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## **Police and National Security: American Local Law Enforcement and Counter-Terrorism after 9/11**

Matthew C. Waxman  
*Columbia Law School*, [mwaxma@law.columbia.edu](mailto:mwaxma@law.columbia.edu)

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# Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11

Matthew C. Waxman\*

## INTRODUCTION

Since the September 2001 terrorist attacks inside the United States, local police agencies have taken on greater national security roles and responsibilities. “The September 11 attacks,” wrote Attorney General John Ashcroft to all U.S. Attorneys in November 2001, “demonstrate that the war on terrorism must be fought and won at home as well as abroad”:

To meet this new threat and to prevent future attacks, law enforcement officials at all levels of government – federal, state, and local – must work together, sharing information and resources needed both to arrest and prosecute the individuals responsible and to detect and destroy terrorist cells before they can strike again.<sup>1</sup>

President Obama’s Secretary of Homeland Security, Janet Napolitano, recently testified that the budget request from the Department of Homeland Security (DHS) included additional counterterrorism funding for “systems to enhance information-sharing among federal, state, local, and tribal law enforcement.”<sup>2</sup> Elsewhere Napolitano characterized partnerships with state, local, and tribal authorities as one of the priorities of the DHS and noted that “[p]artnerships with state, local, tribal, and territorial agencies affect DHS’s ability to identify threats and bolster preparedness before an incident,” and that “[i]nformation sharing between DHS and state and local governments is particularly critical to our security.”<sup>3</sup>

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\* Associate Professor, Columbia Law School; Member of the Hoover Institution Task Force on National Security and Law; Adjunct Senior Fellow, Council on Foreign Relations. I thank the following individuals for their helpful comments: William C. Banks, David Bayley, Ben Bowling, David Cole, Jeffrey Fagan, Aziz Huq, Debra Livingston, Samuel Rascoff, Daniel Richman, Jacqueline Ross, and Peter Schuck.

1. Memorandum from John Ashcroft, Att’y Gen., to All U.S. Att’ys, Cooperation with State and Local Officials in the Fight Against Terrorism (Nov. 13, 2001), *available at* <http://www.fas.org/irp/agency/doj/agdirective5.pdf>.

2. *FY 2010 Budget Request: Hearing Before the S. Comm. on Homeland Sec.*, 111th Cong. (2009) (oral testimony of Janet Napolitano, Sec’y of the Dept. of Homeland Sec.), *available at* [http://www.dhs.gov/ynews/testimony/testimony\\_1242307132502.shtm](http://www.dhs.gov/ynews/testimony/testimony_1242307132502.shtm).

3. *The Path Forward: Hearing on DHS Before the H. Comm. on Homeland Sec.*, 111th Cong. (2009) (testimony of Janet Napolitano, Sec’y of the Dept. of Homeland Sec.), *available at* [http://www.dhs.gov/ynews/testimony/testimony\\_1235577134817.shtm](http://www.dhs.gov/ynews/testimony/testimony_1235577134817.shtm).

This article examines three national security law challenges resulting from greater involvement of state and local police agencies in protecting national security, especially in combating terrorism: organizational challenges, accountability challenges, and institutional tensions with traditional local police functions. Each threatens the balance of security and civil liberties.

This article concludes by forecasting that these three challenges will be addressed incrementally over time, depending on such factors as the continuing evolution of the terrorism threat. Aside from its specific observations, a broader point of this article is that the overwhelming scholarly attention focused on *federal* national security law issues misses the practical consequences of legal debates that often play out at a *local* level in very different ways.

Part II examines organizational challenges, in particular how the decentralized and localized nature of American policing creates enormous problems in coordinating national security and counterterrorism activities. Local police agencies offer tremendous resources in terms of personnel and the familiarity needed to prevent, investigate, and respond to terrorism. But the atomization of U.S. policing requires new coordination mechanisms to harness these resources effectively in pursuit of a national agenda. In recent years the federal government and the states have launched many initiatives aimed at integrating the thousands of U.S. law enforcement agencies, which vary widely in size, capability, threat perception, and relationship to local communities.

Part III examines accountability challenges, including secrecy issues and how the counterterrorism agenda may influence or disrupt systems of political accountability of local police agencies. Those systems are designed for traditional police functions like preventing crime and maintaining order, the costs and benefits of which are generally felt locally and discerned visibly by the public. By contrast, some national security functions are necessarily shielded from public view, and the benefits of local police efforts in support of national security accrue elsewhere or are unobservable.

Part IV examines functional challenges, especially how some of the attributes that make local policing a useful counterterrorism tool also create difficulties in simultaneously carrying out more traditional functions. A tension that sometimes exists between law enforcement and intelligence activities is exacerbated when stretched across local-federal lines, and some actions that may be important to national security can be highly disruptive to traditional law and order police efforts within local communities.

Finally, Part V offers some general observations about alternative futures and the opportunities for addressing the challenges outlined here.

I. AMERICAN POLICING AND NATIONAL SECURITY  
BEFORE AND AFTER SEPTEMBER 11

The subject of police and national security in the United States often conjures fears of aggressive snooping and overbroad sweeps of political dissidents. In the years following World War I, a period now remembered for overblown alarm about radical leftist activity, J. Edgar Hoover's Bureau of Investigation (the forerunner of the Federal Bureau of Investigation, or FBI) enlisted local police agencies to conduct a series of raids – called the “Palmer Raids” for Attorney General A. Mitchell Palmer – on suspected radicals.<sup>4</sup> On two occasions – in November 1919 and January 1920 – the government violently seized thousands of immigrants across the United States without arrest warrants and targeted them for deportation based on suspicion that they held radical political beliefs.

In the 1950s and 1960s, the FBI requested local police agencies' assistance in its “Counter-Intelligence Program” (COINTELPRO), aimed at allegedly subversive political groups, eventually including wide swaths of the civil rights movement membership.<sup>5</sup>

In the wake of the September 11, 2001, attacks, local police again mobilized in support of nationwide efforts to combat national security threats, this time jihadist terrorism. Some observers see this as a necessary precaution; others see parallels to past law enforcement abuses.<sup>6</sup> Both views were displayed, for instance, when the New York City Police Department (NYPD) prepared for the 2004 Republican National Convention by deploying undercover officers across the country to conduct covert surveillance of suspected protesters, including members of religious groups and anti-war organizations.

David Cohen, a former deputy director of the Central Intelligence Agency (CIA) and now Deputy New York City Policy Commissioner for Intelligence, proclaimed that “[g]iven the range of activities that may be engaged in by the members of a sleeper cell in the long period of

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4. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 220-226 (2004). For a discussion of the violent nature of the government raids, see CHRISTOPHER M. FINAN, *FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA* 1-4 (2007) (“During the first raid in November 1919, the police arrested over 1,000 people in eleven cities, sometimes bursting into their homes and dragging them out of their beds without explanation. Many of those who were ultimately detained were denied access to an attorney and kept ignorant of the charges against them.”; “Over 3,000 members of the Communist and Communist Labor parties were seized during a second, even larger raid in January 1920.”).

5. See DAVID CUNNINGHAM, *THERE'S SOMETHING HAPPENING HERE: THE NEW LEFT, THE KLAN, AND FBI COUNTERINTELLIGENCE* (2004); see also RICHARD E. MORGAN, *DOMESTIC INTELLIGENCE: MONITORING DISSENT IN AMERICA* (1980).

6. See, e.g., STEPHEN J. SCHULHOFER, *THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11* 63 (2002).

preparation for an act of terror, the entire resources of the NYPD must be available to conduct investigations into political activity and intelligence-related issues.”<sup>7</sup> Civil liberties groups expressed outrage and brought suits against the city alleging widespread rights abuses and political harassment.<sup>8</sup>

This tension between civil liberties and state security measures lies at the heart of national security law. By “national security law,” I mean regulation of coercive government powers wielded to protect the state, including against external military threats as well as internal efforts to undermine government. While there are some particular features that pertain to local policing, the substantive issue of balancing investigatory and coercive state powers against rights and freedoms is certainly not unique to local police, nor is it unique to U.S. policing.

What makes the issue of U.S. policing and national security so interesting and complex is the decentralized and localized nature of most law enforcement in this country.<sup>9</sup> A recent National Research Council study estimates that there are about 13,500 local police departments across the country.<sup>10</sup> Another source puts the number of state and local police agencies closer to 19,000.<sup>11</sup>

Sub-federal police agencies include state, county, city, or town, and tribal organizations. These sub-federal agencies are responsible for the vast bulk of crime fighting and community protection in this country, and they are as heterogeneous and geographically dispersed as the local populations they serve.

Terrorism was by no means a new problem for the United States in 2001, nor were state and local governments uninvolved in the counterterrorism effort before then. The 1990s alone saw the 1993 World Trade Center bombing, the Oklahoma City bombing, and the series of attacks by “Unabomber” Theodore Kaczynski.

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7. Jim Dwyer, *City Police Spied Broadly Before G.O.P. Convention*, N.Y. TIMES, Mar. 25, 2007, at A1.

8. See Diane Cardwell, *Lawyers' Group Sues City over Arrests of Protesters*, N.Y. TIMES, Oct. 8, 2004, at B3.

9. HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 131-136 (1977); James Q. Wilson, *Criminal Justice*, in UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION 475, 475 (Peter H. Schuck & James Q. Wilson eds., 2008).

10. See NATIONAL RESEARCH COUNCIL, *FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE* 49 (Wesley Skogan & Kathleen Frydl eds., 2004). The Department of Justice recently provided the following numbers: 12,766 local police departments and 3,067 sheriffs' offices. Brian A. Reaves, Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies, 2004* at 1 (Carolyn C. Williams ed.) (2007), available at <http://www.ojp.usdoj.gov/bjs/abstract/cslla04.htm>.

11. James X. Dempsey, *Overview of Current Criminal Justice Systems*, in COMPUTERS, FREEDOM AND PRIVACY 101 (2000), available at <http://www.cdt.org/publications/overview/ofcjs.pdf>.

Many states in the 1990s enacted criminal statutes against terrorist activity that mirror federal criminal laws.<sup>12</sup> Until the September 11 attacks, however, terrorism within the United States was not a priority issue at any level of government. Terrorism fell largely within the jurisdiction of the FBI, and even there it was generally of secondary importance to fighting federal crimes such as white-collar and narcotics offenses.<sup>13</sup>

Following the 1993 World Trade Center attack, FBI Director Louis Freeh tried to reorient the Bureau's priorities toward counterterrorism, including through the creation of a counterterrorism division, but his efforts failed to alter significantly the agency's dominant focus on investigating and solving other federal crimes.<sup>14</sup>

Meanwhile, one survey in the mid-1990s found that less than 40 percent of state law enforcement agencies and only about half of local police agencies had contingency plans for dealing with terrorist threats. About 40 percent of municipalities reported never having had contact with federal agencies regarding terrorism issues.<sup>15</sup>

The September 2001 attacks, followed soon after by anthrax attacks in the postal system, generated new urgency in counterterrorism efforts and stimulated information-sharing throughout the U.S. government system. Changed threat perceptions also resulted in major federal and state bureaucratic restructuring.

At the federal level this mobilization included vastly increasing the FBI's emphasis on domestic counterterrorism through structural changes and increasing the personnel dedicated to this mission.<sup>16</sup> Congress created the new Department of Homeland Security, which consolidated nearly two dozen federal agencies and assumed responsibility for protecting U.S. territory from terrorist attacks and responding to natural disasters.<sup>17</sup> Perhaps most controversially, even the Department of Defense expanded its efforts to identify suspected terrorists and other threats within the United States, until civil liberties objections prompted curtailment.<sup>18</sup>

12. See Laura K. Donohue & Juliette N. Kayyem, *Federalism and the Battle over Counterterrorist Law: State Sovereignty, Criminal Law Enforcement, and National Security*, 25 *STUD. IN CONFLICT & TERRORISM* 1 (2002).

13. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT* 74 (2004).

14. See *id.* at 76-78.

15. KEVIN JACK RILEY & BRUCE R. HOFFMAN, *DOMESTIC TERRORISM: A NATIONAL ASSESSMENT OF STATE AND LOCAL PREPAREDNESS* 26, 31 (1995).

16. See U.S. DEPARTMENT OF JUSTICE, *THE FBI: A CENTENNIAL HISTORY, 1908-2008*, at 98-106, available at <http://www.fbi.gov/book.htm>; *Progress Report on the Reorganization and Refocus of the FBI: Hearing Before the Subcomm. on the Dep'ts. of Commerce, Justice and State, the Judiciary and Related Agencies of the H. Comm. on Appropriations*, 108th Cong. (2003) (testimony of Robert S. Mueller, III, Dir., FBI), available at <http://www.fbi.gov/congress/congress03/mueller061803.htm>.

17. Homeland Security Act of 2002, Pub. L. No. 107-296, §101, 116 Stat. 2142.

18. In 2002, the Counterintelligence Field Activity Office (CIFA) was created within

At the local level, too, governments shifted emphasis to preventing and preparing for potential terrorist attacks.<sup>19</sup> It was not just the magnitude of the perceived terrorist threat after September 11 that pushed the counterterrorism agenda down to local levels of government, including to within the police agencies; it was also the sense that major national vulnerabilities once again existed at home, with threats materializing or operating inside U.S. borders. The September 11 attacks left the government at all levels – federal, state and local – worried about gaps in their capabilities to piece together and neutralize terrorist plots. Many of the “dots” comprising the September 11 plot sequence occurred within the United States, including flight instruction by several of the eventual hijackers and traffic violation stops of two of them by state police. Perhaps, it followed, the attacks could have been averted with better systems and policies to discern, analyze, and act on such “dots” throughout the country, ultimately uncovering the plot.<sup>20</sup>

The September 11 attacks also created a national sense of fear that al Qaeda and its allies were in the process of unleashing a campaign of additional attacks using “sleeper cells” embedded in American communities, and awaiting orders or opportunities to strike.<sup>21</sup> A number of

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the Department of Defense to better coordinate the Pentagon’s efforts to combat foreign intelligence services and terrorism groups inside the United States. The Talon database, maintained in CIFA and begun in 2003, was designed to house intelligence reports about possible threats to military bases within the United States, but was “expanded to include reports by local law enforcement agencies and military security personnel about nonviolent demonstrations and rallies.” Mark Mazzetti, *Pentagon Intelligence Chief Proposes Ending a Database*, N.Y. TIMES, Apr. 25, 2007, at A18. Reports later surfaced that the database included information about antiwar protests at churches, schools, and Quaker meeting halls. Eric Lichtblau & Mark Mazzetti, *Military Documents Hold Tips on Antiwar Activities*, N.Y. TIMES, Nov. 21, 2006, at A18; Mark Mazzetti, *Pentagon Is Expected To Close Intelligence Unit*, N.Y. TIMES, Apr. 2, 2008, at A24; see also Walter Pincus, *Protesters Found in Database: ACLU Is Questioning Entries in Defense Dept. System*, WASH. POST, Jan. 17, 2007, at A8. Defense officials stated that those operating the Talon database had “misinterpreted their mandate” in collecting such information. See Lichtblau & Mazzetti, *supra*. CIFA was also tied to “national security letters” issued by the Pentagon to American banks for the purpose of obtaining information about terrorism suspects. Mark Mazzetti, *Cheney Defends Efforts To Obtain Financial Records*, N.Y. TIMES, Jan. 15, 2007, at A10. The Department of Defense closed Talon in September 2007. Press Release, Dep’t of Def., DoD To Implement Interim Threat Reporting Procedures (Aug. 21, 2007), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=11251>, and CIFA in August 2008. Press Release, Dep’t of Def., DoD Activates Defense Counterintelligence and Human Intelligence Center (Aug. 4, 2008), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=12106>.

19. See INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, POST 9-11 POLICING: THE CRIME CONTROL-HOMELAND SECURITY PARADIGM I (2005); Patrick S. Roberts, *Shifting Priorities: Congressional Incentives and the Homeland Security Granting Process*, 22 REV. POL’Y RES. 437 (2005); Karen Tumulty, *But Will We Be Any Safer?*, TIME, Dec. 2, 2002, at 42.

20. See 9/11 COMMISSION REPORT, *supra* note 13, at 215-241, 416-418.

21. See Kevin Whitelaw & Mark Mazzetti, *War in the Shadows*, U.S. NEWS & WORLD REPORT, Nov. 11, 2002, at 48.

alleged al Qaeda cells in the United States have been arrested and prosecuted in the years since the September 11 attacks, including the “Lackawanna 6” (a half-dozen Yemeni-Americans living near Buffalo, New York, convicted of providing material support to al Qaeda)<sup>22</sup> and a Miami-based group allegedly bent on destroying Chicago’s Sears Tower.<sup>23</sup> Most recently, federal agencies arrested and charged Najibullah Zazi, an Afghan immigrant who allegedly trained in an al Qaeda camp in Pakistan and planned to detonate bombs within the United States.<sup>24</sup>

In retrospect, the sophistication and potential effectiveness of many of the thwarted cells has been called into doubt, and the partial disruption of al Qaeda’s leadership apparatus in Afghanistan and Pakistan has sown doubt as to whether al Qaeda still poses a major threat of attack inside the United States.<sup>25</sup> But the reduced worry of centrally commanded or supported al Qaeda cells inside the United States has been replaced by additional concerns about locally rooted, organizationally autonomous radical extremists who might plan and carry out terrorist attacks in the name of a broader al Qaeda-inspired agenda.<sup>26</sup>

As a result of these emerging threats, local police agencies have played a number of expanded counterterrorism roles in recent years.<sup>27</sup> These

22. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1 (2005).

23. Damien Cave & Carmen Gentile, *Five Convicted in Plot To Blow up Sears Tower as Part of Islamic Jihad*, N.Y. TIMES, May 13, 2009, at A19.

24. See David Johnston & Scott Shane, *Terror Case: ‘Scary’ Ingredients*, N.Y. TIMES, Sept. 25, 2009, at A1.

25. See discussion below in Part V. A recent U.S. intelligence assessment did not rule out the possibility of major al Qaeda attacks inside the United States. DENNIS C. BLAIR, ANNUAL THREAT ASSESSMENT OF THE INTELLIGENCE COMMUNITY FOR THE SENATE SELECT COMMITTEE ON INTELLIGENCE 6 (2009), available at <http://intelligence.senate.gov/090212/blair.pdf> (“We lack insight into specific details, timing, and intended targets of potential, current US Homeland plots, although we assess al-Qa’ida continues to pursue plans for Homeland attacks . . .”); Walter Pincus, *Counterterrorism Official Urges Broader Approach to Foreign Policy*, WASH. POST, Apr. 21, 2009, at A21; see also Johnston & Shane, *supra* note 24, (“In recent years, foiled plots announced with fanfare in Washington have sometimes involved unsophisticated people who seem hardly capable of organizing a major attack.”).

26. See BLAIR, *supra* note 25, at 7:

[W]e remain concerned about the potential for homegrown extremists inspired by al-Qa’ida’s militant ideology to plan attacks inside the United States, Europe and elsewhere without operational direction from the group itself. In this regard, over the next year we will remain focused on identifying any ties between US-based individuals and extremist networks overseas. Though difficult to measure, the spread of radical Salafi Internet sites that provide religious justification for attacks; aggressive and violent anti-Western rhetoric; and signs that self-generating cells in the US identify with Bin Ladin’s violent objectives all point to the likelihood that a small but violent number of cells may develop here.

27. See David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 3

include criminal law enforcement, public protection, emergency response, and intelligence gathering.

Most criminal prosecutions for crimes directly related to terrorism are investigated and prosecuted at the federal level.<sup>28</sup> Federal investigative and prosecutorial capabilities are vast and sophisticated, while federal antiterrorism statutes and the high profile of such crimes push the prosecution of terrorism crimes at the federal rather than state and local levels. However, local police agencies' efforts to prevent and deter crime also aim to establish an environment inhospitable to terrorism-related activities – a role that many local forces have internalized since 2001.<sup>29</sup>

Besides these law enforcement roles, local police agencies' responsibilities for providing protection of possible target sites, public education and awareness, and emergency response have grown considerably.<sup>30</sup> An extensive survey in 2002 by the U.S. Conference of Mayors details the significant financial and personnel costs of these efforts at the municipal level, especially within local police departments.<sup>31</sup> A 2005 survey of state and local police agencies by the International Association of

(2006). A 2005 RAND survey of state and local law enforcement agencies found, not surprisingly, that counterterrorism activities have tended to be concentrated especially in larger police departments: “[T]he survey findings, which reflect heightened awareness associated with the Oklahoma City and September 11 attacks, suggest that the ‘eyes and ears’ capability is concentrated among the larger departments. These are the agencies investing in training, response plans, coordination, and other preparedness measures.” K. JACK RILEY ET AL., *STATE AND LOCAL INTELLIGENCE IN THE WAR ON TERRORISM* 27 (2005), available at <http://www.rand.org/pubs/monographs/MG394/>.

28. See N.Y.U. CTR. ON LAW & SEC., *TERRORIST TRIAL REPORT CARD* (Karen J. Greenberg ed., 2006), available at <http://www.lawandsecurity.org/publications/TTRC Complete.pdf>.

29. See George L. Kelling & William J. Bratton, *Policing Terrorism, Civic Bulletin No. 43* (Manhattan Inst. Ctr. for Civic Innovation, New York, N.Y.), Sept. 2006, at 1, available at [http://www.manhattan-institute.org/html/cb\\_43.htm](http://www.manhattan-institute.org/html/cb_43.htm); see also Michael P. Downing, *Policing Terrorism in the United States: The Los Angeles Police Department’s Convergence Strategy*, *POLICE CHIEF*, Feb. 2009, available at [http://policechief magazine.org/magazine/index.cfm?fuseaction=display&article\\_id=1729&issue\\_id=22009](http://policechief magazine.org/magazine/index.cfm?fuseaction=display&article_id=1729&issue_id=22009):

Policing must be a convergent strategy that fights crime and disorder while creating hostile environments for terrorists.

The theme of convergence illustrates the coupling of local resources, namely police, with the ability to recognize ordinary crimes that terrorists have been known to commit in preparation for their operational attack: committing traffic violations, obtaining fake identification papers, smuggling, human trafficking, counterfeiting, committing piracy, drug trafficking, or participating in any other criminal enterprise that intersects with terrorists' needs. Local police serve as the eyes and ears of communities; as such, they are best positioned to observe behaviors that have a nexus to terrorism.

30. See *Nomination Hearing for Napolitano Before the S. Homeland Sec. & Governmental Affairs Comm.*, 111th Cong. (2009) (testimony of Janet Napolitano, Sec’y-Designate of the Dept. of Homeland Sec.), available at [http://www.dhs.gov/news/testimony/testimony\\_1232547062602.shtm](http://www.dhs.gov/news/testimony/testimony_1232547062602.shtm); Harris, *supra* note 27, at 10-12.

31. U.S. CONF. OF MAYORS, *THE COST OF HEIGHTENED SECURITY IN AMERICA’S CITIES: A 192-CITY SURVEY* (2002).

Chiefs of Police further documents significant changes in operational capacity, mission focus, and program resourcing.<sup>32</sup>

Perhaps the most important as well as controversial national security role for police, however, is intelligence collection.<sup>33</sup> Following exposure of abusive law enforcement surveillance tactics during the 1950s to 1970s, many police agencies dismantled their intelligence collection units altogether.<sup>34</sup> After September 11, many of these agencies scrambled to reconstitute or expand their intelligence units, though research data on the extent of this transformation remains slim.<sup>35</sup> “It was often the feeling at local law enforcement prior to 9/11 that intelligence gathering was a Federal responsibility,” noted Miami Police Chief John F. Timoney in 2006 congressional testimony. “[B]ut the events in Madrid and London and some events recently here in the United States are highlights that local law enforcement can have a very important role.”<sup>36</sup> Many police agencies created intelligence analyst positions and assembled new units dedicated to countering terrorism.<sup>37</sup> The difficult organizational, accountability and functional challenges this role creates for the nationwide policing system are explored in the next three Parts.

## II. ORGANIZATIONAL CHALLENGES

Intelligence, investigation, deterrence, site protection, public education, and emergency response are not new concerns for local police agencies.<sup>38</sup> Indeed, having long held responsibility for all of these functions to certain degrees, local police were already well suited to perform these antiterrorism activities. But harnessing police agencies for a national security agenda creates difficult organizational challenges, magnified by the resilience of U.S. policing’s decentralization and heterogeneity.

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32. INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, *supra* note 19, at 23-32.

33. Of course, intelligence – including the use of informants, undercover officers, and electronic surveillance – is part of routine police crime prevention as well. The line between such activities and national security intelligence is not a bright one, though the latter may be better hidden from public view and has proven more likely to intrude on political and religious activities. See Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493, 533, 566-568 (2007).

34. Edward R. Maguire & William R. King, *Trends in the Policing Industry*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 15 (2004).

35. *See id.*

36. *Police as First Preventers: Hearing Before the Subcomm. on Prevention of Nuclear and Biological Attack of the H. Comm. on Homeland Sec.*, 109th Cong. (2006) (statement of John F. Timoney, Chief of Police, Miami, Fla.)

37. *See* Maguire & King, *supra* note 34.

38. *See supra* notes 12-15 and accompanying text.

It is natural that local police agencies would be called upon to combat the terrorism threat after September 11. The public looks first to local police for basic security. Furthermore, the federal government had little choice but to seek and cultivate the assistance of local police because these agencies possess the numbers of personnel needed to sustain these functions over vast territory and for long periods of time. According to recent data, state and local law enforcement agencies employed about 730,000 full-time sworn officers, defined as those with general arrest powers,<sup>39</sup> compared with the FBI's roughly 13,000 special agents.<sup>40</sup> The New York City Police Department's counterterrorism division alone (by far the largest municipal-level counterterrorism force) has about 1,000 dedicated officers,<sup>41</sup> while the entire FBI dedicates only about one-and-a-half times that number of special agents to combating terrorism.<sup>42</sup>

Aside from this numerical advantage, local police are often believed to be better suited to perform counterterrorism functions because of their superior familiarity with their local communities.<sup>43</sup> Whereas federal law enforcement officials are tasked with investigating specific federal crimes, local police functions include preventing and investigating crime as well as maintaining order, patrolling, and providing services. As a result of these wider mandates, local police are positioned naturally to collect and process information about communities and activities within them.

Modern policing strategy trends, including community policing and problem-oriented policing, also call for wide and deep engagement within the community.<sup>44</sup> These responses to crime, disorder, and other community problems require fostering both proactive and reactive relationships with local social agencies, civic leaders, and community organizations, as well as developing deep awareness of community environments.<sup>45</sup> Armed with

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39. Reaves, *supra* note 10.

40. Federal Bureau of Investigation, Quick Facts, <http://www.fbi.gov/quickfacts.htm>. See also Judith Miller, *On the Front Line in the War on Terrorism*, Summer 2007, CITY J., available at [http://www.city-journal.org/html/17\\_3\\_preventing\\_terrorism.html](http://www.city-journal.org/html/17_3_preventing_terrorism.html) (quoting Los Angeles Police Department counterterrorism official who states: "The FBI has 12,000 agents for the entire country, only some of whom do counterterrorism. Local and state law enforcement includes some 800,000 people who know their territory. We are destined to be frontline soldiers in what could be a very long and complicated war.").

41. See Richard A. Falkenrath, Deputy Commissioner for Counterterrorism, NYPD, Prepared Statement of Testimony Before the Committee on Homeland Security and Governmental Affairs, United States Senate, Sept. 12, 2006, available at [http://hsgac.senate.gov/public/\\_files/091206Falkenrath.pdf](http://hsgac.senate.gov/public/_files/091206Falkenrath.pdf), at 3.

42. The FBI does not publish current figures on this, but in 2003 the number was about 1600. See Statement of John MacGaffin to the National Commission on Terrorist Attacks upon the United States, Dec. 8, 2003, available at [http://www.9-11commission.gov/hearings/hearing6/witness\\_macgaffin.htm](http://www.9-11commission.gov/hearings/hearing6/witness_macgaffin.htm).

43. See Marc Sageman, *A Strategy for Fighting International Islamist Terrorists*, 618 ANNALS AM. ACAD. POL. & SOC. SCI. 223 (2008).

44. See *infra* notes 115-116 and accompanying text.

45. See NATIONAL RESEARCH COUNCIL, *supra* note 10, at 85-93; DAVID H. BAYLEY,

such knowledge and networks of community relationships, local police can better cultivate informants and detect suspicious irregularities.

While the decentralized structure of U.S. policing offers several advantages when it comes to combating terrorism, it also creates organizational challenges. To begin with, that local police agencies command large numbers of personnel intimately familiar with their local communities makes them a valuable asset for fulfilling counterterrorism functions but creates an enormous complication in return. How should these resources be coordinated across thousands of local agencies and with the federal government?

Counterterrorism cooperation among police agencies requires horizontal and vertical coordination. Horizontally, local police agencies need to communicate and collaborate with other local police agencies. Vertically, they need to communicate and collaborate with state and federal agencies. Information must then flow along these axes. Information about threats or investigative leads must radiate from the center (often through federal agencies such as the FBI or Department of Homeland Security) out to local agencies that can act on that information. Those local agencies at the periphery must direct information toward the center, where it can be acted upon immediately by the federal government or aggregated to help shape policy.<sup>46</sup>

Besides informational coordination, which needs to be achieved quickly and often secretly, operations by law enforcement agencies (such as arrests and surveillance) need to be coordinated across multidimensional jurisdictional lines.<sup>47</sup> The problem of how to link thousands of separate agencies together efficiently is not simply one of scale. Heterogeneity also magnifies the complexity.

Local police jurisdictions differ greatly in features such as population size and density, ethnic composition, geography, urbanization, sitting of high-profile targets, civic culture, and political orientation.<sup>48</sup> Local police forces vary in terms of size, resources, capability, operating procedures, equipment, and day-to-day priorities, not to mention variations in local laws, including those regulating police conduct.<sup>49</sup>

In terms of size, for example, the 46 largest metropolitan police forces (out of a total of over 13,000 state and local forces) account for over a third

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POLICE FOR THE FUTURE 105-120 (1994).

46. See WHITE HOUSE, NATIONAL STRATEGY FOR INFORMATION SHARING 3 (2007), available at <http://georgewbush-whitehouse.archives.gov/nsc/infosharing/index.html>.

47. For a discussion of these issues in the context of the Zazi case, discussed *supra* note 24 and in accompanying text, see Associated Press, *NYPD Source's Role Fuels Questions About Raids*, Sept. 22, 2009.

48. For a description of contrasting approaches to counterterrorism policing in New York City and Los Angeles, see Miller, *supra* note 40.

49. See Shane Harris, *Fusion Centers Raise a Fuss*, NAT'L J., (2007).

of all police officers nationwide, while there are also nearly 800 local police agencies that have just one officer.<sup>50</sup> Consider also the unique threats that New York City faces, for example, as a densely populated, ethnically diverse home to much of the U.S. and global private financial system.<sup>51</sup>

In countries with national police forces, such as France, the organizational challenge of coordinating local counterterrorism police efforts is eased through centralized and hierarchical command.<sup>52</sup> Although the United Kingdom does not have a single national police force, its local police forces are linked to each other and to national counterterrorism efforts through standardized institutional mechanisms. Each individual police force in the United Kingdom, for example, until recently had a special branch whose primary duties were to prosecute and assist in counterterrorism and counterintelligence operations. Before recent reforms further centralized British counterterrorism policing,<sup>53</sup> these units interacted directly with MI5 (the Security Service, which deals with domestic intelligence) and MI6 (the Secret Intelligence Service, which deals with intelligence abroad).<sup>54</sup>

The United States cannot rely on such formal hierarchical command or uniform institutional mechanisms to link together the country's massive policing network. The Constitution was designed so that the federal government may not directly control local law enforcement agencies. In *Printz v. United States*, the Supreme Court held unconstitutional a federal statutory provision that required local law enforcement officials to assist in conducting background checks prior to issuance of gun permits. The case clarifies that the federal government cannot "commandeer" local police forces into service,<sup>55</sup> which means that it must use other tools to align the efforts of state and local police agencies with federal initiatives.

These tools include information-sharing arrangements, financial grants, and training programs designed to help bolster and unify local capabilities.<sup>56</sup>

50. NATIONAL RESEARCH COUNCIL, *supra* note 10, at 49.

51. For a detailed discussion of how the New York Police Department organizes for these counterterrorism challenges, see *Prepared Statement of Testimony Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 109th Cong. (2006) (testimony of Richard A. Falkenrath, Deputy Comm'r for Counterterrorism, N.Y. Police Dept.), available at [http://hsgac.senate.gov/public/\\_files/091206Falkenrath.pdf](http://hsgac.senate.gov/public/_files/091206Falkenrath.pdf); see also CHRISTOPHER DICKEY, *SECURING THE CITY: INSIDE AMERICA'S BEST COUNTERTERROR FORCE – THE NYPD* (2009).

52. See PETER CHALK & WILLIAM ROSENAU, *CONFRONTING THE "ENEMY WITHIN": SECURITY INTELLIGENCE, THE POLICE, AND COUNTERTERRORISM IN FOUR DEMOCRACIES* 17-23 (2004).

53. Hugh Muir, *End of the Road for Special Branch*, *GUARDIAN*, Sept. 9, 2005, available at <http://www.guardian.co.uk/uk/2005/sep/09/terrorism.ukcrime>.

54. CHALK & ROSENAU, *supra* note 52, at 7-15.

55. *Printz v. United States*, 521 U.S. 898, 929, 933-935 (1997).

56. See Press Release, Dept. of Homeland Sec., DHS Announces Release of Application Guidance for Over \$3 Billion in Grant Programs, Feb. 1, 2008, available at [http://www.dhs.gov/xnews/releases/pr\\_1201882070387.shtm](http://www.dhs.gov/xnews/releases/pr_1201882070387.shtm). The Department of Justice's

The U.S. policing system has dealt with similar challenges in confronting other law enforcement issues, such as narcotics trafficking and gang or organized crime activity, that have national and international dimensions, and require information sharing and coordination among federal and local police agencies.<sup>57</sup> Counterterrorism, however, differs in size and complexity.

The federal government has established several platforms for sharing terrorism-related information among local police forces and between local and federal agencies. The FBI has spearheaded the expansion over recent years of Joint Terrorism Task Forces (JTTFs) in local areas. Other federal, state, and local agencies have assigned officers to the JTTFs to help coordinate intelligence and law enforcement operations across bureaucratic lines. In effect, the JTTFs allow the federal government to exert considerable control over any operations that run through them. There were about three dozen such FBI-led task forces before September 11, 2001, compared with over 100 today.<sup>58</sup> The Intelligence Reform and Terrorism Prevention Act, as amended in 2007 by the 9/11 Commission Act, requires the President to take action to facilitate sharing of terrorism-related information among federal, state, and local entities.<sup>59</sup>

The Department of Homeland Security funds state-operated “fusion centers” to synthesize law enforcement and investigative information. Unlike the JTTFs, which help manage operations of participating agencies, the fusion centers operate as information clearinghouses. Similarly, the Justice Department has established new programs such as a National Data Exchange, to enable federal law enforcement and intelligence officials to

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State and Local Anti-Terrorism Training Program (SLATT) is an example of a federal training program. The program provides “pre-incident terrorism awareness training to state, local, and tribal law enforcement” personnel. Press Release, Dept. of Justice, Fact Sheet: Supporting State and Local Government Law Enforcement Accomplishments 2001-2008, Nov. 10, 2008, available at <http://www.ojp.usdoj.gov/newsroom/pressreleases/2008/psc-08-993.htm>.

57. See Kip Schlegel, *Transnational Crime: Implications for Local Law Enforcement*, 16 J. CONTEMP. CRIM. JUST. 365 (2000); TRANSNATIONAL ORGANIZED CRIME 29 (Peter Reuter & Carol Petrie eds., Committee on Law and Justice, National Research Center, 1999). As examples, the FBI manages Violent Gang Task Forces and the Drug Enforcement Agency manages Organized Crime Drug Enforcement Task Forces, while the federal government has established information-sharing mechanisms among federal and local law enforcement agencies for dealing with gun, immigration, and narcotics offenses, among other types of crimes. See, e.g., Federal Bureau of Investigations, Violent Gang Task Forces, available at <http://www.fbi.gov/hq/cid/ngic/natgangfs.htm>; Drug Enforcement Agency, Organized Crime Drug Enforcement Task Forces (OCDETF), available at <http://www.usdoj.gov/dea/programs/ocdetf.htm>.

58. See WHITE HOUSE, NATIONAL STRATEGY FOR HOMELAND SECURITY (2007), available at [http://www.dhs.gov/xlibrary/assets/nat\\_strat\\_homelandsecurity\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/nat_strat_homelandsecurity_2007.pdf).

59. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §1016, 118 Stat. 3638, 3664-3670 (2004) (amended by Pub. L. No. 110-53, §504, 121 Stat. 266, 313-17 (2007)).

examine quickly huge quantities of state and local public records.<sup>60</sup> The FBI recently launched a new system for sharing tips about possible terror threats with local police agencies.<sup>61</sup>

The idea behind these programs is to build “an information sharing framework that supports an effective and efficient two-way flow of information enabling officials at all levels of government to counter and respond to threats.”<sup>62</sup> The problem is not merely to collect and pass on more informational “dots,” but to make sense of them in ways that can be acted on effectively. Indeed, the more “dots” that are collected, the harder it may be to analyze and prioritize them.

It remains to be seen how effective these information networking efforts will be. They are not yet fully developed; technology continues to change rapidly; and reliable data on their use are sparse. Some dangers are evident already, however.

First, the expansion of an information-sharing network magnifies some privacy risks, especially personal information collected in one locale is distributed more widely and to other levels of government.<sup>63</sup> In some jurisdictions, civil liberties advocates have complained about the lack of adequate mechanisms to regulate government information-fusion activities, and this has sometimes helped to prompt oversight reforms.<sup>64</sup>

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60. Robert O’Harrow Jr. & Ellen Nakashima, *National Dragnet Is a Click Away*, WASH. POST, Mar. 6, 2008, at A1. The National Data Exchange has been used since March 2008, but will not become fully operational and deployed until 2010. See Posting of Michael Cooney to Layer 8 Blog, FBI Turns on National Crime Information Sharing System, available at <http://www.networkworld.com/community/node/27127>.

61. See Devlin Barrett, *FBI Shares Threat-Tips with Local Police Agencies*, ASSOCIATED PRESS, Jan. 14, 2009; see also Eric Schmitt, *Surveillance Effort Draws Civil Liberties Concern*, N.Y. TIMES, Apr. 29, 2009, at A12 (“A growing number of big-city police departments and other law enforcement agencies across the country are embracing a new system to report suspicious activities that officials say could uncover terrorism plots but that civil liberties groups contend might violate individual rights.”).

62. WHITE HOUSE, *supra* note 46. Homeland Security Secretary Napolitano recently remarked: “Over time, [information-sharing] has proven easy to talk about and difficult to act upon – but we must move forward on it if we are to strengthen our state and local partnerships. The fusion of information between the federal, state and local levels is what makes the intelligence-gathering process critically valuable to preventing threats from materializing. Information sharing is also what makes response efforts effective. The creation of a seamless network we can use to share this information among these levels of government is a critical part of improving our partnerships.” *The Path Forward*, *supra* note 3.

63. See Barrett, *supra* note 61.

64. Jason Hancock, *Iowa’s Intelligence Fusion Center ‘Connects the Dots,’* IOWA INDEP., July 29, 2008, <http://iowaindependent.com/2983/iowas-intelligence-fusion-center-connects-the-dots>; see also William Petroski, *Intelligence Centers’ Growth Concerns Civil Libertarians*, DES MOINES REG., May 26, 2009, available at <http://www.desmoinesregister.com/article/20090526/NEWS10/905260381/-1/SPORTS09>; Mary Beth Sheridan, *States Setting up Own Antiterror Centers: Privacy Issues Raised as Data Are Collected*, BOSTON GLOBE, Jan. 1, 2007, available at [http://www.boston.com/news/nation/washington/articles/2007/01/01/states\\_setting\\_up\\_own\\_antiterror\\_centers/?page=1](http://www.boston.com/news/nation/washington/articles/2007/01/01/states_setting_up_own_antiterror_centers/?page=1).

Information-sharing also carries security risks. For example, information about threats or ongoing investigations that the federal government hopes to keep quiet are more likely to surface publicly as more agencies have access to that information.<sup>65</sup> Indeed, political pressures on local police, described below, may make them more likely than federal police to broadcast or leak sensitive public safety information.

An efficient and effective network also requires some degree of standardization across the thousands of police agencies at all levels. But standardization itself is difficult to achieve when the police forces themselves vary in size, capability, sophistication, and in the threats their jurisdictions face, especially when the federal government lacks authority to dictate reform at the local level.

Even if uniform approaches could be imposed by the federal government through indirect means, too much standardization might undermine the advantages of experimentation and tailoring to conditions that come with local autonomy. Or, as the next section explores, excessive standardization might disrupt systems of local accountability.

### III. ACCOUNTABILITY CHALLENGES

“It has long been accepted,” according to one major treatise on the police powers of the state, “that the best way to maintain the accountability of the police is to keep the lines between the local community and the police department as short as possible.”<sup>66</sup> “The main consequence of America’s decentralized [criminal justice] system,” observes James Q. Wilson, “is that public opinion closely watches and deeply influences law enforcement.”<sup>67</sup>

Maintaining police accountability through local public and political control is relatively straightforward when local police are focused exclusively on their traditional functions of preventing crime, maintaining order, and providing services. Combating terrorism and other threats to the nation with intrusive powers, however, exerts pulls on local policing that strain these systems and patterns of political accountability.

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65. See Theo Milonopoulos, *Local Officials Ask for Help in Terrorism Fight*, L.A. TIMES, Oct. 31, 2007, at 13 (describing federal security clearance procedures as a barrier to greater federal, state, and local counterterrorism information-sharing). On recent intelligence information-collection reforms, see Press Release, ACLU, *Intelligence Community Raises Its Standards for Information Collection: Collaborative Effort Addresses Privacy and Civil Liberties Concerns*, May 22, 2009, available at <http://www.aclu.org/safefree/general/39656prs20090522.html>.

66. See JOHN D. BREWER ET AL., *THE POLICE, PUBLIC ORDER AND THE STATE* 115 (2d ed. 1996).

67. Wilson, *supra* note 9, at 476. See generally David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005) (discussing the relationship between various understandings of democracy and policing in the United States).

Most police agencies are locally financed and controlled, and are subject to direction and oversight by officials elected by and responsible to the communities they serve.<sup>68</sup> Many municipal police chiefs, for example, are appointed by elected mayors. County sheriffs are often elected directly. State governments may provide some financial and other resources to local police agencies, but critical budgetary allocation decisions are made by local governments themselves. Local police officers are generally drawn from the community they will serve, and they are mostly trained there as well.

These long-standing features of U.S. policing – reflecting historical distrust of central government as well as some efficiency and practical advantages – have made the system highly resistant to calls for centralization or consolidation.<sup>69</sup>

The notion that local police agencies are accountable to their own communities and responsive to local needs and preferences has never meant that they are free to ignore national priorities, nor is significant federal direction of local police new. Beginning in the 1960s, the federal government launched a series of initiatives – usually through grants – to gain state and local law enforcement agencies’ support in waging the wars on crime and drugs. For instance, the Local Law Enforcement Assistance (LLEA) program provided federal money to states in support of narcotics enforcement efforts, and the Community Oriented Policing Services (COPS) program provided federal money directly to municipal police departments to support violent-criminal enforcement efforts.<sup>70</sup>

The result has been a delicate balance for police agencies between local autonomy and participation in a broader federal system and constraint by law. As Herman Goldstein explains:

The police should not be responsive in an unlimited sense to either the entire community or minority interests in the community. In many situations it is essential that the police act independent of local community interests, responding instead to state or federal laws that preempt local legislation and override local preferences. It is precisely because we require a system that will insulate the police from some pressures while subjecting them to others that the

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68. *See id.*

69. *See* BREWER ET AL, *supra* note 66, at 115; NATIONAL RESEARCH COUNCIL, *supra* note 10, at 51.

70. In March 2009, Attorney General Eric Holder announced the revitalization of the Office of COPS and a \$1 billion COPS Hiring Recovery Program, through which the Department of Justice would provide funding directly to local law enforcement agencies to hire new law enforcement officers. Holder stated that this program was needed in part because “our cities are, in a very real sense, on the front lines in our fight against terrorism.” Eric Holder, Att’y Gen., Remarks as Prepared for Delivery by Attorney General Eric Holder at the National League of Cities Conference, Mar. 16, 2009, *available at* <http://www.usdoj.gov/ag/speeches/2009/ag-speech-090316.html>.

task of achieving a proper form of citizen control over the police is so complex.<sup>71</sup>

Like the organizational challenges discussed above, accountability challenges are neither new nor unique to the national security context. They are, however, magnified in the context of combating terrorism.

One distinction between the many prior federal grant programs and recent federal initiatives to enlist local support in defending against national security threats is that the former involved “federalizing” spheres of activity traditionally controlled by the states (crime), whereas the latter involve “localizing” traditional federal spheres (national security). The very term “national security” seems in some sense inconsistent with a police system built upon strong traditions of localism. Yet any time national security threats emanate from within U.S. borders – but especially as globalization of travel and communications expands – events in any local area may have national or international security repercussions.

One might think of the supply of police functions in market terms. Control over police priorities and conduct by the local community – through police leadership elections or appointments by elected officials and through scrutiny by the local press – helps ensure that supply of police services is responsive to community demand.<sup>72</sup> A key issue is then whether federal government influence on that prioritization of police activities in support of national objectives is market-correcting or market-distorting.

Federal government intervention may be needed – but may also be viewed as distorting – because unlike most (though not all) crime prevention, the costs of combating terrorism are often borne locally while the benefits accrue elsewhere or are not even observable. In the case of most ordinary crime, the harm of the outlawed activity is felt by the community in which it takes place, as is the impact of combating crime, thereby allowing the community to weigh those costs and benefits.<sup>73</sup>

Terrorist activities, however, are usually dispersed, and the ultimate attacks may occur far away from the site of their planning – perhaps not even in the same country.<sup>74</sup> The costs of combating terrorism – resource costs and trade-offs, intrusions on privacy or inconveniences of security precautions – are nonetheless felt locally.<sup>75</sup>

71. GOLDSTEIN, *supra* note 9, at 143.

72. This is not to say that this system always works well and produces effective and legitimate outcomes. For a critical analysis of community policing and democratic accountability, see Sklansky, *supra* note 67, at 1810-1814.

73. See Wilson, *supra* note 9.

74. David Thacher, *The Local Role in Homeland Security*, 39 LAW & SOC’Y REV. 635, 637-638 (2005). To be clear, this issue is not entirely unique to terrorism or national security threats. It also applies, for example, to narcotics activities and organized crime.

75. See *id.*

Even when perceived threats to national security arise, citizens will still demand from their local police the same public safety and services to which the community is accustomed.<sup>76</sup> There is a limit, therefore, to the resources or mission trade-offs that local agencies can devote to national security functions. The federal government, by contrast, will be held accountable for security lapses wherever they occur, by nature of its constitutional primacy in national security affairs and corresponding public expectations.

At the same time, federal law enforcement agencies such as the FBI have the luxury of some discretion and electivity in their policing priorities. They can move agents from fighting other crimes to concentrating on counterterrorism, for example, more readily than local agencies can because after September 11, public expectations are more focused on federal law enforcement's national security roles and because federal agencies are more insulated from short-term electoral accountability.<sup>77</sup>

In general, this means that federal coordination efforts and offers of assistance to state and local agencies can alter local police priorities from what the local political "market" might produce, but only to a point. A key question is what happens when federal national security priorities are too greatly misaligned from local political preferences.

Some of the consequences of misalignment are illustrated in two frequently cited examples of local-federal tension in combating terrorism: Detroit's response to federal requests to interview certain immigrants, and Portland, Oregon's withdrawal from the FBI's regional JTTF.

In November 2001, the Justice Department requested that local police departments assist in interviewing 5,000 foreign men of Middle Eastern origin residing in their communities to determine whether any of them posed a terrorist threat or had useful information about possible terrorists. The Detroit Police Chief and local officials worried that these interviews might violate of state law and could alienate Arab-Americans. They therefore refused to participate in the federal initiative.<sup>78</sup>

In 2005, Portland became the first city to remove its law enforcement agencies from the FBI-led JTTF. Key members of the city government worried that the JTTF's surveillance activities might, while complying with federal law, not meet more stringent state law standards despite FBI assurances. Nor, due to secrecy rules, could city government leaders

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76. Ellen Scrivner, *The Impact of September 11th on Community Policing*, in COMMUNITY POLICING: THE PAST, PRESENT AND FUTURE 183, 187 (Lorie Fridell & Mary Ann Wycoff eds., 2004).

77. Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 407-426 (2006).

78. Fox Butterfield, *Police Are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1; Tamara Audi & David Zeman, *Many Face a Grilling: Antiterror Questions Disclosed*, DETROIT FREE PRESS, Nov. 23, 2001.

oversee whether city police officers participating in the JTTF were abiding by agreed-upon guidelines.<sup>79</sup>

In both Detroit and Portland, pressures stemming from local accountability systems forced municipal agencies to opt out of the federal effort.<sup>80</sup> The Detroit greater metropolitan area is home to an especially large Arab-American community. Arab-American leaders voiced concern about the interview initiative, and the local police had worked hard over recent years to build a relationship of trust with the Arab-American community, a relationship the police feared could fray as a result of heavy-handed federal efforts.<sup>81</sup> Portland, is an area known for its generally liberal orientation (in 2003 the city council publicly criticized and called for major changes in the USA PATRIOT Act, enacted by Congress soon after September 11 to expand domestic law enforcement and intelligence powers), and city officials were probably particularly sensitive about aggressive federal counterterrorism efforts after a Portland-area lawyer and convert to Islam was erroneously linked by the FBI to terrorist bombings in Madrid.<sup>82</sup>

These examples are best seen as extremes rather than as illustrations of the norm. Most local police agencies have cooperated with federal efforts in large measure. However, these counter-examples are important to show what happens when national security policing initiatives get too far out of step with local political constraints. One may infer that many other local communities and institutions will also resist, even if in less radical ways.<sup>83</sup> An important debate centers on whether local accountability systems can withstand federal pressure and influence.

Daniel Richman argues that over time the political process through which federal, state, and local governments negotiate cooperation in joint efforts may promote both accountability and effectiveness in combating terrorism.<sup>84</sup> That national security efforts, led principally by the federal

79. Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, 41 WILLAMETTE L. REV. 941, 952-955 (2005); Anna Griffin & Scott Learn, *Portland Opts Out of Anti-Terror Task Force*, OREGONIAN, Apr. 23, 2005.

80. On state and local resistance to carrying out federal antiterrorism immigration policies, see Harris, *supra* note 27, at 21-44.

81. See Shannon McCaffrey, *New FBI Sweep Worries Muslims*, DETROIT FREE PRESS, May 27, 2004; Tamara Audi, *Terror War Hits Home*, DETROIT FREE PRESS, Nov. 12, 2002; Siobhan Gorman, *Detroit Finds Some Answers*, NAT'L J., Mar. 29, 2003, at 998.

82. See Tomas Alex Tizon, *Portland, FBI Unit to Part Ways*, L.A. TIMES, Apr. 28, 2005, at A6.

83. Empirical evidence continues to bear this out. "A growing number of state and local governments have protested the federal government's surveillance and intelligence-gathering in antiterrorism investigations. As of February 13, 2006, a total of eight state legislatures and 397 local governments have passed resolutions objecting to federal investigative practices." Tom Lininger, *Federalism and Antiterrorism Investigations*, 17 STAN. L. & POL'Y REV. 391, 391 (2006).

84. See Richman, *supra* note 77.

government, depend on local agencies gives those local agencies leverage. Their accountability, through both electoral politics and the need to maintain cooperative relationships with the communities they serve, in turn may help tether the combined local-state-federal government to responsible and effective policies.

William Stuntz offers a less sanguine view. He views the threat of terrorism as likely to loosen restraints on coercive federal police powers, which will likely loosen restraints on police powers at the local level.<sup>85</sup> Corey Robin similarly points to the history of police excesses in the 1950s and 1960s in warning that “[t]he danger of cooperation between federal agencies and local police is not that the former will conscript the latter into repressive programs the latter would not otherwise pursue, but that it allows the police to apply the legitimizing gloss of national security to their own pet projects of repression.”<sup>86</sup>

As Richman points out, the notion of local police governance serving as a brake to local-federal cooperation on overly aggressive federal tendencies is ironic, given the past tendencies to view federal oversight as necessary to rein in abusive state and local practices rather than the reverse.<sup>87</sup> Indeed, much of modern constitutional criminal procedure doctrine grew out of federal clampdowns on abuses at the state and local levels (often tinged with institutional racism).<sup>88</sup>

In the end, the degree to which federally led national security initiatives distort – for better or for worse – local accountability systems, or the extent to which those local accountability systems shape broader national security policy will probably vary from locality to locality, depending on many of the factors cited earlier, including size, ethnic composition, and dependence on federal assistance.

This push and pull dynamic involving federal and local pressures is hardly unique to policing. There is often, however, an added complication in the national security realm because many policing activities aimed at combating terrorism or other national security threats are necessarily secret or opaque to the public.<sup>89</sup> The ability to track crime rates and to compare them across both localities and time helps hold local police and other law enforcement agencies accountable for performance, at least with regard to their main law and order functions. The public can gauge performance and express satisfaction or dissatisfaction through the political process.<sup>90</sup> But secret surveillance practices – such as the use of undercover informants or

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85. See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002); Herman, *supra* note 79, at 968.

86. See Corey Robin, *History's Shadow*, BOSTON REV., Dec. 2004-Jan. 2005, at 20.

87. See Richman, *supra* note 77, at 421.

88. See Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 201-206.

89. See Ross, *supra* note 33.

90. See Richman, *supra* note 77, at 378.

remote monitoring – are designed to be undetectable.<sup>91</sup> Even if such surveillance is generally believed to be occurring, its impact on security or liberty is difficult to observe or measure.<sup>92</sup>

This secrecy challenge for accountability is not new, and it exists at all levels of government. But a robust system of formal and informal checks on secretive state activity generally operates differently – and in some cases more strongly – at the federal level than at the local level.<sup>93</sup> It may seem counterintuitive to worry more about the adequacy of checks at the state and local level, because federal agencies command such vast intrusive capabilities and have historically abused them. But that history of problems, especially in the 1960s and 1970s, led to the creation of formal mechanisms and institutions at the federal level to regulate domestic spying by law enforcement and intelligence agencies.

Following the Church and Pike Committee investigations in the 1970s, Congress enacted legislation, such as the Foreign Intelligence Surveillance Act (FISA), and created permanent congressional intelligence oversight committees and intelligence agency inspectors general. Internal federal regulations and guidelines constructed a “wall” separating intelligence and law enforcement bureaucracies and the information they collected.<sup>94</sup> The abuses of the 1960s and 1970s led also to constraints on domestic spying at the state and local levels, including the enactment of state laws restricting surveillance of political and other group activities as well as consent decrees stemming from lawsuits challenging police monitoring.<sup>95</sup>

Since September 11, many of these post-Watergate reforms have been rolled back. At the federal level, for example, the USA PATRIOT Act and administrative reforms have expanded law enforcement agencies’ authority to collect intelligence domestically and to share that information with other law enforcement and intelligence agencies.<sup>96</sup> At state and local levels, too, some governments have sought to expand their surveillance authority, including through legislative reform<sup>97</sup> and revisions to consent decrees.<sup>98</sup>

91. Criminal law enforcement also uses these tools, but in that context they are heavily and publicly regulated, and the general policies of their use – even if not specific instances – are openly known.

92. See Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 829-831 (2007).

93. For a general discussion of these issues as they relate to federal intelligence activities, see JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 126-159 (2007).

94. See *id.* at 78-86; 9/11 COMMISSION REPORT, *supra* note 13, at 78-79.

95. See Paul G. Chevigny, *Politics and Law in the Control of Local Surveillance*, 69 CORNELL L. REV. 735 (1984).

96. See William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209 (2007).

97. See Charles H. Kennedy & Peter P. Swire, *State Wiretaps and Electronic Surveillance After September 11*, 54 HASTINGS L.J. 971, 977 (2003) (“Not surprisingly, we have found that much of the post-September 11 legislation liberalizes, or proposes to liberalize, the state wiretap and other electronic surveillance laws.”).

At the federal level, however, there generally remain multiple layers of checks on the conduct of police and intelligence agencies, and perceived excesses by the Bush administration have intensified that scrutiny, including that by the courts.<sup>99</sup> Congressional committees and the Justice Department's inspector general's office actively oversee the FBI's activities and have debated fiercely further amendments to domestic intelligence laws.<sup>100</sup> Beyond government institutional safeguards, scrutiny by civil liberties groups and investigative journalists provide further checks on executive discretion, including through litigation.<sup>101</sup>

Of course there are exceptions and reasons that in some cases scrutiny may be more robust at the state and local levels than at the federal level.<sup>102</sup> For example, state and local governments lack formal authorities for designating and maintaining classified information such as those the federal government uses, which help keep information from the public domain.<sup>103</sup> Other mechanisms for promoting local police compliance with constitutional and other legal rules include criminal and civil liability, internal inspections, and citizen oversight boards.<sup>104</sup> One important question, though, is whether at the state and local levels there are sufficient checks on secret activities, because some layers of inter-branch or non-governmental monitoring are likely to be weaker and less formalized at state and local levels, or in some locales, than at the federal level.<sup>105</sup> At the

98. See Jerrold L. Steigman, *Reversing Reform: The Handschu Settlement in Post-September 11 New York City*, 11 J.L. & POL'Y 745 (2003).

99. See Editorial, *A Better Surveillance Law*, WASH. POST, June 20, 2008, at A18.

100. On FBI Reforms Following an Inspector General's Report Critical of the Way the FBI Handled "National Security Letters," see *Oversight Results: The FBI Tightens Its Procedures for Using National Security Letters*, WASH. POST, Mar. 26, 2008, at A18.

101. For an illustration of these checks at work, see Eric Lichtblau, *New Guidelines Would Give F.B.I. Broader Powers*, N.Y. TIMES, Aug. 21, 2008, at A20. See also RICHARD GID POWERS, *BROKEN: THE TROUBLED PAST AND UNCERTAIN FUTURE OF THE FBI* 1-27, 428-439 (2004) (describing how these checks operate on the FBI).

102. For the example of Maryland state efforts to legislate against police surveillance, see Julie Bykowitz, *State Lawmakers Propose Anti-Spying Legislation*, BALTIMORE SUN, Jan. 23, 2009; see also Lisa Rein, *Federal Agency Aided Md. Spying*, WASH. POST, Feb. 17, 2009, at B1 (reporting complaints and inquiries by civil liberties groups and public officials).

103. President Obama has initiated a review of the federal government's classification policies. See Philip Elliott, *Obama Wants Classified Information Review*, ASSOCIATED PRESS, May 27, 2009. Of course, regardless of formal authorities and requirements, state and local police are accustomed to keeping secret operational information.

104. See NATIONAL RESEARCH COUNCIL, *supra* note 10, at 275-290.

105. See RILEY & HOFFMAN, *supra* note 15, ch. 4.

Oversight of state and local intelligence activities is mostly ad hoc and informal. It is generally conducted through the LLEA's chain of command, although some departments have "outside" review bodies, such as the LAPD's civilian committee approving undercover operations. The courts have not been active in overseeing state and local activities. That may be in large part because most intelligence gathering – especially that not predicated on a crime having been committed – is done by federal officials through federal authorizations.

*Id.* at 49.

very least, it is likely that oversight will remain highly uneven across different states and localities, depending on variation in institutional mechanisms, civic culture, and the strength of local watchdog and advocacy groups or branches.<sup>106</sup>

While state and local agencies lack the resources and technical capabilities of the federal government (as well as the intensity of national security political pressures), there are other reasons to be especially vigilant concerning national security-driven infringements of civil liberties at the local level. Because local police, unlike the FBI, have a broader law and order and public service mandate, their routine activities tend to penetrate more widely and deeply into community groups, including civic and religious organizations. Indeed, this is one of the features that make local police potentially valuable from a counterterrorism perspective.

Consider, for example, a law enforcement officer visiting a local mosque believed to provide a forum for the preaching of extremism. Putting aside how the local law or internal regulations regulate surveillance of groups, a local uniformed police officer's visit to that mosque and interaction with its congregation might stir fewer anxieties among its members than a visit by an FBI agent.<sup>107</sup> Police are *supposed* to interact with significant community groups and to understand the relationships within the community, while FBI agents historically were not expected to. In some cases, this may be a benign police-community relationship from a civil liberties standpoint; in other cases it may open the door to abuses.

#### IV. FUNCTIONAL CHALLENGES

The example of conducting interviews of those attending a mosque highlights another set of challenges for local police in handling national security mandates – there is tension between intelligence functions and other police functions. The Detroit Police Department's resistance to federal immigration enforcement and investigation efforts discussed above reflected not only the political independence of states and localities,<sup>108</sup> but also the practical difficulties of effectively carrying out traditional policing

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106. See Wesley G. Skogan & Tracey L. Meares, *Lawful Policing*, ANNALS AM. ACAD. POL. & SOC. SCI. 66 (2004) (describing the dearth of empirical research regarding effectiveness of various approaches to promoting police compliance with law and department policies).

107. See, e.g., Scott Glover, *Informant Describes Work for FBI*, L.A. TIMES, Apr. 28, 2009, at 3 (describing Muslim organizations' concerns about FBI surveillance efforts targeting mosque members); Samantha Henry, *Some Muslims Rethink Close Ties to Law Enforcement*, MIAMI HERALD, May 4, 2009 (describing backlash by Muslim communities against perceived FBI infiltration of mosques); H. G. Reza, *New Fears in Muslim Community Follow Reports of U.S. Monitoring*, L.A. TIMES, May 29, 2008, at 3 (describing suspicion among American Muslim communities about federal spying).

108. See *supra* notes 67-70, and accompanying text.

missions while simultaneously collecting national security information concerning community groups and their members.<sup>109</sup>

This is more than simply an issue of constrained resources and allocation trade-offs (although, of course, those are involved).<sup>110</sup> Rather, this is about whether and how pursuit of national security missions can undermine other law enforcement and community safety functions.

There are two main difficulties. The first is the general and long-standing tension between criminal law enforcement and intelligence collection. Law enforcement agencies typically strive for convictions of lawbreakers, while intelligence agencies attempt to collect information about them.<sup>111</sup> Law enforcement involves taking individuals *off* the street; intelligence agencies may depend on keeping them *on* the street.<sup>112</sup> Often, of course, the objectives align, but not always.

While this tension has been studied mostly at the federal level,<sup>113</sup> it also complicates the organizational challenges mentioned earlier. Local police agencies may be more likely to prize efforts to rid their streets of dangerous individuals even if doing so is at the expense of developing clear pictures of national or international networks, a federal priority.

Consider, for example, the varying priorities a local police agency and the FBI might have when it comes to arresting an individual suspected of trafficking in bomb-making materials. The local police agency might want to arrest this individual as soon as possible and in a high-profile way. By contrast, the FBI (with responsibility for federal crimes as well as domestic intelligence) might not want to disrupt his activities immediately or at all, but rather would prefer instead to build a larger case against his affiliates in other jurisdictions or to collect intelligence on a broader network.<sup>114</sup>

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109. See Harris, *supra* note 27, at 37-44.

110. See INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, *supra* note 19.

111. See William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1150-1153 (2003).

112. See RICHARD POSNER, COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS 109-118 (2007); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 425-436 (2007) (arguing that after 9/11, the Justice Department tended to favor early intervention in terrorism cases). This tension between law enforcement and intelligence priorities was evident in the case of the "Lackawanna Six," mentioned earlier, see Dina Temple-Raston, *Enemy Within? Not Quite*, WASH. POST, Sept. 9, 2007, at B1, though internal FBI reforms and other federal revamping (such as creation of the National Counterterrorism Center) have helped alleviate some of this tension.

113. See, e.g., Gregory F. Treverton, *Set up To Fail*, GOV'T EXECUTIVE, 64 (2002), available at <http://www.govexec.com/features/0902/0902s6.htm>.

114. See RILEY & HOFFMAN, *supra* note 15, at xiv-xv ("Federal authorities – the FBI in particular – will naturally lead in intelligence gathering that is not connected to criminal investigation. Local [law enforcement agencies] have neither money nor capacity for that kind of pure intelligence."); Scott Shane & Lowell Bergman, *F.B.I. Struggling To Reinvent Itself To Fight Terror*, N.Y. TIMES, Oct. 10, 2006.

How should these concerns be reconciled and prioritized? The JTTFs provide a mechanism for adjudicating bureaucratic differences – and ultimately the prosecutions of terrorism crimes will usually take place at the federal level – but they do not set the underlying policy priorities, which need to be worked out through the political process.

Besides the general tension between law enforcement and intelligence functions, a further tension concerns balancing counterterrorism activities with the particular law and order activities of local police agencies, especially where aggressive counterterrorism may undermine cooperative relationships with community actors.

As noted earlier, current trends in community policing and problem-oriented policing demand wider and deeper police engagement within the community, including cooperative partnerships with community organizations and leaders to reduce crime, enhance security, and tackle the problems that underlie criminal patterns.<sup>115</sup> These approaches often include involving key community groups or representatives in decision making as part of a broader effort to improve responsiveness to community needs and establish sustained relationships of trust.<sup>116</sup>

Some see this trend as creating natural synergies with national security functions.<sup>117</sup> Gary LaFree and James Hendrickson of the University of Maryland write: “In many ways the community-oriented approach favored by successful police departments is the same kind of approach that is most likely to uncover terrorist operations.”<sup>118</sup> Local familiarity provides a baseline for detecting suspicious activities, and local police may have networks of cooperative relationships with community members who supply them with information.<sup>119</sup> According to George L. Kelling and William J. Bratton, Chief of the Los Angeles Police Department (which commands the second largest U.S. municipal counterterrorism police force, behind New York): “Local police officers have an everyday presence in the communities that they are sworn to protect. They ‘walk the beat,’ communicate regularly with local residents and business owners, and are more likely to notice even subtle changes in the neighborhoods that they patrol.”<sup>120</sup> As a result, local police “are in a better position to know

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115. See NATIONAL RESEARCH COUNCIL, *supra* note 10, at 85-93. There remains a good deal of controversy over how effective these strategies are, especially with respect to police compliance with law and department policies and to perceived legitimacy among communities. See *id.* at 328-329 (calling for more research in these areas).

116. See Harris, *supra* note 27, at 21-44.

117. See Darrel W. Stephens & Francis X. Hartmann, *The Policing Challenge, in BEYOND THE BELTWAY: FOCUSING ON HOMETOWN SECURITY* 15, 15-22 (2002).

118. Gary LaFree & James Hendrickson, *Build a Criminal Justice Policy for Terrorism*, 6 CRIMINOLOGY & PUB. POL’Y 781, 783 (2007).

119. See Sageman, *supra* note 43, at 223, 229-231.

120. Kelling & Bratton, *supra* note 29, at 2.

responsible leaders in the Islamic and Arabic communities and can reach out to them for information or for help in developing informants.”<sup>121</sup>

Ellen Scrivner, the former Deputy Director for Community Policing Development in the Justice Department’s Office of Community Oriented Policing Services, offers a more cautious assessment.<sup>122</sup> She suggests that some of the local police agency enthusiasm for taking on counterterrorism functions may reflect the pursuit of new financial and other resources and may come at the expense of traditional local police functions:

During the 1990s, law enforcement leaders helped to determine how resources should be directed to continue the fight against crime, and they had a strong voice at the federal funding table. Now they struggle to find where the table is located . . . . Consequently, police leaders question whether law enforcement interests will be fully represented in what is now a competition for resources. These events cannot help but influence the future of community policing as local agencies modify operations to position their agencies to receive homeland security funds.<sup>123</sup>

Some of this concern is based on the fear that resource-tradeoffs will cause counterterrorism activities to squeeze out other police functions.<sup>124</sup> Anecdotal evidence also suggests that aggressive counterterrorism policies by law enforcement agencies may disrupt other valuable policing efforts. In particular, perceptions that police are “spying” may undermine the relationships of trust so critical to community policing strategies.<sup>125</sup> The Los Angeles Police Department recently touted its program for ensuring that tips about potential terrorist activity are passed from patrolling officers to federal security officials, but it then had to shelve a program intended to reach out to Muslim communities because it was perceived as an effort to monitor them.<sup>126</sup> The urgency of taking short-term aggressive police action to uncover or disrupt terrorist plots may also erode goodwill cultivated through long-term police efforts to provide community services.<sup>127</sup>

121. *Id.*

122. *See* Scrivner, *supra* note 76.

123. *Id.* at 188.

124. *See* David Johnston, *With Crime up, a City’s Police Force Questions the Focus on Terror*, N.Y. TIMES, July 24, 2008, at A17; Eric Schmitt & David Johnston, *States Chafing at U.S. Focus on Terrorism*, N.Y. TIMES, May 26, 2008, at A1; *see also* RILEY & HOFFMAN, *supra* note 15, at 47 (“Unfortunately, there is no analysis on the tradeoff between homeland security and crime prevention activities, so no conclusions can be drawn about the effect that post-9/11 missions are having on crime.”).

125. *See supra* notes 42-43 and accompanying text.

126. *See* Richard Winton & Teresa Watanabe, *LAPD’s Muslim Mapping Plan Killed*, L.A. TIMES, Nov. 15, 2007, at 1; Siobhan Gorman, *LAPD Terror-Tip Plan May Serve as Model*, WALL ST. J., Apr. 15, 2008, at A3.

127. *See* Harris, *supra* note 27, at 39-44.

These functional tensions are likely to be exacerbated across federal-local jurisdictional and bureaucratic lines, because federal law enforcement agencies generally do not have to balance local law and order with their national security priorities, have less direct interest in long-term relationships with community figures and groups, and are not directly accountable to them politically.<sup>128</sup> A study sponsored by the Justice Department's Office of Community Oriented Policing Services reported concerns among local police that federal agents "are not aware of community issues when they sweep into a jurisdiction to search for an individual or engage in other investigatory practices and leave just as quickly. The unintended consequence is damage to police-citizen relations, particularly in minority communities, that took tremendous effort to build through community policing."<sup>129</sup>

If Daniel Richman is correct, in suggesting that "the federal government [may] court the assistance of state and local governments by giving them a greater voice in how the federal government interacts with citizens, and particularly with immigrant communities,"<sup>130</sup> we can expect some of these functional tensions to work themselves out through federal-local political and bureaucratic dynamics. David Thacher studied the handling of the Justice Department's immigrant interview requests by the police department in Dearborn, Michigan, near Detroit, a city that contains a high concentration of Arab-Americans. He found that:

Concerns about community trust did seem to influence the way the city participated in the interviews, despite the police's own inclination to view the effort as a legitimate law enforcement tool. Local police declined to conduct the interviews themselves, they went to great lengths to explain their participation in a qualified way, and they ultimately adopted the role (at least in part) of monitors for the federal agents and representatives of community concerns.<sup>131</sup>

Thacher concludes:

In that way, the role the [Dearborn Police Department] played in the Justice Department interviews was shaped by the interest local police had in establishing legitimate boundaries around the use of new surveillance and information-gathering efforts, which could

128. *See id.*

129. *See* GERARD R. MURPHY & MARTHA R. PLOTKIN, 1 PROTECTING YOUR COMMUNITY FROM TERRORISM: THE STRATEGIES FOR LOCAL LAW ENFORCEMENT SERIES 12 (2003), available at <http://www.policeforum.org/terrorismwp.html>.

130. *See* Richman, *supra* note 77, at 418.

131. Thacher, *supra* note 74, at 661.

otherwise undermine the trust and support they had worked so hard to develop in the Arab community.<sup>132</sup>

It is difficult to generalize from cases such as this. At the federal level, too, the FBI and other agencies and departments have taken steps to reach out to Arab-American and Muslim-American communities, perhaps partly as a result of interactions with local law enforcement agencies.<sup>133</sup> The degree to which any gap between counterterrorism functions and successful local policing approaches can be narrowed in the long term will depend heavily on whether local policing is seen by security officials at all levels as effective in guaranteeing both local and national security.

Looking at the British experience, Martin Innes concludes: “Based upon providing local communities with a degree of direct democratic influence over how they are policed, [neighborhood policing] officers will be well positioned to build levels of interpersonal trust with members of Muslim and other minority communities upon which the communication of intelligence is often contingent.”<sup>134</sup> In addition to addressing the improvement of counterterrorism effectiveness without the sacrifice of other police missions, Innes concludes that this model helps safeguard civil liberties, too: “[Integrating neighborhood policing into counterterrorism efforts] may be more effective and ultimately less damaging to democratic traditions than extending covert policing methods and the sorts of reactionary legislative reform proposals that governments tend to issue in the wake of major terrorist incidents.”<sup>135</sup> This view heavily influences counterterrorism strategies in the United Kingdom, learned not only from dealing with contemporary Islamist terrorism but with Britain’s extended experience in combating terrorism in Northern Ireland.<sup>136</sup>

Will a similar view take hold in the United States? Perhaps, but, as discussed below, even if it would be desirable, any similar adaptation in the U.S. system will likely be slow and nonlinear due to the institutional fragmentation and decentralization of the American policing system.

132. *Id.* at 661-662.

133. See Press Release, Dept. of Justice, Federal Bureau of Investigation Reinforce Commitment To Working with Leaders of Muslim, Sikh and Arab-American Communities, July 9, 2004; Alexandra Marks, *US Works to Bridge Its Muslim Trust Gap*, CHRISTIAN SCI. MONITOR, Nov. 27, 2006, at 1; see also Daniel W. Sutherland, Officer for Civil Rights and Civil Liberties, Remarks at the American-Arab Anti-Discrimination Committee’s Silver Anniversary National Convention, May 28, 2005 (discussing steps by DHS), available at [http://www.dhs.gov/xabout/structure/editorial\\_0627.shtm](http://www.dhs.gov/xabout/structure/editorial_0627.shtm).

134. Martin Innes, *Policing Uncertainty Countering Terror Through Community Intelligence and Democratic Policing*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 222, 224 (2006).

135. *Id.*

136. See DAVID BLAKEY, HER MAJESTY’S CHIEF INSPECTOR OF CONSTABULARY, A NEED TO KNOW: HMIC THEMATIC INSPECTION OF SPECIAL BRANCH AND PORTS POLICING (2003), available at <http://inspectorates.homeoffice.gov.uk/hmic/inspections/thematic/antk/them03-antk.pdf>.

## V. FUTURE PATHS

The legal and institutional challenges discussed above stem from the localized and heterogeneous nature of the U.S. local policing system. One possible future involves radical structural reform that would address these issues through new federal institutions to coordinate efforts nationally and relieve local police systems of major responsibilities. At the other end of the spectrum, decentralized localization of American policing might not only prove resilient, but could gain new strength from the national security law challenges discussed above.

As for radical structural change, some experts after the September 2001 attacks called for creating a domestic intelligence agency like the United Kingdom's MI5 to relieve local police of much of its national security mission.<sup>137</sup> Creating new federal institutions, so the argument goes, might also alleviate tension within the FBI between its law enforcement and its intelligence functions, and it might even address some civil liberties concerns by separating the most intrusive surveillance authorities from institutions that wield other coercive powers, such as authority to arrest.<sup>138</sup>

Such architectural revamping – even if it could address the fundamental decentralization problem – is extremely unlikely, however. Serious proposals of this sort have waned in recent years, as 2001 has become more distant.<sup>139</sup> The political convulsions following the 9/11 attacks produced a series of macro-level architectural reforms and decisions, including assignment of domestic counterterrorism intelligence collection to the FBI, reorganization of the intelligence community under a new Director of National Intelligence, and creation of the Department of Homeland Security, which consolidating dozens of smaller agencies.<sup>140</sup> Even putting aside the civil liberties outcry that would follow any proposal to create a dedicated domestic intelligence service, it seems unlikely that additional organizational overhauls will follow in the near future absent a dramatic escalation in threat.

137. See POSNER, *supra* note 112, at 105-167.

138. See RICHARD C. SHELBY, ADDITIONAL VIEWS OF SEPTEMBER 11 AND THE IMPERATIVE OF REFORM IN THE U.S. INTELLIGENCE COMMUNITY 75-76 (2002), available at <http://intelligence.senate.gov/shelby.pdf>.

139. For a discussion of this debate and concerns about domestic intelligence agencies in the United States, see THE CHALLENGE OF DOMESTIC INTELLIGENCE IN A FREE SOCIETY: A MULTIDISCIPLINARY LOOK AT THE CREATION OF A U.S. DOMESTIC COUNTERTERRORISM INTELLIGENCE AGENCY (Brian A. Jackson ed., 2009), available at [http://www.rand.org/pubs/monographs/2009/RAND\\_MG804.pdf](http://www.rand.org/pubs/monographs/2009/RAND_MG804.pdf); see also Matthew M. Johnson, *FBI's Intelligence Woes Restir Debate on an American MI5*, CQ HOMELAND SEC., Oct. 23, 2007, available at <http://public.cq.com/docs/hs/hsnews110-000002611323.html> (“The FBI is struggling to implement domestic intelligence gathering into its mission, resuscitating the debate about whether to create a domestic intelligence agency separate from the bureau.”).

140. See *supra* notes 15-16 and accompanying text.

The process of further organizational reform in the foreseeable future is therefore likely to be evolutionary, not revolutionary. The challenges outlined above will be addressed incrementally. Drawing broad conclusions about how these challenges will be resolved, however, is complicated by two factors.

First, the very structure of American policing that makes these questions so critical – decentralized and heterogeneous – makes it arduous but necessary to study these national security institutional challenges empirically in a thorough way. American policing at all levels has been well studied, but much of what we know about recent experience with national security coordination, accountability, and tensions with other police functions is based more on anecdotal evidence than on the type comprehensive investigation that will support the needed analytical depth. For example, the point raised in Part IV about different checks operating on some national security powers at the federal level compared to state and local levels warrants further study. Future studies might help explain why there is – or why there should be – differentiation between national security functions of local and national agencies.

Second, the national security threat itself is evolving.<sup>141</sup> There is a growing debate within the academic and intelligence communities about whether the primary terrorism threat to the United States comes from abroad by centrally organized and controlled groups like al Qaeda, or is home-grown in the United States from loosely knit cells of individuals becoming radicalized largely on their own.<sup>142</sup> According to terrorism researcher Marc Sageman (who has worked as an advisor to the NYPD):

The present threat has evolved from a structured group of al Qaeda masterminds, controlling vast resources and issuing commands, to a multitude of informal local groups trying to emulate their predecessors by conceiving and executing operations from the bottom up. These “homegrown” wannabes form a scattered global network, a leaderless jihad.<sup>143</sup>

Other scholars, such as Bruce Hoffman, dispute Sageman’s assessment, and argue instead that al Qaeda and its allies operating abroad remain strong and continue to constitute the major terrorism threat facing the United States.<sup>144</sup>

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141. For a recent congressional report highlighting the homegrown terrorist threat, see JOSEPH LIEBERMAN & SUSAN COLLINS, SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, VIOLENT ISLAMIST EXTREMISM, THE INTERNET, AND THE HOMEGROWN TERRORIST THREAT 12-13 (2008), available at [http://hsgac.senate.gov/public/\\_files/IslamistReport.pdf](http://hsgac.senate.gov/public/_files/IslamistReport.pdf).

142. See MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY (2008).

143. *Id.* at vii.

144. See Bruce Hoffman, *The Myth of Grass-Roots Terrorism*, 87 FOREIGN AFF. 133 (2008).

The U.S. intelligence community, meanwhile, maintains that al Qaeda and its allies continue to threaten the United States, while also predicting that autonomous terrorist cells will likely develop inside the United States.<sup>145</sup>

Over the long term, responsibility for dealing with “top down” threats like al Qaeda will fall mostly on the federal government, which must penetrate and disrupt the network at home and abroad. Responsibility for dealing with a “bottom up” threat like autonomous terrorist cells, by contrast, will continue to be shared heavily with local police agencies.<sup>146</sup> According to Brian Michael Jenkins of the RAND Corporation, “As [terrorism] metastasizes, cops are it. We’re going to win this at the local level.”<sup>147</sup> This would exacerbate the challenges outlined above. Analyzing and designing institutions to address the organizational, accountability, and functional issues described above thus requires more precise efforts to match institutional solutions to sophisticated assessments of threat.

### CONCLUSION

This article raises and begins to answer three key questions about the decentralized and heterogeneous system of U.S. policing and national security. Is greater networking of local, state, and federal police agencies an effective way to combat terrorism? Will devolution of national security responsibilities to local police agencies disrupt systems of accountability and oversight? Will national security responsibilities undermine traditional core functions of local policing?

The decentralization and heterogeneity of U.S. policing pose obstacles to effective national coordination efforts and sometimes serve to check intrusive federal powers and policies while also raising concerns about over-intrusion at the local level. Due to the vast diversity of U.S. communities and the police institutions that serve them, the equilibrium of national security law will reemerge, depending in part on the changing nature of the terrorism threat, in decentralized ways as well.

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145. See BLAIR, *supra* note 25, at 4-8.

146. See Sageman, *supra* note 43, at 230-231.

147. William Finnegan, *The Terrorism Beat: How Is the N.Y.P.D. Defending the City?*, NEW YORKER, July 25, 2005, at 58, 61 (quoting Jenkins).