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POLICING PRIORITIES FOR THE NEW ADMINISTRATION

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POLICING PRIORITIES FOR THE NEW ADMINISTRATION

The challenge of ensuring that policing is sound—which is to say, effective, non-discriminatory, fair, minimally harmful, and democratically accountable—is enormous. Achieving this goal fully will require legislation and long-term policy development. That said, there are critical and immediate steps the new Administration can and should take.

This document offers clear and actionable recommendations the new Administration can pursue as part of a national commitment to sound policing, largely by taking a regulatory approach to national policing policy.

The guidance was written the **Policing Project at New York University School of Law**, and the **Center for Criminal Justice at the University of Virginia School of Law**.

The Policing Project at New York University School of Law is a non-profit organization that partners with communities and police to promote public safety through transparency, equity, and democratic engagement. Founded in 2015 by Barry Friedman, Jacob D. Fuchsberg Professor of Law and Affiliated Professor of Politics at NYU Law and author of *Unwarranted: Policing Without Permission*, the Policing Project focuses on front-end, or democratic, accountability—ensuring the public has a voice in setting transparent, ethical, and effective policing policies and practices before the police or government act.

The Center for Criminal Justice Reform serves as a hub for scholarship and activities involving criminal law guided by the nation’s leading criminal law faculty. The Center for Criminal Justice Reform is led by Director Rachel Harmon, the Class of 1957 Research Professor of Law. She is a leading scholar on policing and the laws that regulate police behavior. Her casebook, *The Law of the Police*, is the first resource for those seeking to understand, evaluate, and reform American law governing police interactions with the public.

In offering these recommendations, we do not aim to be comprehensive. Others have suggested important directions. We recognize in particular the importance of re-invigorating pattern or practice investigations and litigation by the Civil Rights Division, as well as collaborative reform efforts by the Community Oriented Policing Services (“COPS”) Office. These are enforcement or quasi-enforcement approaches. Here, as we say, are immediate regulatory steps the Administration can take to improve American policing.

SPEAKING WITH ONE VOICE

Challenge: At present, the federal government’s approach to policing lacks coherence, and pays insufficient attention to the social harms of policing. The Department of Justice’s (“DOJ”) various units distribute funds, administer programs, set law enforcement priorities, enforce civil rights, and work with local departments. Too often these work at cross purposes or suffer from an inconsistent approach. The federal government’s role in policing goes far beyond the DOJ. It encompasses many federal agencies, including the Department of Homeland Security, the Department of Defense, and the National Highway Traffic Safety Administration. These agencies, and the many federal law enforcement agencies within them, take divergent approaches to policing, transparency, and accountability.

Response: Appoint a policing czar in the White House to ensure that federal programs that influence state and local policing, and federal law enforcement agency practices, promote a consistent and coherent vision of policing. Create a position in the Deputy Attorney General’s Office to ensure that the DOJ’s federal grant programs, technical assistance to departments, law enforcement activities, and civil rights enforcement all reflect a commitment to promoting policing that is effective, non-discriminatory, fair, minimally harmful, and democratically accountable.



GETTING THE HOUSE IN ORDER

ENSURE BASIC TRANSPARENCY

Challenge: Transparency breeds trust; its lack fosters distrust. Too much information about federal law enforcement agencies and activities simply is unavailable to the public, and for no good reason. Providing this information would meet the requisites of democratic accountability and set the standard for policing agencies nationwide.

Response: By executive order, require that all of the more than 80 federal law enforcement agencies meet basic standards for transparency, including making public and easily accessible basic information about the agency. This should include, at a minimum: how many officers work in the agency, an organizational chart, statutory and regulatory authority for coercive activities, policies governing encounters with the public, complaint procedures, disciplinary procedures and appeals processes, annual data on arrests and uses of force, demographic information on those subject to enforcement actions, and participation in task forces with other law enforcement agencies. Set guidelines about how the information is posted to agency websites so there is consistency across agencies, allowing better public access. (This approach also could serve as an example, and provide a template, for policing agencies nationwide.)

ENSURE BASIC OFFICER ACCOUNTABILITY

Challenge: The public needs to know that federal law enforcement officers, like other public officials, are accountable for misconduct. Yet, too often, they are not. Recent instances of federal personnel engaging in enforcement without clear demarcation of agency, or identification of officers, has created understandable concern.

Response: By executive order, require that federal agencies have consistent decertification procedures, minimum citizen complaint intake and investigation mechanisms, and standards for wearing uniforms and displaying name badges.

PROMOTE BASIC DATA COLLECTION

Challenge: Policing suffers from an information problem. It is impossible to design or set policy without adequate data. And it is difficult for the federal government to encourage nationwide data collection efforts when its own agencies do not collect and make public basic data.

Response: By executive order, require federal agencies to establish shared definitions and collect and publish data (including demographic data) about stops, searches, arrests, and uses of force (including nonlethal uses of force). Make data collection standards consistent across federal law enforcement agencies. Require all federal law enforcement agencies to publish data regularly on agency websites, and ensure data is easily accessible and machine readable.

SET GROUND RULES FOR FEDERAL MULTIAGENCY TASKFORCE PARTICIPATION

Challenge: Federal-state-local task forces often operate without transparency or adequate governance and guidance. This leads to inadequate supervision, public distrust, and disputes about appropriate policy and practice.

Response: By executive order, require that all multiagency federal task forces operate under written memoranda that specify the participants, the chain of command, which department's policies govern officer conduct, and complaint mechanisms for citizens. Participation in such a task force and the memoranda that govern it should be disclosed on the website of every agency that participates (i.e., both local and federal agencies).

PROMOTE THE RESPONSIBLE USE OF SURVEILLANCE TECHNOLOGY

Challenge: There is a deep divide in society about the propriety of using certain surveillance technologies, such as facial recognition. These technologies can provide very real benefits for public safety, but their use also poses a threat to society, particularly if the use is not regulated appropriately and subject to adequate safeguards. Without such regulation and safeguards, public distrust may lead to a ban on using such technologies altogether. Members of Congress and the public have expressed concern about the use of a variety of technologies by federal agencies, among them facial recognition and cell site simulators. The concern extends to federal agencies providing subsidies to state and local agencies for the acquisition and use of such technologies.

Response: By executive order, (1) require that all federal agencies make public the surveillance technologies they use and the policies that govern use; and (2) create a task force to develop a unified set of policies for the use of surveillance technologies by federal agencies. This task force should include a range of stakeholders, including law enforcement, advocates from civil liberties and racial justice organizations, and individuals from affected communities. The task force also should be charged to examine the subsidization of state and local agency acquisition of such technologies, and the policies that should govern such subsidization.

FOSTERING SOUND POLICING NATIONWIDE

REQUIRE DEMOCRATIC AUTHORIZATION FOR PARTICIPATION IN FEDERAL PROGRAMS

Challenge: Local policing should be the product of democratic processes. Yet some federal grant and equipment programs and task forces permit local agency participation without formal approval by local legislative bodies. As a result, the federal government sometimes subsidizes local policing that might not have the imprimatur of democratic consent. This is especially problematic when the programs facilitate intrusive practices such as the use of surveillance technologies or military equipment.

Response: By executive order, mandate approval from local governing bodies for participation in federal policing programs.

ESTABLISH NATIONAL STANDARDS FOR DATA COLLECTION AND REPORTING

Challenge: It is impossible to govern what we do not understand, and right now we possess far too limited information about the actions law enforcement officers take to govern policing effectively. State and local efforts to collect and report data on police activities, including stops, searches, and the use of force often are inadequate. But the most sincere state and local efforts are plagued by an absence of national definitions and data collection standards, especially with respect to the use of force. Only federal leadership can help create the basis for effective regulation of policing, and yet the DOJ has failed even to live up to the minimum statutory mandate to collect data on the use of excessive force by law enforcement officers.

Response: Task the DOJ with establishing uniform definitions for reportable police activities, including stops, searches, and uses of force. In addition, the DOJ should develop appropriate incentives, such as conditions on grant programs or access to federal databases, to facilitate national data collection on the use of force and other enforcement actions. Put in place a plan capable of achieving this essential goal.

REVIEW SPENDING GRANTS AND PROGRAMMING TO ENSURE THEY FOSTER FEDERAL PURPOSES AND INCLUDE ASSESSMENT OF HARMS

Challenge: The federal government historically has used federal grant and equipment programs to help make state and local policing more effective, focused on national priorities, and cooperative among agencies. But these programs have the effect of expanding the footprint of policing, they do not always foster sound policing, and they have been administered in ways that conflict with federal civil rights priorities or exacerbate existing problems in policing.

Response: All federal programs that provide money or equipment for policing should be assessed not only for their efficacy in promoting policing that serves specific national goals, but for the social costs they induce by promoting policing in a particular way. For example, if a program encourages or incentivizes particular policing tactics—such as frequent traffic stops—the social costs of those tactics must be considered in assessing the value of the program. Although the social costs of policing can be difficult to quantify, methodologies (which are used elsewhere in the federal government) exist to mitigate that difficulty.

Even without formal cost-benefit analysis, however, appropriate review easily could indicate when existing programs facilitate or incentivize pedestrian or traffic stops, frisks, arrests, the threat of force, or the use of force. Once reviewed, agencies should reform and rethink programs to promote sound policing.

In addition, the DOJ needs to conduct a top-to-bottom review of spending grants, technical assistance, and programming related to policing and public safety, including from the COPS office, the Office of Violence Against Women, the Office of Justice Programs, and the Civil Rights Division. This assessment should ensure that the spending and programming consistently promotes sound state and local policing that is fair and minimizes unnecessary harm.

To advance the above efforts, it is important for all federally funded programs to state objectives and anticipated outcomes clearly and have consistent guidelines for data that grant recipients should collect to inform program assessments and evaluations. Federal public safety and related grant programs should establish shared definitions and data reporting requirements. This will improve the quality of subsequent evaluations and ease reporting burdens for recipients of multiple federal awards.

FOSTER THE TRANSFORMATION OF FIRST RESPONSE

Challenge: As the turmoil of the last few months has revealed, police often impose unnecessary social harm because they are asked to respond to a raft of societal problems to which they are ill-suited and that other actors could handle better. Police are called upon to do this usually because policing is the only resort. Although some cities have developed creative and effective alternatives to police as first responders for some problems, not every city has the imagination or capacity to build such alternatives from scratch. Encouraging and spreading such innovation requires national leadership.

Response: Announce a First Responders Initiative within the DOJ to develop, assess, and spread the use of alternatives to police responses to common social problems and citizen calls. The initiative should include participation from units across the Department that provide technical assistance or funding to local agencies in first response situations or enforce federal civil rights law against local agencies.

Task the Deputy Attorney General with coordinating DOJ and other federal efforts relevant to improving public safety outcomes, with a focus on integrating public safety and public health approaches. This could include leading a multi-department effort to streamline the relevant grant programs of participating agencies, with the goal of better coordinating grants towards shared outcomes, and minimizing the burden on jurisdictions receiving grants from multiple agencies.

ALIGN THE RESEARCH MISSION OF FEDERAL AGENCIES WITH REIMAGINED PUBLIC SAFETY

Challenge: Historically, federally funded research relevant to public safety has focused on the effectiveness of policing tactics rather than on holistic efforts to improve community outcomes. There has been very little attention to alternatives to traditional policing that might foster better outcomes, such as those described above. And while the DOJ has made efforts to integrate the insights of researchers and criminal justice practitioners into research priorities, the perspectives of communities—especially those most impacted by crime and policing—is largely absent.

Response: To support a shift towards a transformed first response and alternatives to traditional policing models, a significant amount of discretionary research funds should be directed toward understanding which preventative interventions and alternative response models are most effective at improving community outcomes.

Prior to the development of FY22 program solicitations, all agencies administering research programs should engage in robust outreach to communities—particularly highly impacted communities—to understand their public safety needs and priorities. Agencies should integrate these priorities into research solicitations, and include community advocates on peer review panels to ensure that impacted community members have a voice in allocating research funding.

TAKE ACTIONS TO LIMIT MILITARIZATION OF POLICE

Challenge: Although high-powered weaponry and military vehicles may be appropriate in the most extreme circumstances, federal programs now distribute, facilitate, or fund a massive amount of military equipment that is used in far less exceptional circumstances. Although many have called for elimination of the “1033” Department of Defense surplus military equipment program, not all equipment disbursed through the 1033 program is militarized, and many other programs subsidize or facilitate state and local acquisition of military equipment.

Response: The executive branch needs to do a review of and develop guidance for all federal programs that contribute to putting militarized equipment into the hands of state and local law enforcement, including not only the 1033 program, but also the 1022 program, the Equitable Sharing Programs, and Homeland Security Grants, among others. Such a review should establish standards of transparency that determine what information should be made public about when agencies receive such equipment or funding.

More immediately, by executive order, no such equipment should go to any jurisdiction without sign-off by the responsible democratically elected leadership of that jurisdiction and without a transparent policy in place governing the use of this equipment. In addition, federal agencies should make a list of recipients of military equipment or funding for equipment easily accessible on their website, as the 1033 Program already has done. For programs outside the DOJ that provide or subsidize military equipment to state and local police departments, either a DOJ official or the White House policing czar should be required to assess and approve the propriety of the equipment for local policing.

ENSURE EQUITABLE SHARING DOES NOT SUBSIDIZE PROBLEMATIC POLICING

Challenge: Federal equitable sharing statutes permit local police departments to seize property associated with federal crimes and receive a significant share of the proceeds from those seizures. Funneling proceeds directly to agencies risks distorting policing priorities and encourages overly aggressive (and sometimes ineffective) policing simply to feed agency coffers. By mandating that shared proceeds increase resources to local law enforcement agencies, federal sharing guidelines often bypass state efforts to minimize the impact of asset forfeiture and undermine local efforts to pursue public safety beyond police departments. Existing guidelines also encourage intrusive policing without democratic accountability by allowing agencies to use equitable proceeds for activities that local communities otherwise might restrict, such as obtaining surveillance technologies or paying informants.

Response: By executive order and rewriting the Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement Agencies (and as needed revising the Code of Federal Regulations): (1) stop adopting forfeitures from activities in which federal law enforcement is not involved; (2) allow shared funds to supplant locally provided money to law enforcement agencies so that communities can take advantage of increased resources to fund public safety purposes beyond police departments; and (3) prohibit the use of shared funds for “buy” money, payments to informants, electronic surveillance equipment, weapons, or providing matching grants for other federal programs. In addition, no agency should receive a greater share of proceeds from asset forfeiture than they would be permitted to receive directly by state forfeiture under state law (which in some cases is none).

PROMOTE NATIONAL STANDARD SETTING

Challenge: The United States lacks even the most basic uniform standards for sound policing. That cannot be a surprise given that there are by some accounts as many as 18,000 distinct policing agencies in the country. But the lack of national best practices has resulted in many harms. The federal government need not, and perhaps should not, mandate standards—and in many instances it may lack the power to do so—but it could do a great deal to foster sound policing by taking a leadership role, in concert with appropriate stakeholders, in promoting the adoption of best practices. In the past, the Department of Justice’s civil rights enforcement and technical assistance to departments has been mined as an indirect source for national standards, but consent degrees and findings reports are constrained by department-specific problems and conditions.

Response: Begin to create formal national standards for policing, akin to those in the American Law Institute’s Principles of the Law: Policing, which are developed and agreed upon by a range of stakeholders, including members of affected communities and the police. When appropriate, tie grant funding and participation in other federal programs to compliance with these standards.

PROMOTE DECERTIFICATION WHEN WARRANTED AND A NATIONAL DATABASE

Challenge: Police officers who are dismissed from positions because of misconduct, even grave misconduct, often find work in other agencies, sometimes even after another state has decertified the officer. Neither states nor agencies can prevent this harm in the absence of a national system for keeping track of such problem officers.

Response: At a minimum, the Department of Justice should support vocally the National Decertification Index, at least until a better-funded, more coherent alternative is up and running. DOJ should expressly encourage states to participate in it and encourage local agencies to check it before hiring an officer. As a longer-term goal, the Department of Justice should support a stronger and broader national database for decertification and misconduct information. That database should include not only decertified officers, but any officers who have been (1) convicted of a felony or a specified list of misdemeanor crimes that reflect on an officer’s fitness to serve, or (2) terminated from an agency due to misconduct or allowed to resign while under investigation for misconduct that could be the basis for termination.