



4 Ideas That Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations

By Michele Jawando and Chelsea Parsons | December 18, 2014

From the shooting death of unarmed teenager Michael Brown, to the heavily militarized police response, to the protests in the wake of Brown's death, to the failure of the grand jury to indict Officer Darren Wilson for his role in the shooting, the events in Ferguson, Missouri, have turned up the heat on a long simmering debate over the persistent inequalities in our criminal justice system. Other recent events have made the urgent need to act even more clear: In Staten Island, New York, a grand jury decided not to indict New York Police Officer Daniel Pantaleo for causing the death of another unarmed black man, Eric Garner, even though the officer's actions were caught on tape. Days earlier, a police officer shot and killed Tamir Rice, a 12-year-old in Cleveland, Ohio, while he played with a toy gun.

At the center of this debate has been a conversation about inequities in the basic functioning of the criminal justice system—including police practices, the use of force and aggressive policing, arrest and prosecution policies, the severity of criminal sentences, and the disparate impact many of these policies have on communities of color. Little wonder there is a deep-seated sentiment within communities of color that the criminal justice system is inherently rigged against them and that the institutions supposedly designed to protect them are failing them, or even worse, targeting them. Moreover, the gap between black and white views on law enforcement, the criminal justice system, and race relations in this country only seems to be growing.¹ This ever-widening gulf further complicates our attempts to understand exactly what is at issue in cases such as the deaths of Brown and Garner, the failure of the grand juries in those cases to indict the officers responsible, and the opportunity to think through ideas and options for concrete solutions to address the underlying problems.

While reflection is important after moments such as this, we are now tasked with the obligation of figuring out how to move forward, learn from these incidents, and turn a moment of anger and frustration into an opportunity to make positive change in our criminal justice system. Much of this work is already underway. Following the unrest in Ferguson, President Barack Obama announced a three-year, \$263 million package to increase police officers' use of body-worn cameras and expand local law-enforcement

training.² The president is preparing to issue an executive order calling for additional oversight of various federal programs that provide military surplus equipment to local law-enforcement agencies and for the establishment of a presidential taskforce examining crime reduction and efforts to build public trust.³ Additionally, U.S. Attorney General Eric Holder announced the release of updated Department of Justice, or DOJ, guidance, for federal law-enforcement agencies that will create rigorous new standards and robust safeguards that seek to end racial profiling by federal law enforcement.⁴ Another promising development from the Obama administration includes the DOJ announcement that it “has enlisted a team of criminal justice researchers to study racial bias in law enforcement in five American cities and recommend strategies to address the problem.”⁵ These data will not only help inform smart and more effective policing models, but they will also help to close some of the looming racial divides by identifying prejudiced behavior and developing processes to address bias in all aspects of policing.

These are excellent steps, but they are not a panacea. More must be done to implement new innovations in policing and other aspects of the justice system that will improve police accountability and reduce the degree to which the harshest aspects of criminal justice fall disproportionately on communities of color. The United States needs to embrace a smarter approach to criminal justice that recognizes that the propensity to focus on race is not the answer to create safe communities. The failure to ensure that our judicial and legal systems treat all Americans equally has divided too many of our communities. We must give voice to the legitimate and widespread concerns about trust in the criminal justice process. As Americans, we have a responsibility to build inclusive communities where families thrive and where compassion, not fear, is the core value.

This issue brief offers four ideas to reform the criminal justice system, including improved police training; data collection and accountability; repairing the fractured relationship between police and community; and, in instances where lives are taken, the promise of a diligent, independent, and thorough investigation and prosecution, when appropriate. This is certainly not intended as a final assessment of what needs to be done to reform policing and the criminal justice system in the United States, but rather as an opening salvo in an ongoing conversation about crime and justice in this country.

1. Increase the use of special prosecutors in police misconduct investigations

In recent weeks, the role of the prosecutor and the grand jury system has come under intense scrutiny.⁶ The failure of grand juries to indict either Officer Darren Wilson for his role in Brown's death or Staten Island Officer Daniel Pantaleo for his role in Garner's death have raised significant questions about the ability of local prosecutors to remain impartial in cases involving local law enforcement in the same jurisdiction. Prosecutors rely on local police officers to make arrests, investigate cases, interrogate suspects, and testify at trial. Police officers, in turn, rely on prosecutors to convert their arrests into convictions and assist with investigations. The prosecutor's office is charged with responsibility for prosecutions in its jurisdiction. However, in most instances of fatalities involving officers, "prosecutors generally use special grand juries ... to investigate and gather evidence before determining if an arrest and indictment are warranted."⁷ In cases involving alleged police misconduct, questions about prosecutors' sympathies for the defendant—sympathies that may prevent the prosecutor from being an effective advocate for the state—provide an opportunity to consider alternatives to address perceived conflicts of interests.

The Cato Institute's "National Police Misconduct Reporting Project" shows 4,861 unique reports of misconduct in 2010, including 127 fatalities associated with excessive force.⁸ Additionally, according to the Bureau of Justice Statistics, 70 percent of black people who have experienced the use of police force against them feel that the force was excessive.⁹ Black people are three to five times more likely than whites to believe that police misconduct frequently occurs in their city, and black Americans are three times more likely to say that it occurs very often in their neighborhood.¹⁰ As discussed below, no precise figures exist for the number of people killed by the police in the United States, but police departments each year voluntarily report about 420 "justifiable police homicides" to the Federal Bureau of Investigation.¹¹ Rarely do deaths involving police lead to murder or manslaughter charges.¹² Philip Stinson, a criminologist at Bowling Green State University, has found that between 2005 and 2011, 41 officers were charged with murder or manslaughter for on-duty shootings, but police departments reported 2,600 justifiable homicides to the FBI.¹³

The perception, real or perceived, is that local prosecutors have far too great of an interest to protect and justify the actions of local law enforcement. The perceived bias in the system has led to the erosion of trust that is needed to build public safety between law enforcement and local communities, suggesting that viable alternatives should be considered.

Some states have established permanent special prosecutors' offices. Maryland handles a variety of cases, from violations of election law to police misconduct, through an independent special prosecutor.¹⁴ In 1972, the state of New York created a special prosecutor's office to explore police corruption in New York City.¹⁵ According to the *New York Law Journal*, the special prosecutor's office in New York "established a remarkable track record in fairly, objectively and successfully investigating and prosecuting police officers and others in the criminal justice system suspected of criminality."¹⁶ In 1990, the office was disbanded, but recently, there have been calls to reinstate the office to investigate and potentially prosecute alleged police brutality cases that result in the death of an unarmed subject.¹⁷

There are several approaches employed in states across the country that could serve as a model for reform. States could provide state attorney generals additional prosecutorial authority over fatalities involving police¹⁸ and create permanent "special prosecutors" that are housed within the state office of the attorney general to provide a level of insulation from local law enforcement. As suggested by Joshua Deahl, an appellate attorney with the District of Columbia's Public Defender Service, the special prosecutor's responsibilities could "be limited to the oversight, investigation and prosecution of police or public official misconduct, keeping them independent from other policing functions."¹⁹ Alternatively, states such as Wisconsin have "officer-involved-death" statutes. In Wisconsin, this requires that at least two independent investigators examine cases.²⁰

Finally, automatic referral outside the jurisdiction in fatal cases involving police is a possibility. In that instance, a prosecutor from outside the jurisdiction in question would lead the investigation. The requirement of an independent, outside party could address perceived conflict of interest issues with local officials. Whether by state statute requiring an out-of-jurisdiction investigator or state executive action automatically assigning fatalities cases involving police to attorney generals or special prosecutors, all states should adopt practices to ensure that all investigations of homicides involving police are conducted by a neutral prosecutor other than the office that typically works with the police department that is the subject of the investigation.

2. Enhance the collection of data on fatalities involving police

In the immediate aftermath of the deaths of Brown and Garner, many commentators, community members, and policymakers around the country asked what should be relatively easy questions to answer: How often do police officers kill unarmed individuals? Are the deaths of Brown and Garner isolated incidents or examples of a larger trend of inappropriate use of force by police officers in communities around the country, and are communities of color disproportionately affected?

Unfortunately, these are not easy questions to answer. As a number of reporters discovered over the past few months, there are significant gaps in the collection and analysis of data related to fatalities involving officers; these gaps make it very difficult to assess the scope of the problem either nationwide or in individual states and localities.²¹ The primary source for data about homicides in the United States is the FBI's Uniform Crime Reporting, or UCR, program, through which federal, state, and local police agencies voluntarily report information about certain designated crimes, including homicides.²² Police agencies are asked to submit more detailed information about homicides, including demographic information about the victim and offender, the type of weapon used, the relationship between the perpetrator and offender, and some limited information about the circumstances of the killing, such as whether the homicide occurred during the commission or attempted commission of a felony.²³ As part of this Supplementary Homicide Report, the FBI also collects information about deaths of individuals deemed "justified," which includes two categories of homicides: felons killed by law-enforcement officers in the line of duty and felons killed by private individuals during the commission of a felony.²⁴

There are a number of problems with these data. First, police departments' reporting of homicide data to the UCR program is voluntary. And because police departments are not required to submit these data, many choose not to. For example, Florida does not provide any data to the UCR program,²⁵ and other states submit these data in a piecemeal and incomplete fashion.²⁶ So while FBI data tell us that between 2009 and 2013, law-enforcement officers killed 2,102 felons nationwide in the line of duty and used firearms in 99 percent of these cases,²⁷ this is likely a very incomplete total count of fatalities involving police. Indeed, a comparison with another source of homicide data—the Centers for Disease Control, which compiles information on deaths based on death certificates²⁸—demonstrates the limitations of the FBI data. For 2012, the FBI reports 426 justifiable homicides nationwide;²⁹ the CDC reports 550 such fatalities.³⁰ Although these two sources use slightly different definitions,³¹ the disparity between the two numbers helps demonstrate the scope of the data gap. Additionally, the FBI only counts homicides by police officers that are deemed justified, so deaths by officers that do not fall into that category—such as shootings in which an officer is determined to have acted criminally—will not be included in the FBI count.³² Second, the data that local police agencies voluntarily provided to the FBI about officer-involved fatalities include limited information about the context and circumstances of those incidents and what immediately precipitated the fatal event, including whether the victim was armed.³³

But even with this incomplete data set, there is evidence of a racial disparity in instances of police shootings of civilians. An analysis of FBI Supplementary Homicide data conducted by the independent, nonprofit news service ProPublica found that from 2010 to 2012, police killed young black men at much higher rates than their white peers: 31.17 per million for black males between the ages of 15 and 19 versus 1.47 per million for white males in the same age group.³⁴ This analysis found that young black men in this age group were 21 times more likely to be shot by police than young white men.³⁵ Reporters from Vox, a news website, obtained more detailed information from the FBI about each of the justifiable homicides reported in 2012 and found that a disproportionate number of reported felons who were killed by police were black.³⁶

In order to develop smart laws and policies to address law enforcement's inappropriate and illegal use of force, we need to understand the scope and nature of the problem. The federal government must improve data collection and require state and local law enforcement to provide detailed information about deaths caused by police officers. On December 11, 2014, Congress passed the Death in Custody Reporting Act of 2013, a bill that would mandate such reporting by states and would give the U.S. attorney general the discretion to reduce federal law-enforcement funding to states that fail to comply by as much as 10 percent.³⁷ This legislation would require states to submit demographic information about the victim, details about the time and location of the death, the law-enforcement agency involved, and "a brief description of the circumstances surrounding the death."³⁸ The attorney general would then be required to conduct a study of this information in order to "determine means by which such information can be used to reduce the number of such deaths."³⁹

This legislation would be a significant step forward in addressing the current data gap on fatalities involving police, and President Obama should sign it into law as soon as possible. However, in order for this legislation to have the maximum beneficial impact, the administration must implement detailed regulations outlining exactly what kind of information about each of these incidents are required to be reported under the catch-all language in the legislation to ensure that states are reporting crucial information—including whether the victim was armed, whether the officer or officers involved had any relevant disciplinary history related to the use of force, and other key details regarding events precipitating the fatal event. Additionally, the regulations should provide that, absent "extraordinary circumstances," the attorney general will exercise the discretion to impose the 10 percent funding penalty on states that fail to comply by the second year that the law is in effect.

The next Congress should also act to expand the reporting mandate on states to include full participation in the FBI Supplementary Homicide Report to provide details on all homicides in a jurisdiction, not just those involving police. This information would provide a crucial baseline for understanding homicides in the states and help inform law-enforcement practices going forward. In particular, states should be required to provide information about homicides in which individuals invoke "stand-your-ground" defenses, another area in which there is an extreme paucity of reliable data.⁴⁰

3. Implement implicit bias training for all federal law-enforcement officers and state and local police involved in federal task forces

“Black Lives Matter” is one of the most evocative statements being chanted from protesters participating in demonstrations in the wake of the recent killings of Michael Brown, Eric Garner, and Tamir Rice. The statement itself has become a point of contention,⁴¹ but the statement speaks to perhaps the most important and most difficult issue that has arisen out of the recent protests: the subtle and stark differences that make up white and black experiences in America. While these divisions are often felt writ large by communities of color, the disparities seem to be particularly acute between white and black individuals, and the data seem to support these perceptions. The discrepancies in outcomes with similar circumstances between races can be interpreted through the lens of implicit bias. Researchers who seek to measure implicit biases often point to psychological and neurological factors inherent in unconscious racial associations. This has shown, as one researcher recently noted, “that hidden biases operating largely under the scope of human consciousness influence the way that we see and treat others, even when we are determined to be fair and objective.”⁴² Findings show that implicit bias can be contradictory to an individual’s stated beliefs.⁴³ The presence of implicit bias has been used to explain disparities among races in both access to and quality of health care, treatment in the criminal justice system, and housing.

For instance, despite reporting very little explicit bias, approximately two-thirds of the nation’s health clinicians were found to harbor a statistically significant implicit bias against blacks and Latinos.⁴⁴ Additionally, unconscious views about race help explain the disproportionate arrest and incarceration of African Americans for drug offenses. Research shows that although whites engage in drug offenses at rates higher than blacks do, blacks are almost four times more likely to be arrested for these offenses compared to whites.⁴⁵ The data also reveal that black men were sent to prison on drug charges at 11.8 times the rate of white men, and black women are sent to prison on drug charges at 4.8 times the rate of white women.⁴⁶

Likewise, the realm of housing shows a striking racially based implicit bias when African Americans look to rent or buy housing. When renting, blacks were told about the availability of 11.4 percent fewer units as compared to whites and shown 4.2 percent fewer units. When it came to home buying, blacks were also told about 17 percent fewer homes than whites and shown 17.7 percent fewer homes.⁴⁷

According to David R. Williams, a Harvard sociologist, the “frightening point” is that because implicit bias is “an automatic and unconscious process, people who engage in this unthinking discrimination are not aware of the fact that they do it.”⁴⁸ A 2012 study found that officers were quicker to shoot an armed black person and slower to refrain from shooting an unarmed black person than they were with members of any other racial group.⁴⁹ Similar results were found in a study of the Denver, Colorado, police

department. When asked to press a button labeled “shoot” or “don’t shoot,” Denver police officers were “uniformly faster to shoot an armed black target, relative to an armed white target, and uniformly faster to press the ‘Don’t shoot’ button for an unarmed white target, relative to an unarmed black target.”⁵⁰

If these are indeed unconscious reactions, what can actually be done about implicit bias, especially in policing? There are promising policies available that may mitigate the effects of bias.⁵¹ A key element is training.⁵² Training recommendations do not reduce bias; rather, they raise consciousness about them. Research has suggested that by making one aware of unconscious biases, these malleable biases may be reduced.⁵³ The federal government should require training on implicit bias in police academies and ongoing state and local departmental training as a condition of federal grants. Law-enforcement recruits should be challenged to identify key police decisions and scenarios that are at greatest risk of manifesting bias—such as traffic stops, consent searches, reasonable suspicion to frisk, and other procedures—and then reflect on the potential impact of implicit bias on their perceptions and behaviors in those scenarios.⁵⁴ Furthermore, seasoned officers should be similarly challenged at in-service and other training venues.

In addition, police departments should be encouraged to take steps to increase diversity among law-enforcement professionals. The federal government should condition receipt of certain grant funding by state and local law-enforcement agencies—perhaps funding for surplus military equipment—on the implementation of hiring and retention policies designed to increase diversity in police departments. Ideally, the composition of personnel should reflect the diversity of the community that it serves.⁵⁵ Finally, law-enforcement agencies need to eschew colorblindness and acknowledge real group and individual differences, such as through ongoing diversity and multiculturalism training.⁵⁶ Research suggests that a colorblind ideology generates greater amounts of implicit bias than a multicultural perspective does.⁵⁷

4. Increase the federal government's oversight of police conduct

The day-to-day operations of police departments across the country are largely handled at the state and local level. The federal government does have a role in local policing, primarily through the provision of federal funding for law enforcement for a variety of programs such as crime deterrence initiatives, hiring of officers, purchasing equipment, training, and creation of cross-jurisdiction task forces.⁵⁸ A Brennan Center for Justice analysis found that at least \$3.8 billion is given to state and local governments each year in federal criminal justice grants.⁵⁹ The federal government also becomes involved when a complaint is made to the Department of Justice Office of Civil Rights about issues relating to police officer conduct. The complaints regard either an individual incident in which an officer allegedly violated the civil rights of a community member or an incident in which an entire police department has engaged in a “pattern or practice” of violating the civil rights of the community.⁶⁰ In those cases, the DOJ conducts extensive investigations and, upon finding violations of civil rights, commences or threatens litigation against the offending jurisdictions, which often results in consent decrees that reform police practices in the jurisdiction.⁶¹

However, the DOJ engages in relatively little proactive activity to shape police practices on the ground in communities across the country. While the DOJ may enter into a detailed consent decree with a particular jurisdiction that outlines specific policies and practices that officers must implement on the ground, it does not offer this guidance on a broader basis to law-enforcement agencies across the country. The DOJ should take a more proactive role in providing guidance to local police agencies about best practices—for issues such as use of force, racially discriminatory practices, or officer accountability—before police department practices deteriorate to the point of systematically violating the civil rights of members of the community. While the DOJ has issued some general guidance for police departments over the years, there are certainly lessons learned from pattern and practice investigations of individual police departments—along with innovative new policies and practices that have arisen from those investigations—that could and should be shared with law enforcement across the country. In recent months, the DOJ has done more of this by issuing guidance to law enforcement on maintaining order during protests⁶² and the appropriate circumstances under which federal officers may consider a person's race or ethnicity.⁶³

The DOJ should take a more active approach in setting expectations for police conduct nationwide and ensure compliance with those standards by conditioning participation in federal task forces on the adoption of certain standards, policies, and training and through penalties in federal funding.⁶⁴ The Brennan Center recently released a report offering an innovative new approach for rethinking federal funding for law enforcement called “Success-Oriented Funding” that would better connect provision of federal funding with achievement of clearly-established goals.⁶⁵ The federal government has an obligation to ensure that police officers in communities around the country are not violating the civil rights of the people they are charged to serve and protect and should be more proactive in ensuring that police agencies are properly training and supervising their officers before individual misconduct rises to the level of systemic violations of civil rights.

Conclusion

These four recommendations, along with President Obama's recent actions, are among a set of reforms that are needed to address injustice and inequalities in the criminal justice system, particularly with respect to police misconduct. The challenges that the criminal justice system face, however, do not operate in a vacuum; but rather, they reflect broader challenges in our culture and in our democracy. Ferguson, Missouri—where even though “two in three Ferguson residents are black, the city government is almost entirely white”⁶⁶—underscores the lack of representation of people of color and raises significant concerns over a lack of reflective representation in our democracy.

One new challenge in ensuring full civic participation of people of color is an increasing trend in laws and practices that restrict voter access. In 2013, the U.S. Supreme Court's *Shelby County v. Holder* ruling weakened the landmark Voting Rights Act of 1965.⁶⁷ November 4, 2014, marked the first Election Day in 50 years in which voters went to the polls without many important protections. As a result, many states imposed suppressive new voting laws that make it harder for eligible voters to cast their ballots.⁶⁸ Unsurprisingly, the 2014 election had the worst voter turnout in 72 years.⁶⁹ Suppressive voter laws also affect the composition of local grand juries. In many states, the list generated for juror selection uses the names of registered voters.⁷⁰ State laws that make it harder to register to vote—by limiting same-day registration, imposing stringent voter ID laws, and eliminating the so-called “golden week”⁷¹ when voters can register and immediately cast ballots—deleteriously prevent potential jurors from appearing on juror lists. This dilutes the pool of potential grand jurors and inaccurately reflects the make up of local communities. The lack of diversity on the grand juries in Ferguson and Staten Island underscores this lack of reflectiveness.⁷²

The current lack of political representation for communities of color undermines trust in government, disadvantages depressed communities, and creates the context for racial tension. This threatens our democracy. Racial and ethnic diversity in elected office can result in positive policy changes for all Americans. Instead of crafting more barriers to representation and excluding communities from the juror's box, we should actively seek to promote opportunities for participation in civic life. Instead of denying the right to vote, we should strive to engage all citizens in our democracy. Addressing efforts to curtail the right to vote and to limit participation in the democratic process are crucial to promoting the kinds of robust democratic institutions and rebuilding the public's confidence in those institutions to both reform and build confidence in policing and prosecution. Poverty, lack of representation, and perceived bias of local law enforcement combine to create a combustible situation that presents significant challenges to communities across the country. We should make every effort to address these challenges and strive to make a more inclusive, fair, and just America.

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Endnotes

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