THE BULWARK

Consent Decrees for Police Reform: An Imperfect But Important Tool

Law enforcement agencies that wish to avoid federal intervention should study the agencies that already went through the process.

Dan King

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In a win for criminal justice reformers, the federal government may soon have a more hands-on role in providing oversight into local police departments. But the feds must be cautious in how they wield this power.

Attorney General Merrick Garland announced last month that he would be lifting a Trump-era limit on the use of consent decrees, the process through which the Department of Justice (DOJ) investigates an entity accused of constitutional misconduct, provides its findings, and enters into a court-issued binding agreement with the agency to address the concerns. This can occur with private corporations, police departments, or various other entities.

In the wake of the 1992 beating of Rodney King by Los Angeles police and the subsequent L.A. riots, Congress in 1994 permitted the use of consent decrees to reform police departments. Their use became much more frequent during the Obama administration, when DOJ entered into 15 consent decrees with law enforcement agencies throughout the country (up from 3 under George W. Bush). Then, in 2018, on the same day he was forced to resign as Donald Trump's attorney general, Jeff Sessions issued a memo announcing the department would be substantially limiting its use of consent decrees, raising the threshold for federal intervention in the workings of state and local governments.

When considering the use of consent decrees, there are competing goods that must be balanced. It is important to ensure that state and local police agencies are not violating constitutional rights. It is also desirable not to create a top-down approach to policing from Washington. After all, local knowledge is crucial to effective policing, and local prosecutorial and policing discretion can go a long way toward reforming policing. For example, Baltimore's State Attorney Marilyn Mosby announced in March 2020 that the city would stop prosecuting certain nonviolent crimes, such as drug possession, open container, prostitution, public urination, and minor traffic violations. Since that time, both violent and property crime rates have decreased, and fewer people have entered the criminal justice system. This at a time when crime rates in major cities are increasing.

While Baltimore's shift away from prosecuting nonviolent crimes has been a successful example of local discretion, it likely would not have occurred if it weren't for some federal oversight, which came in the form of a consent decree. Following the 2015 death of Freddie Gray in police custody, DOJ investigated the Baltimore City Police Department and found it "engage[d] in a pattern or practice of conduct that violates the First and Fourth Amendments of the Constitution

as well as federal anti-discrimination laws." In 2017, the consent decree was formalized. The media attention arising from this federal oversight received likely helped create an appetite for the reforms Mosby made in 2020. (It is worth noting that one of the key federal investigators in the Baltimore case was Vanita Gupta, who was recently confirmed to be Garland's associate attorney general.)

Another criticism often leveled by opponents of consent decrees is that because these documents are hundreds of pages long and contain various policy changes, police will stop policing certain communities for fear of being accused of violating the consent decree. Heather Mac Donald, the Manhattan Institute scholar and author of *The War on Cops*, calls it "politically induced depolicing."

There may be cases where consent decrees have that effect—but there are contrary examples as well, in which policing improved. In 2005, the Vera Institute published a review of the 1997 consent decree reached between the federal government and police in Pittsburgh. "Despite recent financial strains," the authors reported, reforms put in place after the consent decree "remain firmly in place today, and both community leaders and citizen surveys reflect significant improvements in service." Further, the 2017 Baltimore consent decree expressly calls for *more* community policing—a popular concept in which police walk their beats and foster positive relations with communities, as opposed to a stop-and-frisk approach or an approach in which police only respond to a community after a crime has been committed. This type of policing would be invaluable to communities of color that are, paradoxically, both overpoliced and underpoliced—they simultaneously have incredibly high rates of arrest for minor offenses and incredibly low rates of clearance on violent crimes.

In cities where local discretion has led to discriminatory policing, unconstitutional searches and seizures, or overzealous use of force, the federal government has a role to play. While DOJ can certainly overstep its role with consent decrees—as Walter Olson noted a couple of months after the Sessions memo came out—they can also serve as an important tool to provide independent oversight into potential police abuses, and provide concrete policy prescriptions to address the issues.

That's why the role of the independent monitor is so important. This person is tasked with actually being on the ground in the jurisdiction that will be affected by the consent decree. He or she meets with community members and police officers alike, to determine if new reforms are working or not. As Radley Balko explains, the independence of this monitor from the police department can lead community members and police officers to be more open about sharing their honest opinions on the reforms:

Where the police relationship with some marginalized communities is particularly bad, members of those communities may feel more comfortable talking to an independent monitor than with a representative of the same department they feel has been disrespectful or abusive. Monitors also meet with rank-and-file officers to talk about how the policies are affecting them—again, officers whose opinions differ from the status quo would presumably be more comfortable talking honestly to someone from outside the agency than inside of it.

Consent decrees relating to law enforcement are typically focused on issues of "constitutional policing," such as the use of force, unlawful searches and seizures, and bias that could raise equal protection issues. Even police departments that haven't reached consent decrees with the

federal government could learn from the published findings of departments that have. Two years ago, the Crime and Justice Institute analyzed the results of twenty-one different decrees between 1997 and 2017, and provided what it calls a "floor" of policy solutions that all police departments should strive to meet, including set-in-stone policies around use of force, searches and seizures, de-escalation training, data collection, and much more. If a department were to proactively adopt these ideas, it could ensure it is in line with the Constitution without going through the expensive consent decree process.

Concerns about consent decrees don't only come from those who are skeptical of reforms. Some pro-reform individuals worry about compliance after federal withdrawal. The Vera Institute study found that Pittsburgh largely continued to make strides on accountability even after federal officials left the city, noting that "two key factors enabled the city quickly to comply with the terms of the decree: the leadership of a talented police chief and guidance from the federal monitor."

The Vera study also found that the consent decree, combined with Pittsburgh having a reform-minded police chief at the time, led to the creation of an "early warning system" that identified potential bad apples within the department, increased accountability through a centralized review of officer performance, improved use-of-force training, and much more.

Another concern that is often brought up by opponents of consent decrees is the cost, which can often run into the millions of dollars. Mac Donald argues that consent decrees "cost police departments millions of dollars to implement and take dozens of officers off the street to fill out reams of paperwork within rigid deadlines." She is correct about the costs. For example, the consent decree between DOJ and the New Orleans Police Department came with a price tag to the city of $55 million. Certainly that is a lot of money, but some research indicates that consent decrees may actually save cities money in the long run by reducing the number of lawsuits brought against them. A study conducted by criminologists at the University of Dallas found that jurisdictions that entered into consent decrees saw their risk of civil rights litigation under Section 1983 decrease by 23 to 36 percent. Section 1983 lawsuits typically cost cities millions of dollars.

And again, departments could avoid being saddled with the costs associated with consent decrees by proactively implementing the policy recommendations from the Crime and Justice Institute or by reviewing other cities' consent decrees and learning from the findings.

Better policing will have to largely be driven by local reforms, but the return of consent decrees means that the federal government will be able to work with local police departments on reforms, and can hold those departments accountable through an enforcement mechanism, if the terms of the agreement are broken.

It is important that Garland and the DOJ should be able to pursue consent decrees when they see fit, but they must do so only when they have reasonable suspicion to believe a department is violating a constitutional right or anti-discrimination protection. This cautious approach will provide oversight for bad departments, while also ensuring the federal government doesn't overstep its role in policing and saddle local taxpayers with the bill.