

# Police Killings as a Problem of Governance

By  
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Police kill more than a thousand civilians each year in the United States, a much higher death rate than occurs in any other developed nation. One important cause of the epidemic of civilian deaths is the larger risk that the police who patrol American communities face from civilian assaults with firearms, widely owned and often not visible. Yet many hundreds of killings each year of civilians in the United States are not necessary to protect either police or others from life-threatening attacks. Governments in the United States have failed to collect reliable data, investigate the causes of high death rates, or develop administrative standards to reduce unnecessary killings. The power and expertise vacuums that govern the current ignorance and overkill in the police use of deadly force are the direct, if unintended, consequences of state and federal government failures to assert authority over the many thousands of local police forces that are progeny of the American federal system.

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**T**he unnecessary killings of civilians by police is both a singular and a serious problem in the United States. Police shoot and kill about a thousand civilians each year, and other types of conflict and custodial force add more than one hundred other lives lost to the annual total death toll. This is a death toll far in excess of any other fully developed nation, and the existing empirical evidence suggests that at

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least half and perhaps as many as 80 percent of these killings are not necessary to safeguard police or protect other citizens from life-threatening force. Three killings a day, every day, and at least half of these unnecessary to protect life (Zimring 2017, 228–35).

One reason why U.S. police kill so many civilians is that U.S. police themselves are vastly more likely than police in other rich nations to die from violent civilian attacks. In Great Britain or Germany, the number of police deaths from civilian attack most years is either one or zero. In the United States—four or five times larger—the death toll from civilian assaults is fifty times larger. And the reason for the larger danger to police is the proliferation of concealable handguns throughout the social spectrum. When police officers die from assault in Germany or England, the cause is usually a firearm (Zimring 2017, 79, 83), but firearms ownership is low, and concealed firearms are rare. There are, however, at least 60 million concealable handguns in the United States and the firearm is the cause of an officer's death in 97.5 percent of intentional fatal assaults (Zimring 2017, 96), an effective monopoly of life-threatening force even though more than 95 percent of all assaults against police and an even higher fraction of those said to cause injury are not gun related (Zimring 2017, 93, Table 5.2).

Even though guns are the only serious threat to police safety, other forms of assault still provoke more than four hundred civilian deaths every year from police lethal force, and this group of non-life-threatening incidents is the core of currently known civilian deaths that are not necessary to save lives. But it is also likely that there are a large number of gun cases that do not involve shots fired by civilians and that need not provoke police gunfire, and there are also a large number of cases where the death rate from police shootings doubles and triples because officers keep shooting after any danger to them has passed (Zimring 2017, 68–69).

But the peculiarities of the distribution of power in the U.S. federal system and the problematic focus of reformers on criminal prosecution of police officers rather than administrative restrictions on police shooting have made the always difficult task of effective reforms of police shootings impossibly complicated. For most of the 35 years after 1976, when the risk of a fatal attack of a police officer declined by two-thirds, the much higher death toll of civilians stayed remarkably stable (Zimring and Arsiniega 2015). In the complex labyrinth of the levels and branches of federal and state governmental authority in the United States during this period, research and policy analysis on police use of lethal force was nobody's responsibility. After the firestorm of concern struck in the wake of Ferguson, Missouri, in 2014, the only modest national resource that could provide any support to reform was the program in the Civil Rights Division of the federal Department of Justice that had been created in reaction to Rodney King's death in the 1990s (see Rushin 2017).

This article briefly describes some of the procedural and jurisdictional problems that are limiting the effectiveness of government efforts to save civilian lives from lethal force by police. I first discuss the error of reliance on expanding criminal prosecution almost exclusively to reduce unnecessary killings when administrative controls within police agencies are also an important vehicle for

effective reform. The second part of the article focuses on the particular problems of current governmental organization in the United States. A brief concluding section discusses one model for creating a statistical and research branch in the national government to generate better data and to create incentives for administrative reforms in the thousands of operating law enforcement agencies that must become the main arena for the protection of civilian lives in the United States.

## The Limits of Criminal Law in the Reform of Police Use of Lethal Force

One important problem in the governmental control of unnecessary police use of deadly force is the fact that police officers have been operating with near impunity when efforts are made by citizens or law enforcement to prosecute police officers for criminal misuse of their lethal weapons. The thousand or so killings of civilians by police officers in the United States each year have in recent history produced about one felony conviction of a uniformed officer per year. According to research by Philip Stinson of Bowling Green University, there were in the years 2000 to 2014 an average of 4.4 cases per year in the United States where police killings resulted in murder or manslaughter *charges* against one or more officers, and the prospects for obtaining felony *conviction* in these cases were low. The odds of a death producing a felony conviction were close to one in one thousand (see Zimring 2017, 174–75). There is also empirical evidence that this tiny conviction hazard is much lower than it should be. Even though there is no evidence of any camera record in 80 percent of the fatal cases in the first six months of 2015 reported in the *Guardian* newspaper study, Professor Stinson reports that “video evidence was available in at least 11 of the (18) cases” where he confirmed there was a felony charge (Zimring 2017, 189). If the rate of criminal charges is actually six times as high in camera record cases, the odds of prosecution would probably increase if more of these unfiled cases had been filmed, that suggests that the rate of charges in cases without film of the event is much lower than it would be if better evidence were available.

The much higher rate of prosecution with camera evidence also suggests that as camera records increase, so too will the proportion of cases that result in criminal charges. But how many of these charges will also result in convictions? When measured against the five hundred to eight hundred unnecessary deaths per year in current American experience, the reach of criminal convictions to reduce shooting deaths will be far short of the hundreds of unnecessary civilian deaths we need to prevent. Why is this? What other approach would be superior to only criminal prosecution for saving lives?

The extraordinary limits on the reach of criminal liability for prevention of unnecessary police killings is closely related to the circumstances of police shooting incidents in the United States. While there is of course wide variation in the events that provoke police to kill in the United States, most of the provoking

circumstances that produce gunfire by the police were not part of an intentional attack by police. Police are on patrol, or responding to a service call reporting a disturbance, when they encounter what they regard as the threat of attack, usually an assault against the officer. In about 88 percent of these cases, the officer reports the presence of a weapon in possession of the adversary (Zimring 2017, 57, Figure 3.6). In this important sense, the police officer is usually not the author of the conflict that generates his or her fatal force. This is significant because the criminal law is about personal fault and is much more comfortable making judgments about personal fault for harms that were wrongfully intended by individual actors.

The unpremeditated character of fatal force in the United States is similar in character to the circumstances that produce civilian shootings by police in other developed nations, but of course the rate of fatal force in these other nations is much lower than in the United States. By contrast, however, it appears that many nations outside the United States that experience very high volumes of lethal force by police also involve much more intended and premeditated killing by police. While precise statistical data on what legal analysts call “extrajudicial killings” is not available in the United States, such killings are frequently reported in India (Johnson and Zimring 2009, 434–35), in Brazilian urban favela areas (Sinhoretto, Schlittler, and Silvestre 2016), and in recent years as part of a “war on drugs” encouraged by current Philippine President Rodrigo Duterte.

When premeditated murder becomes a tool of law enforcement policy, the criminal law should become the weapon of choice in the control of violence by police, but the distinctive American pattern is far from any model of extrajudicial execution. Police may and often do overreact to the emergencies they encounter, but police themselves are rarely the cause of the emergencies. If the high death rates generated by police activity in the United States were for the most part the result of blameworthy activity by a few bad cops, then criminal law would make sense as a primary control strategy. But the problems are a mix of ineffective administrative controls, vague regulations, and the absence of administrative policy analyses and incentives for reducing death rates. It is hard to pin 100 percent of the blame for this mess on one or two officers.

The impediments to effective prosecution of extreme cases of police killings is of course a very serious problem. The worst of fatal force episodes in the United States tiptoe very close to intentional murder. The failure to criminally punish in circumstances like those of Oscar Grant in Oakland or Laquan McDonald in Chicago does tremendous damage to feelings of safety and personal integrity in the neighborhoods where intentional police killings happen. If extreme personal fault of police officers is in fact a rare event in the mass of fatal force episodes, that is all the more reason why it is necessary to isolate and condemn it when it does happen.

But simply because much more effective enforcement of the criminal law is a necessary reform in the governance of police use of force does not mean that is a sufficient reform for a nation that averages three citizen funerals a day from the conduct of its law enforcement. Public morale and effective police discipline both require better criminal law enforcement of grossly excessive fatal force and

corrupt falsification of the facts of police violence during the investigation of incidents. But these reforms in extreme cases will not save the hundreds of lives now lost to unnecessary shootings every year.

The critical problem with reform priorities in the first years after Ferguson, Missouri, was the exclusive emphasis on criminal prosecutions and criminal prosecutors. Ineffective police administrators—and the vague and permissive non-specificity of their deadly force standards—have been unjustly spared in the reexamination of why the epidemic of civilian deaths is a chronic part of our national experience. The shortest distance between three killings a day and cutting the death toll from police force in half is sustained administrative priority for reducing civilian death tolls by means of evidence-based rules of engagement for treating the inevitably dangerous interaction of police with armed civilians. This would be a difficult and complex agenda in any political democracy, but as I argue in the next section, the uniquely American distribution of power, resources, and responsibility in our federal system has produced a critical shortage in research, in policy analysis, and in expertise in evaluating police deadly force problems and responses.

## The Hazards of Federalism in the Management of Police Deadly Force

The American federal system is both unique in its structure and division of responsibilities and noncomprehensive in its design. The three basic levels of government—federal, state, and local—have parallels in other nations. But there are no exact equivalents to the United States when it comes to both the allocation of functions and power between the levels of government and the distribution of authority and responsibilities within the various branches at each level of government. The federal government is what has been called the supreme law in the federal system in the United States in the sense that if a particular topic is within the legislative prerogative of the national government, the federal regulation controls in conflicts with state and local laws. This is what could be called a “conditional supremacy” depending on the legitimacy of the national government’s claim to subject matter power, a matter for the national courts to decide when federal versus state or federal versus local conflicts arise. But there is also a second sense in which the federal responsibility for particular topics is conditional. That condition is that the national government must choose to exercise its authority, for it only has as much authority as it takes on.

By traditional and current circumstance, the role of the federal government in the establishment and enforcement of criminal law is limited in the United States. The national government has its own penal code as well as both prosecutors and courts to adjudicate criminal charges and prisons to hold convicted offenders. But each of the fifty states in the federal union also has its own penal code and institutions to adjudicate and punish criminal offenders, and the collective impact of state criminal law enforcement dwarfs that of the national. State

government traditionally imprisoned the vast majority of all persons behind bars and now accounts for 85 percent of state prisoners and more than 90 percent of all persons in secure confinement (Zimring, forthcoming). The federal government has an even smaller share of nonmilitary police, excluding specialized security personnel at airports and borders. The Federal Bureau of Investigation (FBI) employs thirty thousand or so of the nation's six hundred thousand police, and the Drug Enforcement Administration (DEA) has about four thousand agents.

If most criminal law and criminal punishment is a creature of the state level of government, police functions are dominated by two much smaller levels of local government, municipalities for police agencies and county-level government—typically with larger areas and populations—for sheriffs' offices and local jails.

Which of these levels of government are responsible for regulating the police use of deadly force? The prosecution of police conduct in criminal courts is usually the responsibility of local prosecutors, county government officials who also depend on local police to provide suspects and evidence. Criminal charges are rare, as noted above. The training, promotion, discipline over, and discharge of police officers is the responsibility of municipal police departments (for police) and county sheriffs (for sheriffs).

But what levels of government and agencies are responsible for evaluating the impact and legitimacy of a police agency's standards governing use of deadly force? What agencies analyze the impact and necessity of different deadly force policies on police safety and citizen risks? Often, the answer is nobody. And one reason for this gap is the singular architecture of police organization and authority in the federal system.

The national government has one police agency with a wide variety of investigative and arrest functions limited to federal law—the FBI—and a series of special function police or administrative security agencies. The FBI has a modest program of statistical reporting on crime and on police activity, which uses reports the agency collects from local police agencies to construct aggregate national profiles. The FBI does not audit any of the data that local agencies submit except for reported crime numbers, where the self-interests of local agencies to underreport crime generated some efforts of FBI quality control starting in the 1950s. For assaults against police officers or for the "justified killings by police of felons" reports that the agency collects and reports, there is no program of quality control.

The other branch of the national government with four modest programs that concern the activities of police functions is the U.S. Department of Justice, which has (1) a research institute to support some police programs—the National Institute of Justice; (2) a statistical reporting branch—the Bureau of Justice Statistics (BJS); and (3) two programs that are concerned with police behavior that puts citizens at risk. The Civil Rights Division of the department has an office that investigates and negotiates with local police departments, often generating consent decrees that subject reform efforts to the regulatory concern of federal district courts (Rushin 2017). The "COPS" program, an even smaller office in the Department of Justice, sends consultants to local police departments to help chiefs who request technical assistance. Both of these modest programs were involved in efforts to reduce police use of lethal force in the months following the Ferguson

emergency in 2014. Both programs have been substantially limited by the Trump/Sessions administration of the U.S. Department of Justice since 2017.

While state government is the most powerful level of government for criminal laws and criminal punishments, it is the least important level of government in policing. Putting aside only state highway patrol agencies, no level of government in the United States has less administrative or operational presence in policing than states.

The limited authority of state governments in police matters rather naturally leads to this level of government having little expertise about or influence on the conduct of local law enforcement. This has in one case led to serious problems of quality control in a program of the BJS in the U.S. Department of Justice. That bureau created and administered a well-functioning program of reporting deaths in custody in prisons and jails, the Deaths in Custody reports that were established by Congress in 2000. The best level of government for reporting deaths in prisons and jails was the state governments in the United States because the majority of persons are locked up in state custody, the administrative center for prisons (Zimring 2017, 29–30). But when the federal BJS program added an analysis of police data on “arrest related deaths” in 2003, it centered responsibility for these data in the same office in fifty state capitals that was collecting information on deaths in custodial confinement. Fully 61 percent of the “arrest related deaths” that the program reported were law enforcement homicides, almost always the result of local police and sheriffs in cities and towns not closely linked to agencies of state administration. The state agency collecting these data could only request accounts from local enforcement agencies and add up the numbers and descriptions and pass them on to Washington, D.C. (Zimring 2017, 29–32). The program was thus destined to be problematic.

The larger problems generated by the incapacity of state government in police regulation are sins of complete omission, rather than mere weaknesses in well-intended efforts at reporting influence and control. Every state in the federal system has an attorney general with some claim to statewide leadership in the administration of criminal law. But no state government has either the authority or the desire to regulate or evaluate the mission or behavior of municipal police or county sheriffs. With about eighteen thousand different police agencies operating independently, there are also very few departments with the size and specialized personnel to conduct research on the impact of various police activities. Most police administrators came up through the ranks and often from within the same organizations where they started their careers on the street. With the possible exception of criminal investigation, the operational departments provide very little scientific or technical training of officers. The ubiquitous police academy “weapons instructors” teach recruits how to service, store, aim, and shoot their weapons. The lore that many weapons instructors provide on use of deadly force in conflict with civilians is never research-based and often preposterous, as in the fanciful theory that any citizen brandishing a bladed weapon within twenty-one feet of an officer is a threat to kill the officer (Martinelli 2014).

Police departments lack experts and therefore they also lack expertise. The responsibility by default to create and evaluate deadly force policy that falls on

unspecialized county and municipal police agencies is in no sense a thoughtful or deliberate decision about governance. It just exists as an artifact of the United States' particular brand federalism. Any real success in going beyond the current police self-interested self-government in matters of lethal force policy must involve giving some funding and authority to other branches and levels of government.

Let me make my central point explicit. The power and expertise vacuums that govern the current ignorance and overkill in police use of deadly force are the direct, if unintended, consequence of state and federal government failures to assert authority over the use of lethal force by law enforcement. The unit of government that maintains authority in many other criminal justice operations—the state level—usually has no concern with and little statutory authority about policing.

This point was illustrated in my earlier study by comparing the great success of the national government's Kevlar evaluations and promotion as standard equipment for police in communities with the failure to test the unproven theories that provide cover for hundreds of unnecessary killings of civilians by police:

In contrast to the systemic application of empirical evidence in developing national standards that surrounded the introduction of soft body armor to police forces nationwide, the lack of evaluation for a number of life-threatening law enforcement tactics—the 21-foot rule, the firing of multiple shots and infliction of multiple wounds in response to perceived threats—indicates the inherent anarchy and lack of accountability we find in the animating principles of police use of deadly force. (Zimring 2017, 100–101)

What causes this “inherent anarchy” is an accidental allocation of responsibility for fact-finding and policy evaluation about police use of deadly force. In the current federal system, a critical approach to research, fact-finding, and policy evaluation on lethal policing is the current responsibility of no branch of government. Because local police forces are small, unspecialized, and susceptible to conflicts of interest, they would be nobody's first choice to test policies and recommend strategies to reduce the risks for citizens and police. Local police forces do not have either the concern or the capacity to protect citizen lives without outside pressure. But local police have become the decision-makers by default. This probably costs the nation hundreds of civilian deaths each year—the deadly shame of the missing links in the American federal system.

## Filling in the Governance Gaps

My earlier book on police killing presented an outline of some of the vital missing tasks of government that were necessary to create effective control of police use of lethal force. One chapter titled “The Missing Links” emphasized a few of the important tasks that no level of American government has been performing, including collecting reliable data on the volume, circumstances, and necessity of use of lethal force incidents; reliable data on the volume and circumstances of life-threatening assaults against police officers; assessments of the cases where

lethal force is necessary to police officer or citizen safety; the identification of strategies other than deadly force that can be safely used in conflict with civilians; the evaluation of limitations on shots fired and the effectiveness of “stop shooting” rules; and the financial support for such programs of research and analysis (Zimring 2017, 143–65). If we had national or state police forces as the main arena for deadly force policy, they could do much more by themselves to create appropriate policy. But eighteen thousand separate police agencies require standards and support they do not now receive.

I want to pay special attention in this brief conclusion to one procedural question about the places in American government that are best suited to funding and administering such programs of research and evaluation. What level of government is best suited to these vital support functions?

The best method of assessing the competence of various levels of government in these critical tasks is a process of elimination. The vast majority of all policing agencies of government are in units of local government, either municipalities or counties. But individual police departments lack the resources, the motivation, and the competence to conduct empirical research and to evaluate police programs. The police chief can and should become a sophisticated consumer of research and evaluation. Police chiefs must also be the agents who transform policy findings into the operational rules that keep both their officers and their citizens safe. Some police forces can also serve as the hosts for the field research and policy evaluations that outside experts will conduct. But city and county governments are too small to run and finance their own laboratories of police experimentation. This means that the institutions of government that will fund and administer fact-finding and policy analysis should be separate from those that manage police services. This separation of functions would make sense in any event, but it is compelling in the administrative reality of the American federal system.

The units of government that control most criminal justice policy in the United States—state government—are less involved with police and policing than with most other aspects of crime. There are, however, a few areas of governmental responsibility where the distance between state government and policing administration may be an advantage, such as taking responsibility out of the hands of local prosecutors when police use of lethal force becomes an issue of potential criminal liability.

There is one other consideration, however, that points away from state government, and toward national governmental institutions, as the primary focus of responsibility for policy research and standards. Police use of fatal force and police vulnerability to life-threatening assault are both national problems. There are some regional variations in the rate at which police kill and are killed in the United States, but it is a fifty-state problem. The national government has the most to gain from relevant and well-designed research and should therefore have the largest incentive to support it.

There are modest historical precedents that also provide indications of which branches of the national government (and which institutions within them) are best suited to filling the research, information, and policy analysis gaps in

contemporary police lethal force policy. The National Institute of Justice has funded both research and policy innovation that has saved thousands of police officer lives (McMullen 2008). Ten million federal dollars a year in the Institute's budget in 2020 could transform policy research in police use of lethal force. The Civil Rights Division in the Department of Justice has been administering a consent degree program for police departments with chronic problems that turned its attention to lethal force issues after Ferguson. The small "COPS" program in the Department of Justice provides management consulting and expert advisors to police chiefs who request help, and this can pay substantial dividends (Zimring 2017, 235–38). Both programs are tiny now and could be tripled in scale and impact for very few millions per year.

There is also one important foreign model of a national fact-gathering institution that could also be incorporated into the U.S. government's Department of Justice, perhaps in the civil rights division. Police departments in England and Wales have decentralized administrations, not unlike the United States. But the United Kingdom also created an Independent Office for Police Conduct (formerly known as the Independent Police Complaints Commission) that has become a statistical and analysis resource that is worthy of emulation on this side of the Atlantic (Zimring 2017, 80–85).

## The Bright Side of Historical Neglect

The complete lack of data and research across the landscape of American police lethal force questions does provide one cheerful budgetary prospect. Ten to 20 million dollars a year invested wisely can produce life-saving results of a scale that is almost impossible to imagine in many other areas of national public health concern. Saving citizens lives from unnecessary police use of lethal force is a bargain—all the more reason why we had best be starting soon.

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