshold as blocking too many meritorious cases and argue that it should be lowered to adequately protect civil rights.[55]

The second major legal tool is a federal statute that focuses on *civil* liability of law enforcement agencies as a whole, rather than on the wrongdoing of individual officers. Enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, and codified at 42 U.S.C. §14141, this statute prohibits government authorities or agents acting on its behalf from engaging in a "pattern or practice of conduct by law enforcement officers ... that deprives persons of rights ... secured or protected by the Constitution of laws of the United States."[56] It authorizes the Attorney General to sue for equitable or declaratory relief when he or she has "reasonable cause to believe" that such a pattern of constitutional violation has occurred.

The scope of investigations under Section 14141, primarily conducted by the Special Litigation Section of DOJ's Civil Rights Division, has ranged from police use of force and unlawful stops and searches to racial and ethnic biases.[57] Many of these investigations are resolved by consent decree—a judicially enforceable settlement between DOJ and the local police department that outlines the various measures the local agency must take to remedy its unconstitutional police practices. For instance, after two years of extensive investigation into the New Orleans Police Department's policies and practices in which DOJ found numerous instances of unconstitutional conduct, DOJ entered into a consent decree with the City of New Orleans requiring the city to implement new policies and training to remedy these constitutional violations.[58] The content of each consent decree can differ, but many include provisions concerning use-of-force reporting systems, citizen complaint systems, and early warning systems to identify problem officers.[59]

What Role Might the Department of Justice Play in Improving Police-Community Relations?

DOJ and its component agencies such as the FBI can help shape policing in the United States. Such influence can be seen in at least four roles that DOJ and its components fill on this stage:

- *Enforcer*—investigating and prosecuting federal laws related to police abuse of power.
- *Policy leader*—setting standards on criminal justice issues.

[53] See United States v. Kerley, 643 F.2d 299 (5th Cir. 1981).

[54] See Bradley, 196 F.3d at 769.

[55] See Michael J. Pastor, *A Tragedy and a Crime?: Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 171 (2002).

[56] 42 U.S.C. §14141.

[57] See generally Police Executive Research Forum, *Civil Rights Investigations of Local Police: Lessons Learned*, (2013), http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf.

[58] United States v. City of New Orleans, No. 12-1924 (E.D. La. July 24, 2012) (consent decree regarding the New Orleans Police Department), *available at* http://www.nola.gov/getattachment/NOPD/About-Us/NOPD-Consent-Decree/NOPD-Consent-Decree-7-24-12.pdf/.

[59] See Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits In Context*, 22 ST. LOUIS U PUB. L. REV. 6 (2003).

- *Convener*—bringing together key parties on sensitive, relevant, and important issues.
- *Funder*—awarding grants to state and local police as well as researchers probing important policing questions.[60]

DOJ as Enforcer

As noted elsewhere in this report, DOJ has a hand in shaping the way state and local police operate by enforcing federal laws covering the conduct of such agencies.[61] Success in these efforts could enhance public confidence in the oversight of law enforcement. To this end, DOJ's Civil Rights Division and the FBI rely on their authority to pursue officials or agencies depriving persons of their constitutionally protected rights. Such actions can be broken down into "color of law"[62] cases and "pattern or practice"[63] investigations (discussed above).

The FBI is the lead federal agency for investigating color of law abuses and can initiate cases involving official misconduct, which DOJ can prosecute.[64] Such cases involve excessive force, discriminatory harassment, sexual assault, false arrests, or unlawful stops, searches, or arrests.[65] The FBI reported that in 2014 its investigations resulted in 72 indictments for color of law violations.[66]

Additionally, DOJ's Civil Rights Division can review the patterns or practices "of law enforcement agencies that may be violating people's federal rights"[67] and seek civil remedies when "law enforcement agencies have policies or practices that foster a pattern of misconduct by employees." Such remedies target agencies, not individual officers. DOJ reviews can be initiated when agencies are suspected of

- lack of supervision/monitoring of officers' actions;
- lack of justification or reporting by officers on incidents involving the use of force;
- lack of, or improper training of, officers; and

[60] The mission statement of the Department of Justice (DOJ) is "to enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans." The statement suggests at least two of the prominent roles that influence state and local policing efforts. DOJ. See U.S. Department of Justice, http://www.justice.gov/about.

[61] Department of Justice, Civil Rights Division, *Addressing Police Misconduct Laws Enforced by the Department of Justice.*

[62] Ibid.

[63] These are not investigations of isolated incidents, but rather recurring activities by agencies. Ibid.

[64] See 18 U.S.C. §241, 242.

[65] Department of Justice, Civil Rights Division, *Addressing Police Misconduct Laws Enforced by the Department of Justice.*

[66] See http://www.fbi.gov/about-us/investigate/civilrights/color_of_law.

[67] Under 42 U.S.C. §14141 and "[i]f a law enforcement agency receives federal funding, [DOJ] can also use the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, and Title VI of the Civil Rights Act of 1964, which forbid discrimination on the basis of race, color, sex or national origin by agencies receiving federal funds. [DOJ] may act if [it] find[s] a pattern or practice by the law enforcement agency that systemically violates people's rights. Harm to a single person, or isolated action, is usually not enough to show a pattern or practice that violates these laws." See http://www.justice.gov/crt/about/spl/police.php.

- citizen complaint processes that treat complainants as adversaries.[68]

Despite DOJ's authority to prosecute police misconduct, experts have highlighted a number of challenges. Some have suggested, for instance, that the burden of proof is on DOJ to "prove a defendant's specific intent to deprive a victim of constitutional rights,"[69] and this may make it difficult to convict someone of misconduct. In addition, even with a prosecution some are skeptical as to whether such an outcome may incentivize sweeping institutional changes to prevent future misconduct.[70] Regardless, "[t]he Civil Rights Division is not the most direct mechanism of police oversight in the nation, nor is it the primary mechanism on which the people of any single jurisdiction rely; but ... [it] has been the most steady and longest lasting instrument of police accountability in the United States."[71]

DOJ as Policy Leader

DOJ can serve as a model for state and local law enforcement. For example, it issues guidance for U.S. police work; sets policies for its own agencies that resonate broadly in federal, state, and local law enforcement; sponsors studies that examine policing practices; and provides training.

- *Issuing guidance*. One relevant illustration of DOJ's dissemination of guidance is a December 2014 product offering direction on the use of race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity in police work. This guidance is directed at federal policing agencies as well as state and local police active on federal task forces.[72] In issuing this guidance, DOJ noted its belief that "[l]aw enforcement practices free from inappropriate considerations ... strengthen trust in law enforcement agencies and foster collaborative efforts between law enforcement and communities to fight crime and keep the Nation safe."[73] The 2014 document expanded on guidance issued by DOJ in 2003.
- *Setting polices for DOJ agencies*. DOJ also sets policies for its own agencies. For example, domestic investigations at the FBI are governed by principles articulated by DOJ.[74] These purportedly "make the FBI's operations in the United States more effective by providing simpler, clearer, and more uniform standards and procedures." Such principles set the investigative standards for task forces that the FBI leads. These task forces often include state and local officers and follow DOJ standards in their task force casework.
- *Sponsoring studies on policing practices*. Elements within DOJ sponsor studies that are intended to help state and local law enforcement address policing challenges. (These studies do not necessarily represent the official position or

[68] See http://www.fbi.gov/about-us/investigate/civilrights/color_of_law.

[69] Christopher E. Stone, Introduction to *Prosecuting Police Misconduct: Reflections on the Role of the U.S. Civil Rights Division*, Vera Institute of Justice, p. 10.

[70] Ibid., p. 9.

[71] Ibid., p. 3.

[72] Department of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity*, December 2014.

[73] Ibid., p. 1.

[74] Available at http://www.justice.gov/ag/readingroom/guidelines.pdf. See also U.S. Department of Justice, "Memorandum for the Heads of Department Components: The Attorney General's Guidelines for Domestic FBI Operations," press release, September 29, 2008. For a broader discussion see Emily Berman, *Domestic Intelligence: New Powers, New Risks*, Brennan Center for Justice at New York University School of Law, 2011, pp. 8-9, 11.

policies of DOJ.) One such product, a report focused on the use of body-worn cameras by police, was published in 2014.[75] DOJ also supported the production and 2013 release of a planning guide for managing large-scale security events.[76]

- *Providing training*. In 2014, responding to circumstances in Ferguson, MO, DOJ developed a national initiative to enhance trust between the police and public. According to DOJ, among other things the initiative will involve a "substantial investment in training."[77] In March 2015, then-Attorney General Eric Holder announced a $4.75 million initiative in six cities[78] for the National Initiative for Building Community Trust and Justice.[79] More routine examples of training are sponsored by DOJ's National Institute of Justice, which offers training to state and local law enforcement on a wide variety of topics.[80]

Notably, DOJ sets polices for its own agencies that can be binding, but guidance issued by the DOJ to police forces around the country may be just that—guidance. As such, some may be skeptical as to the true impact of DOJ as a policy setter for nationwide policing.

DOJ as Convener

DOJ brings together representatives from law enforcement agencies and local communities to discuss policing issues. Its Community Relations Service (Service) plays a pivotal role in this and was sent to Ferguson, MO, after the shooting of Michael Brown.[81] The Service describes itself as a "'[p]eacemaker' for community conflicts and tensions arising from differences of race, color, national origin, gender, gender identity, sexual orientation, religion and disability."[82] Geared toward conflict resolution strategies, it *does not* investigate or prosecute crimes, but rather opens discussions among elements within a community such as police, government officials, residents, and a wide variety of community groups (i.e., faith-based groups, businesses, and advocacy organizations). Additionally, the Service notes that it *does not* take sides in a dispute, impose solutions, assign blame, or assess fault.[83] Rather, it offers services geared toward the following:

- *Mediation.* Relying on structured in-person negotiations led by conflict resolution specialists, this process "is not used to determine who is right or who is wrong."

[75] The report was supported by cooperative agreement number 2012-CK-WX-K028 awarded by the Office of Community Oriented Policing Services, U.S. Department of Justice. See Lindsay Miller, Jessica Toliver, and Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, (2014) Washington, DC: Office of Community Oriented Policing Services.

[76] The guide was supported by Grant No. 2012-ZC-BX-K001 awarded by the Bureau of Justice Assistance. See CNA Corporation, *Managing Large-Scale Security Events: A Planning Primer for Local Law Enforcement Agencies*, (2013) Washington, DC: Bureau of Justice Assistance.

[77] Department of Justice, Press Release, "Justice Department Announces National Effort to Build Trust Between Law Enforcement and the Communities They Serve," September 18, 2014.

[78] The six cities where the pilots will be conducted are Birmingham, AL; Ft. Worth, TX; Gary, IN; Minneapolis, MN; Pittsburgh, PA; and Stockton, CA.

[79] National Initiative for Building Community Trust and Justice, Press Release, "Attorney General Holder Announces the First Six Pilot Sites for the National Initiative." https://trustandjustice.org/news/press-releases, accessed on July 8, 2016.

[80] See http://www.nij.gov/training/pages/welcome.aspx.

[81] Department of Justice, Press Release, "Statement by Attorney General Holder on the Ongoing Situation in Ferguson, Missouri," November 25, 2014.

[82] See http://www.justice.gov/crs.

[83] Ibid.

Mediation can result in "Memorand[ums] of Understanding, Mediation Agreement[s], Resolution[s], Proclamation[s], Collaborative Agreement[s], Community Pact[s], or Ordinance[s]."[84]

- *Facilitation.* Conflict resolution specialists facilitate discussion among elements within particular communities. Such discussions can cover topics such as "race, police-community relations, perceived hate crimes, tribal conflicts, protests and demonstrations, and other issues that may be important for a community."[85]
- *Training.* The Service provides nine programs that address racial and ethnic conflict and prevent and respond to violent hate crimes.[86]
- *Consulting.* The Service offers "technical assistance, information on best practices, referrals, coaching, advice, and insight. For example, [the Service] might provide technical insight on the structure and function needed in order to establish a Human Relations Commission. Consulting services can help communities address police, community, or school conflicts."[87]

At the national level, DOJ can also convene law enforcement, policy, and academic experts to discuss issues of local importance. For example, DOJ's Community Oriented Policing Services Office (COPS), cooperating with the Police Executive Research Forum (PERF), brought together a meeting of "police executives, DOJ officials, academics and other experts to discuss constitutional policing as a cornerstone of community policing" in December 2014.[88] COPS and PERF plan to publish the proceedings of the one day session as a resource for law enforcement. Also, as discussed above, DOJ convened a task force on 21st Century Policing.

DOJ as Funder

DOJ operates grant programs to assist state and local law enforcement in their efforts to control domestic crime. Two of the most prominent examples are

- *COPS grants*. The mission of the COPS program is to advance community policing in all jurisdictions across the United States. The COPS program awards grants to state, local, and tribal law enforcement agencies to advance the practice of community policing.[89]
- *The Edward Byrne Memorial Justice Assistance Grant (JAG) program*. JAG provides funding to state, local, and tribal governments for state and local initiatives, technical assistance, training, personnel, equipment, supplies, contractual support, and criminal justice information systems in one or more of seven program purpose areas. The program purpose areas are (1) law enforcement programs; (2) prosecution and court programs; (3) prevention and education programs; (4) corrections and community corrections programs; (5) drug treatment and enforcement programs; (6) planning, evaluation, and

[84] http://www.justice.gov/crs/what-we-do/mediation.

[85] http://www.justice.gov/crs/what-we-do/facilitation.

[86] http://www.justice.gov/crs/what-we-do/training.

[87] http://www.justice.gov/crs/what-we-do/consulting.

[88] Department of Justice, Press Release, "U.S. Department of Justice Convenes Constitutional Policing Session With Law Enforcement Leaders," December 11, 2014.

[89] U.S. Department of Justice, Community Oriented Policing Services Office, *About Community Oriented Policing Services Office*, http://www.cops.usdoj.gov/Default.asp?Item=35.

technology improvement programs; and (7) crime victim and witness programs (other than compensation).[90]

Policy Options for Congress

Policymakers might consider the pros and cons of several options if they want to help promote better police-community relations or increase law enforcement's accountability while promoting effective crime reduction. These options include (1) placing conditions on federal funding to encourage state and local governments to adopt policy changes; (2) expanding efforts to collect data on the use of force by law enforcement officers; (3) promoting the use of body-worn cameras; (4) taking steps to facilitate more investigations and prosecutions of deaths that result from excessive force; (5) promoting community policing activities through COPS grants; and (6) using the influence of congressional authority to affect the direction of national criminal justice policy.

Conditions on Federal Funding

As previously discussed, Congress does not have direct control over state and local law enforcement policies. However, Congress can attempt to influence these polices by placing conditions on grant programs that provide assistance to law enforcement. Policymakers commonly try to attach conditions to the JAG program in an attempt to influence state and local criminal justice policies. JAG is a frequent target for such conditions because it is a formula grant program that provides funding to state and local governments for law enforcement purposes.[91] Congress might consider reducing a state and local law enforcement agency's allocation under the JAG program unless it adopts a certain policy change. While the majority of JAG funding for FY2009 to FY2012 was used for law enforcement programs, state and local governments also used their funding for other programs, such as "prosecution, court, and indigent defense"; "planning, evaluation, and technology improvement"; "prevention and education"; and "drug treatment and enforcement."[92]

The broad nature of the JAG program means that if Congress were to reduce a state or local government's allocation under it for not adopting a certain policy change, it could reduce funding for non-law enforcement related purposes. On the one hand, it could be argued that this would provide a strong inducement for states and local governments to adopt the policy change (e.g., state and local governments would comply with the requirement because they would not want to lose funding for other important programs). On the other hand, it could penalize agencies (e.g., the correctional department or prosecutors and public defenders offices) that have no control over whether law enforcement agencies adopt the policy change. Also, some allocations (e.g., for law enforcement agencies serving small jurisdictions) might not be large enough to convince law

[90] For more information, see CRS Report RS22416, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program: In Brief*, by Nathan James.

[91] For more information on how allocations are calculated under the JAG program, see CRS Report RS22416, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program: In Brief*, by Nathan James.

[92] The Bureau of Justice Assistance reported that 64% of JAG funding was used for law enforcement programs between FY2009 and FY2012. The remaining funds were used for prosecution, court, and indigent defense (9%); planning, evaluation, and technology improvement (9%); prevention and education (6%); drug treatment and enforcement (5%); corrections and community corrections (5%); and crime victim and witness protection (2%). Laura Wyatt, *Grant Activity Report: Justice Assistance Grant (JAG) Program, April 2012-March 2013*, U.S. Department of Justice, Office of Justice Program, Bureau of Justice Assistance, Washington, DC, p. 2, https://www.bja.gov/Publications/JAG_LE_Grant_Activity_03-13.pdf.

enforcement agencies to comply with the requirement, especially if the cost of complying exceeded the agency's allocation.

Policymakers might also consider making state and local law enforcement agencies ineligible to apply for funding under competitive grant programs that provide funding for law enforcement unless they adopt a certain policy. This option might be effective for bringing about changes in state and local law enforcement policy because law enforcement agencies might lose access to significant sources of federal funding unless they comply with the condition(s). Also, unlike a formula grant program where each law enforcement agency can only apply for its allocated amount, law enforcement agencies can apply for an amount of funding equal to its needs. For example, a small law enforcement agency might only be eligible to receive $15,000 under the JAG program, but under the Community Oriented Policing Services (COPS) hiring program, it could apply for up to $125,000 to hire a new officer. However, making some law enforcement agencies ineligible to apply for funding would not provide an incentive to change for those agencies that do not wish to apply for a grant under the program.

Expanding Efforts to Collect Data on Police Use of Force

As previously discussed, there is a lack of comprehensive and reliable data on law enforcement's use of force. Policymakers may have an interest in collecting more comprehensive data to help them understand when and against whom law enforcement is using force, which could help formulate policy. Collecting more detailed data on how the police use force could provide insight into whether reported problems with excessive force are the result of a few "bad apples" or are more of a systemic issue. More complete data could also help law enforcement agencies develop best practices about when to use force and how much force to use.

The FBI announced in December that it is planning to expand the data it collects through the UCR program to go beyond justifiable homicides to include data on instances where a law enforcement officer causes serious injury or death to civilians.[93] While final details about the expansion of data collection efforts are still being worked out, the FBI reports that data will probably include the gender and race of officers and suspects involved in these encounters, the level of threat or danger the officer faced, and the types of weapons wielded by either party.[94] The data also will be collected and shared with the public in "near real-time," instead of being tallied in aggregate at the end of each year. The FBI is planning to publish the expanded use of force data in 2017.

In addition to the FBI's efforts, BJS has established a pilot program that uses data collected by the *Washington Post*[95] and other open sources to collect data on police-involved deaths that are not being reported.[96] BJS verifies the data it collects by contacting police, medical examiners, and other local officials. BJS plans to make the pilot program permanent and publish the first full year of data at the end of 2016.

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[93] Kimberly Kind, "FBI to Sharply Expand System for Tracking Fatal Police Shootings," *Washington Post*, December 8, 2015, https://www.washingtonpost.com/national/fbi-to-sharply-expand-system-for-tracking-fatal-police-shootings/2015/12/08/a60fbc16-9dd4-11e5-bce4-708fe33e3288_story.html (hereinafter, "FBI to Sharply Expand System for Tracking Fatal Police Shootings").

[94] The FBI announced that it has formed a working group to determine what data should be collected. The working group's proposal is due in June 2016. It is not clear if the working group's proposal has been submitted. Ibid.

[95] The *Washington Post* has been collecting and publishing data—using news reports, public records, Internet databases and original reporting—on people shot and killed by law enforcement. The data is available online at https://www.washingtonpost.com/graphics/national/police-shootings/.

[96] "FBI to Sharply Expand System for Tracking Fatal Police Shootings."

There are several issues for policymakers to consider if Congress wants the federal government to expand use of force data collection efforts. The first question might be how much data should the federal government collect? Should it only collect data in cases where a law enforcement officer kills someone, or should it collect data on all use of force incidents? In the latter option, how would "use of force" be defined? BJS noted the difficulty with defining "use of force," "excessive force," and "excessive use of force" the last time Congress required DOJ to collect these data. Limiting data collection efforts to instances where a law enforcement officer engages in an action that results in someone's death might be easier to define, thereby making it easier to collect reliable data, but it omits data on many other use of force incidents. As one expert has noted, "[e]very study that I'm aware of shows that most of the people who are shot by the cops survive and most of the time when cops shoot the bullets don't hit. If your statistics look just at dead bodies you'd be under-counting it by 85 percent. If the cops are shooting, we need to [know] when they are shooting, not just when they kill somebody with the bullets."[97]

Another issue is how the federal government would collect police-involved shootings or use of force data. Congress could consider requiring the FBI to collect the data on use of force incidents through the UCR. As mentioned above, the FBI has taken steps to expand its efforts to collect more data on the use of force by police, but this is an administrative effort, and not the result of congressional action. However, participation in the UCR is voluntary, and if law enforcement agencies under-report justifiable homicides to the UCR, they might also under-report use of force incidents. When announcing the expansion of its collection of use of force data, the FBI noted that participation will continue to be voluntary.[98] FBI officials reported they lack the legal authority to mandate data submission.[99]

Congress could consider making data submission on use of force incidents a condition of receiving federal funding. Congress recently reauthorized the Death in Custody Reporting program (P.L. 113-242). States are required to submit data on certain *deaths*, or face losing up to 10% of their JAG funding. Because states are only required to submit data on deaths in custody, data on all use of force incidents are not captured.

If Congress were to make submitting use of force data a requirement to receive federal funding, there still might be questions about the reliability of the data. There is no guarantee that law enforcement agencies would submit reliable data, especially if they are reluctant to report it in the first place. If Congress put in place a requirement for agencies to submit *reliable* data, how would it be verified? Would the FBI have the resources to verify that all law enforcement agencies reported all of the incidents where their police officers used force? Also, some law enforcement agencies might forgo federal funding rather than report the data.

Congress might consider getting states more involved in the process of collecting data on the use of force. Policymakers could consider making a state and all jurisdictions in it ineligible for federal law enforcement funding if it does not pass a law requiring all law enforcement agencies in the state to report use of force data and establish a program to collect the data and report it to DOJ. States would have to oversee fewer law enforcement agencies than DOJ would if it were solely responsible for collecting the data. State government agencies might have more knowledge of police-involved shootings in the state, so it is possible that police-involved shooting data

[97] Wesley Lowery, "How Many Police Shootings a Year? No One Knows," *Washington Post*, September 8, 2014, http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/.

[98] Kimberly Kindy, "FBI to Sharply Expand System for Tracking Fatal Police Shootings," *Washington Post*, December 8, 2015. https://www.washingtonpost.com/national/fbi-to-sharply-expand-system-for-tracking-fatal-police-shootings/2015/12/08/a60fbc16-9dd4-11e5-bce4-708fe33e3288_story.html, accessed on July 8, 2016.

[99] Ibid.

would be more complete if they were collected by the state. It seems improbable that state agencies would be aware of all, or even most, of the instances where law enforcement officers used force, so this option might still result in incomplete use of force data. Also, this option might be considered too coercive because some jurisdictions might not be eligible to receive federal funding if the state did not act.

A potentially less coercive option would be to require BJS to conduct an annual survey of law enforcement agencies to collect data on their use of force. However, since law enforcement agencies would not have to respond to the survey, it is possible that the results would underestimate the number of officer-involved shootings or use of force incidents.

Congress could also consider providing more funding to the CDC to expand the NVDRS to all 50 states. This program has the benefit of not trying to induce states to submit data to the federal government; the CDC collects the data on its own. However, it requires the federal government to provide funding to sustain the program—unlike the other options discussed above, which place no requirements on Congress to fund a program to collect data. Also, it only collects data on deaths, not on all use of force incidents.

Promoting the Use of Body-Worn Cameras

Body-worn cameras (BWCs) are mobile cameras that allow law enforcement officers to record what they see and hear. They can be attached to a helmet, a pair of glasses, or an officer's shirt or badge. The Administration requested $30 million for FY2016 to help law enforcement agencies purchase BWCs.[100] Congress appropriated $22.5 million for this purpose for FY2016 (P.L. 114-113).

There are several perceived benefits to the use of BWCs by law enforcement officers. One of the primary perceived benefits is that they are expected to have a civilizing and deterrent effect on both officers and citizens, resulting in fewer citizen complaints, less use of force by officers, and fewer assaults on officers. What little research exists on the effects of BWCs suggests that they result in fewer citizen complaints and less use of force by officers.[101] However, the Center for Evidence-Based Crime Policy at George Mason University conducted their own review of the literature on BWCs and concluded "[we] refrain at this point from drawing any definitive conclusions about BWCs from the twelve existing studies because there are so few of them."[102] The researchers at George Mason University seem to believe that the existing literature on BWCs generates more questions than answers.

It has also been theorized that BWCs could increase transparency and the perception of police legitimacy. Another theory is that they could provide enhanced opportunities for police training. The research on BWCs, however, has not sufficiently studied these claims.

Congress could consider authorizing a grant program that would provide funding for law enforcement agencies to purchase BWCs.[103] One potential model for such a program would be

[100] U.S. Department of Justice, Office of Justice Programs, *FY2016 Performance Budget*, p. 151.

[101] For a review of the current research on BWCs, see Michael D. White, *Police Officer Body Worn Cameras: Assessing the Evidence*, U.S. Department of Justice, Office of Justice Programs, Washington, DC, 2014.

[102] Cynthia Lum, Christopher Koper, and Linda Merola, et al., *Existing and Ongoing Body Worn Camera Research: Knowledge Gaps and Opportunities*, George Mason University, Center for Evidence-Based Crime Policy, Fairfax, VA, 2015, p. 11, https://www.bja.gov/bwc/pdfs/BodyWornCameraResearch.pdf.

[103] The $22.5 million Congress appropriated for FY2016 to help law enforcement agencies purchase BWCs was not appropriated pursuant to a currently authorized program.

the Matching Grant Program for Armor Vests. The program provides grants to state, local, and tribal governments to help purchase armor vests for use by law enforcement officers and court officers. Grants under the program cannot pay for more than 50% of the cost of purchasing a new armor vest. Before authorizing a BWCs funding program, policymakers may consider the following issues:

- How much would it cost to supply BWCs to all law enforcement agencies? Data from the Bureau of Justice Statistics estimate that approximately one-third of local police departments provide BWCs for some of their officers.[104] Further, BJS estimates that approximately three-quarters of all police officers (approximately 363,000) work in an agency that does not have a BWC program.[105] A market survey conducted by the National Institute of Justice shows that BWCs can cost anywhere from $120 to $1,000.[106] The median price of a BWC included in the survey was $499.
- Should all law enforcement officers be required to wear BWCs? For example, should officers in law enforcement agencies that serve small jurisdictions with relatively low crime rates be required to wear them? Would it be more effective to allocate funding to outfit officers in urban and suburban jurisdictions with BWCs?
- There are costs to law enforcement agencies beyond the cost of purchasing BWCs. For example, there would be maintenance and replacement costs for the BWCs and law enforcement agencies would have to pay to store and manage the data generated by BWCs. Would Congress provide grant funding to cover these costs? If not, would this discourage law enforcement agencies from purchasing BWCs for their officers?
- There may also be concerns about whether BWCs could invade citizens' privacy. BWCs could potentially record what officers see when they enter someone's home as well as their interactions with bystanders, suspects, and victims in sometimes stressful situations. The American Civil Liberties Union, which supports the use of BWCs, believes that it is necessary to establish strong policies regarding the use of BWCs so that they do not become another form of public surveillance.[107] Law enforcement agencies that outfit their officers with BWCs might also have to develop polices about, among other things, which interactions with the public will be recorded, how long the video will be stored, who would have access to it, and whether videos would be distributed to the public.

The researchers at the Center for Evidence-Based Crime Policy also raise concerns about the relative lack of research on BWCs, especially at a time when it appears that many law enforcement agencies are eager to roll out BWC programs. They note that while some BWC-

[104] Brain A. Reaves, *Local Police Departments, 2013: Equipment and Technology*, NCJ 248767, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, July 2015, p. 4, http://www.bjs.gov/content/pub/pdf/lpd13et.pdf.

[105] BJS reported that there were 477,317 sworn police officers in 2013. Brain A. Reaves, *Local Police Departments, 2013: Personnel, Polices, and Practices*, NCJ 248677, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, May 2015, p. 2, http://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf.

[106] U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Body-Worn Cameras for Criminal Justice: Market Survey*, version 1.0, March 2014, https://www.hsdl.org/?view&did=754782.

[107] Jay Stanley, *Police Body-Mounted Cameras: With the Right Policies in Place, A Win for All*, American Civil Liberties Union, October 2013, p. 1, https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf.

related issues are being studied to a large degree (e.g., the effects of BWCs on the quality of officer-citizen interactions or the effects of BWCs on the use of force by officers), there are other issues upon which research has not largely focused and where more research is needed:

- Can BWCs reduce implicit[108] or explicit[109] bias and differential treatment based on race, sex, age, ethnicity, or other extralegal characteristics?
- Do BWCs have an effect on law enforcement officers' compliance with Fourth Amendment requirements (i.e., concerning illegal search and seizures)?
- Do BWCs affect whether officers engage in proactive contacts (e.g., traffic and pedestrian stops) and do they affect whether officers are likely to make arrests or issue citations in these situations? And if so, what are the implications for both crime control and police-community relations?
- Do BWCs affect whether citizens are willing to call the police, cooperate as victims or witnesses, help with investigations, or comply with officers' commands? What about concerns citizens might have about their privacy regarding be filmed during an interaction with a law enforcement officer?
- Can BWCs facilitate the investigation of critical incidents, officer-involved incidents, or officer-involved shootings or deaths?
- Can BWCs be used to improve training and affect policy changes?
- Do BWCs have an effect on police accountability, supervision, management, and disciplinary systems?

In addition, the researchers also note that there is little research on how BWC programs might affect court proceedings, such as whether BWCs might have an effect on prosecutorial behaviors or practices (e.g., changes in charging patterns, types of plea bargains offered, or witness preparation), evidentiary issues (e.g., would lost footage or failure to record have an effect on proceedings), or the legal effects of failing to tell someone they were being recorded.

Research on BWCs, while more robust than the research on some other forms of new law enforcement technology, appears to still be in its infancy. This might raise the issue of whether Congress should support more diverse research on BWC programs before potentially investing millions of dollars to expand BWC use in law enforcement agencies across the country.

Facilitating the Investigation and Prosecution of Excessive Force

The decisions of grand juries in Missouri and New York not to indict the police officers responsible for the deaths of Michael Brown and Eric Garner have raised questions about whether the grand jury system favors police and if the system can hold officers accountable for civilian deaths.[110] There are concerns that local prosecutors work too closely with police officers, which

[108] "Implicit bias" is a bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control. National Center for State Courts, "Helping Courts Address Implicit Bias: Frequently Asked Questions," p. 1, http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx.

[109] "Explicit bias" are the attitudes or beliefs some express at a conscious level. Ibid.

[110] James C. McKinley, Jr. and Al Baker, "Grand Jury System, With Exceptions, Favors the Police in Fatalities," *The New York Times*, December 7, 2014, http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html?_r=0.

can affect their ability to objectively evaluate cases of police-involved shootings.[111] Part of the problem stems from the fact that prosecutors must maintain a working relationship with the very officers they are expected to prosecute.[112] Policymakers might want to consider ways to use federal authority to promote more accountability for deaths resulting from police officers' actions.

One option Congress could consider is amending 18 U.S.C. §242 to remove the requirement that federal prosecutors must show that an officer had the specific intent to deprive someone of his or her civil rights. This could be done by amending §242 to employ a "reckless disregard" standard. This would allow DOJ to prosecute not only officers who intentionally violated an individual's constitutional rights, but also those who use force in a reckless manner, thereby likely increasing the number of prosecutions of deadly force cases. This option might help promote a sense of greater police accountability because police-involved shootings could be investigated and prosecuted by DOJ. This may help counteract the perception that police officers are being investigated by their friends and colleagues. However, this option may also raise concerns about state sovereignty. To wit, does Congress want to shift more responsibility for maintaining police accountability from state and local agencies to the federal government?

Another option might be to promote the use of special or independent prosecutors to investigate cases of police-related fatalities. Congress could make it a condition of receiving federal funding that states have a procedure in place whereby the state or local government can appoint a special or independent prosecutor in instances of police-involved shootings. If Congress chooses to pursue this option, it may consider several policy questions:

- What event would trigger the appointment of a special prosecutor? Because many excessive force cases are initially investigated internally by the local police department, there should be a clear mechanism in place to determine when a special prosecutor would be appointed.
- Should such a policy require states to appoint a special prosecutor in all police-involved shooting cases or should the appointing authority have the discretion to decide when to appoint a special prosecutor? Requiring states to appoint a special prosecutor in all cases might reassure the public that an impartial investigation is being conducted; however, it might also be viewed as an undue financial burden on the states.
- How would special prosecutors be chosen: by the governor, the state attorney general, the presiding judge?
- From which office would special prosecutors be chosen? They might be appointed from a different locality in the state, from the state attorney general's office, or from the private sector.

Congress may grapple with these and other questions when attempting to alter states' criminal justice systems to promote increased police accountability.

Promoting Community Policing

Community policing is viewed as one potential avenue to repairing relationships between law enforcement agencies and the communities they serve. Unlike providing grants for expanding the use of BWCs, Congress has already established a grant program to promote community policing:

[111] Ibid.

[112] John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803-04 (2000).

the Community Oriented Policing Services (COPS) program. Under the COPS program, Congress can appropriate funding for grants to state, local, and tribal law enforcement agencies to "hire and train new, additional career law enforcement officers for deployment in community-oriented policing."[113]

One issue with using the COPS program to promote community policing is that there is no single definition of "community policing." It is notable that the authorizing legislation for the COPS program does not contain a definition of "community policing." Two scholars, in their review of trends in policing, note that community policing is "a catchphrase that has been used to describe a potpourri of different strategies" and that "one complication in determining the extent to which [community policing] has transformed policing is determining exactly what it is."[114] The COPS Office states that community policing is a "law enforcement philosophy that focuses on community partnerships, problem-solving and organizational transformation."[115] However, some critics argue that if community policing is only a philosophy, it is nothing more than an "empty shell."[116] All of this is to say that if policymakers want to promote "community policing," it is not clear what that entails, and before providing grants to law enforcement agencies to promote community policing, policymakers may need to decide what they want "community policing" to be.

There may be some questions about whether COPS grants convince law enforcement agencies to give up aggressive policing tactics and move toward community policing. During the mid- to late 1990s, the COPS Office awarded billions of dollars in grants for law enforcement agencies to hire officers to engage in community policing.[117] However, over this same period of time there was continued growth in use of Special Weapons and Tactics (SWAT) teams by law enforcement agencies nationwide.[118] Research on SWAT teams indicates that many law enforcement agencies believe they play an important role in community policing strategies.[119] In addition, scholars argue that "community policing" is just a way for law enforcement agencies to present their old ways in a new package. Two scholars note, "[law enforcement agencies] are managing to reconstitute their image away from the citizen-controller paradigm based in the autonomous legal order and towards a more comforting Normal Rockwell image—police as kind, community care-takers."[120] They contend that community policing is more about police transforming their image rather than the substance of their work.

The COPS Office notes that the majority of police recruits receive their training in academies with a stress-based military organization (e.g., a "boot camp") that prepares young recruits for

[113] 42 U.S.C. §3796dd(b)(2).

[114] Edward R. Maguire and William R. King, "Trends in the Policing Industry," *Annals of the American Academy of Political and Social Science*, vol. 593 (May 2004), p. 23.

[115] U.S. Department of Justice, Community Oriented Policing Services Office, *About the Community Oriented Policing Services Office*, http://www.cops.usdoj.gov/Default.asp?Item=35.

[116] Gary W. Cordner, "Community Policing: Elements and Effects," in *Critical Issues in Policing*, ed. Roger G. Dunham and Geoffrey P. Alpert, 6th ed. (Long Grove, IIL: Waveland Press, 2010), p. 433.

[117] Between FY1995 and FY1999, Congress appropriated approximately $6 billion for the COPS hiring program. See CRS Report RL33308, *Community Oriented Policing Services (COPS): In Brief*, by Nathan James.

[118] Peter B. Kraska, "Militarization and Policing—Its Relevance to 21st Century Police," *Policing: A Journal of Policy and Practice*, vol. 1, no. 4 (December 2007), p. 6.

[119] Peter B. Kraska and Victor E. Kappeler, "Militarizing American Police: the Rise and Normalization of Paramilitary Units," *Social Problems*, vol. 44, no. 1 (February 1997), p. 13.

[120] Victor E. Kappeler and Peter B. Kraska, "A Textual Critique of Community Policing: Police Adaption to High Modernity," *Policing: An International Journal of Policing Strategies & Management*, vol. 21, no. 2 (1998), p. 306.

"combat" and emphasizes the crime fighting and action-oriented aspects of policing.[121] A stress-based approach to training officers does not always "lend itself to the philosophical underpinnings of community policing, even when there is an effort to incorporate community policing and collaborative problem solving into the curriculum."[122] Research on training for law enforcement careers suggests that law enforcement agencies might not be recruiting candidates that would be well-suited for community policing activities. Recruits might be attracted to police work because they want to focus on honing their skills in shooting, driving, and defensive tactics rather than acquiring knowledge about crime causation, diversity, and the law.[123] Also, even if recruits are given formal training in the skills needed for community policing, the effect of those lessons might be minimized by the informal lessons the recruit learns at the academy or during their first years of service.[124] Scholars note, "[t]he informal messages may be so salient that they may counteract the formal curriculum. The new police training may not be fully effective until the [community policing] philosophy is fully integrated into the operating environments of police agencies, their organizational goals, and the larger police culture."[125]

Congress could try to promote community policing by providing funding for COPS hiring grants. However, there appear to be some limitations to how much influence COPS grants can have on re-orienting law enforcement agencies toward community policing. Before allocating more funding for COPS hiring grants, policymakers might consider whether there need to be clearer expectations for how law enforcement agencies use the officers hired with the grants, or at least some limitations on COPS-funded officers' activities.

Part of the issue is changing the culture in law enforcement agencies, which is harder to influence. Congress cannot remove police chiefs or sheriffs that will not, or only half-heartedly, endorse a community policing orientation for their offices. Even if Congress were to increase appropriations for the COPS program and flood the ranks of local law enforcement agencies with COPS-funded officers who believe in the community policing paradigm, those officers might not stay with the agency long enough to affect any change if the organization's goals and culture do not align with their own views. Congress could also consider providing funding to the COPS Office to do more training and host seminars on the importance of using community policing practices to try to engender trust between law enforcement and citizens. Policymakers might also consider using non-legislative measures, such as the influence of their office (the proverbial "bully pulpit"), to work with law enforcement agencies in their states and districts to bring about changes in their approach to policing.

Non-legislative Measures

In addition to the legislative measures outlined above, policymakers may also consider ways to use Congress's "soft" power (i.e., non-legislative influence) to bring about changes in law enforcement-community relations. For example, Congress might continue to hold hearings on issues related to law enforcement-community relations, racial discrimination in the criminal

[121] Karl W. Bickel, "Recruit Training: Are We Preparing Officers for a Community Oriented Department," *Community Policing Dispatch, the e-Newsletter of the COPS Office*, vol. 6, no. 6 (June 2013), http://cops.usdoj.gov/html/dispatch/06-2013/preparing_officers_for_a_community_oriented_department.asp.

[122] Ibid.

[123] Allison T. Chappell, Lonn Lanza-Kaduce, and Daryl H. Johnston, "Law Enforcement Training: Changes and Challenges," in *Critical Issues in Policing*, ed. Roger G. Dunham and Geoffrey P. Alpert, 6th ed. (Long Grove, IL: Waveland Press, 2010), p. 56.

[124] Ibid., pp. 57-58.

[125] Ibid., p.63.

justice system, DOJ's role in assisting law enforcement with adopting more effective policing strategies, or how law enforcement officers use force. Policymakers could continue to give speeches about the importance of improving trust in law enforcement and meet with local officials to discuss what they are doing to improve law enforcement services. Policymakers might also consider meeting with community groups to get their views on what, if any, reforms need to take place and to keep them engaged in promoting efforts to reform law enforcement practices.

Non-legislative congressional influence could serve to keep law enforcement-community relations in the national spotlight and keep pressure on state and local law enforcement agencies to improve their relationships with the public. To some extent, efforts to change the way that law enforcement officers interact with citizens must come from changes within police departments and sheriff's offices, and these changes might only be brought about through grassroots movements. Congress might be able to support these movements by keeping the issue of citizens' trust in law enforcement in the national consciousness.

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