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

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

Matthew C. Waxman\*

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**POLICE, COMMUNITY AND THE RULE OF LAW**

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## **Introduction**

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 few years following World War I, a period now remembered for overblown alarm of radical leftist activity, J. Edgar Hoover's Bureau of Investigation (the forerunner of the Federal Bureau of Investigation (FBI)) enlisted local police agencies to assist the "Palmer Raids" on suspected radicals.<sup>1</sup> In the 1950s and 60s, the FBI enlisted 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.<sup>2</sup>

In the wake of the September 11, 2001 attacks, local police again mobilized in support of nation-wide efforts to combat national security threats, this time jihadist terrorism. Some observers see this as necessary precaution while others already see parallels to recent history of law enforcement abuses.<sup>3</sup> Both views were displayed, for instance, when the New York City Police Department 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 and

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<sup>1</sup> G Stone, *Perilous Times: Free Speech in Wartime from The Sedition Act of 1798 to The War on Terrorism* (New York, W. W. Norton & Company, 2004) 220-226

<sup>2</sup> D Cunningham, *There's Something Happening Here: The New Left, the Klan, and FBI Counterintelligence* (2004, Berkeley & Los Angeles, University of California Press)

<sup>3</sup> Stephen J. Schulhofer, *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11 A Century Foundation Report* (New York, 2002) 61.

now deputy New York City police 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 preparation for an act of terror, the entire resources of the N.Y.P.D. must be available to conduct investigations into political activity and intelligence-related issues.”<sup>4</sup> Civil liberties groups expressed outrage and brought suits against the city alleging widespread rights abuses and political harassment.<sup>5</sup>

This tension between civil liberties and state security measures lies at the heart of national security law. The problem of defining “national security” is discussed at length in the chapter by Bowling and Newburn in this volume, and, consistent with their conceptualization, 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 threats to undermine government. While there are some particular features of the tension to local policing, the basic substantive issue of balancing investigatory and coercive state powers against rights and freedoms is certainly not unique to police, nor is it unique to *American* policing.

What makes the issue of American police and national security so interesting and complex is the decentralized and localized nature of most law enforcement in the United States.<sup>6</sup> Counts vary, but a recent National Research Council volume estimates about there are about 13,500 local police departments across the country.<sup>7</sup> Sub-federal police agencies – including those at the state, county and city or town level, and which are responsible for the vast bulk of basic crime fighting and community protection in this country – are as heterogeneous and geographically dispersed as the local American populations they serve. These attributes give rise to three challenges for policing and national security, each of which is addressed in this chapter.

First, the decentralized and localized nature of American policing creates enormous organizational problems in coordinating national security activities, and combating terrorism in particular. Local police agencies offer tremendous resources in terms of personnel and local familiarity needed to prevent, investigate and respond to terrorism or related activities. But the atomization of American policing requires new coordination mechanisms to harness these

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<sup>4</sup> Jim Dwyer, *City Police Spied Broadly Before G.O.P. Convention* (New York Times, March 25, 2007)

<sup>5</sup> Diane Cardwell, *Lawyers’ Group Sues City over Arrests of Protesters* (New York Times, Oct. 8, 2004)

<sup>6</sup> Herman Goldstein, *Policing a Free Society* (Cambridge, 1977) 131.

<sup>7</sup> National Research Council, *Fairness and Effectiveness in Policing: The Evidence*. Committee to Review Research on Police Policy and Practices. Wesley Skogan and Kathleen Frydl, editors. Committee on Law and Justice, Division on Behavioral and Social Sciences and Education (Washington, D.C. 2004). 49 The Department of Justice recently provided the following numbers: 12,766 local police departments and 3,067 sheriffs’ offices. Bureau of Justice Statistics Bulletin, Census of State and Local Law Enforcement Agencies 2004 [2007].

resources effectively in pursuit of a national-level agenda. The federal government and states have over recent years launched many initiatives aimed at integrating the thousands of American law enforcement agencies, which vary widely in size, capability, threat perception and relationship to local communities.

Second, the counter-terrorism agenda may influence or disrupt systems and patterns of political accountability of local police agencies. Those systems work best for traditional police functions like preventing crime and maintaining order, the costs and benefits of which are generally felt locally and discerned 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 counter-terrorism accrue elsewhere or unobservably.

Third, some of the same attributes of local policing that makes it a useful counter-terrorism tool also create difficulties in effectively carrying out more traditional functions. A tension that sometimes exists between law enforcement efforts to prosecute criminals and secret intelligence activities to monitor them is exacerbated when stretched across local-federal lines. Some actions that may be important from a national security perspective may also be disruptive to more traditional law and order police efforts within localized communities.

The U.S. Government and society continues to wrestle with each of these challenges. Whether and how they will be resolved depend heavily not only responses generated through the political system but on the evolutionary trajectory of the national security threats that spawn them.

### **American Policing After 9/11**

“The September 11 attacks” wrote Attorney General John Ashcroft to all United States 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>8</sup>

This statement in part reflected the politics of the Bush Administration’s “War on Terror,” and the notion of full national mobilization to combat a continuing, major threat. At the federal level this mobilization included vastly increasing the FBI’s emphasis on domestic counter-terrorism through structural changes and boosting personnel dedicated to this mission.<sup>9</sup> But Ashcroft’s statement also reflected a

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<sup>8</sup> Memorandum from Attorney General John Ashcroft to All United States Attorneys, *Cooperation with State and Local Officials in the Fight Against Terrorism* (Washington, D.C. Nov. 13, 2001).

<sup>9</sup> Testimony of Robert S. Mueller, III, Director, FBI Before the House of Representatives Committee on Appropriations, Subcommittee on the Departments

devolution of responsibility for dealing with this threat to local levels unaccustomed to a national security orientation.

Terrorism was by no means a new problem for the United States in 2001, nor were state and local governments absent from the counter-terrorism fight 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. Many states in the 1990s enacted criminal statutes against terrorist activity, mirroring federal criminal laws.<sup>10</sup> Until the September 11 attacks, however, from a law enforcement perspective terrorism within the United States was not a priority issue and it fell largely within the province of the FBI (and even there it was generally of secondary importance to fighting federal crimes such as white-collar and narcotics offenses).<sup>11</sup> Following the 1993 World Trade Center attack FBI Director Louis Freeh tried to reorient the Bureau’s priorities toward counter-terrorism, including through the creation of a Counter-terrorism Division, but his efforts failed to significantly alter the agency’s dominant focus on investigating and solving other federal crimes.<sup>12</sup> 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; meanwhile 40 percent of municipalities reported never having had contact with federal agencies regarding terrorism issues.<sup>13</sup>

The September 2001 attacks, followed soon after by anthrax attacks through the postal system, generated new urgency to counter-terrorism efforts and information-sharing throughout the U.S. governmental system, including at the local level. At the federal level, for example, the FBI further bolstered and prioritized its counter-terrorism capabilities, while a new Department of Homeland Security was created and the Defense Department expanded its efforts to identify suspected terrorists and other threats within the United States. At the local level, too, governments shifted emphasis to preventing and preparing for potential terrorist attacks.<sup>14</sup>

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of Commerce, Justice, and State, the Judiciary and Related Agencies, June 18, 2003 (available at <http://www.fbi.gov/congress/congress03/mueller061803.htm>).

<sup>10</sup> Laura K. Donohue & Juliette N. Kayyem, *Federalism and the Battle over Counterterrorist Law: State Sovereignty, Criminal Law Enforcement, and National Security*, *Studies in Conflict & Terrorism*, 25:1 (2002).

<sup>11</sup> National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (New York, 2004) 74.

<sup>12</sup> *Ibid.* 76-78.

<sup>13</sup> KJ Riley & B Hoffman, *Domestic Terrorism: A National Assessment of State and Local Preparedness* (Santa Monica, CA, 1995) 26, 31.

<sup>14</sup> International Association of Chiefs of Police, ‘Post 9-11 Policing: The Crime Control-Homeland Security Paradigm,’ (Sept. 2005) 1; P Roberts, ‘Shifting Priorities: Congressional Incentives and the Homeland Security Granting Process’ (2005) 22 *Review of Policy Research* 437; K Tumulty, *But Will We Be Any Safer?* (Dec. 2, 2002, *Time Magazine*) 42.

It was not just the magnitude of the perceived terrorist threat after 9/11 that pushed the counter-terrorism agenda down towards local levels of government, including police agencies. It was also the sense that the greatest national vulnerabilities once again lay at home, with threats materializing or operating inside U.S. borders. The 9/11 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 9/11 plot 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 future such “dots” throughout the country.

The 9/11 attacks also created a national sense of fear that al Qaida and its allies were in the process of unleashing a campaign of additional attacks utilizing “sleeper cells” embedded in American communities, awaiting orders or opportunity to strike. A number of alleged al Qaida cells in the United States have been arrested and prosecuted in the years since, including the “Lackawanna 6” (a half-dozen Yemeni-Americans living near Buffalo, New York, convicted of providing material support to al Qaida) and a Miami-based group allegedly bent on destroying Chicago’s Sears Tower.<sup>15</sup> In retrospect the sophistication and potential effectiveness of the thwarted cells has been called into doubt, and the partial disruption of al Qaida’s leadership apparatus in Afghanistan and Pakistan has sown doubt as to whether al Qaida still poses a major threat of attack inside the United States. But the reduced worry of centrally commanded or supported al Qaida 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 Qaida-inspired agenda.<sup>16</sup>

As a result of these emergent threats, local police agencies have played a number of counter-terrorism roles in recent years. Most criminal prosecutions for crimes directly related to terrorism are investigated and prosecuted at the federal level.<sup>17</sup> But local police agencies’ efforts to prevent and deter crime also aim to establish an environment inhospitable to terrorism-related activities.<sup>18</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 since 2001. An

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<sup>15</sup> Robert Chesney, ‘The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention’ (2005) 42 *Harvard Journal on Legislation*

<sup>16</sup> Statement for the Record of John Scott Redd, Director, National Counterterrorism Center, Senate Foreign Relations Committee (June 13, 2006); National Intelligence Estimate, *The Terrorist Threat to the US Homeland* (July 2007)

<sup>17</sup> NYU Center on Law & Security, *Terrorist Trial Report Card*, (New York, 2006) (<http://www.lawandsecurity.org/publications/TTRCCComplete.pdf>).

<sup>18</sup> George L Kelling & William J. Bratton, *Policing Terrorism*, Civic Bulletin No. 43 (September 2006) ([http://www.manhattan-institute.org/html/cb\\_43.htm](http://www.manhattan-institute.org/html/cb_43.htm))

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>19</sup> A 2005 survey of state and local police agencies by the International Association of Chiefs of Police further documents significant changes in operational capacity, mission focus and program resourcing.<sup>20</sup>

Perhaps the most important as well as controversial national security role for police however, is secret intelligence collection.<sup>21</sup> Following exposure of abusive law enforcement surveillance tactics during the 1950s to 1970s, many police agencies dismantled their intelligence collection units altogether.<sup>22</sup> After 9/11 many of these agencies scrambled to reconstitute or expand them, though comprehensive research data on the extent of this transformation remains slim.<sup>23</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>24</sup> As a result, many police agencies created intelligence analyst positions and assembled new units dedicated to countering terrorism.<sup>25</sup> The next sections explore the difficult organizational, accountability and mission challenges this role creates for the nationwide policing system.

### **Organizational Challenges**

As explained further below, none of these functions – intelligence, investigation, deterrence, site protection, public education, emergency response – is entirely new to local police agencies. Indeed, there are several reasons why

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<sup>19</sup> The United States Conference of Mayors, *The Cost of Heightened Security in America's Cities: A 192-City Survey*, (January 2002).

<sup>20</sup> International Association of Chiefs of Police, n.9 at 23-32.

<sup>21</sup> 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. J Ross, ‘The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany’ (2007) 55 *American Journal of Comparative Law* 533, 566-568.

<sup>22</sup> Edward R. Maguire & William R. King, ‘Trends in the Policing Industry’ (2004) 19 *Annals of the American Academy of Political and Society Science* 15, 593

<sup>23</sup> Ibid.

<sup>24</sup> Statement of John F. Timoney before the Subcommittee on Prevention of Nuclear and Biological Attack, House Committee on Homeland Security (Sept. 21, 2006).

<sup>25</sup> Maguire & King, n 21, 593

local police were especially well-suited to take on these functions. But harnessing these agencies for a national security agenda creates difficult organizational problems, and these problems are magnified by the resilience of American policing's decentralization and heterogeneity.

It is natural that local police agencies would be called upon to combat the terrorism threat. The public looks first to local police for basic security. And the federal government had little choice but to seek and cultivate their assistance because local police agencies possess the massive manpower needed to sustain these functions over vast territory like the United States and over long periods of time. According to one recent Department of Justice estimate, state and local law enforcement agencies employed about 730,000 sworn officers (defined as those with general arrest powers),<sup>26</sup> compared with the FBI's roughly 13,000 special agents.<sup>27</sup> The NYPD counter-terrorism division alone (by far the largest municipal-level counter-terrorism force) has about 1000 officers, while the FBI dedicates about 1200 special agents dedicated to combating terrorism.

Aside from this numerical advantage, local police are often believed to be well-suited to perform counter-terrorism functions because of their superior familiarity with local communities. 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 vast amounts of data about communities and activities within them. Policing strategy trends, including community policing and problem-oriented policing, also call for wide and deep police engagement with the community. These proactive versus reactive responses to crime, disorder and other community problems require cultivating relationships with local social agencies, civic leaders and community organizations and developing deep awareness of community environments.<sup>28</sup>

While the decentralized, localized structure of American policing offers several advantages when it comes to combating terrorism, however, it 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 counter-terrorism functions, but it creates an enormous organizational complexity in return: how to coordinate among the thousands of them, and between them and the federal government.

Counter-terrorism cooperation among police agencies requires difficult coordination along two main axes. Horizontally, local police agencies need to communicate and collaborate with other local police agencies. Vertically, they

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<sup>26</sup> Brian A. Reaves, U.S. Department of Justice *Bureau of Justice Statistics, Bulletin: Census of State and Local Law Enforcement Agencies, 2004*, (Washington 2007), 1 (<http://www.ojp.usdoj.gov/bjs/pub/pdf/cslllea04.pdf>).

<sup>27</sup> Federal Bureau of Investigation Quick Facts (<http://www.fbi.gov/quickfacts.htm>).

<sup>28</sup> National Research Council, n 7, 85-93; D Bayley, *Police for the Future* (New York, Oxford University Press US, 1994) 105-120.

need to communicate and collaborate with state and federal agencies. Information must then flow in both directions along these axes: information about threats or investigative leads must be pushed from the center (often the federal government) out to local agencies that can act on it, and those local agencies at the periphery must send information toward the center where it can be acted upon in some cases immediately by the federal government or aggregated to help shape policy. Besides informational coordination, which needs to be done quickly and often secretly, operations by law enforcement agencies need to be coordinated across multidimensional jurisdiction lines.

The problem is not simply numerical, or how to how link thousands of separate agencies together efficiently. Heterogeneity magnifies the complexity. Local police jurisdictions differ greatly along such dimensions as population size and density, geography and urbanization, ethnic composition, situation of high-profile targets, civic culture and political orientation. And the American policing system mirrors this diversity. Local police forces vary in terms of size, capability, resources, operating procedures, and equipment, not to mention differences among their day-to-day priorities and variation in local law, including law regulating police conduct.<sup>29</sup> To take one of these dimensions, size, consider that the 46 largest metropolitan police forces (out of a total of over 13,000 state and local forces) account for over a third of all police officers nation-wide, while there are also more than 700 local police agencies that have just one officer.<sup>30</sup> Or consider the unique threats facing New York City, the very densely populated, ethnically diverse home to much of the U.S. and global private financial system.

In countries with national police forces like France, the organizational challenge of coordinating local counter-terrorism police efforts is eased through centralized and hierarchical command.<sup>31</sup> Although the United Kingdom does not have a single national police force, its local police forces are linked together and to national-level counter-terrorism efforts through standardized institutional mechanisms. For example, each individual police force in the United Kingdom, for example, has a “Special Branch” whose primary duties are prosecuting and assisting in counterterrorism and counterintelligence operations. They interact directly with MI5 (the Security Service, which deals with domestic intelligence) and MI6 (the Secret Intelligence Service, which deals with intelligence abroad).<sup>32</sup>

The U.S. Government cannot rely on formal hierarchical command or uniform institutional mechanisms to link together the country’s massive policing network. As a matter of U.S. constitutional design the federal government cannot directly control local law enforcement agencies. In *Printz v. United States* the Supreme Court held unconstitutional a federal statutory provision that required

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<sup>29</sup> S Harris, *Fusion Centers Raise a Fuss* ( February 10, 2007, National Journal)

<sup>30</sup> National Research Council, n 7, 49.

<sup>31</sup> Peter Chalk & William Rosenau, *Confronting the “Enemy Within”: Security Intelligence, the Police, and Counterterrorism in Four Democracies* (Santa Monica, 2004)

<sup>32</sup> Ibid.

local law enforcement officials to assist in conducting background checks prior to issuance of a gun permit,<sup>33</sup> clarifying that the federal government cannot “commandeer” local police forces into service. This means that the federal government must use an array of other tools 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>34</sup> The American policing system has dealt with similar challenges using these tools in confronting other law enforcement issues, like narcotics trafficking and gang or organized crime activity, that have national and international dimensions, and that require information-sharing and coordination among federal and local police agencies.<sup>35</sup> But the counter-terrorism organizational challenge differs in size and complexity.

The federal government has built several platforms for sharing terrorism-related information among local police agencies and between local and federal agencies. The FBI has spearheaded the expansion over recent years of Joint Terrorism Task Forces (JTTFs) in local areas, to which other federal, state and local agencies assign officers 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 it. There were about three dozen such FBI-led task forces before 9/11, compared with over 100 today.<sup>36</sup> The Intelligence Reform 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>37</sup> Related to this effort, the Department of Homeland Security funds state-operated “Fusion Centers” to synthesize law enforcement and investigative information provided by local police as well as federal agencies.<sup>38</sup> Unlike the JTTFs that help manage operations running through it of participating agencies, the Fusion Centers operate as information clearinghouses, without exerting top-down direction. Along

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<sup>33</sup> *Printz v United States* [1997] 521 U.S. 898.

<sup>34</sup> Department of Homeland Security Press Release, *DHS Announces Release of Application Guidance for Over \$3 Billion in Grant Programs* (Feb. 1, 2008)

<sup>35</sup> Kip Schlegel, *Transnational Crime: Implications for Local Law Enforcement*, [2000]16 J. Contemp. Crim. Just. 365 ; National Research Council, *Transnational Organized Crime: Summary of Workshop 29* (Peter Reuter & Carol Petrie eds., 1999). As examples, the FBI manages a Violent Gang Task Force and the Drug Enforcement Agency manages an Organized Crime Drug Task Force, 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.

<sup>36</sup> The White House, *National Strategy for Homeland Security* (October 2007) 50.

<sup>37</sup> *P.L. 108-458* [2004] sec 1016, 118 Stat 3638, 3664-70 amended by *P.L. 110-53* [2007] sec 504, 121 stat 266, 313-17.

<sup>38</sup> John Rollins, *Fusion Centers: Issues and Options for Congress*, CRS Report for Congress (January 18, 2008).

similar lines the Justice Department has established a National Data Exchange, enabling federal law enforcement and intelligence officials to examine quickly huge caches of state and local public records.<sup>39</sup>

The idea behind these programs and systems 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>40</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 networking efforts will be, because they are not yet fully developed, because technology continues to change rapidly, and because reliable public data on their use is sparse. Some problems are evident already. Expanding an information-sharing network magnifies some privacy risks (private information collected in one locale might be distributed more widely and to other levels of government, for example) and security risks (information, say, about threats or ongoing investigations the federal government hopes to keep quiet might be more likely to surface publicly as more agencies handle it). Indeed, political pressures on local police, described below, may make them more likely than federal police to broadcast or leak sensitive public safety threat information. An efficient and effective information network also requires some degree of system and process 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 threats their jurisdictions face, and when the federal government lacks legal and bureaucratic authority to dictate reform at the local level. Even if that were possible through indirect means, too much standardization might undermine the advantages of experimentation and tailoring to local conditions that come with local autonomy or, as the next section explores, might disrupt systems of local accountability.

### **Political Accountability Challenges**

“It has long been accepted 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>41</sup> This is relatively easy when the local police are focused exclusively on traditional functions of preventing crime, maintaining order and providing services. Combating terrorism and other threats to the nation-state with intrusive powers, however, exerts pulls on local policing that strain these systems and patterns of political accountability.

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<sup>39</sup> Robert O’Harrow Jr. & Ellen Nakashima, *National Dragnet Is a Click Away*, (Washington Post, March 6, 2008).

<sup>40</sup> The White House, *National Strategy for Information Sharing*, Oct. 2007, p. 3 ([www.whitehouse.gov/nsc/infosharing/](http://www.whitehouse.gov/nsc/infosharing/))

<sup>41</sup> John D. Brewer, Adrian Guelke, Ian Hume, Edward Moxon-Browne, Rick Wilford, *The Police, Public Order and the State* 2d Ed ( London 1996) 115.

Most local police agencies are locally financed and controlled, subject to direction and oversight by officials elected by and responsible to the community they serve. 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 decentralized and localized features of American 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>42</sup>

The notion that local police agencies are responsible to local communities and responsive to local needs and preferences has never meant that they are free to ignore national priorities, nor is some 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 in support of violent-criminal enforcement efforts. The result has been a delicate balance for local police agencies between local autonomy and local responsiveness with participation in a broader federal system. 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 task of achieving a proper form of citizen control over the police is so complex.<sup>43</sup>

One aspect that distinguishes many prior federal grant programs from recent federal initiatives to enlist local support in defending against national security threats is that the former involved “federalizing” traditional state spheres of activity (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 anytime national security threats emanate from within U.S. borders – but

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<sup>42</sup> Ibid., 115; National Research Council, n 7, 51.

<sup>43</sup> Goldstein, n 6, 143.

especially as globalization of travel and communications expands – events in any local area can have national or international security repercussions.<sup>44</sup>

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 local press and community oversight mechanism helps ensure that the supply of police services is responsive to community demand. When the federal government influences that prioritization of police activities and mission in support of national objectives, however, should that be viewed as market correcting or market distorting?

In a sense it is both. One reason why this market intervention may be needed – but may also be viewed as distorting – is because unlike most crime prevention, the costs of combating terrorism are often borne locally while the benefits accrue elsewhere, or unobservably. In the case of most ordinary crime, the harm of the outlawed activity is felt by the community in which it takes place. So is the impact of combating it, allowing the community to weigh those costs and benefits. Terrorist activities, meanwhile, are dispersed, and the ultimate attacks may occur far away from the site of their planning, perhaps not even in the same country.<sup>45</sup> The costs of combating terrorism – resource costs and tradeoffs, restrictions on privacy or inconveniences of security precautions – are felt locally, though. Furthermore, even when perceived threats to national security rise, local citizens will still demand from police the same public security and services to which they are accustomed.<sup>46</sup> There is a limit, therefore, to the resources or mission tradeoffs local agencies can devote to national security functions. The federal government, by contrast, will be held to account for security lapses wherever they occur, by nature of its constitutional primacy in national security affairs and corresponding public expectations. Federal law enforcement agencies like the FBI also have the luxury of some discretion and electivity in their policing priorities; they can move agents from fighting crimes to counter-terrorism, for example, more easily than can local agencies because public expectations are more focused after 9/11 on their national security roles and because they are more insulated from short-term electoral accounting.<sup>47</sup>

What this generally means is that federal coordination efforts and offers of assistance to state and local agencies can alter local police priorities from what the

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<sup>44</sup> See the chapter in this volume by Bowling and Newburn for a detailed discussion of these issues.

<sup>45</sup> David Thacher, 'The Local Role in Homeland Security' (2005) 39 *Law & Society Review* 635, 37-38. To be clear, this issue is not entirely unique to terrorism or national security threats, but also applies, for example, to narcotics activities and organised crime.

<sup>46</sup> Ellen Scrivner, *The Impact of September 11<sup>th</sup> on Community Policing, Community Policing, The Past, Present and Future* (Washington, D.C. 2004) 187.

<sup>47</sup> D Richman, 'The Past, Present, and Future of Violent Crime Federalism,' (2006) 34 *Crime and Justice: A Review of Research* 377, 407-426.

local political “market” might produce, but only to a point. What happens when federal national security priorities misalign too far with local preferences?

Two oft-cited examples of local-federal tension in combating terrorism – Detroit’s response to federal requests to interview certain immigrants and Portland’s withdrawal from the FBI’s regional Joint Terrorism Task Force – help illustrate some consequences. In November 2001 the Justice Department requested local police departments’ assistance in interviewing FBI lists of 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 these interviews might run astray of state law and could alienate Arab-American communities, and they therefore refused to participate in the federal initiative.<sup>48</sup> In 2005, Portland became the first city to pull out 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 oversee whether city police officers participating in the JTTF were abiding by agreed-upon guidelines.<sup>49</sup> In both cases pressures stemming from local accountability systems pushed municipal agencies to opt out of the federal effort.

These examples serve as outliers, not illustrations of the norm; most local police agencies have largely cooperated with both federal efforts. They are nevertheless important for showing what happens at when national security policing initiatives run too far out of step with local political constraints. In the case of Detroit, its greater metropolitan area is home to an especially large Arab-American community. Well-organized 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 Arab-American communities, a relationship the police feared could fray as a result of heavy-handed federal efforts.<sup>50</sup> In the case of Portland, the local area is 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 9/11 to expand domestic law enforcement and intelligence powers), and city officials were probably particularly sensitive about aggressive federal counter-terrorism efforts

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<sup>48</sup> Fox Butterfield, *Police Are Split on Questioning of Mideast Men* (New York Times, Nov. 22, 2001); Tamara Audi & David Zeman, *Many Face a Grilling: Antiterror Questions Disclosed* (Detroit Free Press, Nov. 24, 2001).

<sup>49</sup> Susan N. Herman, ‘Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror’ (2005) 41 *Willamette Law Review* 941, 952-55; Anna Griffin & Scott Learn, *Portland Opts Out of Anti-Terror Task Force* (Oregonian, April 23, 2005).

<sup>50</sup> Shannon McCaffrey, *New FBI Sweep Worries Muslims* (Detroit Free Press MAY 27, 2004); Tamara Audi, *Terror War hits home; Detroiters caught in widening investigation* (Detroit Free Press November 12, 2002); Siobhan Gorman, *Detroit Finds Some Answers* (National Journal, March 29, 2003).

after a Portland-area lawyer and convert to Islam was erroneously linked by FBI to terrorist bombings in Madrid, Spain, the previous year.<sup>51</sup>

What conclusions ought to be drawn from these examples? Daniel Richman argues that the political process through which federal, state and local governments negotiate cooperation in joint efforts may promote both accountability and effectiveness in combating terrorism. The dependence of national security efforts, led principally by the federal government, on local agencies gives those local agencies leverage. The accountability of those local agencies, 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.

Others are less sanguine. William Stuntz views the threat of terrorism as loosening restraints on coercive federal police powers, which will trickle down to loosened restraints on police powers at the local level.<sup>52</sup> Corey Robin points to history of police excesses in the 50s and 60s 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>53</sup>

As Richman himself points out, his notion of local police governance serving as a brake through local-federal cooperation on over-aggressive federal tendencies is ironic, given that past tendencies to view federal oversight as necessary to rein in abusive state and local practices.<sup>54</sup> Indeed, much of modern constitutional criminal procedure doctrine grew out of federal clamp-downs on abuses at the state and local level (often tinged with institutional racism).<sup>55</sup> In the end, the degree to which federally-led national security initiatives distort – for better or worse – local accountability systems or, in reverse, those local accountability systems shape broader national security policy will probably vary from locality to locality depending on many of the same factors cited earlier, including size, ethnic composition and dependence on federal assistance.

This push and pull of federal and local pressures is hardly unique to policing, but there is often an added twist in the national security realm: many policing activities aimed at combating terrorism or other national security threats are necessarily secret or opaque from public view. The ability to track crime rates and compare them across localities and across time helps hold local police and other law enforcement agencies accountable for performance, at least with regard

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<sup>51</sup> Tomas Alex Tizon, *Portland, FBI Unit to Part Ways* (L.A. Times, April 28, 2005).

<sup>52</sup> William J. Stuntz, “Local Policing After the Terror” (2002) 111 *Yale Law Journal* 2137; Herman, n 48, 968.

<sup>53</sup> Corey Robin, *History’s Shadow* (Boston Review, 2005) 20.

<sup>54</sup> Richman, n 47, 421.

<sup>55</sup> Tracey L Meares & Dan M Kahan, ‘The Wages of Antiquated Procedural Thinking: A Critique of *Chicago v. Morales*, 1998’ (1998) 197 *University of Chicago Legal Forum* 201-206.

to their law and order functions. The public can gauge performance and express satisfaction or dissatisfaction through the political system.<sup>56</sup> But secret surveillance practices – such as the use of undercover agents or remote monitoring – are meant to be undetectable.<sup>57</sup> Even if such surveillance is believed to be occurring, its impact on security or liberty is difficult to observe or measure.

This challenge for political 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 more strongly – or at least in different ways – at the federal level than the local. This may seem counter-intuitive, since federal agencies command such vast intrusive capabilities and have historically abused them. Following the Church and Pike Committee investigations in the 1970s, a number of systems were put in place at the federal level to regulate domestic spying, especially by law enforcement agencies. These included legislation like the Foreign Intelligence Surveillance Act (FISA), the creation of permanent congressional intelligence oversight committees and agency inspectors general, and internal federal regulations and guidelines that constructed a “wall” separating to a large extent intelligence and law enforcement bureaucracies and the information they collected.<sup>58</sup> The same abuses of the 1960s and 70s led to constraints domestic spying at the state and local level, including state laws restricting surveillance of political and other group activities as well as consent decrees stemming from lawsuits filed over misused police monitoring.<sup>59</sup> Since 9/11, 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’ authorities to collect intelligence domestically and to share information among law enforcement and intelligence agencies. At state and local levels, too, some governments have sought expanded authorities, including through revisions to consent decrees.<sup>60</sup>

At the federal level, however, there generally remain multiple layers of checks on the conduct of police and intelligence agencies. 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. Beyond government institutional safeguards, scrutiny by civil liberties groups and investigative journalists further check executive discretion.<sup>61</sup> Of course there are exceptions, and reasons why in some cases

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<sup>56</sup> Richman, n 47, 378.

<sup>57</sup> 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 – is openly known.

<sup>58</sup> *9/11 Commission Report*, n 11, 78-79.

<sup>59</sup> Paul G. Chevigny, ‘Politics and Law in the Control of Local Surveillance’ (1984) 69 *Cornell Law Review* 735

<sup>60</sup> Jerrold L. Steigman, ‘Reversing Reform: The Handschu Settlement in Post-September 11 New York City’ (2003) 11 *Journal of Law & Policy* 745.

<sup>61</sup> For an illustration of these checks at work, see E Lichtblau, *New Guidelines Would Give F.B.I. Broader Powers* (Aug. 21, 2008 N.Y. Times) On how these

scrutiny may be more robust at the state and local levels than the federal. For example, state and local governments lack formal arrangements for designating and maintaining classified information like those the federal government uses. One important question, though, is whether at the state and local level there are sufficient checks on secretive activities, since these additional layers of monitoring tend to be weaker at those levels than at the federal level.

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 at the federal level), there are other causes for concern and greater need for vigilance 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, and their activities. Consider, for example, a law enforcement officer visiting a local mosque believed to house occasional preaching of extremism. Putting aside how the local law or internal regulations regulate group surveillance, a local police officer's visit to that mosque and interaction with its congregation might stir fewer anxieties among members than a visit by an FBI agent. Against background community expectations, police are *supposed* to interact with significant community groups and understand their relations with the community. FBI agents generally are not. This is one of the features that make local police potentially valuable from a counter-terrorism perspective. 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.

### **Mission Challenges**

This example highlights a final challenge for local policing in managing national security missions: the possible tension between intelligence functions and other police functions. The Detroit police department's pushback against federal immigration enforcement and investigation efforts, cited earlier, reflected not only political independence of states and localities. It also reflected the practical difficulties of conducting traditional policing missions effectively while simultaneously collecting national security information on community groups and members. This is more than simply an issue of constrained resources and allocational tradeoffs (though of course such resource tradeoffs operate as well).<sup>62</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 tensions at issue here. The first is a general and long-standing one between criminal law enforcement and intelligence collection: law enforcement agencies typically strive for convictions of law-breakers while intelligence agencies strive to collect information about them. One involves

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checks operate on the FBI, see RG Powers, *Broken: The Troubled Past and Uncertain Future of the FBI* (New York, Simon and Schuster, 2004) 1-27; 428-439.

<sup>62</sup> International Association of Chiefs of Police, n 14, 1.

taking individuals off the street while the other may depend on keeping them on.<sup>63</sup> Often, of course, the objectives align, but not always. While this tension has mostly been studied at the federal level,<sup>64</sup> it also complicates the organizational challenges mentioned earlier because local police agencies are likely to prize efforts to rid their streets of dangerous individuals even 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 get this individual off its city streets as soon as possible and in a high-publicity way, whereas the FBI (with responsibility for federal crimes as well as domestic intelligence) might not want to disrupt his activities immediately or at all, preferring instead to build a larger case against his affiliates in other jurisdictions or to collect intelligence on a broader network. How should these priorities be deconflicted? The JTTFs described above provide a mechanism for adjudicating these bureaucratic differences but they do not set the underlying policy priorities, which need to be worked out through the political process.

Another tension concerns balancing counter-terrorism activities with other law and order activities, especially where aggressive counter-terrorism may undermine cooperative relationships with community actors. As noted earlier, current trends in community policing problem-oriented policing demand wider and deeper police engagement with the community, including cooperative partnerships with community organizations and leaders to reduce crime, enhance security and tackle the problems the underlie criminal patterns. 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 relationships of trust.<sup>65</sup>

Some see this trend as creating natural synergies with national security functions.<sup>66</sup> Gary LaFree and James Hendrickson of the University of Maryland write that: “In many ways the community-oriented approach favored by

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<sup>63</sup> Richard Posner, *Countering Terrorism* (Lanham, MD, 2007) 109-18; Robert M. Chesney, ‘Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism’ (2007) 80 *Southern California Law Review* 425, 425-36. (arguing that post-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* (Washington Post, Sept. 9, 2007).

<sup>64</sup> Gregory F. Treverton, *Set Up To Fail* (Government Executive, Sept. 2002) 64.

<sup>65</sup> National Research Council, n 7, 85-93.

<sup>66</sup> DW Stephens & FX Hartmann, *The Policing Challenge*, Recommendations for State and Local Domestic Preparedness Planning A Year After 9-11, A Report of the Executive Session on Domestic Preparedness (John F. Kennedy School of Government Harvard University, September 2002) 15-22

successful police departments is the same kind of approach that is most likely to uncover terrorist operations.”<sup>67</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. According to George L. Kelling and William J. Bratton, chief of the Los Angeles Police Department (which commands the second largest U.S. municipal counter-terrorism 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. They are in a better position to know responsible leaders in the Islamic and Arabic communities and can reach out to them for information or for help in developing informants.<sup>68</sup>

Ellen Scrivner, the former Deputy Director for Community Policing Development in the Justice Department’s Office of Community Oriented Policing Services, is more cautious:

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>69</sup>

Some of this concern stems from scarce resources: will counter-terrorism functions squeeze out other police functions?<sup>70</sup> But anecdotal evidence also validates concerns that aggressive counter-terrorism 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. The Los

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<sup>67</sup> G LaFree & J Hendrickson, ‘Build a Criminal Justice Policy for Terrorism’ (2007) 6 *Criminology & Public Policy* 781, 783.

<sup>68</sup> GL Kelling & WJ Bratton, *Policing Terrorism*, Civic Bulletin No. 43 (September 2006) ([http://www.manhattan-institute.org/html/cb\\_43.htm](http://www.manhattan-institute.org/html/cb_43.htm))

<sup>69</sup> Scrivner, n 46, 183,188.

<sup>70</sup> David Johnston, A City’s Police Force Now Doubts Terror Focus, N.Y. Times, July 24, 2008; Eric Schmitt & David Johnston, States Chafing at U.S. Focus on Terrorism (N.Y. Times, May 26, 2008).

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 Muslims.<sup>71</sup> Or the urgency of taking short-term aggressive police action to uncover or disrupt terrorism plots might erode goodwill cultivated through long-term police efforts to provide community services. These mission tensions are likely again to be exacerbated across federal-local bureaucratic lines, since 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 accountable to them politically. 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>72</sup>

If Richman's speculation is correct, that the federal government may "court the assistance of state and local governments by giving them a great voice in how the federal government interacts with citizens, and particularly with immigrant communities,"<sup>73</sup> we can expect some of these mission tensions to work themselves out through the federal-local dynamic. David Thacher studied, for example, the handling of the Justice Department's immigrant interview requests by the police department in Dearborn, Michigan (located near Detroit, it also contains a high concentration of Arab-Americans). He concluded that:

[c]oncerns 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. 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

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<sup>71</sup> Siobhan Gorman, *LAPD Terror-Tip Plan May Serve as Model* (Wall Street Journal, April 15, 2008)

<sup>72</sup> Gerard R. Murphy & Martha R. Plotkin, *Protecting Your Community from Terrorism: The Strategies for Local Law Enforcement Series*, Vol. 1 (Washington D.C. 2003) 12.

<sup>73</sup> Richman, n 47, 418.

efforts, which could otherwise undermine the trust and support they had worked so hard to develop in the Arab community.<sup>74</sup>

It is difficult to generalize from cases such as this, and at the federal level, too, the FBI has taken steps to reach out to Arab-American and Muslim-American communities, perhaps even as a result of interactions with local agencies.<sup>75</sup> The degree to which any gap between counter-terrorism missions and successful local policing approaches can be narrowed in the long-term will depend heavily on whether the latter are seen by security officials at all levels as effective in guaranteeing both local and national security.

Looking at the British experience, Martin Innes concludes that: “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 minorities communities upon which the communication of intelligence is often contingent.”<sup>76</sup> Besides improving counter-terrorism effectiveness without sacrificing other police missions, he further concludes that this model helps safeguard civil liberties: “[Integrating neighborhood policing into counter-terrorism 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>77</sup> This view heavily influences counter-terrorism strategies in the United Kingdom, learned not only from dealing with contemporary Islamist terrorism but its extended experience in combating Northern Irish terrorism.<sup>78</sup> Will such a view take hold in the United States? Perhaps, but even if it is valid, any similar adaptation in the U.S. system will likely be slow and non-linear due to the institutional fragmentation of the policing system.

### **Looking Forward**

The organizational, political accountability, and mission challenges discussed above stem from the decentralized and heterogeneous nature of American policing. One answer might be radical structural change, such as the creating a domestic intelligence agency, like the UK’s MI5, to relieve local police of much of this mission.<sup>79</sup> This might also, so the argument goes, alleviate

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<sup>74</sup> Thacher, n 44, 661-62.

<sup>75</sup> FBI Press Release, Department 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 Science Monitor, Nov. 27, 2006)

<sup>76</sup> Maguire & King, n 22, 222, 224.

<sup>77</sup> Ibid.

<sup>78</sup> H.M.’s Inspectorate of Constabulary, *A Need to Know: HMIC Thematic Inspection of Special Branch and Ports Policing*, 2003.

<sup>79</sup> Posner, n 61, 105-167.

tension within the FBI between its law enforcement and its intelligence functions while separating the most intrusive surveillance authorities from institutions that wield other coercive powers, like those of arrest.<sup>80</sup> Such architectural revamping – even if it could address the fundamental decentralization problem – is extremely unlikely, however. The political convulsions following the 9/11 attacks already produced a series of macro-level architectural reforms and decisions, including assignment of domestic counter-terrorism intelligence collection to the FBI; reorganization of the intelligence community under a new Director of National Intelligence; creation of the Department of Homeland Security, consolidating dozens of smaller agencies. It seems improbable that additional organizational overhauls will follow in the near future, even putting aside the civil liberties outcry that would follow any proposal to create a dedicated domestic intelligence service. The process of further organization reform in the foreseeable future is likely to be incremental and evolutionary, not revolutionary.

This chapter therefore raises but only begins to answer three big questions about the decentralized and heterogeneous system of American 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 political accountability; and will national security responsibilities undermine traditional core functions of local policing? The difficulty of answering these questions stems from two issues that should guide future research and analysis.

First, the very structure of American policing that makes these questions so critical – its decentralized heterogeneity – makes it arduous but necessary to study these national security institutional challenges empirically in a thorough or generalizable 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 on anecdotal evidence more than comprehensive investigation that also contains the needed analytical depth. For example, the point I raise about different, and perhaps more robust, checks operating on some national security powers at the federal level compared to state and local levels warrants further study, in part because it might help explain why there is – or why there should be – differentiation between functions of local and national-level agencies.

Second, the national security threat itself is evolving. 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

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<sup>80</sup> Additional Views of Senator Richard C. Shelby, September 11 and the Imperative of Reform in the U.S. Intelligence Community (Dec. 10, 2002) 75-76. <http://intelligence.senate.gov/shelby.pdf>

own.<sup>81</sup> Over the long-term responsibility for dealing with a “top-down” threat like the former will mostly fall on the federal government, to penetrate and disrupt the network at home and abroad. Responsibility for dealing with a “bottom-up” threat like the latter, by contrast, will continue to be shared heavily with local police agencies, thereby exacerbating the challenged outlined above. Analyzing and designing institutional architecture to address the organizational, accountability and mission issues described above thus requires more precise efforts to match institutional solutions to assessments of underlying threat.

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<sup>81</sup> Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* (Philadelphia, 2008); Bruce Hoffman, ‘The Myth of Grass-Roots Terrorism’ (2008) 87 *Foreign Affairs* 133