

# FEDERAL PROGRAMS AND THE REAL COSTS OF POLICING

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*Dozens of federal statutes authorize federal agencies to give money and power to local police departments and municipalities in order to improve public safety. While these federal programs encourage better coordination of police efforts and make pursuing public safety less financially costly for local communities, they also encourage harmful policing. Of course, policing often interferes with our interests in autonomy, privacy, and property, and those harms are often worthwhile in exchange for security and order. Federal public safety programs, however, are designed, implemented, and evaluated without reference to the nonbudgetary costs of policing. When those costs are high, federal programs can make local policing seem cheaper for communities, but actually make it more costly in its impacts and therefore less efficient.*

*The coercion costs of policing are overlooked in most assessments of policing policy, not just in federal programs. Ordinarily, however, even when they are not formally recognized, those costs are accounted for, at least to some degree, in local political processes because local government officials experience public ire when the harms of policing become too great. Unfortunately, federal programs also frequently undermine this check on the intrusiveness of local policing. Internalizing the nonbudgetary costs of policing depends on public capacity to monitor harmful police conduct and on city officials' capacity to influence police conduct. Some federal programs interfere with these conditions by clouding responsibility for law enforcement coercion and by giving money directly to departments rather than to municipalities. Thus, federal programs not only ignore significant costs of the policies they subsidize, they also interfere with the usual local mechanisms for managing those costs. Until federal public safety programs are approached with a more complete understanding of policing—one that attends to its full costs and the need for accountability—federal programs will continue to promote policing practices that do more harm than necessary and maybe even more harm than good.*

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INTRODUCTION

Coercion is not the goal of policing. It is its tool. We allow police to make arrests, use force, and search and seize property to enable the prosecution of crimes and the protection of public safety and order, not as ends in themselves.<sup>1</sup> There are myriad benefits that come from lawful and effective law enforcement, but the coercive tools of policing are also socially costly. They intrude upon individuals, their families, and often whole communities, causing injury, suffering, and fear. Those harms are sometimes worth suffering, at least to society as a whole, because they are part of the price we pay for the security and order we seek. Moreover, they are also often justifiable against individuals who have committed or are suspected of committing crimes. Still, coercion is costly, and policing policy should minimize those costs. Like other public services, good policing is efficient as well as effective.<sup>2</sup>

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<sup>1</sup> See Rachel A. Harmon, *When is Police Violence Justified?*, 102 Nw. U. L. REV. 1119, 1151 (2008) [hereinafter Harmon, *Police Violence*] (“Police uses of force are entirely instrumental, which is to say that there are no deontological justifications for the practice of exercising state force against criminal suspects.” (emphasis added)).

<sup>2</sup> See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (2012) [hereinafter Harmon, *Problem*] (“The law should promote policing that effectively controls crime, fear, and disorder without imposing unjustifiable and avoidable costs on

The federal government plays a significant role in local policing policy both by regulating police practices through civil and criminal law, and by assisting police agencies and providing money, equipment, personnel, and power to support federal public safety priorities. Legal scholars have often focused on the federal role in reigning in police abuses. But federal support for local law enforcement is far more extensive than its civil rights enforcement and has an enormous and understudied impact on policing.

Dozens of federal statutes authorize federal agencies to give money and power to local police departments and municipalities. The Department of Justice's grants—such as Edward Byrne Justice Assistance Grants (Byrne JAG) and Community Oriented Policing Services (COPS) Hiring Program grants—may be most well known, but other agencies, from the Department of Homeland Security to the Department of Agriculture, also use federal programs to intervene in local policing to promote public safety. Federal agencies have used these programs to expand local policing, encourage the enforcement of specific laws, and promote coordination among law enforcement agencies. Until concern developed in the aftermath of the shooting death of Michael Brown in Ferguson, Missouri, few of these programs were part of the public debate about policing, despite their considerable consequences. Even now, the full range of federal influence—the common effects of the array of programs that has arisen ad hoc over decades to deal with a variety of public safety programs—is largely hidden from view.

On the positive side, federal public safety programs offer much-needed resources and expertise to local governments to improve policing without forcing a uniform federal policing policy on diverse communities. But they also have a darker side: They encourage legal but coercive policing. Many of the programs provide incentives to local police departments to conduct additional arrests, use force, intimidate citizens, take private property, and engage in electronic surveillance of individuals. This increased interference with individual interests in autonomy, privacy, bodily integrity, and property may be justified if the benefits of each program outweigh the harms. But we have no reason to think they do. The vast array of federal public safety programs that influence local policing have been implemented and assessed as if coercion has no cost.

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individuals and communities. Addressing the problem of policing therefore requires determining what harms policing produces, what kinds of policing are too harmful, and what kinds are harm efficient.”).

Policymakers and economists do make more formal assessments of federal public safety programs. But these analyses generally omit important parts of the programs' effects. In cost-benefit assessments of programs that influence local policing, they reason expansively with respect to benefits, recognizing a multitude of costs averted by federal programs when the programs prevent crime, such as the pain and suffering avoided when a federally funded officer prevents an offense. But they consider only the budgetary outlay to the federal agency as costs. They do not contemplate any harm—and, therefore, any cost—from policing itself. The consequence is that federal public safety programs may encourage coercion even when coercion is not worth its costs or when less costly means of reducing crime and promoting order are available. The programs may make local policing seemingly cheaper for communities but less efficient overall by increasing collateral harm.

Ordinarily, the kinds of costs that police officers impose through lawful arrests, property and privacy deprivations, and intimidation are constrained primarily by local political processes. Local control over policing is surely an imperfect mechanism for protecting against law enforcement harm. But local political actors nevertheless internalize the nonbudgetary costs of policing in deciding how much and what kinds of policing a community should have, at least to some degree, and they do so more than federal actors.

Federal public safety programs not only encourage the kinds of harmful policing that communities might wish to limit. Many of them also undermine the local political control over police departments that otherwise functions to curb that intrusiveness. Some cloud responsibility for officer conduct so that the public cannot assess how intrusive their departments' activities are. Other programs give money, equipment, and power directly to departments rather than municipalities, weakening the ability of political actors to use municipal budgets to influence police action. In this way, federal programs not only ignore the full costs of policing, they also interfere with the usual local political and budgetary mechanisms for recognizing and weighing those costs.

Efficiency is not the only measure of good policing. I have argued elsewhere that police uses of force must be necessary and proportionate to the public ends they serve to be justifiable, whether or not they are net beneficial to society. Similarly, other invasions of privacy, autonomy, liberty, and bodily integrity by the police should also be measured both by whether they serve a legitimate state end and

whether they are proportionate to that end.<sup>3</sup> Law enforcement should also be distributionally fair. Given the significance of these other criteria, no assessment of costs and benefits can tell us what ideal policing should look like. Nor should efficiency alone determine how regulatory responsibility for the police is distributed among federal, state, and local institutions, a matter that is also tied to history, to federalism values, and to questions of institutional competence.<sup>4</sup>

Nevertheless, cost-benefit considerations are important to policing policy, as they are to other policy assessments. The federal government actively intervenes in local policing through an array of significant federal programs. At the very least, these crime-control efforts should be worth their costs, should not be substantially and obviously less cost effective than alternative means of achieving the same goals, and should not interfere with local capacity to assess and influence the costs of policing. Not every federal program designed to foster more effective local policing either encourages intrusive policing or undermines local accountability, but many significant programs do, and these problems have been largely overlooked.

In the past few months, scholars and the media have paid new attention to federal public safety programs. Images of police officers carrying military-style weapons and driving military vehicles clashing with protesters in Ferguson have raised the profile of programs that provide equipment and resources to police departments.<sup>5</sup> As a result, commentators and scholars alike are flocking to criticize federal programs. And the federal government is responding. The Obama Administration is in the process of reevaluating several major public safety programs.<sup>6</sup> Still, very little comprehensive analysis about the

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<sup>3</sup> See Harmon, *Police Violence*, *supra* note 1, at 1148 (describing timing, necessity, and proportionality as measures of whether the use of force by the police is justifiable).

<sup>4</sup> See Harmon, *Problem*, *supra* note 2, at 809 (advocating more thorough comparative institutional analysis to identify “the optimal allocation of regulatory responsibility” over policing).

<sup>5</sup> See Matt Apuzzo, *Senate Studies Police Use of Military Gear*, N.Y. TIMES, Sept. 10, 2014, at A17 (noting that images of violent clashes between heavily armed police officers and protestors in Ferguson have forced the federal government to review its policy of providing local police forces with military-style equipment).

<sup>6</sup> See, e.g., OFFICE OF THE ATT’Y GEN., U.S. DEP’T OF JUSTICE, ORDER, PROHIBITION ON CERTAIN FEDERAL ADOPTIONS OF SEIZURES BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2015), available at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney\\_general\\_order\\_prohibiting\\_adoptions.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf) (revising the Equitable Sharing Program to prohibit Department of Justice components from adopting seizures except for firearms, ammunition, explosives, and property connected to child pornography); Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, Megan Mack, Officer, Office of Civil Rights & Civil Liberties & Philip A. McNamara, Assistant Sec’y for Intergovernmental Affairs 1–2 (Nov. 20, 2014)

role and structure of federal programs that affect local law enforcement is being conducted. Without that analysis, reform efforts will remain uneven, and new programs may replicate the problems of the past.

This Article begins to fill this gap. Part I provides context for understanding federal public safety programs that offer resources and power to police departments. Though these programs were created piecemeal and are often studied that way, together they represent a discrete federal approach to aiding municipalities in reducing crime and addressing terrorism. They can be distinguished from federal civil rights enforcement and public corruption prosecutions—which intervene in local policing towards different ends—and from national forensic databases—which provide assistance to local policing by different means. Federal public safety programs originated in the 1930s and have since expanded dramatically (if inconsistently) in scope and in kind. Today, the programs mostly seek to encourage more policing, to focus policing on national public safety priorities, and to improve coordination among law enforcement agencies in order to solve plausible weaknesses in local governance of the police. To achieve these ends, the programs offer federal money, equipment, training, and power, often with few conditions attached.

Part II argues that these programs encourage especially harmful policing and yet policymakers overlook these harms in implementing and assessing these programs. Police coercion—in the form of arrests, uses of force, invasions of privacy, and the like—imposes real, quantifiable costs. These costs are broadly analogous to commonly recognized costs of crime, which are already used in evaluating the cost effectiveness of criminal justice interventions. Federal public safety programs intended to improve policing encourage local police departments to engage in additional coercion. While informally critics sometimes note negative effects of individual programs, formal analyses of these programs by policymakers and economists consistently fail to weigh the costs of these intrusions against the law enforcement benefits achieved. As a result, federal programs appear more cost effective than they are as a means to promote public safety, and the full costs of these programs often go unacknowledged.

Part III contends that, in addition to encouraging especially costly policing, federal public safety programs also undermine the usual local political mechanisms by which the nonbudgetary costs of policing are

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[hereinafter Memorandum from Jeh Charles Johnson], *available at* [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf) (discontinuing the Secure Communities program and directing U.S. Immigration and Customs Enforcement (ICE) to implement, in its place, the Priority Enforcement Program).

constrained. Local governments largely decide how harmful policing will be. Though local political processes are far from perfect, the public often pressures local public officials when policing's nonbudgetary costs become extreme, salient, or widespread. Those public officials exert political control over police chiefs and department budgets. And police departments work to lessen the intrusiveness of policing in response. Presently, however, several significant federal programs muddy responsibility for harmful policing by blurring jurisdictional and organizational boundaries between law enforcement agencies. Other major federal programs give equipment, funding, or power directly to police departments rather than municipalities, weakening municipal control over those departments through police budgets and political influence. States provide an additional check on police intrusiveness, but federal public safety programs often weaken this mechanism too.

This Article conceptualizes the harms of police coercion as costs that can be weighed against the benefits of federal interventions into local policing. Thinking about the costs of policing in this way provides a framework for integrating these costs into formal evaluations of federal public safety programs, an approach that is consistent with how other criminal justice policies are evaluated. It also articulates the local political mechanisms that constrain the costs of policing, which is the first step in designing federal programs to avoid disrupting those mechanisms unnecessarily. Unless we approach federal public safety programs with a more complete understanding of policing—one that attends to its costs and systems of accountability—federal programs will continue to promote policing practices that do more harm than necessary and maybe more harm than good.

## I

### THE CHARACTER OF FEDERAL PUBLIC SAFETY PROGRAMS

#### A. *Federal Public Safety Programs in Context*

As a matter of both law and tradition, policing in the United States is overwhelmingly local. The U.S. Constitution reserves general law enforcement power to the states, and by state statute, constitutional law, and charter, states have given municipalities authority to protect public safety and preserve order within their borders.<sup>7</sup> Local

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<sup>7</sup> See *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“[R]egulation and punishment of intrastate violence . . . not directed at . . . interstate commerce has always been the province of the States. . . . Indeed, we can think of no better example of the police power which the Founders denied the National Government . . . than the suppression of

governments in turn create police departments, which employ most of the law enforcement officers in the United States and conduct most of what is thought of as policing, including traffic patrols, crime investigation, order maintenance, criminal arrests, and the like.<sup>8</sup> Though subject to state and federal law, police departments are overwhelmingly funded by local governments and governed by the local political process.<sup>9</sup> Localism may be American policing's most distinctive characteristic,<sup>10</sup> though of course, the federal government has also long influenced the police.

Federal involvement in local policing takes several forms. First, the federal government shares crime and forensic information with local police departments. The Uniform Crime Report program coordinated by the Federal Bureau of Investigation (FBI) is the oldest of these programs. The FBI also offers the National Incident-Based Reporting System (NIBRS), a newer and more detailed local crime reporting mechanism; the National Crime Information Center (NCIC), a computerized index that includes criminal justice information about individuals and property; the traditional Integrated Automated Fingerprint Identification System (IAFIS), a national fingerprint and criminal history system and the Next Generation Identification program that is replacing it; the Combined DNA Index System (CODIS), a national index of DNA profiles; and the National Automotive Paint File, a database containing more than 40,000 samples of automotive paint from manufacturers, among other databases.<sup>11</sup> Other agencies also maintain databases that are available

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violent crime and vindication of its victims.”); *see also* United States v. Lopez, 514 U.S. 549, 567 (1995) (denying that Congress has “a general police power of the sort retained by the States”).

<sup>8</sup> *See* BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, NCJ 231174, LOCAL POLICE DEPARTMENTS, 2007, at 8 (2010), available at [www.bjs.gov/content/pub/pdf/lpd07.pdf](http://www.bjs.gov/content/pub/pdf/lpd07.pdf) (listing the manifold services local police departments provide and stating that they employ 77% of all sworn law enforcement officers with full arrest powers).

<sup>9</sup> *See* JEFFREY L. BARNETT & PHILLIP M. VIDAL, U.S. CENSUS BUREAU, STATE AND LOCAL GOVERNMENT FINANCES SUMMARY: 2011, at 4 (2013) (“Local governments comprised 86.7 percent of the state and local government total spending on police protection.”).

<sup>10</sup> *See* William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 665 (2002) (“The defining characteristic of American criminal law enforcement—the characteristic that most distinguishes it from law enforcement elsewhere in the developed world—is its localism.”).

<sup>11</sup> *See* Robin Bowen & Jessica Schneider, *Forensic Databases: Paint, Shoe Prints, and Beyond*, 258 NAT'L INST. JUST. J. (2007), available at <http://www.nij.gov/journals/258/Pages/forensic-databases.aspx> (describing federal forensic databases and indicating which agencies host them); *Integrated Automated Fingerprint Identification System*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/cjis/fingerprints\\_biometrics/iafis/iafis](http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis) (last visited Mar. 30, 2015) (indicating that Next Generation Identification is replacing the Integrated Automated Fingerprint Identification System).

to local law enforcement. The Bureau of Alcohol, Tobacco, Firearms and Explosives keeps the National Integrated Ballistics Information Network (NIBIN); the Secret Service jointly manages the Forensic Information System for Handwriting and the International Ink Library with the Internal Revenue Service; and an interagency group that includes the Departments of State and Defense runs the Glass Evidence Reference Database.<sup>12</sup>

Second, federal agencies enforce federal law against local police departments. Although criminal procedure rights are largely enforced through private exclusionary rule motions and civil suits, the Department of Justice's Civil Rights Division and U.S. Attorneys' offices also bring civil actions against police departments and criminal prosecutions against individual officers to enforce federal civil rights law regarding police treatment of citizens.<sup>13</sup> Antidiscrimination and labor laws regulate police departments as employers and are often enforced with the help of federal agencies.<sup>14</sup> And the Department of Justice's Criminal Division and U.S. Attorneys' offices pursue occasional federal criminal fraud and bribery charges against police officers as part of their efforts to control public corruption among local officials.<sup>15</sup>

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<sup>12</sup> Bowen & Schenider, *supra* note 11.

<sup>13</sup> See, e.g., 18 U.S.C. § 242 (2012) (prohibiting persons acting under the color of law from willfully depriving a person of his constitutionally or legally protected rights); 42 U.S.C. § 14141 (2012) (authorizing the Department of Justice to sue police departments engaged in patterns or practices of civil rights violations for injunctive relief); see also DISABILITY RIGHTS SECTION, U.S. DEP'T OF JUSTICE, COMMONLY ASKED QUESTIONS ABOUT THE AMERICANS WITH DISABILITIES ACT AND LAW ENFORCEMENT, available at [http://www.ada.gov/qanda\\_law.pdf](http://www.ada.gov/qanda_law.pdf) (last visited Jan. 30, 2015) (stating that law enforcement agencies are prohibited from discriminating against people with disabilities in service provision and law enforcement activities by Title II of the Americans with Disabilities Act); *Conduct of Law Enforcement Agencies*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/spl/police.php> (last visited Jan. 30, 2015) (providing an overview of civil suits against law enforcement agencies for patterns and practices of rights violations); *Criminal Section Selected Case Summaries*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/crm/selcases.php#conduct> (last visited Jan. 30, 2015) (describing criminal cases involving official misconduct by police officers).

<sup>14</sup> See, e.g., Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Sues Maui County Police Department for Age Discrimination (Dec. 18, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/12-18-13.cfm> (describing the Equal Employment Opportunity Commission's age discrimination suit against the county of Maui and noting that it is the federal agency responsible for enforcing federal laws against employment discrimination); *Resources for Workers*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/workers.htm> (last visited Jan. 30, 2015) (indicating that the Department of Labor's Wage and Hour Division enforces "some of the nation's most comprehensive federal labor laws," which collectively cover most state and local government employment).

<sup>15</sup> See, e.g., Maria Newman, *A Virginia Sheriff Is Charged with Selling Drug Evidence*, N.Y. TIMES, Nov. 3, 2006, at A24 (describing a federal indictment against the Henry County, Virginia Sheriff and thirteen current and former officers of the Sheriff's Department for conspiring with drug dealers to sell Ketamine, cocaine, and other drugs seized from criminals); Sarah Larimer, *Sledgehammers, Threats and Stolen Designer Suits*:

This Article addresses a third kind of federal involvement in local policing, one that operates on a far larger scale than civil rights enforcement, employee rights litigation, public corruption prosecutions, or national forensic databases: the dozens of federal statutes that authorize federal agencies to give money, equipment, and power to local law enforcement agencies and officers. These programs developed piecemeal over several decades, and they are diverse in scope, concern, and form. Nevertheless, these programs share a core set of means and ends. They seek to improve public safety by expanding local law enforcement, by focusing local law enforcement on national priorities, and by improving coordination among federal, state, and local law enforcement agencies. To reach these goals, these programs provide federal resources and federal power to local police officers and departments.

Federal public safety programs intended to influence local policing have a history closely connected to the story of federal law enforcement expansion. It is well known that, in the 1930s, Congress responded to widespread concern about organized and interstate violent crime with new federal crimes and a much larger federal law enforcement bureaucracy.<sup>16</sup> Less commonly recognized is that at the same time the federal government expanded federal law enforcement effort, it also began to bolster local crime fighting capabilities.

Local policing in the 1930s had a national problem. By the early 1930s, federal law enforcement had, to a large degree, recovered from the disastrous reputational consequences of failed Prohibition policies. By contrast, local law enforcement was widely perceived as incompetent, if not corrupt. One can see that conventional wisdom

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*Breaking Down the Philadelphia Police Corruption Case*, POST NATION (July 31, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/07/31/sledgehammers-threats-and-stolen-designer-suits-breaking-down-the-philadelphia-police-corruption-case> (describing a twenty-six count federal indictment against six former members of the Philadelphia Police Department's Narcotics Field Unit for racketeering, robbery, and extortion over several years).

<sup>16</sup> See, e.g., CLAIRE BOND POTTER, *WAR ON CRIME: BANDITS, G-MEN, AND THE POLITICS OF MASS CULTURE* 1–2 (1998) (suggesting that the emergence of organized criminality linked to violent interstate crimes contributed to a desire for, and a rise in, national policing and federal crime control); SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 160 (2d ed. 1998) (noting that a series of federal laws in the 1930s significantly expanded the Federal Bureau of Investigation's (FBI) jurisdiction); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, in 34 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 377, 385–88 (Michael Tonry ed., 2006) (describing a surge in congressional enactments targeting criminal behavior that enlarged the purview of federal law enforcement); see also Athan G. Theoharis, *A Brief History of the FBI's Role and Powers*, in *THE FBI: A COMPREHENSIVE REFERENCE GUIDE* 1, 4 (Athan G. Theoharis ed., 1999) (providing statistics that demonstrate a significant increase in FBI agents and budget in the late 1930s).

reflected in the Wickersham Commission's report, *The Police*, in 1931.<sup>17</sup> President Herbert Hoover appointed the National Commission on Law Observance and Enforcement, better known by the name of its chair, George W. Wickersham, in 1929. The Commission was the first national task force to study law enforcement issues, and it released fourteen reports on crime, law enforcement, and the institutions of criminal justice, two of which concerned policing.<sup>18</sup> The Commission's more famous and influential report on policing, *The Third Degree*, made its contribution in large part by providing detailed evidence of widespread abuse in local police interrogations.<sup>19</sup> By contrast, *The Police*, the Commission's volume on police effectiveness, started from the premise—which it took to need no support—that local police could not protect public safety. According to the first words of the Commission's transmitting report, “[T]he general failure of the police to detect and arrest criminals guilty of the many murders, spectacular bank, pay-roll, and other hold-ups, and sensational robberies with guns, frequently resulting in the death of the robbed victim, has caused a loss of public confidence in the police of our country.”<sup>20</sup> From there, the report examined means to improve local policing, taking for granted that most departments were so badly run that they could not effectively fight crime.<sup>21</sup>

Law enforcement's reputation for ineptitude was spectacularly reinforced in 1932 by the ineffectual response to the kidnapping of Charles Lindbergh's baby, which led to contamination of the crime scene and civilian interference that stymied the investigation.<sup>22</sup>

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<sup>17</sup> NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, No. 14, REPORT ON POLICE (1931).

<sup>18</sup> See Russ Immarigeon, *Wickersham Commission*, in 4 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1708 (David Levinson ed., 2002) (detailing the subjects of the Wickersham reports).

<sup>19</sup> See NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, No. 11, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 1 (1931) (noting in its first line that “[t]he widest inquiry into the shortcomings of the administration of justice . . . necessarily involves the duty of investigating the justice of complaints, often made, that in their zeal to accomplish results Government officials . . . frequently lose sight of the fact that they are servants of the law, subject to its mandates”); *id.* at 38–152 (summarizing evidence on the use of abusive interrogation tactics). Even thirty years later, the report provided one of the only credible accounts of law enforcement misconduct. See *Miranda v. Arizona*, 384 U.S. 436, 447 (1966) (citing Wickersham Commission to bolster the Court's assessment of the prevalence of aggressive custodial interrogation techniques).

<sup>20</sup> NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, *supra* note 17, at 1.

<sup>21</sup> *Id.*

<sup>22</sup> Both state and local law enforcement were involved in the investigation. See SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM 152 (1977) (noting the significance of the Lindbergh baby kidnapping in justifying the expanded role for federal government in fighting crime after 1932).

Together, the Commission report and the Lindbergh kidnapping highlighted—the former in analytic and the latter in emotional terms—that local police departments could not control the criminal problems of the day, especially the challenges posed by organized interstate crime.

Congress authorized several new federal programs over the course of the 1930s to mitigate this municipal inefficiency. These federal efforts involved little money. The George-Deen Act and the Works Progress Administration (WPA) together provided a few million dollars in research and training money to police departments,<sup>23</sup> and the FBI used a little money informally to incentivize local cooperation with federal enforcement.<sup>24</sup> But despite early calls for using conditional grants to influence local police work,<sup>25</sup> early public safety programs largely worked through the FBI to provide technical assistance and interstate coordination to police departments, rather than giving financial aid. Thus, the FBI began collecting crime data for the Uniform Crime Reports in 1930.<sup>26</sup> In 1935, it started the National Police Academy, now called the National Academy, which provided a centralized source of training for local police officers from around the country<sup>27</sup> and became an unobtrusive way to promote federal priorities in local law enforcement.<sup>28</sup> By the end of the decade, the FBI was

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<sup>23</sup> *Id.* at 142, 163. Between its start in 1935 and its peak in 1938, the Works Progress Act provided grants of more than \$1 million for dozens of police-related research projects around the country. *Id.* at 142. This represented a tiny proportion of WPA and other Emergency Relief Appropriations Act funds, which amounted to almost \$5 billion in 1935 alone. See *Giant Relief Drive Pictured in Report*, N.Y. TIMES, Sept. 27, 1936, at N1 (summarizing appropriations and expenditures under the Emergency Relief Appropriations Act in 1935). The George-Deen Act of 1936 authorized funds by the Department of Education for vocational training, including the training of police officers, and in 1937, grants for police training amounted to over \$4 million. WALKER, *supra* note 22, at 163.

<sup>24</sup> See Richman, *supra* note 16, at 388 (citing POTTER, *supra* note 16, at 194) (noting that the FBI sometimes paid money rewards for local police cooperation).

<sup>25</sup> See, e.g., Paul H. Sanders, *Federal Aid for State Law Enforcement*, 1 LAW & CONTEMP. PROBS. 472, 472–73 (1934) (calling for federal grants as a means to improve local law enforcement and local cooperation with federal law enforcement).

<sup>26</sup> WALKER, *supra* note 22, at 143; see also WALKER, *supra* note 16, at 161–62 (describing FBI control of newly instituted Uniform Crime Reports).

<sup>27</sup> The Academy was created in response to the Wickersham Commission's recommendation that police departments receive more centralized training to increase standardization and professionalization of law enforcement throughout the country. See Homer Cummings, *Progress Toward a Modern Administration of Criminal Justice in United States*, 22 A.B.A. J. 345, 348 (1936) (announcing, in an address by the Attorney General of the United States, efforts to improve local law enforcement and increase federal, state, and local cooperation, including the creation of a school to offer FBI instruction to experienced police officers from around the country).

<sup>28</sup> During World War II, for example, this meant teaching local police about espionage and sabotage. Today, the curriculum includes terrorism and understanding the terrorist

offering a variety of services to assist local law enforcement, such as comparing fingerprints from crime scenes to federal databases, examining forensic evidence collected in local crimes, and providing information on previously arrested criminals.<sup>29</sup>

While federal technical assistance and training opportunities for local law enforcement continue to this day, over time these early programs have been dwarfed by programs that provide resources and power to local policing more directly. This project began in earnest in the 1960s when intensifying public concern about crime led to the Law Enforcement Assistance Act of 1965 (LEAA) and the Omnibus Crime Control and Safe Streets Act of 1968.<sup>30</sup> Together, these statutes provided the first substantial federal financial assistance to local law enforcement, in the form of flexible block grants to states, intended to improve public safety simply by increasing the resources available to state and local law enforcement agencies.<sup>31</sup>

As others have noted, intergovernmental grants to local police departments have waxed and waned with public perceptions about crime and public safety.<sup>32</sup> In short, the block grants of the 1960s faded during the late 1970s in the face of criticisms of their effectiveness and a declining national focus on crime.<sup>33</sup> By the late 1980s, Congress responded to national concern about rising crime with the Edward Byrne Memorial State and Local Law Enforcement Assistance

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mindset. See *The National Academy*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/training/national-academy> (last visited Jan. 31, 2015) (describing the history of the National Academy, including some of the subjects taught).

<sup>29</sup> See ARTHUR C. MILLSPAUGH, BROOKINGS INST., CRIME CONTROL BY THE NATIONAL GOVERNMENT 90–94 (1937) (describing the creation of the FBI national fingerprint database in 1933 and noting that fingerprints were provided by and shared with local police departments); *id.* at 94–97 (describing the creation of FBI forensics laboratory, the services of which were “available to and . . . utilized by state and local police departments”).

<sup>30</sup> See DAVID TEASLEY, CONG. RESEARCH SERV., IB90078, CRIME CONTROL: THE FEDERAL RESPONSE 2 (2001) (describing origins of Omnibus Crime bill of 1968 and creation of Law Enforcement Assistance Act of 1965 (LEAA)); MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION 3–4, 40–49 (1980) (same); WALKER, *supra* note 22, at 126 (describing the growing national concern about crime).

<sup>31</sup> See CONG. BUDGET OFFICE, TRENDS IN FEDERAL SPENDING FOR THE ADMINISTRATION OF JUSTICE 9 (1996) (indicating spending on criminal justice assistance to state and local governments rising from zero in 1962 to \$65 million in 1970); TEASLEY, *supra* note 30, at 2 (describing origins and purpose of LEAA and the Omnibus Crime Control and Safe Streets Act of 1968); Richman, *supra* note 16, at 390–91 (describing the impact of the LEAA).

<sup>32</sup> See Richman, *supra* note 16, at 392–407 (describing the rise and fall of various federal programs in response to perceptions about crime).

<sup>33</sup> See TEASLEY, *supra* note 30, at 3 (noting that critics complained that LEAA “funds were misused and . . . had no visible impact on crime”).

Formula Grant Program,<sup>34</sup> and then more dramatically to the crack epidemic and associated violent crime with the largest crime bill in history, the Violent Crime Control and Law Enforcement Act of 1994.<sup>35</sup> This latter law authorized \$10.8 billion over six years for programs to assist state and local law enforcement. Congress dedicated the bulk of that money, \$8.8 billion, to fulfill President Clinton's pledge to provide for 100,000 new police officers through the COPS program.<sup>36</sup>

Eventually, like the funding of the 1960s, the monumental funding of the 1990s generated a backlash, and by 2000, some of the key programs of the 1990s decade, such as the COPS Hiring Program (CHP), faced fading support and resources.<sup>37</sup> In 2001, however, after 9/11, terrorism emerged to replace violent crime and crack as a national public safety crisis that justified reenergizing federal funding to local police. Grants of aid once again expanded radically, with tens

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<sup>34</sup> See NATHAN JAMES, CONG. RESEARCH SERV., RS22416, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM: LEGISLATIVE AND FUNDING HISTORY 1–2 (2008) (describing the Byrne Grant program and noting that it represented increased support for local and state law enforcement in response to more rampant crime).

<sup>35</sup> See NATHAN JAMES, CONG. RESEARCH SERV., RL33308, COMMUNITY ORIENTED POLICING SERVICES (COPS): BACKGROUND, LEGISLATION, AND FUNDING 1–3 (2011) (describing the Community Oriented Policing Services (COPS) program and noting that it was created by Title I of the Violent Crime Control and Law Enforcement Act of 1994 to advance community policing across the United States).

<sup>36</sup> U.S. DEP'T OF JUSTICE, VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, FACT SHEET (1994), available at <https://www.ncjrs.gov/txtfiles/billfs.txt>; see also TEASLEY, *supra* note 30, at 5 (describing the Violent Crime Control and Law Enforcement Act of 1994). In an amendment to the 1994 Act a year later, Congress also launched the Local Law Enforcement Block Grants (LLEBG) Program, which provided funding to local units of government based on the number of violent crimes in the jurisdiction. John L. Worrall, *Do Federal Law Enforcement Grants Reduce Serious Crime?*, 21 CRIM. JUST. POL'Y REV. 459, 461 (2010). Between 1997 and 2001, Congress dedicated an average of nearly \$500 million per year to the LLEBG Program. See David Lilley & Rachel Boba, *A Comparison of Outcomes Associated with Two Key Law-Enforcement Grant Programs*, 19 CRIM. JUST. POL'Y REV. 438, 440 tbl.1 (2008) (providing annual payment amounts under the LLEBG from 1996 to 2001). In 2005, the LLEBG Program was combined with Byrne Grants into a program now usually referred to as the Justice Assistance Grant Program or the Byrne Justice Assistance Grant (Byrne JAG) Program. MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, NCJ 209333, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, 2005, at 1 (2005).

<sup>37</sup> See NATHAN JAMES, CONG. RESEARCH SERV., RL33308, COMMUNITY ORIENTED POLICING SERVICES (COPS): BACKGROUND AND FUNDING 3, 5 (2013) (noting that COPS Hiring Program (CHP) grants decreased after 2002, though funding for all COPS programs increased in 2009 and 2010 with the American Recovery and Reinvestment Act of 2009, responding to the recession, and decreased in 2011 and 2012); NATHAN JAMES, CONG. RESEARCH SERV., RS22416, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM 6 tbl.1 (2013) (showing a downward trend for spending on various versions of block and formula grant programs from 1998 to 2012).

of billions of dollars spent on new programs for local law enforcement.<sup>38</sup>

Federal public safety programs continue to evolve. Today, they provide not only money, but also equipment and federal power to local law enforcement.<sup>39</sup> They emphasize interstate coordination, fighting terrorism and the war on drugs, and many other goals. They originate not only in the Department of Justice but also in the Departments of Defense, Homeland Security, Treasury, and Agriculture. Together, these federal public safety programs represent a massive intervention into local law enforcement, one that has not been sufficiently assessed.<sup>40</sup>

### B. *The Goals of Federal Public Safety Programs*

There are two basic questions raised by federal public safety programs: Do they serve appropriate ends, and do they serve them well? The second question is the focus of this Article, and in Parts II and III, I argue that federal programs may not promote efficient and cost-effective policing because they neglect the costs of police coercion and the effects of federal programs on local accountability in policing. In this section, I briefly address the first question by noting that these programs overwhelmingly target plausible shortcomings in local political processes, which may systematically fail to produce optimal

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<sup>38</sup> See SHAWN REESE, CONG. RESEARCH SERV., R40246, DEPARTMENT OF HOMELAND SECURITY ASSISTANCE TO STATES AND LOCALITIES: A SUMMARY AND ISSUES FOR THE 111TH CONGRESS 1, 4–5, 21 tbl.5 (2009) (describing grants and showing funding since the 2002 fiscal year).

<sup>39</sup> While this Article emphasizes federal public safety programs that fuel additional local law enforcement, federal/local interaction is often instead in the form of federal investigation and prosecution of locally investigated crime. For a discussion of that phenomenon and its federalism implications, see Richman, *supra* note 16, at 382–415.

<sup>40</sup> In the past decade, a few scholars have considered federal intervention in local law enforcement more carefully, highlighting especially the effects of federal policy on federalism. Most cogently, Dan Richman has described the impact on federal, state, and local relations of federal support for antiterrorism efforts and violent crime enforcement. Richman, *supra* note 16. Michael O’Hear has considered the impact of federal involvement in local drug enforcement. Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783 (2004); see also Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 40–41 (1998) (arguing that the drug war has distorted criminal justice goals and undermined legislative oversight). Matthew Waxman has explored the influence of federal law promoting intelligence gathering by local police departments for national security purposes. Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT’L SEC. L. & POL’Y 377 (2009). Additional articles have considered the federalism implications of greater local police involvement in enforcing federal immigration law. E.g., Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87 (2013); David Alan Sklansky, *Crime, Immigration and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012).

amounts or kinds of local policing. Whether or not every program is justified, public safety programs on the whole seek to solve possible problems with the local provision of policing services.

First, local governments may simply produce too little policing from an efficiency standpoint.<sup>41</sup> If they do, something like the present “cornerstone [of] federal justice assistance,” the Department of Justice’s Byrne JAG grants, could help correct the problem.<sup>42</sup> This block grant program permits funding with few restrictions to local governments—and to states to pass through to localities—in order to reduce crime and violence.<sup>43</sup> It provides hundreds of millions of dollars for law enforcement purposes determined by states and local communities.<sup>44</sup>

Second, even if policing were adequately provided overall, small and poorer communities might not be able to provide sufficient resources to establish effective police departments. This economic

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<sup>41</sup> See Julian Le Grand, *The Theory of Government Failure*, 21 BRIT. J. POL. SCI. 423, 433 (1991) (noting that monopoly provision of government services can result in less being provided than is allocatively efficient); Vincent Ostrom & Elinor Ostrom, *Public Goods and Public Choices*, in POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES 75, 90 (Michael D. McGinnis ed., 1978) (“[O]ptimal levels of expenditure are difficult to establish[, thus] the provision of public goods can be easily overfinanced or underfinanced.”); Charles Wolf, Jr., *Market and Non-Market Failures: Comparison and Assessment*, 7 J. PUB. POL’Y 43, 58 (1987) (describing how the possibility of free-riding for a public good and high time-discounts of political actors can lead to less than optimal allocation of resources for public goods).

<sup>42</sup> NAT’L CTR. FOR JUSTICE PLANNING, NAT’L CRIMINAL JUSTICE ASSOC., CORNERSTONE FOR JUSTICE: BYRNE JAG AND ITS IMPACT ON THE CRIMINAL JUSTICE SYSTEM 2 (2011); see also BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, EDWARD BYRNE JUSTICE ASSISTANCE GRANT (JAG) PROGRAM FACT SHEET 1 (2014), available at [https://www.bja.gov/Publications/JAG\\_Fact\\_Sheet.pdf](https://www.bja.gov/Publications/JAG_Fact_Sheet.pdf) (describing the Byrne Justice Assistance Grant program).

<sup>43</sup> In classifying federal grant programs, it is useful to distinguish between “[c]ategorical grants [that] have a narrowly defined purpose and may be awarded on a formula basis or as a project grant” and “block grants [that] provide the recipient with more latitude to define the use of the funding and are awarded on a formula basis specified in law.” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2015, at 243 (2014), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/topics.pdf>. The Byrne JAG program is the primary block grant program for local law enforcement. The other grant programs described in this Article are categorical grants. Although the conditions on JAG funding are few, there are some. For instance, the Sex Offender Registration and Notification Act, part of the Adam Walsh Child Protection and Safety Act of 2006, mandates a 10% reduction in JAG funding for states that fail to implement the Act. BUREAU OF JUSTICE ASSISTANCE, *supra* note 42, at 2.

<sup>44</sup> See NAT’L CTR. FOR JUSTICE PLANNING, *supra* note 42, at 1–2 (describing JAG grants and indicating funding of approximately \$500 million per year). Created in 2006, the Byrne JAG Program replaced various prior block grant programs administered by the department for similar purposes. See HICKMAN, *supra* note 36, at 1 (describing the origins of the Byrne JAG program).

argument, along with distributional concerns, appears to motivate several programs across federal agencies. In the Department of Justice, the CHP has awarded billions of dollars since the mid-1990's to police departments facing financial distress and high crime rates to permit hiring local police officers.<sup>45</sup> The Department of Agriculture's Rural Development Community Facility Grants offer grants of up to seventy-five percent of the cost of building or buying facilities, such as police stations, exclusively for rural municipalities.<sup>46</sup> Other Department of Justice grant programs dedicate resources specifically to tribal law enforcement, and the Coordinated Tribal Assistance Solicitation process streamlines application for tribal-specific grant resources devoted to law enforcement and criminal justice.<sup>47</sup> The Department of Homeland Security also provides millions of dollars in grants each year to improve tribal agencies' ability to respond to terrorism threats.<sup>48</sup>

Third, some federal programs target spillover effects. Several federal programs facilitate local policing of interstate public safety

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<sup>45</sup> At its inception, the program emphasized community-oriented policing as well as hiring more officers, but over time, that focus has faded, and with it the number of officers dedicated to community policing. See REAVES, *supra* note 8, at 29 (noting the decline in the use of community police officers in all categories of departments between 2000 and 2003 and in some categories of departments—especially smaller departments—between 2003 and 2007).

<sup>46</sup> See 7 U.S.C. § 1926(a)(19) (2012) (authorizing the program and stating limits); 7 C.F.R. § 3570(B) (2012) (describing the program); see also *Community Facilities Direct Loan & Grant Program*, U.S. DEP'T OF AGRIC., [http://www.rurdev.usda.gov/had-cf\\_grants.html](http://www.rurdev.usda.gov/had-cf_grants.html) (last visited Feb. 2, 2015) (describing the program); Kevin Johnson, *Rural Community Facilities Program is a Lifeline*, USA TODAY (May 18, 2011), [http://usatoday30.usatoday.com/news/washington/2011-05-17-Agriculture-Department-funds-rural-towns-budget\\_n.htm](http://usatoday30.usatoday.com/news/washington/2011-05-17-Agriculture-Department-funds-rural-towns-budget_n.htm) (describing the significance of the program to local communities and indicating that over five years, between 2006 and 2011, it provided for, among other things, more than 1200 police cars).

<sup>47</sup> See U.S. DEP'T OF JUSTICE, FY 2014 BUDGET REQUEST: PUBLIC SAFETY IN INDIAN COUNTRY, available at <http://www.justice.gov/jmd/2014factsheets/indian-country.pdf> (describing special needs of tribal law enforcement agencies and summarizing the range of federal programs with funding targeted at aiding law enforcement in tribal nations).

<sup>48</sup> See, e.g., *FY 2010 Tribal Homeland Security Grant Program*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/fy-2010-tribal-homeland-security-grant-program> (last updated July 24, 2014) (describing the Tribal Homeland Security Grant Program (THSGP) and noting the total funding available for the 2010 fiscal year was up to \$10 million); *FY 2013 Tribal Homeland Security Grant Program*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/fy-2013-tribal-homeland-security-grant-program-thsgp-0> (last updated July 24, 2014) (stating the total funding available for the 2013 fiscal year THSGP was \$10 million); *FY 2014 Tribal Homeland Security Grant Program*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/fy-2014-tribal-homeland-security-grant-program-thsgp> (last updated July 25, 2014) (stating the total funding available for the 2014 fiscal year THSGP was \$10 million); see also 6 U.S.C. § 606 (2012) (authorizing congressionally direct grants to eligible tribes).

threats, which otherwise may be suboptimal.<sup>49</sup> The Department of Justice administers, inter alia, Project Safe Neighborhoods, which targets gun and gang crime; the Intellectual Property Theft Enforcement Program, which seeks to increase local criminal enforcement of intellectual property laws; the COPS Anti-Methamphetamine Program (replacing the Methamphetamine Initiative); and the Child Sexual Predator Program.<sup>50</sup> The Department of Homeland Security has provided nearly \$40 billion in terrorism preparedness grants to state and local governments since 9/11, much of it exclusively for law enforcement.<sup>51</sup> The Department of Defense's Excess Property Program, usually referred to as the 1033 Program, gives surplus Department of Defense military equipment free of charge to state and local

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<sup>49</sup> See, e.g., Ostrom & Ostrom, *supra* note 41, at 96 (noting that "a highly fragmented political system without substantial overlap among the many jurisdictions" is vulnerable to some jurisdictions seeking to derive the benefits of the public goods without fairly contributing to paying their share of the costs).

<sup>50</sup> See SUMMER BRENWALD & CHRISTINE NORTON, U.S. DEP'T OF JUSTICE, PROGRAM PERFORMANCE REPORT: INTELLECTUAL PROPERTY THEFT ENFORCEMENT PROGRAM (IPEP) 1 (2013) (describing the program and noting that it funds task forces); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, BJA-2015-4047, VIOLENT GANG AND GUN CRIME REDUCTION PROGRAM (PROJECT SAFE NEIGHBORHOODS) FY 2015 COMPETITIVE GRANT ANNOUNCEMENT 4 (2014) (describing the program); OFFICE OF AUDIT, ASSESSMENT & MGMT., U.S. DEP'T OF JUSTICE, THE COPS OFFICE MANAGEMENT OF THE METHAMPHETAMINE INITIATIVE 2-4 (2012) (noting that funding went to local law enforcement for multijurisdictional task forces); OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, FACT SHEET: 2014 COPS ANTI-METHAMPHETAMINE PROGRAM 1-2 (2014), available at [http://cops.usdoj.gov/pdf/2014AwardDocs/CAMP/2014\\_CAMP\\_FactSheet.pdf](http://cops.usdoj.gov/pdf/2014AwardDocs/CAMP/2014_CAMP_FactSheet.pdf) (noting that grants go to states for multijurisdictional task forces); OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, FACT SHEET: CHILD SEXUAL PREDATOR PROGRAM: PROTECTING COMMUNITIES AND AMERICA'S CHILDREN FROM PREDATORS 1 (2010) (noting that the program is intended to improve coordination and favors multijurisdictional task forces).

<sup>51</sup> See *Managing Preparedness Grants and Assessing National Capabilities: Continuing Challenges Impede FEMA's Progress: Testimony Before the Subcomm. on Emergency Preparedness, Response & Commc'ns of the H. Comm. on Homeland Sec.*, 112th Cong. 1 (2012) (statement of William O. Jenkins, Jr., Dir., Homeland Sec. & Justice, Gov't Accountability Office) (indicating that between 2002 and 2011, the Department of Homeland Security gave away more than \$37 billion in preparedness grants); U.S. DEP'T OF HOMELAND SEC., FY 2012 HOMELAND SECURITY GRANT PROGRAM (HSGP) FACT SHEET 1 (2012), available at [http://www.fema.gov/media-library-data/20130726-1840-25045-5504/fy\\_2012\\_hsgp\\_program\\_fact\\_sheet\\_062612\\_clean\\_1.pdf](http://www.fema.gov/media-library-data/20130726-1840-25045-5504/fy_2012_hsgp_program_fact_sheet_062612_clean_1.pdf) (indicating \$830,976,000 in preparedness grants); U.S. DEP'T OF HOMELAND SEC., FY 2013 HOMELAND SECURITY GRANT PROGRAM (HSGP) FACT SHEET 1 (2013), available at [http://www.fema.gov/media-library-data/8d0439562c89644a68954505a49cbc77/FY\\_2013\\_Homeland+Security+Grant+Program\\_Fact\\_Sheet\\_Final.pdf](http://www.fema.gov/media-library-data/8d0439562c89644a68954505a49cbc77/FY_2013_Homeland+Security+Grant+Program_Fact_Sheet_Final.pdf) (indicating \$968,389,689 in preparedness grants); U.S. DEP'T OF HOMELAND SEC., FY 2014 HOMELAND SECURITY GRANT PROGRAM (HSGP) FACT SHEET 1 (2014), available at [https://s3-us-gov-west-1.amazonaws.com/dam-production/uploads/1406300389096-4a90f0348040a8210de9854d8f597edf/HSGP\\_Fact\\_Sheet\\_Final.pdf](https://s3-us-gov-west-1.amazonaws.com/dam-production/uploads/1406300389096-4a90f0348040a8210de9854d8f597edf/HSGP_Fact_Sheet_Final.pdf) (indicating \$1,043,346,000 in preparedness grants).

law enforcement agencies for use in counternarcotics and counterterrorism activities.<sup>52</sup>

Federal programs also target cross-border crime by supporting coordination among law enforcement agencies. Byrne JAG grants fund multijurisdictional task forces, especially drug task forces.<sup>53</sup> The Violent and Gun Crime Reduction Program, also known as Project Safe Neighborhoods, provides grants expressly for the purpose of establishing multijurisdictional Violent Gang Safe Streets Task Forces “to implement gang and gun crime enforcement, intervention and prevention initiatives.”<sup>54</sup> The Enhanced Collaborative Model to Combat Human Trafficking and the Anti-Human Trafficking Task Force Initiative provide funding to local police departments that coordinate with other law enforcement agencies to fight human trafficking.<sup>55</sup> The Department of Homeland Security’s Operation Stonegarden exists “to enhance cooperation and coordination among local, tribal, territorial, state, and Federal law enforcement agencies in a joint mission to secure the United States’ borders.”<sup>56</sup> The U.S. Immigration and Customs Enforcement (ICE) Border Enforcement Security Task Force program funds task forces to disrupt border-related criminal activity, including trafficking in drugs, people, weapons, and cash.<sup>57</sup> And the Office of National Drug Control Policy awards grants to law enforcement agencies to encourage cooperation among federal, state, and

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<sup>52</sup> See 10 U.S.C. § 2576a (2012) (giving program authority to the Department of Defense). The program does require that the local departments pay for transportation and shipping costs. *Id.* § 2576a(b)(3). These programs are illustrative, not exhaustive.

<sup>53</sup> See NAT’L CTR. FOR JUSTICE PLANNING, *supra* note 42, at 5 (indicating that more than half of Byrne JAG funding goes to law enforcement and that a majority of those funds are used by local law enforcement agencies for task forces).

<sup>54</sup> BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, BJA-2013-3476, VIOLENT GANG AND GUN CRIME REDUCTION PROGRAM (PROJECT SAFE NEIGHBORHOODS) FY 2013 COMPETITIVE GRANT ANNOUNCEMENT 4 (2013). Project Safe Neighborhoods has transitioned from a formula grant to a competitive grant program in recent years. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, BJA-2014-3810, VIOLENT GANG AND GUN CRIME REDUCTION PROGRAM (PROJECT SAFE NEIGHBORHOODS) FY 2014 COMPETITIVE GRANT ANNOUNCEMENT 4 (2014).

<sup>55</sup> OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, BJA-2013-3482, ENHANCED COLLABORATIVE MODEL TO COMBAT HUMAN TRAFFICKING FY 2013 COMPETITIVE GRANT ANNOUNCEMENT 4-11 (2013); *Anti-Human Trafficking Task Force Initiative*, BUREAU OF JUSTICE ASSISTANCE, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=51#horizontalTab6](https://www.bja.gov/ProgramDetails.aspx?Program_ID=51#horizontalTab6) (last visited Feb. 8, 2015).

<sup>56</sup> *FY 2014 Homeland Security Grant Program*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/fy-2014-homeland-security-grant-program-hsgp> (last updated July 25, 2014).

<sup>57</sup> See *Border Enforcement Security Task Force (BEST)*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/best> (last visited Feb. 8, 2015) (describing the program’s origins, authorization, and activities).

local law enforcement agencies in order to reduce drug trafficking and production in the United States.<sup>58</sup>

The existing array of federal public safety programs is not a perfect means to achieve the right kind or right amount of policing. Federal programs may be excessive relative to the problems that purportedly justify them, either because they misestimate the local political failure or because they are poorly managed.<sup>59</sup> Many of the programs lack appropriate outcome measures, so we cannot easily determine whether they are achieving their public safety ends.<sup>60</sup> More

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<sup>58</sup> *High Intensity Drug Trafficking Areas (HIDTA) Program*, OFFICE OF NAT'L DRUG CONTROL POLICY, <http://www.whitehouse.gov/ondcp/high-intensity-drug-trafficking-areas-program> (last visited Feb. 8, 2015). The Department of Justice also coordinates and funds the Internet Crimes Against Children Task Force Program, which helps local agencies coordinate efforts to respond to child pornography and online victimization. See *The Internet Crimes Against Children Task Force Program*, ICAC TASK FORCE, <https://www.icactaskforce.org/Pages/ICACTFP.aspx> (last visited Feb. 11, 2015) (describing the program).

<sup>59</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-1016, GRANTS TO STATE AND LOCAL GOVERNMENTS: AN OVERVIEW OF FEDERAL FUNDING LEVELS AND SELECTED CHALLENGES 15–16 (2012) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE, GRANTS TO STATE AND LOCAL GOVERNMENTS], available at <http://www.gao.gov/assets/650/648792.pdf> (describing some common weaknesses in federal grant program implementation). For instance, both the Department of Justice and the Department of Homeland Security have been criticized by the U.S. Government Accountability Office for providing funds from different grant programs to the same fund recipients for the same purposes. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-342SP, 2012 ANNUAL REPORT: OPPORTUNITIES TO REDUCE DUPLICATION, OVERLAP AND FRAGMENTATION, ACHIEVE SAVINGS, AND ENHANCE REVENUE 121 (2012), available at <http://www.gao.gov/assets/590/588818.pdf> (noting that jurisdictions often receive funding under both the Urban Areas Security Initiative and State Homeland Security Program); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-517, JUSTICE GRANT PROGRAMS: DOJ SHOULD DO MORE TO REDUCE THE RISK OF UNNECESSARY DUPLICATION AND ENHANCE PROGRAM ASSESSMENT 40 (2012), available at <http://www.gao.gov/assets/600/592361.pdf> (noting that inadequate procedures for identifying and mitigating duplication have led to overlapping grants to the same recipients).

<sup>60</sup> Policing performance can be hard to measure. See ROBERT C. DAVIS, SELECTED INTERNATIONAL BEST PRACTICES IN POLICE PERFORMANCE MEASUREMENT 3 (2012), available at [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2012/RAND\\_TR1153.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1153.pdf) (“[B]ecause outcomes are influenced by factors outside the control of the police, they . . . measure what the police do in a very imperfect manor[ ] [sic].”); see also Wolf, *supra* note 41, at 60 (“Non-market outputs are often hard to define in principle, ill-defined in practice, and extremely difficult to measure as to quantity, or to evaluate as to quality.”). Federal programs that support policing have struggled with developing appropriate measures of performance. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-303, HOMELAND SECURITY: DHS NEEDS BETTER PROJECT INFORMATION AND COORDINATION AMONG FOUR OVERLAPPING GRANT PROGRAMS 30–31 (2012) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE, HOMELAND SECURITY], available at <http://www.gao.gov/assets/590/588960.pdf> (criticizing the absence of effective performance measures for State Homeland Security Program and Urban Areas Security Initiative); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-87, RECOVERY ACT: DEPARTMENT OF JUSTICE COULD BETTER ASSESS JUSTICE ASSISTANCE GRANT PROGRAM IMPACT 33 (2010), available at <http://www.gao.gov/assets/320/311401.pdf> (indicating that even improved

importantly, existing programs leave many of the most significant problems in local policing untouched. Beyond the usual requirements for monitoring spending and complying with federal antidiscrimination law,<sup>61</sup> federal public safety programs do little to promote lawfulness, accountability, or fairness in policing, a lacuna I have suggested should change.<sup>62</sup> Aside from a few small endeavors, federal programs have not sought to improve departmental management.

Notwithstanding these deficiencies and excesses, however, the current landscape is this: Dozens of federal statutes authorize federal agencies to give resources and power in order to compensate for what are at least plausible gaps in local provision of optimal policing.<sup>63</sup>

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Byrne JAG grant performance measures were unclear, poorly linked with program goals, unreliable, and/or unmeasurable).

<sup>61</sup> See, e.g., Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 44 C.F.R. § 13 (2010); OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, COPS FY2013 APPLICATION GUIDE: COPS HIRING PROGRAM (CHP) 12 (2013), available at <http://www.cops.usdoj.gov/pdf/2013AwardDocs/CHP/2013-CHP-AppGuide.pdf> (describing legal constraints on grant recipients); U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2014: DHS STANDARD TERMS AND CONDITIONS (2013), available at <http://www.dhs.gov/sites/default/files/publications/Proposed%20FY%2014%20Standard%20TC%202013-12-04.pdf> (enumerating various spending and antidiscrimination requirements). For general requirements on grants, see the Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified as amended in scattered sections of 31 U.S.C.).

<sup>62</sup> See Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 55-56 (2012) [hereinafter Harmon, *Limited Leverage*] (arguing that federal funding could be used to subsidize reform that prevents misconduct and reward chiefs who promote reform). There are exceptions. For example, the Violence Against Women Act (VAWA) Arrest Program encourages additional policing of domestic violence, stalking, and other crimes to compensate for local inadequate attention to violence against women, a fairness issue. See 42 U.S.C. §§ 3796hh to 3796hh-4 (2012) (authorizing the Arrest Program grants and stating its purpose). Moreover, though most COPS funding has gone to hiring grants, another function of the COPS office and program has been to promote community policing. See Bernard K. Melekian, *Policing in the New Economy: A New Report on the Emerging Trends from the Office of Community Oriented Policing Services*, POLICE CHIEF, Jan. 2012, at 18 (acknowledging that the COPS office is primarily viewed as a hiring agency because of its funding for additional police officers, but noting that it also has advanced community policing through training, technical assistance, and information dissemination). The most significant recent COPS initiative is the Collaborative Reform Initiative for Technical Assistance Program, which provides a cooperative mechanism for achieving reform to promote civil rights and public trust. CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, COLLABORATIVE REFORM INITIATIVE FOR TECHNICAL ASSISTANCE (2015), available at [http://www.cops.usdoj.gov/pdf/2015AwardDocs/crita/CRI-TA\\_one-pager.pdf](http://www.cops.usdoj.gov/pdf/2015AwardDocs/crita/CRI-TA_one-pager.pdf). But this program is as of yet very small. *The COPS Office Is Pleased to Announce the Awarding of Nearly \$5 Million for the FY 2014 Collaborative Reform Initiative for Technical Assistance Program*, U.S. DEP'T OF JUSTICE, <http://www.cops.usdoj.gov/Default.asp?Item=2714> (last visited Apr. 19, 2015).

<sup>63</sup> While not the focus of this Article, federal programs providing informational resources and civil rights enforcement also target plausible local political market failures. Federal programs to promote national crime-related databases take advantage of positive network effects and the continual returns to scale that come from widespread participation

These programs are voluntary. In fact, few impose restrictions beyond matching grants or an ongoing commitment to funded activities.<sup>64</sup> They offer considerable resources to local policing, and they are overwhelmingly popular with states, local governments, and police departments.<sup>65</sup> These programs represent a broad, if fragmented, intervention into local law enforcement policy, one with considerable effects. Yet these programs fail to take into account the collateral costs of law enforcement activities and the programs' impacts on local governance of policing.

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in those informational resources, and federal civil rights enforcement can mitigate agency costs and majoritarian difficulties that may inhibit local enforcement of individual rights against police misconduct.

<sup>64</sup> The CHP presently includes both of these types of requirements. See 42 U.S.C. § 3796dd(g) (2012) (stating that grant awards may not pay for more than 75% of the funded activity and, with respect to hiring grants, that this amount should decrease over time to ensure increasing local funding); OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, GRANT MONITORING STANDARDS AND GUIDELINES FOR ALL COPS GRANTS AND COOPERATIVE AGREEMENTS 33 (2014), available at [www.cops.usdoj.gov/pdf/e081420661\\_Grant%20Monitoring\\_Final.pdf](http://www.cops.usdoj.gov/pdf/e081420661_Grant%20Monitoring_Final.pdf) (noting that COPS requires that all sworn officer positions are retained for twelve months beyond the three years of program funding); see also 7 U.S.C. § 1926 (a)(19)(B)(ii) (2012) (stating that grants may be up to 75% of the cost of developing essential community facilities). In practice, these conditions can leverage local resources beyond the terms of the program, because, for example, officers hired are difficult to fire. See Harmon, *Problem*, *supra* note 2, at 796–800 (discussing legal obstacles to terminating officers). A few programs also mandate policy changes beyond limiting the use of federally provided resources. For example, federal law gives preferential treatment to departments receiving money for body armor under either the Bulletproof Vest Partnership or Byrne JAG grants if they adopt a mandatory armor-wearing policy for uniformed officers engaged in patrol or field operations. Bulletproof Vest Partnership Grant Act of 1998, Pub. L. No. 105-181, 112 Stat. 512 (codified as amended at 42 U.S.C. §§ 3796ll to 3796ll-2); Bureau of Justice Affairs, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program Frequently Asked Questions* 11, <https://www.bja.gov/Funding/JAGFAQ.pdf> (last visited Mar. 30, 2015). The VAWA Arrest Program also requires that departments adopt a pro-arrest approach to policing domestic violence. See *infra* note 102 and accompanying text (describing the pro-arrest requirements of VAWA grants); see also *supra* note 43 (describing conditions on JAG).

<sup>65</sup> See VERA INST. OF JUSTICE, THE IMPACT OF FEDERAL BUDGET CUTS FROM FY10-FY13 ON STATE AND LOCAL PUBLIC SAFETY: RESULTS FROM A SURVEY OF CRIMINAL JUSTICE PRACTITIONERS (2013), available at <http://www.vera.org/sites/default/files/resources/downloads/impact-federal-budget-cuts-public-safety.pdf> (reporting a survey of state and local law enforcement agencies indicating serious concern about the impact of federal funding cuts on local law enforcement); Richman, *supra* note 16, at 404, 406–07 (noting local approval of COPS and other grants and aid-in-kind from federal government programs); *id.* at 406–07 (noting that any state resistance to federal intrusion was muted by state “appreciation of the relief that federal activity offered to the state criminal justice budget”); Alissa Skelton, *Sheriff Says AG’s Decision on Police Seizures “Benefits Nobody but Drug Dealers,”* OMAHA.COM (Jan. 17, 2015), [http://www.omaha.com/news/crime/sheriff-says-ag-s-decision-on-police-seizures-benefits-nobody/article\\_1827aebf-075c-58c4-a89a-f87880baf345.html](http://www.omaha.com/news/crime/sheriff-says-ag-s-decision-on-police-seizures-benefits-nobody/article_1827aebf-075c-58c4-a89a-f87880baf345.html) (describing the law enforcement reaction to new restrictions on the federal asset forfeiture program).

## II

## FEDERAL PROGRAMS AND THE COSTS OF POLICING

Clearly, federal programs should do more good than harm. Policing—though essential—is not only costly in monetary terms. It also unavoidably imposes other costs when officers arrest, intimidate, search, and sometimes kill. Of course, coercion is sometimes necessary as a means to reduce crime or disorder. The challenge for federal public safety programs is to induce only that policing activity that is worth its costs, all things considered. This is not an easy assessment to make. By any measure, however, many of the federal programs described above encourage especially harmful policing practices, and they are not designed or evaluated with attention to these harms. As a result, the federal programs that promote local policing likely encourage policing that is more costly than it need be, which is to say, policing that is less efficient overall.

*A. Cost-Benefit Assessment of Criminal Justice Policy*

One way to determine whether policing policy is doing more harm than good is to use the tools of social science. Economic analysis is not the only measure of policy quality, but it provides a useful and systematic means of estimating whether policy will increase social welfare.<sup>66</sup> Specifically, cost-benefit and cost-effectiveness analysis provide a basis for comparing the strengths and weaknesses of public policy interventions. Many areas of public policy analysis have employed economic approaches for many decades. More recently, this trend has expanded to include criminal justice policy.<sup>67</sup>

One early prominent call for such analysis appears in the 1967 report of the President's Commission on Law Enforcement and Administration of Justice. It argued:

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<sup>66</sup> One might argue we assess costs and benefits in even the most intuitive evaluations of criminal justice programs, just without the rigor cost-benefit analysis seeks to impose. See John Roman & Graham Farrell, *Cost-Benefit Analysis for Crime Prevention: Opportunity Costs, Routine Savings and Crime Externalities*, in EVALUATION FOR CRIME PREVENTION 53, 54 (Nick Tilley ed., 2002), available at [http://www.popcenter.org/library/crimeprevention/volume\\_14/03-Roman\\_Cost.pdf](http://www.popcenter.org/library/crimeprevention/volume_14/03-Roman_Cost.pdf) (“Like it or not, cost-benefit analysis . . . is implicit to almost all crime prevention effort . . .”).

<sup>67</sup> See, e.g., JENNIFER ROSENBERG & SARA MARK, BALANCED JUSTICE: COST-BENEFIT ANALYSIS AND CRIMINAL JUSTICE POLICY 3–5 (2011) (discussing expansion of use of cost-benefit analysis in criminal justice policy); Mark A. Cohen, *Measuring the Costs and Benefits of Crime and Justice*, in MEASUREMENT AND ANALYSIS OF CRIME AND JUSTICE 263, 265–66 (David Duffee ed., 2000) (noting that while cost-benefit analysis had been common to other areas of policy evaluation for decades, it was still uncommon in criminal justice policy assessments).

Researchers, policymakers, and operating agencies should know which crimes cause the greatest economic loss, which the least; on whom the costs of crime fall, and what the costs are to prevent or protect against it; whether a particular or general crime situation warrants further expenditures for control or prevention and, if so, what expenditures are likely to have the greatest impact.<sup>68</sup>

The following year, economist Gary S. Becker published the canonical work on economic analysis of optimal criminal justice policy, *Crime and Punishment: An Economic Approach*.<sup>69</sup> Although President Johnson's Commission called for economic analysis and Becker's work provided the theoretical basis for determining whether law enforcement interventions are worth their costs, many years passed before scholars sought to articulate clearly the costs of crime or policymakers attempted to analyze costs and benefits in assessments of criminal justice interventions.<sup>70</sup>

States have been especially innovative in the economic analysis of criminal justice interventions,<sup>71</sup> but federal law and policy systematically encourage federal agencies to quantify the costs and benefits of federal programs.<sup>72</sup> Slowly, that analysis is being extended to criminal justice programs. For instance, in the past couple of years, commenta-

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<sup>68</sup> PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 32 (1967).

<sup>69</sup> 76 J. POL. ECON. 169 (1968). Becker is well recognized to have provided the essential elements of the contemporary economic approach. See BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS 133-36 (2011) (describing Becker's contribution and its theoretical context); RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 52 (2001) (citing Becker's work as "a fount of economic writing on crime and its control"); Kevin Marsh, *Economic Evaluation of Criminal Justice Interventions: A Methodological Review of the Recent Literature*, in COST-BENEFIT ANALYSIS AND CRIME CONTROL 1, 3 (John K. Roman et al. eds., 2010) (describing Becker's work). As Richard Posner has noted, Becker's work had historical antecedents in Bentham. POSNER, *supra*, at 52.

<sup>70</sup> See Cohen, *supra* note 67, at 281-98 (summarizing literature and adding a more comprehensive list of costs of crime).

<sup>71</sup> The most notable are the analyses by the Washington State Institute for Public Policy. See, e.g., STEVE AOS ET AL., WASH. STATE INST. FOR PUB. POLICY, THE COMPARATIVE COSTS AND BENEFITS OF PROGRAMS TO REDUCE CRIME: VERSION 4.0 (2001), available at <http://www.wsipp.wa.gov/ReportFile/756> (examining the costs and benefits of the State of Washington's programs to reduce crime); see also ROSENBERG & MARK, *supra* note 67, at 3-5 (2011) (describing strong state efforts to incorporate cost-benefit analysis in criminal justice policymaking, especially with respect to corrections).

<sup>72</sup> See 31 U.S.C. § 1111 (2012) (requiring the President to improve economy and efficiency in administrative agencies through analysis of organization, appropriations, and programs); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (reaffirming Executive Order 12866 and reiterating that an agency should only adopt a regulation upon determination that its benefits outweigh its costs); OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS 1, 2, 28-29 (2003) (detailing required economic analysis for agency regulation); OFFICE OF MGMT. & BUDGET, CIRCULAR A-94, GUIDELINES AND DISCOUNT RATES FOR BENEFIT-COST ANALYSIS OF FEDERAL PROGRAMS (1992) (providing general guidance for conducting cost-benefit analysis).

tors on crime-control policy across the political spectrum have trumpeted being “smart on crime” rather than (or in addition to) being “tough on crime,” where being smart on crime means adopting approaches supported by evidence of effectiveness and cost effectiveness.<sup>73</sup> This approach became entrenched in federal justice policy in 2013, when Attorney General Eric Holder announced a new federal “Smart on Crime” initiative, which emphasizes alternatives to incarceration to improve cost effectiveness as well as fairness and effectiveness in allocating finite criminal justice resources.<sup>74</sup>

Scholars have also advocated cost-benefit analysis for crime prevention interventions and have worked to refine the tools for that analysis.<sup>75</sup> Social scientists have been especially attentive to the costs of crime.<sup>76</sup> These costs are essential to criminal justice policy assessment because criminal justice programs are largely evaluated by whether they reduce crime. In most cases, the primary benefit of

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<sup>73</sup> See, e.g., Mark A.R. Kleiman, *Smart on Crime: Being Tough on Criminals Hasn't Worked, but Neither Has Being Lenient. Here's How to Prevent—and Punish—Crime the Right Way*, 28 DEMOCRACY J. 51, 56–57 (2013) (encouraging progressives to think in economic terms about crime-control policy); Jason Chaffetz, *Getting Smart About Crime: When So Many Prisoners Bounce Back the System Isn't Working*, WASH. TIMES (July 15, 2013), <http://www.washingtontimes.com/news/2013/jul/15/getting-smart-about-crime> (“It’s no longer enough to be tough on crime. We have to be smart on crime as well.”); Sam Stanton, *Prop. 47 Victory Shows California Embracing ‘Smart on Crime’ Approach, Supporters Say*, SACRAMENTO BEE (Nov. 6, 2014, 11:30 AM), <http://www.sacbee.com/news/politics-government/election/article3591130.html> (“There’s a shift in the national consciousness . . . about crime and punishment, and I think that ‘smart on crime’ sort of captures the mood of the nation now.” (quoting Allen Hooper, ACLU of California) (alteration in original)); see also *About the Texas Smart-on-Crime Coalition (TSCC)*, TEXAS SMART-ON-CRIME COALITION (Sept. 11, 2014), <http://smartoncrimetexas.com/featured/texas-smart-crime-coalition-tsc> (describing the founding in 2014 of diverse coalition of groups uniting “to pursue cost-effective reforms that enhance public safety, promote safe rehabilitation, and save taxpayer dollars”).

<sup>74</sup> U.S. DEP’T OF JUSTICE, SMART ON CRIME, REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (2013), available at <http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>; Eric Holder, U.S. Att’y Gen., Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

<sup>75</sup> See, e.g., COST-BENEFIT ANALYSIS AND CRIME CONTROL, *supra* note 69 (reviewing and synthesizing literature on economic analysis of criminal justice interventions); MARK A. COHEN, THE COSTS OF CRIME AND JUSTICE (2005) (advocating for cost-benefit analysis in making criminal justice policy decisions and reviewing techniques for estimating costs of crime); MARK A.R. KLEIMAN ET AL., MEASURING THE COSTS OF CRIME (2014) (examining limitations of certain cost-benefit analysis approaches regarding crime and advocating for supplementing such analyses with additional cost considerations).

<sup>76</sup> See, e.g., KLEIMAN ET AL., *supra* note 75, at 2 (“Frequently, the principal benefit of a policy or program is a reduction in the extent and impact of the targeted problem. Thus, estimates of the problem’s current cost can play a crucial role in deciding how to address that problem . . .”).

effective criminal justice programs is averting the costs of crime.<sup>77</sup> Thus, the benefits of criminal justice programs cannot be fully articulated until the costs of crime are carefully described.

Despite this increased interest, economic analysis of criminal justice interventions remains incomplete. In focusing on averted crime as the primary benefit of policing programs, existing economic analysis ignores other potential benefits of criminal justice policy, including reducing fear, improving citizen satisfaction, decreasing perceived disorder, and promoting legal compliance and cooperation with law enforcement.<sup>78</sup> These additional benefits of policing have been increasingly formalized, measured, and integrated into discussions among commentators, but they have not yet fully penetrated evaluations of criminal justice policy. More notably, while scholars and policymakers have improved assessment of the *benefits* of criminal justice interventions both inside and outside of economics, analysis of the *costs* of criminal justice policy continues to be anemic.

One can see the origins of the problem in the 1967 President's Commission. In describing the costs of law enforcement and crime prevention, the Commission's report listed only private efforts to prevent crime and the public money necessary to fund police, prosecution, courts, and corrections.<sup>79</sup> Becker included the same costs<sup>80</sup>—though he added the costs of punishment (and not policing) to offenders.<sup>81</sup> Ever since, economic assessments of criminal justice policies have relied on the assumption that the primary costs of policing are the budgetary costs of implementing the program.<sup>82</sup> Scholars

<sup>77</sup> *Id.*

<sup>78</sup> See, e.g., LORRAINE MAZEROLLE ET AL., LEGITIMACY IN POLICING: A SYSTEMATIC REVIEW 10 (2013) (discussing the benefits of good criminal justice policy). One might argue this literature is still too narrow. Public pressure to arrest domestic violence offenders and police officers who shoot unarmed citizens as well as charge them with crimes can be thought of as valuing the expressive value of police coercion, a benefit of policing apart from lowering crime.

<sup>79</sup> See PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *supra* note 68, at 34 fig.8 (listing as "Public Expenditures for Prevention and Control of Crime" costs of police, courts, prosecution and defense counsel, and corrections).

<sup>80</sup> See Becker, *supra* note 69, at 171 (using Crime Commission's estimates about costs of responding to crime, including public expenditures on police, prosecution and courts, corrections, and private costs of combatting crime); *id.* at 174 (describing the cost of apprehension and conviction).

<sup>81</sup> See *id.* at 179–80 (describing cost of punishments to offenders).

<sup>82</sup> See, e.g., AOS ET AL., *supra* note 71, at 8–9 (using the net direct cost per participant of criminal justice programs as the only costs of the programs); MARC SCHABSES, N.Y. DIV. OF CRIMINAL JUSTICE SERVS., NO. CBA-1, COST BENEFIT ANALYSIS FOR CRIMINAL JUSTICE: DEPLOYMENT AND INITIAL APPLICATION OF THE RESULTS FIRST COST BENEFIT MODEL 5 (2013) (describing proper implementation of cost-benefit analysis for public safety policy in New York State and describing costs as the annual operating costs of the relevant criminal justice system component); Ann Netten, *Identifying Costs and Costing*

sometimes debate how to calculate the costs to an agency of implementing a criminal justice program. As a recent summary of the scholarship noted:

In general, estimation of costs [of crime control] is more straightforward than estimation of benefits. Costs are generally estimated either top down through an examination of administrative budgets or bottom up through semi-structured interviews with program staff. In the end, the goal of the cost analysis is to estimate the economic value of resources consumed by the intervention.<sup>83</sup>

But neither scholars nor policymakers have engaged in any broader thinking about what should be included as costs beyond the cost of implementation.

There have been intimations of progress. Current public debate more forcefully highlights the harms of policing than it has done in many years. It is hard to interpret otherwise protesters' cries of "I can't breathe" and "Hands up, don't shoot" following the summer 2014 deaths of Eric Garner, a man who died following a neck hold by a New York Police Department officer, and Michael Brown, an unarmed eighteen-year-old shot by Ferguson, Missouri police officer Darren Wilson.<sup>84</sup> But while commentators identify some negative consequences of policing, they have done so partially, informally, and in terms not easily integrated into analysis of law enforcement policy. Scholars and policymakers sometimes acknowledge the broad social effects of criminal justice policy, but they focus almost exclusively on

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*Complex Intervention Programs, in COST-BENEFIT ANALYSIS AND CRIME CONTROL, supra note 69, at 35–37 (using implementation costs as the costs of criminal justice programs). Like Becker, some include the costs of punishment to the offenders, and even other costs arising from the criminal justice system's efforts to punish the right offender fairly, see Cohen, supra note 67, at 275 (listing categories of costs), but they do not include in any meaningful way the full costs of policing.*

<sup>83</sup> Aaron J. Chalfin, *From Impact Analysis to Cost-Benefit Analysis: Methodological Issues in the Joint Estimation of Costs and Benefits, in COST-BENEFIT ANALYSIS AND CRIME CONTROL, supra note 69, at 167, 176; see also Netten, supra note 82, at 33, 37–38 (discussing the relative advantages of top down and bottom up methodologies).*

<sup>84</sup> See, e.g., Philip Bump, *Rep. Hakeem Jeffries (D-N.Y.) Brings 'Hands Up, Don't Shoot' to House Floor*, WASH. POST (Dec. 1, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/12/01/rep-hakeem-jeffries-d-n-y-brings-hands-up-dont-shoot-to-house-floor> (reporting use of the cry and gesture by a member of Congressional Black Caucus on the House floor, National Football League players during a game, and protesters criticizing the shooting death of Michael Brown); "I Can't Breathe" T-Shirts See High-School Basketball Team Disinvited from Event, GUARDIAN (Dec. 27, 2014, 1:15 PM), <http://www.theguardian.com/world/2014/dec/27/i-cant-breathe-t-shirts-high-school-basketball> (reporting high school team, NFL players, and NBA players wearing shirts with the "I Can't Breathe" slogan of nationwide protesters after Eric Garner was heard to say the quote during his death at the hands of the NYPD).

the costs of incarceration rather than policing.<sup>85</sup> As a consequence, in evaluating law enforcement interventions, neither academics nor agency officials have seriously considered costs of police action other than those arising from administering the programs.

Inattention to policing's nonbudgetary costs is fully apparent in formal analyses of federal public safety programs. The most studied and evaluated federal public safety program is COPS, and there is an ongoing debate about whether the program is worth its price. This debate is significant: Though COPS was only one source of federal funds, and federal funding is only one source of law enforcement resources, COPS expenditures between 1994 and 2001 accounted for about one percent of all spending on local police services.<sup>86</sup> Even now, long after the peak of COPS funding, the program provides substantial grants to local police departments.

Yet evaluations of COPS grant programs universally share the premise of other economic analyses of criminal justice policy—they assume the only cost of the program is the federal expenditure. Thus, economists John Donohue and Jens Ludwig argue that “the right standard for judging whether COPS is a success . . . is whether the independent effects of the COPS program to reduce crime is [sic] large enough to justify the program's budget.”<sup>87</sup> A more thorough analysis of the program answers the question, “Did the costs of the COPS program outweigh its benefits?” by comparing the “total cost of the hiring grants” with “the benefit of the COPS hiring grants, . . . the monetary benefit of the resulting reductions in crime.”<sup>88</sup> The analysis is no different for detractors of the program, who similarly compare the “dollar values of crimes prevented through COPS grants” with the amount of grants received to determine whether “COPS grants [are] worth their cost,”<sup>89</sup> but reach the opposite conclusion.<sup>90</sup>

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<sup>85</sup> See, e.g., David S. Abrams, *The Prisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905 (2013) (applying new empirical tools to improve cost-benefit analysis of changes to punishment).

<sup>86</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-104, *COMMUNITY POLICING GRANTS: COPS GRANTS WERE A MODEST CONTRIBUTOR TO DECLINES IN CRIME IN THE 1990s* 11–12 (2005).

<sup>87</sup> JOHN J. DONOHUE III & JENS LUDWIG, BROOKINGS INST., *MORE COPS 5* (2007), available at <http://www.brookings.edu/~media/research/files/papers/2007/3/crime%20ludwig/pb158>.

<sup>88</sup> William N. Evans & Emily G. Owens, *COPS and Crime*, 91 J. PUB. ECON. 181, 199–200 (2007).

<sup>89</sup> DAVID B. MUHLHAUSEN, HERITAGE FOUND., *IMPACT EVALUATION OF COPS GRANTS IN LARGE CITIES* 15 (2006).

<sup>90</sup> See *id.* at 19 (concluding that “federal funding for community policing was associated with small reductions in crime in large cities,” but that “hiring grants produced negative returns”).

Both proponents and opponents fail to include the social costs of policing.

Analyses of other programs are less common, but suffer the same defect.<sup>91</sup> One prominent assessment purports to determine the net effect of Violence Against Women Act (VAWA) funding by considering “all costs and all effects of VAWA[ ], regardless of who experiences the costs and the effects . . . .”<sup>92</sup> The benefits in the form of prevented crime are defined broadly. These averted costs include direct property losses, medical care, ambulance services, mental health care, initial police response, follow up police investigation, victim services and other social services, lost victim productivity, and victim quality of life, as well as a “measure of cost for nontangible losses such as loss of life, pain, suffering, and reduced quality of life . . . .”<sup>93</sup> The costs against which those benefits are weighed include only the expenditures necessary to provide VAWA funding.<sup>94</sup>

As these descriptions suggest, contemporary analysis of criminal justice policy is distorted. In evaluating the *benefits* of criminal justice interventions, including federal programs, policymakers and scholars properly incorporate a broad array of averted costs, including the direct, indirect, and intangible benefits of crime prevented by the programs. But the same analysts have ignored significant costs imposed by policing, beyond its price tag. They assume that policing has no costs but budgetary ones.

Overlooking the nonbudgetary costs of policing not only affects efforts to determine whether grants are worth their costs, but also inhibits our ability to assess the costs and outcomes of grant programs relative to other ways of spending federal money to reduce crime. For example, despite some disputes about whether COPS has been worth its budgetary costs, most analysts take it to have achieved its aims, at least to some degree, succeeding both in putting officers on the street

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<sup>91</sup> See John L. Worrall, *The Effects of Local Law Enforcement Block Grants on Serious Crime*, 7 CRIMINOLOGY & PUB. POL'Y 325, 344 (2008) (noting that researchers have become more interested in effects of federal funding for local law enforcement but so far have limited most of their attention to COPS); see also Eric P. Baumer, *Evaluating the Balance Sheet of Asset Forfeiture Laws: Toward Evidence-Based Policy Assessments*, 7 CRIMINOLOGY & PUB. POL'Y 245, 245 (2008) (“[V]ery little empirical research exists on the possible benefits of civil asset forfeiture laws, and to my knowledge, no research considers a systematic comparison of their costs and benefits.”).

<sup>92</sup> Kathryn A. Clark et al., *A Cost-Benefit Analysis of the Violence Against Women Act of 1994*, 8 VIOLENCE AGAINST WOMEN 417, 418 (2002).

<sup>93</sup> *Id.* at 420.

<sup>94</sup> See *id.* at 418, 425 (indicating that costs include legislative appropriations and administrative costs); see also *id.* at 424 (“This analysis suggests that the Violence Against Women Act of 1994 is an efficient social program, with averted costs of criminal victimization outweighing the costs of implementation.”).

and in mitigating crime.<sup>95</sup> But even if COPS is effective, the funding could be used instead to fund other kinds of crime prevention programs, such as by expanding Byrne JAG block grants, which give more discretion to localities in determining how funds are spent. Thorough economic analysis could help policymakers determine whether federal law enforcement dollars are better spent on COPS grants or Byrne JAG grants.

There are few studies of the effects of federal grant programs on crime, and fewer still comparing programs.<sup>96</sup> But what little research there is suggests that coercion costs may matter to choices about how to allocate scarce criminal justice resources. One study compared the effects of local law enforcement block grants—the predecessor to contemporary Byrne JAG grants<sup>97</sup>—to the effects of COPS hiring grants. It found that both programs reduced serious crime, though block grants did so somewhat more powerfully over the studied period.<sup>98</sup> By the measure of crime control, the differences between the outcomes of the programs might be relatively minor. Nevertheless, the consequences of the grants differed substantially along another measure: Even as they reduced crime, block grants significantly reduced arrests, both for drug crimes and for disorder, whereas COPS grants increased arrests for the same crimes.<sup>99</sup> The results are not entirely mysterious. COPS grants increase the number of officers on the streets and more officers usually means more arrests.<sup>100</sup> JAG grants, by contrast, are often used for crime-reducing strategies that focus on making policing

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<sup>95</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 10002(1), 108 Stat. 1796 (describing the purposes of COPS grants); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 86, at 12–14 (finding that COPS increased sworn officer levels and reduced crime); Evans & Owens, *supra* note 88, at 193 (indicating that COPS hiring grants increased the size of police forces, though not as much as intended); *id.* at 195 (indicating that COPS hiring grants were associated with reductions in crime rates); Lilley & Boba, *supra* note 36, at 450–52 (discussing reductions in crime associated with COPS hiring grants). *But see* MUHLHAUSEN, *supra* note 89, at 19 (concluding that COPS hiring grants did not reduce crime).

<sup>96</sup> See Worrall, *supra* note 91, at 344 (noting that little research exists on federal programs); *id.* at 344–45 (counting between five and ten studies concerning the connection between federal grant spending and crime).

<sup>97</sup> Evaluations of JAG grants are complicated by the fact that the JAG program represents a consolidation of previous grant programs, including the Local Law Enforcement Block Grant, the Byrne Formula Grant, and the Byrne Discretionary Grant. See *Program and Funding History*, NAT'L CTR. FOR JUSTICE PLANNING, <http://www.ncjp.org/byrne-jag/history> (last visited Feb. 15, 2015) (indicating that the existing JAG grant program was created when prior programs were merged in 2005).

<sup>98</sup> Lilley & Boba, *supra* note 36, at 456.

<sup>99</sup> See *id.* at 453–54 (finding that COPS hiring grants were associated with increased misdemeanor arrests, but that block grants were strongly associated with decreased arrests in the same categories).

<sup>100</sup> *Id.* at 456–57.

more efficient, such as buying in-car mobile data terminals or crime mapping software, which might not have similar effects on arrest rates.<sup>101</sup> As the next section suggests, arrests can be very costly to the individuals arrested, to their families, and to their communities. If those costs of policing were incorporated into the analysis, the advantages of block grants might not seem so minor. Whatever further research determines about JAG and COPS grants, the general point remains true: Because we have ignored the costs of policing, federal programs may favor approaches to increasing public safety that are not cost effective compared to available alternatives when all costs are considered.

Whereas COPS encourages additional arrests only indirectly—by funding more police officers—VAWA’s Arrest Grant program expressly encourages arrests, which are considered a mark of the program’s success, even apart from its effects on crime.<sup>102</sup> Arrest Grants and other VAWA grants also fund other strategies for reducing domestic violence, ones that might not necessarily increase arrests. These include training for officers, prosecutors, and judges; computer tracking systems to ensure better communication and recordkeeping; and comprehensive victim support.<sup>103</sup> The Department of Justice has asserted that its other grant strategies and the Arrest Program both reduce violence against women.<sup>104</sup> If arrests are indeed costly, as I contend below, then resources may be better spent on those other

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<sup>101</sup> See NAT’L CTR. FOR JUSTICE PLANNING, *supra* note 42, at 5 (indicating that 33.5% of JAG spending on law enforcement was spent on equipment and technology); *id.* at 457 (noting that block grant spending on technology and equipment might explain differences in arrests between COPS and block grants).

<sup>102</sup> See OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUSTICE, 2012 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT 17 (2012) (using arrests as one measure of VAWA’s effectiveness); see also David Eitle, *The Influence of Mandatory Arrest Policies, Police Organizational Characteristics, and Situational Variables on the Probability of Arrest in Domestic Violence Cases*, 51 CRIME & DELINQUENCY 573, 591–92 (2005) (measuring the impact of mandatory arrest policies by evaluating whether they are associated with increased arrests in domestic violence cases).

<sup>103</sup> OFFICE ON VIOLENCE AGAINST WOMEN, *supra* note 102, at 9–12.

<sup>104</sup> See, e.g., *id.* at 18 (listing legal advocacy, protection orders, specialized probation supervision, victim support services, nursing and first response programs, and specialized sentencing along with pro-arrest policies as leading to positive outcomes with respect to crimes against women and noting that all of these strategies are supported in the Office on Violence Against Women’s grant programs); *id.* at 154–55 (“Meaningful and serious responses [to violence against women] by law enforcement agencies—including arrest, providing victims with information pamphlets, taking down witness statements, and helping victims secure protection orders—were all associated with reduced reabuse.”).

strategies, especially if the effect of arrests as a means of preventing domestic violence is modest.<sup>105</sup>

Not surprisingly, assessments of VAWA's costs and benefits are much like assessments of COPS. "[A]ll costs" of the program do not include any of the analogous costs to individuals, families, and society of arresting additional suspects, such as lost productivity or quality of life.<sup>106</sup> Although some commentators have noted that arresting alleged abusers can have serious consequences for victims and families, those costs have not been quantified or integrated into assessments of the program. The National Institute of Justice has repeatedly solicited grant applications for additional research on reducing domestic violence, but since neither the Department of Justice nor the researchers recognize that extrabudgetary costs of different means of fighting violence against women are different, the mistake of omitting coercion costs will likely be replicated in future work. And it is likely that the Arrest Program will remain one of the biggest federal programs devoted to reducing violence against women, whatever its real costs and the costs of the alternatives.<sup>107</sup>

Arrests provide only one example of costly police actions insufficiently recognized by assessments of policing. Whenever policing infringes significantly on individual interests, it imposes negative consequences that should be recognized and counted against the benefits of policing in evaluations of law enforcement programs.

### *B. The Costs of Policing*

Most local policing seeks to facilitate criminal justice and prevent crime and disorder in order to make a community safer and happier. These goals frequently depend on the capacity of the police to com-

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<sup>105</sup> See, e.g., DAVID A. FORD ET AL., *CONTROLLING VIOLENCE AGAINST WOMEN: A RESEARCH PERSPECTIVE ON THE 1994 VAWA'S CRIMINAL JUSTICE IMPACTS* 13–14 (2002) (explaining that despite an early study showing a link, the impact of arrests on reducing domestic violence is uncertain); CHRISTOPHER D. MAXWELL ET AL., U.S. DEP'T OF JUSTICE, NCJ 188199, *THE EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 2* (2001) (finding that arrests reduce repeat domestic violence offenses, but modestly compared with other factors).

<sup>106</sup> Clark et al., *supra* note 92, at 418, 425; see also *id.* at 424 ("This analysis suggests that the Violence Against Women Act of 1994 is an efficient social program, with averted costs of criminal victimization outweighing the costs of implementation.")

<sup>107</sup> In funding, the Arrest Program has consistently been only second to the STOP (Services, Training, Officers, and Prosecutors) Grant Program, which also seeks to improve criminal justice response to crimes of violence against women. See 42 U.S.C. § 3793 (2012) (authorizing appropriations for various VAWA grants); LISA M. SEGHELLI & JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42499, *THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING* 23–32 tbl.A-2 (2012) (indicating VAWA grant program spending between 2008 and 2012).

mand and to back their commands with force.<sup>108</sup> As a result, ordinary policing sometimes involves the exercise of coercion, as minor as directing traffic around a car accident or pulling apart teenagers engaged in late-night fisticuffs, and as major as storming a house or shooting a fleeing bank robber. We often think of these activities—and especially lawful arrests, pedestrian stops and frisks, and searches and seizures of evidence and contraband—as the services we pay police to provide, that is, as a marker of police productivity, in part because it is so hard to measure good policing.<sup>109</sup> It consequently can seem counterintuitive to treat arrests, searches, and other useful police activities as imposing costs that should be taken into account in weighing the value of criminal justice interventions, including federal programs. Nevertheless, policing—and especially police coercion—has costs.

Police coercion occurs when an officer, invoking the authority of the state, intrudes upon individual interests in liberty, autonomy, bodily integrity, privacy, or property in order to protect public safety or order, or to facilitate criminal adjudication. Traditional police coercions include not only arrests, but also uses of force, traffic and pedestrian stops, orders to stay or to go, frisks, searches, and seizures of property. These are the tools rather than the ends of policing.<sup>110</sup> In this way, policing is different from punishment, in which imposing harm is central to the purpose of the enterprise.<sup>111</sup>

There are obvious benefits to these coercions: They help solve and adjudicate crimes, they deter and incapacitate criminals, and they facilitate order.<sup>112</sup> These benefits are largely, though not entirely, already reflected in existing cost-benefit assessments of police interventions in the value of crimes averted. Equally obviously, however, these coercions also impose costs. The costs can be financial if, for example, a suspect loses income as a result of an arrest or pays medical expenses for injuries resulting from a use of force. They can be

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<sup>108</sup> See Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE* 17, 35 (Herbert Jacob ed., 1974) (“[P]olice work consists of coping with problems in which force *may have to be used*.”).

<sup>109</sup> See DAVIS, *supra* note 60, at 1 (“[H]istorically, Western police agencies have measured their performance against a very restricted set of crime-focused indicators, such as crime rates, arrests, response times, and clearance rates.” (internal citation omitted)).

<sup>110</sup> See Harmon, *Police Violence*, *supra* note 1, at 1151 (“Police uses of force are entirely instrumental, which is to say that there are no deontological justifications for the practice of exercising state force against criminal suspects.”).

<sup>111</sup> See *id.* at 1151–52 (noting that while retribution is one purpose of punishment, police uses of force are “entirely instrumental”).

<sup>112</sup> There are additional benefits to police coercions. See, e.g., *infra* notes 167–170 and accompanying text (describing other benefits of arrests).

intangible, such as the humiliation one feels when forcibly stopped by an officer in public or the degradation that comes from having one's body touched in a frisk.<sup>113</sup> These costs are not reflected in existing assessments of the costs of policing or criminal justice policy. Yet, if a particular law enforcement program encourages coercions that impose more costs than benefits, or if alternative law enforcement measures are equally effective at lower cost, then these costs should lead us to reconsider the policies at issue.<sup>114</sup> This is the necessary consequence of seeking policing that is harm efficient as well as effective, lawful, and fair.<sup>115</sup>

One reason the coercion costs of policing are neglected is that many of them accrue to the targets of policing, to whom they are at least arguably due. Why should we attend to injuries to a suspect who resists arrest or to the lost income suffered by a detained criminal? The costs-of-crime literature reflects the intuition that these costs should not count. In it, scholars often exclude consideration of the suffering of the offender as a "private" rather than "social" cost.<sup>116</sup> This approach is not easy to justify: From a welfare perspective, all costs matter, even costs to criminals, and even if they are fairly imposed. Nevertheless, excluding costs to the guilty in determining the costs of policing still leaves many of the costs of coercion unaccounted for since policing also imposes suffering on nonsuspects, on suspects who turn out to be innocent, on the families and communities of suspects, and on society at large.

Relatedly, the coercion costs of policing are often overlooked because they are lawfully imposed. Traditional analysis of the suf-

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<sup>113</sup> See *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968) (describing a frisk as a humiliating and degrading intrusion on bodily integrity); Cohen, *supra* note 67, at 272 (recognizing analogous costs, such as pain and suffering, as costs of crime).

<sup>114</sup> According to Bentham, "all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970). Punishment should not be "*unprofitable* or too *expensive*; where the mischief it would produce would be greater than what it prevented," and "[w]here it is needless: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate." *Id.* at 159. Police coercion, or at least federal policies that subsidize it, should equally satisfy this test.

<sup>115</sup> See Harmon, *Problem*, *supra* note 2, at 792–93 (arguing that in addition to being constitutional and effective, police tactics should be "harm efficient," that is, that the harms they cause should be reasonable in relation to their benefits).

<sup>116</sup> See Cohen, *supra* note 67, at 276 ("Although the offender is part of society, the conventional approach [to assessing the costs of crime] ignores the purely private losses."); *id.* at 276–77 (noting the offender's lost productivity while he is incarcerated and harms to the offender's family should be counted in assessing the costs of crime). See also *infra* notes 128–133 and accompanying text (discussing costs of coercion).

fering policing causes focuses on police misconduct. While preventing misconduct is a worthy goal, by any measure, police mostly act legally.<sup>117</sup> The law broadly permits police to command, to search, to detain, and to use force to achieve the state's objectives. Just as coercive misconduct causes harm, these legal encounters also matter to well being. In fact, legal police coercions, rather than illegal ones, impose most of the coercion costs of policing. For that matter, even consensual encounters can be costly. A person who sacrifices his time, privacy, or autonomy to cooperate with law enforcement may subjectively experience the event as injurious even when the law enforcement request is not backed by a threat of force or arrest.<sup>118</sup> If so, that experience is a cost of policing.

The failure to assess or recognize the nonbudgetary costs of policing deprives us of the opportunity to thoroughly evaluate public safety approaches or to minimize the harms imposed by the police. An efficient policing strategy or program is one for which the marginal costs outweigh the marginal benefits, and a cost-effective program has superior relative costs and outcomes in comparison to alternatives. We cannot determine whether a program is efficient or cost effective if we exclude a significant category of costs.

Although the failure to consider the full costs of policing policies exists across criminal justice programs, it is of special relevance in federal public safety programs. Federal programs often encourage policing that is especially coercive and therefore costly, and federal political processes are likely weaker than local political processes at internalizing these coercion costs when they are not expressly recognized. Since they do not acknowledge the costs of coercion, our

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<sup>117</sup> For example, a central claim against New York Police Department's program of aggressively stopping and frisking suspects as a means of crime control is that it involved a pattern of unconstitutional stops. See Second Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages at 2, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034 (SAS)) (alleging that the defendants were engaging in a practice of unconstitutional stops and frisks of New York City residents without reasonable articulable suspicion in violation of the Fourth Amendment). Even by the plaintiff's measure, however, of the 2,805,721 stops by the NYPD from 2004–09, nearly two million *were* legally justified. See Report of Jeffrey Fagan at 4, 19, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034 (SAS)) (analyzing NYPD stop-and-frisk program data). Presumably, a department could develop an aggressive stop-and-frisk policy that ensured that every stop is justified and that the program was implemented in a nondiscriminatory manner, eliminating any constitutional objections to the program. Treating lawful coercions as costs provides a basis for subjecting such a program, which might still deprive 500,000 people per year of their autonomy, to serious scrutiny.

<sup>118</sup> See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (recognizing that a suspect might consent to a search to avoid a more intrusive, inconvenient search).

existing assessments of federal public safety programs are deeply misleading.

### C. *Estimating the Costs of Police Coercion*

We need further research to quantify the costs of police coercion, but the task is analogous to the project of assessing the costs of crime, a subject on which there is a well-developed literature. Applying some of the lessons from that scholarship suggests that, even at first glance, the costs of policing are likely significant.

In determining the costs and benefits of a specific policy, scholars often determine outcomes and then quantify the costs and benefits of those effects. In calculating effects for criminal justice policies, scholars and policymakers largely focus on how much programs decrease offending.<sup>119</sup> To engage in a more complete cost-benefit analysis of policing policy, social scientists must also determine the degree to which specific programs influence arrests, uses of force, searches, traffic stops, surveillance, and other police coercions.

Police coercions are concrete and discrete affairs, and they can be counted. Already, assessments of criminal justice programs sometimes determine the impact of policies on arrests, an outcome on which law enforcement agencies collect data.<sup>120</sup> While there is an appalling dearth of national data on other forms of police coercion, including uses of force, searches, and stops and frisks, some data already exist, especially at the department level.<sup>121</sup> These more limited sources can be the bases for initial estimates of the effects of federal programs, and over time, it should be possible to improve estimates of how many

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<sup>119</sup> See, e.g., MUHLHAUSEN, *supra* note 89, at 2 (questioning whether grants deter crime); Evans & Owens, *supra* note 88, at 196–97 (considering whether COPS grants reduce crime); Lilley & Boba, *supra* note 36, at 439 (examining whether law enforcement block grants reduce crime); John L. Worrall & Tomislav V. Kovandzic, *COPS Grants and Crime Revisited*, 45 CRIMINOLOGY 159, 160 (2007) (noting that several researchers have studied whether COPS money reduces crime).

<sup>120</sup> See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2013, at 1–2 (stating that the Uniform Crime Reporting Program collects data for arrests for twenty-eight offenses); OFFICE ON VIOLENCE AGAINST WOMEN, *supra* note 102, at 17 (2012) (using arrests as measure of VAWA’s effectiveness); Lilley & Boba, *supra* note 36, at 445 (noting difficulties with UCR arrest data).

<sup>121</sup> See Rachel Harmon, *Harmon on the Fragility of Knowledge in the Riley (Cellphone and 4A) Case*, 4 J. L. THE POST 239, 239–41 (noting that data on searches and seizures are hard to find and arguing that the Supreme Court relied on weak evidence for an empirical claim about searches and seizures as a result); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 29–30 (2009) [hereinafter Harmon, *Promoting*] (describing weak national data collection on police misconduct); Rachel Harmon, *Why Do We (Still) Lack Data on Policing*, 96 MARO. L. REV. 1119, 1129–30 (2014) [hereinafter Harmon, *Data*] (describing the weak state of information about policing).

additional arrests, stops, searches, and uses of force federal criminal justice dollars buy.

Once we know how many coercions occur, estimating the costs of each coercion is a lot like assessing the costs of each crime. Though the endeavor of appraising the costs of crime is long standing, scholars have refined these estimates in recent years.<sup>122</sup> There are two common approaches. One, sometimes labeled the “bottom up” method, is to identify all possible harms that crime inflicts, determine the value of each of those injuries, and aggregate them to reach a total cost for each kind of crime.<sup>123</sup> A second “top down” approach is to assess how much people value crime (or its absence) by asking them or by using other evidence of their actual preferences.<sup>124</sup> The first depends on identifying all costs and can therefore easily underestimate costs if some kinds of costs are systematically omitted. The second approach depends on what may seem like implausible accuracy in self-reporting or in proxies for how we value crime, such as jury awards.<sup>125</sup> This latter approach tends to lead to much higher estimates for the cost of each crime.<sup>126</sup> While both methods have limitations, they are no more likely to be ineffectual in assessing the costs of police coercions than they are in assessing the costs of crime. Until we start using some method, we know for sure that our evaluations of federal criminal justice interventions—in fact, our assessments of all criminal justice interventions—will be incomplete.

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<sup>122</sup> See, e.g., Aaron Chalfin, *The Economic Cost of Crime*, in *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* (Wesley G. Jennings ed., forthcoming 2015) (manuscript at 9), available at [http://achalfin.weebly.com/uploads/8/5/4/8/8548116/chalfin\\_econcost.pdf](http://achalfin.weebly.com/uploads/8/5/4/8/8548116/chalfin_econcost.pdf) (“Over the last thirty years, tremendous progress has been made with respect to the development of empirical estimates of the cost of crime.”); Kathryn E. McCollister et al., *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation*, 108 *DRUG & ALCOHOL DEPENDENCE* 98, 99 (2010) (updating the estimate for costs of more than a dozen major crimes).

<sup>123</sup> See Chalfin, *supra* note 122, at 6–8 (describing the “bottom up” method of computing the costs of crime); see also McCollister et al., *supra* note 122, at 102 (illustrating a form of the bottom up method by taking the cost-of-illness approach, which estimates the tangible costs of crime).

<sup>124</sup> See Chalfin, *supra* note 122, at 8–11 (describing contingent valuation and hedonic pricing estimates of costs of crime); see also Giles Atkinson et al., *Valuing the Costs of Violent Crime: A Stated Preference Approach*, 57 *OXFORD ECON. PAPERS* 559, 563–77 (2005) (developing valuations for various forms of assault based on preference study); Jens Ludwig & Philip J. Cook, *The Benefits of Reducing Gun Violence: Evidence from Contingent-Valuation Survey Data*, 22 *J. RISK & UNCERTAINTY* 207, 207 (2001) (using national survey to elicit willingness-to-pay estimates to reduce gun violence).

<sup>125</sup> See Chalfin, *supra* note 122, at 9 (“[S]ince stated preferences are hypothetical, responses may be arbitrary since the respondent does not actually need to pay the stated price.”); Abrams, *supra* note 85, at 943 (describing disadvantages of the approach).

<sup>126</sup> See Abrams, *supra* note 85, at 942 (describing the gap in outcomes that arises from competing methodologies).

One seminal “bottom up” study on the costs of crime, *Victim Costs and Consequences: A New Look*, was published by the National Institute of Justice in 1996.<sup>127</sup> This influential work contended that the primary costs of crime to victims arise from “(1) out-of-pocket expenses such as medical bills and property losses, (2) reduced productivity at work, home, and school, and (3) nonmonetary losses—such as fear, pain, suffering and lost quality of life.”<sup>128</sup> Notably, the same types of costs accrue to those subject to police coercions. Individuals who are killed by the police suffer the same loss in productivity as those killed in fatal crimes, estimated in the study to be \$1 million per death.<sup>129</sup> Those injured by the police incur costs for medical care and rehabilitation just as victims of crime do.<sup>130</sup> Those whose homes are searched suffer property damage not unlike that suffered in burglaries and attempted burglaries, which the study estimates at \$970 per crime.<sup>131</sup> And any police coercion can decrease quality of life, a cost that varies from zero dollars to nearly \$2 million per crime in the study’s estimation.<sup>132</sup>

A casual “top down” look at the coercion costs of policing confirms the idea that there are real costs associated with policing. One way scholars estimate the costs of crime is to examine civil verdicts that value the harms caused by criminal activity.<sup>133</sup> Since civil rights litigation, especially damages actions under 42 U.S.C. § 1983 for constitutional violations by the police, involves quantifying many of the costs of policing, this litigation can similarly provide insight into the costs of coercion.

The basic purpose of awarding damages under § 1983 is “to compensate persons for injuries that are caused by the deprivation of constitutional rights.”<sup>134</sup> Just as they would be in common law torts, those compensatory damages are intended to reflect the harm a victim of police misconduct actually endures.<sup>135</sup> Thus, plaintiffs do not receive damages for the “abstract value of the rights . . . asserted.”<sup>136</sup> Instead,

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<sup>127</sup> TED R. MILLER ET AL., U.S. DEP’T OF JUSTICE, NCJ 155282, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996).

<sup>128</sup> *Id.* at 9.

<sup>129</sup> *Id.* at 9 tbl.2 (estimating costs in 1993 dollars).

<sup>130</sup> *See id.* at 10 (listing the medical costs of crime).

<sup>131</sup> *Id.* at 9 tbl.2.

<sup>132</sup> *See id.* at 9 (illustrating costs of various crimes).

<sup>133</sup> *See id.* at 2 (describing the use of damages awards to quantify the costs of crime).

<sup>134</sup> *Carey v. Phipps*, 435 U.S. 247, 254 (1978).

<sup>135</sup> *See id.* at 256–58 (indicating that § 1983 awards should be governed by the principle of compensation as reflected in the common law of torts, as adapted to the nature of the constitutional right).

<sup>136</sup> *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305, 310 (1986) (describing principles of § 1983 compensation in a nonpolice case).

they collect compensation for “actual losses” arising from provable injuries.<sup>137</sup> Those injuries include monetary losses such as the loss of past earnings, the impairment of future earnings, the expense of property damaged or destroyed, and medical or psychological treatment expenses.<sup>138</sup> And they include nonmonetary injuries, such as those resulting from physical harm, including pain, disability, and discomfort; and emotional and mental harm including fear, humiliation, and mental anguish.<sup>139</sup> Sometimes a victim’s parents or children or spouses are entitled to compensation for their own emotional pain and suffering as a result of a victim’s injuries as well.<sup>140</sup>

Of course, § 1983 only compensates for injuries caused by an officer’s *wrongdoing*. It does not put a price on *constitutional* police action. Nevertheless, by reckoning with the value of the harms of unconstitutional acts, § 1983 cases provide insight into the costs of coercive policing, whether lawful or not. For example, plaintiffs who win excessive force claims under § 1983 are often awarded million-dollar compensation awards for physical injuries, pain and suffering, medical expenses, and lost wages.<sup>141</sup> Although plaintiffs are not enti-

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<sup>137</sup> *Id.* at 307; *see also* *Amato v. City of Saratoga Springs*, 170 F.3d 311, 314 (2d Cir. 1999) (noting that “a jury finding of excessive force does not automatically entitle a claimant to compensatory damages” because damages would be inappropriate when any injuries lacked monetary value).

<sup>138</sup> *See Memphis Cmty. Sch. Dist.*, 477 U.S. at 307 (stating that compensatory damages under § 1983 may include “out-of-pocket loss and other monetary harms”); *see also* *McCullum v. McDaniel*, 32 Fed. App’x 49, 51–52 (4th Cir. 2002) (describing an unchallenged award for past medical expenses and past and future lost wages in a § 1983 case involving excessive force by a police officer); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 578, 580 (1st Cir. 1989) (approving an award of \$4.5 million in compensation for permanent disability, past and future medical expenses and rehabilitation costs, as well as pain and suffering resulting from police shooting).

<sup>139</sup> *See Memphis Cmty. Sch. Dist.*, 477 U.S. at 307 (stating that compensatory damages under § 1983 may include “such injuries as ‘impairment of reputation . . . , personal humiliation, and mental anguish and suffering’” (alteration in original) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974))); *see also* *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 17–18 (1st Cir. 2005) (permitting an award to a man shot by police of no more than \$3 million for physical and mental pain and suffering, and discussing damages that could be appropriately awarded in a similar case for “horror,” loss of consortium, change in quality of life, worry, and shock); *McCullum*, 32 Fed. App’x at 56–57 (permitting a noneconomic award of \$1.25 million in a police misconduct case); *Gutierrez-Rodriguez*, 882 F.2d at 578 (noting “emotional problems, including depression and aggressiveness” as partial basis for a \$4.5 million award).

<sup>140</sup> *See, e.g.,* *Fox v. Hayes*, 600 F.3d 819, 845 (7th Cir. 2010) (upholding a \$2.7 million award for wife’s loss of consortium during false arrest); *Whitfield*, 431 F.3d at 18 (reducing an award to parents who were upset by their sons’ shooting by police to \$100,000 each).

<sup>141</sup> *See Whitfield*, 431 F.3d at 16–17 (reducing compensatory damages for physical and mental pain and suffering arising from police shooting resulting in shattered femur from \$4 million to \$3 million); *McCullum*, 32 Fed. App’x at 49, 56–57 (upholding a \$1.25 million noneconomic damages award for injuries, pain, and suffering in an excessive force claim involving the loss of an eye and other significant injuries); *id.* at 51–52 (noting awards of

tled to that compensation unless the officer violates the law and excessive force causes the injuries,<sup>142</sup> these harms overwhelmingly stem from force itself, not from its illegality. An arrestee who resists arrest or attacks an officer and therefore invites and justifies the use of force against him—no less than a compensated plaintiff—loses earning capacity and suffers medical expenses. His life is made notably worse by his injuries, pain, and suffering. Even if one decides to exclude costs suffered by offenders, costs to the arrestee’s children, who suffer as a result of his disabilities, and the societal costs of his lost productivity would remain.<sup>143</sup>

Just as excessive force cases suggest the injuries that can arise in any police use of force, many of the damages awarded in false arrest cases are for harms incurred in any arrest. Juries often award substantial damages in false arrest cases for emotional harm, loss of liberty, and monetary losses.<sup>144</sup> Plaintiffs receive several thousands of dollars merely for the loss of a few hours’ time,<sup>145</sup> and tens of thousands of dollars for longer detentions.<sup>146</sup> It is not uncommon for awards to

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\$67,670 for past medical expenses and \$145,000 for past and future lost wages arising from an excessive force claim); *Park v. Shiflett*, 250 F.3d 843, 854 (4th Cir. 2001) (permitting compensatory damages of \$300,000 for past and future medical costs from injuries caused by excessive use of force during arrest); *Gutierrez-Rodriguez*, 882 F.2d at 578–87 (upholding a jury award of \$4.5 million for a plaintiff rendered paraplegic when he was shot in the back by the police).

<sup>142</sup> See *Carey v. Phipps*, 435 U.S. 247, 255 (1978) (stating that damages are available under § 1983 “for actions ‘found . . . to have been violative of . . . constitutional rights and to have caused compensable injury’”) (alteration in original) (emphasis omitted) (quoting *Wood v. Strickland*, 420 U.S. 308, 319 (1975)); *Amato*, 170 F.3d at 314 (indicating that damages should not be awarded “where both justified and unjustified force were used, [and] the jury conclude[s] that the injuries resulted from the justified use of force”).

<sup>143</sup> See *Cohen*, *supra* note 67, at 276 (“Although the offender is part of society, the conventional approach [to assessing the costs of crime] ignores the purely private losses.”); *id.* at 276–77 (noting the offender’s lost productivity while he is incarcerated and arguing that harms to the offender’s family should be counted in assessing the costs of crime).

<sup>144</sup> See *Martinez v. Port Auth. of N.Y. and N.J.*, 445 F.3d 158, 160–61 (2d Cir. 2006) (affirming district court decision awarding \$360,000 in a false arrest claim); *Kerman v. City of New York*, 374 F.3d 93, 125–26 (2d Cir. 2004) (concluding that a plaintiff is entitled to more than nominal damages for a false arrest and citing approvingly prior New York cases upholding awards of up to \$10,000 for a few hours of illegal confinement without evidence of injury); see also MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW & LITIGATION* §§ 13:19–:20 (3d ed. 2014) (citing similar cases).

<sup>145</sup> See *Kerman*, 374 F.3d at 125–26 (noting that awards of several thousand dollars are appropriate for the loss of liberty for several hours separate from any damages awarded for physical injury, embarrassment, or suffering).

<sup>146</sup> See, e.g., *Fox v. Hayes*, 600 F.3d 819, 846 (7th Cir. 2010) (ordering remittitur of \$1.7 million compensatory damages to \$16,000 for thirty-six hours of detention under false arrest); *Gardner v. Federated Dep’t Stores, Inc.*, 907 F.2d 1348, 1352–53 (2d Cir. 1990) (rejecting \$150,000 compensation for brief deprivation of liberty by department store security guards as excessive, setting \$50,000 as appropriate, and citing cases affirming awards of tens of thousands of dollars).

come to \$200,000 or \$300,000 for arrests lasting from a few hours to a few days, when there are injuries other than lost time.<sup>147</sup> While only the victims of *false* arrest deserve compensation, suspects arrested based on probable cause suffer much the same harm as those arrested illegally, including lost earnings, medical expenses, the “denial of free movement,” and some of the same humiliation and mental anguish, independent of guilt.<sup>148</sup> There are good reasons not to ignore the costs of arrests to an arrestee—given that those costs are not essential to either the adjudication of crime or to its punishment—but as with uses of force, even if we exclude the negative experiences of an arrestee himself, many notable costs would remain, including anguish, lost income, work, and companionship suffered by families and communities, regardless of an arrestee’s guilt. Civil rights litigation is relatively rare, and jury awards can be a high-variance means of estimating the full costs of policing. But if the damages reflected in those suits reflect even the right order of magnitude, they tell us something significant about the potential costs of police coercion.

Uses of force and arrests may impose obviously high costs, but even minor coercions can be costly in the aggregate. Consider, as an analogy, traffic. Traffic congestion merely slows those travelling by road, a form of suffering many would consider less serious than being pulled over by an officer or being ordered to leave a political protest. To estimate the costs of congestion, social scientists estimate the fuel wasted, the value of lost hourly wages and time, and the increased cost of goods and services that result from wasted time.<sup>149</sup> While some of those costs seem trivial to each person, one recent assessment concluded that the total economy-wide costs of traffic congestion to the United States was more than \$120 billion in 2013.<sup>150</sup> Common coercions by the police also have consequences for time wasted, income lost, humiliation suffered, and increased fear and distrust of the

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<sup>147</sup> See *Martinez*, 445 F.3d at 160–61 (upholding \$360,000 in damages for false arrest claim as within the “broad range of awards authorized in similar, even if not wholly identical cases,” and recognizing as separate bases for compensation loss of liberty and emotional harms from arrest); *Martinez v. Port Authority of N.Y. and N.J.*, No. 01 Civ. 721(PKC), 2005 WL 2143333, at \*20–21 (S.D.N.Y. Sept. 2, 2005) (collecting and comparing cases). In outrageous cases, the damages can be far more. See, e.g., *Fox*, 600 F.3d at 845 (upholding a \$2.7 million award for wife’s loss of consortium during a thirty-six hour false arrest because she had just had her child murdered and was “coping with extraordinary grief”). These are damages actions compensating for the harms of a false arrest by a police officer. Once the suspect has a hearing on probable cause or has his guilt adjudicated, additional losses are not caused by the arrest itself.

<sup>148</sup> *Gardner*, 907 F.2d at 1353.

<sup>149</sup> CTR. FOR ECON. AND BUS. RESEARCH, *THE FUTURE ECONOMIC AND ENVIRONMENTAL COSTS OF GRIDLOCK IN 2030*, at 10–11 (2014).

<sup>150</sup> *Id.* at 45.

police.<sup>151</sup> Hundreds of people are killed each year by the police.<sup>152</sup> Around thirteen million people are arrested.<sup>153</sup> More than twenty-five million are pulled over in traffic stops.<sup>154</sup> Millions more are frisked or searched or ordered to disperse.<sup>155</sup> By any estimate, the costs of policing add up.

As the costs-of-crime literature suggests, developing fully accurate estimations of the costs of coercion will not be easy. In fact, some critics argue that monetizing noneconomic costs of these kinds is an inevitably problematic, if not pointless, exercise.<sup>156</sup> Whether or not good estimates of the costs are available, however, we should expressly acknowledge the kinds and the degree of injury that are caused by police coercion. In the absence of explicit discussion of the costs of policing, arguments in favor of policing policies are instead premised on “informal, implicit, and possibly ill-informed” cost-benefit analyses, ones that may well overlook the real costs of public

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<sup>151</sup> See *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (describing a frisk as “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment”); *id.* at 24–25 (describing a frisk of outer clothing for weapons as “a severe, though brief, intrusion upon cherished personal security, and . . . an annoying, frightening, and perhaps humiliating experience”).

<sup>152</sup> See *Expanded Homicide Data Table 14*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_14\\_justifiable\\_homicide\\_by\\_weapon\\_law\\_enforcement\\_2009-2013.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2009-2013.xls) (indicating that approximately 400 people were killed each year between 2009 and 2013 by law enforcement officers). While this data is incomplete, see Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, POST NATION (Sept. 8, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/> (quoting a Department of Justice statistician stating that FBI shooting data has “significant limitations in terms of coverage and reliability”), it illustrates the point.

<sup>153</sup> See HOWARD N. SNYDER, U.S. DEP’T OF JUSTICE, NCJ 239423, ARREST IN THE UNITED STATES, 1990-2010, at 2 tbl.1 (showing estimates of total arrests in the United States over two decades). The number is now a little lower. See FED. BUREAU OF INVESTIGATION, *supra* note 120, at 2 (estimating 11,302,102 arrests in 2013).

<sup>154</sup> See LYNN LANGTON & MATTHEW DUROSE, U.S. DEP’T OF JUSTICE, NCJ 242937, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 15 tbl.1 (2013) (estimating the number of traffic stops at 26,404,200 for 2011).

<sup>155</sup> See *id.* at 2, 9 (indicating that 42% of the almost sixty-three million people who had contact with the police in 2011 were pulled over in a traffic stop and 3.5% of drivers pulled over were searched); see also *Floyd v. City of New York*, 959 F. Supp. 540, 546 (S.D.N.Y. 2013) (indicating that in New York City alone, between 314,000 and 686,000 people were stopped as pedestrians each year between 2004 and 2011 and that 52% of them were frisked).

<sup>156</sup> See Alexander Volokh, *Rationality or Rationalism? The Positive and Normative Flaws of Cost-Benefit Analysis*, 48 HOUS. L. REV. 79, 82–87 (2001) (discussing problems with valuing noneconomic costs).

policy choices.<sup>157</sup> Rigorous estimations of the costs of coercion could improve formal assessments of policing interventions and contribute to finding ways to minimize the costs. But simply recognizing that coercion has real costs could improve criminal justice decision making, a worthwhile, if more modest, goal.<sup>158</sup>

#### D. *How Federal Programs Increase Police Coercion and Its Costs*

Although local decisions dictate much of the cost of policing, federal public safety programs also seek to expand and shape police conduct. To the degree they succeed, federal actors influence the marginal costs and benefits of local policing. Sometimes, as with COPS grants, they primarily affect the amount of policing by paying for additional officers or additional equipment.<sup>159</sup> Such programs affect coercion costs because they increase local policing, and that policing involves coercion. The challenge in evaluating such programs is in determining whether the marginal benefits in crime and fear reduction associated with the program are worth the marginal costs of those coercions. Notably, while eliminating policing completely may increase crime, the evidence about adding officers to an existing police department is mixed.<sup>160</sup> If additional resources do not reduce crime or only do so to a minor degree, adding police may be inefficient, especially in a department that uses especially coercive policing tactics.

Other federal programs are intended to affect not only the amount of local policing, but also its targets and tactics. As noted in Part I, there are often good reasons to shift the targets and tactics of local policing, but doing so comes at a price. Many of the federal pro-

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<sup>157</sup> Roman & Farrell, *supra* note 66, at 58 (“It is clear that many informal, implicit, and possibly ill-informed cost-benefit analyses take place on an ongoing basis, influencing decisions varying from those of the individual to those of social policy.”).

<sup>158</sup> *See id.* at 58 (“An aim of formal cost-benefit analysis in the field of crime prevention, therefore might be to reduce the inaccuracy of current implicit cost-benefit decisions. . . . For crime policy purposes, ‘rough n’ ready’ may be preferable to ‘perfect but never completed’ . . .”).

<sup>159</sup> Since some federal resources may supplant rather than supplement local resources, even if they are not intended to, the effect will not be a dollar-for-dollar increase in total spending on local law enforcement. *See* Evans & Owens, *supra* note 88, at 193 (“[W]hile receipt of a COPS grant expanded the police force, . . . the force expanded by about half as much as the law intended.”).

<sup>160</sup> *See, e.g.,* NAT’L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 224–25 (Wesley Skogan & Kathleen Frydl eds., 2004) (concluding that evidence does not support the proposition that adding police officers reduces crime); Evans & Owens, *supra* note 88, at 194 (“[T]here is limited evidence suggesting that a larger police force will reduce crime.”); Cody W. Telep & David Weisburd, *What is Known About the Effectiveness of Police Practices in Reducing Crime and Disorder?*, 15 POLICE Q. 331, 348–49 (2012) (describing limited support for idea that adding police officers reduces crime).

grams that seek to reorient local law enforcement also encourage significant additional marginal coercion costs. In this way, federal programs push local policing in directions that are less cost effective, as the examples in this section suggest.

### 1. Arrests and Stops

Several federal programs promote arrests, sometimes expressly. One of the centerpieces of VAWA is the authorization of Grants to Encourage Arrest Policies and Enforcement of Protection Orders, known as the Arrest Program.<sup>161</sup> Arrest Program grants encourage “units of local government to treat domestic violence, dating violence, sexual assault, and stalking as serious violations of criminal law,”<sup>162</sup> first and foremost by “implement[ing] pro-arrest programs and policies in police departments.”<sup>163</sup> Even when grantees seek funding under the program for other purposes, such as “strengthen[ing] legal advocacy service programs for victims”<sup>164</sup> or “improv[ing] tracking of cases,” they must certify that their laws or official departmental policies “encourage or mandate arrests of domestic violence offenders based on probable cause that an offense has been committed.”<sup>165</sup>

When it operates as intended, the Arrest Program promotes arrests for crimes for which officers have probable cause to arrest but might otherwise have issued a summons.<sup>166</sup> *Ceteris paribus*, it seeks to increase arrests even apart from increasing prosecution and punishment of domestic violence crimes. Of course, domestic violence arrests can have significant marginal benefits. An arrest can end ongoing violence.<sup>167</sup> It may deter future crime, even if charges are

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<sup>161</sup> See 42 U.S.C. § 3796hh (2012) (authorizing grants under VAWA); see also CASSANDRA ARCHER ET AL., NATIONAL EVALUATION OF THE GRANTS TO ENCOURAGE ARREST POLICIES PROGRAM, REVISED FINAL REPORT 1–6 (2002) (discussing origins, purposes, and effects of the Arrest Program).

<sup>162</sup> 42 U.S.C. § 3796hh(a).

<sup>163</sup> *Id.* § 3796hh(b)(1).

<sup>164</sup> *Id.* § 3796hh(b)(5).

<sup>165</sup> *Id.* § 3796hh(c)(1)(A).

<sup>166</sup> Arrest Program grantees made 124,968 relevant arrests during the two-year reporting period and referred 92,718 for prosecution, though reports did not provide baseline data for comparison. OFFICE ON VIOLENCE AGAINST WOMEN, *supra* note 102, at 17, 64. Research on whether mandatory or pro-arrest policies increase arrests is more mixed. See, e.g., Eitle, *supra* note 102, at 575 (“Of . . . studies that have examined how mandatory arrest policies are associated with domestic violence arrests in a single jurisdiction, the results are equivocal, with some studies finding that arrests in such cases are more likely and others finding no change in arrests.”); *id.* at 591 (finding in a cross-jurisdictional study that a mandatory arrest policy increases arrests, but only modestly).

<sup>167</sup> See *Virginia v. Moore*, 553 U.S. 164, 174 (2007) (noting that arrest “ensure[s] a suspect’s appearance at trial, prevent[s] him from continuing his offense, and enable[s] officers to investigate the incident more thoroughly”).

subsequently dropped.<sup>168</sup> It has symbolic value.<sup>169</sup> And it may increase the chances that prosecutors will pursue the case to conviction.<sup>170</sup> These benefits motivated the Arrest Program, which along with other parts of VAWA, was intended to remedy inadequate protection of women by local law enforcement.<sup>171</sup>

However, arrests in domestic violence cases can also have substantial marginal costs. For an arrestee and his family, an arrest can lead to lost wages and lost productivity (including childcare and housework); decreased future income; legal costs; forgone education; humiliation; and a decreased quality of life, including from consequences related to housing, child custody, and immigration status.<sup>172</sup> Families may also incur precautionary costs to avoid arrests: Some spouses and children will suffer physical injury and emotional harm because they refrain from calling 911 when attacked to avoid triggering their batterers' arrest.<sup>173</sup>

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<sup>168</sup> This matter is controversial. An early study, which influenced the passage of VAWA, found that arrests deter violence. See Lawrence W. Sherman & Richard A. Berk, *Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 269–70 (1984) (finding that subjects arrested for simple assaults of domestic violence were less likely to commit subsequent violent acts against victims than others, though police were traditionally reluctant to conduct arrests). More recently, others have disagreed. See, e.g., Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. PUB. ECON. 85, 85 (2009) (finding that mandatory arrest laws are associated with a significant increase in intimate partner homicides).

<sup>169</sup> See KRISTIN A. KELLY, *DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY* 89 (2003) (describing results of interviews with legal advocates for battered women, domestic violence activists, policymakers, shelter workers, prosecutors, and police officers indicating that arrest has important symbolic value).

<sup>170</sup> See Eric L. Nelson, *Police Controlled Antecedents Which Significantly Elevate Prosecution and Conviction Rates in Domestic Violence Cases*, 13 CRIMINOLOGY & CRIM. JUST. 526, 542 (2012) (finding that arrest increases the likelihood of prosecution and, in felony cases, the likelihood of conviction).

<sup>171</sup> See 42 U.S.C. §§ 3796hh to 3796hh-4 (2012) (authorizing the Arrest Program and stating its purpose).

<sup>172</sup> Opponents of mandatory arrest for domestic violence have long argued that arrests have substantial costs. See, e.g., Benjamin P. Foster, *Norms and Costs of Government Domestic Violence Policies: A Critical Review*, 32 J. FAM. & ECON. ISSUES 140, 147–48 (2011) (arguing that domestic violence policies produce considerable economic costs); Donna M. Welch, Comment, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse*, 43 DEPAUL L. REV. 1133, 1148 (1994) (quoting Michael Steinman, *Coordinated Criminal Justice Interventions and Recidivism Among Batterers*, in WOMAN BATTERING: POLICY RESPONSES 221, 222 (Michael Steinman ed., 1991)); see also Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. (forthcoming 2015) (manuscript at 3–5), available at <http://scholarship.law.georgetown.edu/facpub/1415> (describing negative consequences of arrests with respect to housing, employment, child custody, and immigration).

<sup>173</sup> See, e.g., Iyengar, *supra* note 168, at 93 (finding increased homicides associated with mandatory arrest statutes consistent with decline in reporting by victims of domestic

Given the probable cause standard, a suspect lawfully subject to arrest is not always guilty of a crime, and the innocent may suffer higher emotional costs than the guilty when they are arrested. Mandatory and preferred arrest policies have the predictable consequence of causing more innocent suspects to be arrested, since the policies reduce officer discretion not to arrest suspects who satisfy the legal standard for arrest but are unlikely to be prosecuted or successfully convicted. Though there is limited research on the matter, some empirical evidence suggests that pro-arrest policies in domestic violence cases increase the proportion of domestic violence arrestees who are not subsequently convicted of any crime, and they increase “dual arrests”—arrests of both parties to an act of domestic violence.<sup>174</sup>

There were and are many good reasons for strengthening the criminal response to domestic violence through VAWA. The question today is whether Arrest Program grants and the conditions they require make continuing sense as a means of preventing domestic violence, given the significant costs of police coercion. Scholars and advocates have strong and varying views about the consequences of policing domestic violence crimes. It should not, however, be controversial to suggest that whatever the costs and benefits are, additional arrests must be evaluated in light of them. Yet existing assessments of VAWA’s effectiveness do not adequately address the costs of arrests or consider the impact of arrests separate from the impact of victim services, training for criminal justice system participants, and increased prosecution and punishment.<sup>175</sup>

VAWA provides the most obvious federal encouragement for arrests, but it is not alone in doing so. For example, under section 287(g) of the Immigration and Nationality Act, the Secretary of Homeland Security may enter into agreements with local law enforcement agencies that authorize local officials to perform the functions of federal immigration officers.<sup>176</sup> This delegated authority allows local

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violence). The marginal costs of arrests are not fixed. They can be changed by other laws and regulations, such as those governing public housing or immigration.

<sup>174</sup> See, e.g., DAVID HIRSCHER ET AL., EXPLAINING THE PREVALENCE, CONTEXT AND CONSEQUENCES OF DUAL ARREST IN INTIMATE PARTNER CASES 4, 11–13 (2007) (describing prior research finding dual arrests account for a portion of increased arrests from mandatory and preferred arrest laws); *id.* at 82–83 (finding support for the conclusion that mandatory arrest laws increase dual arrests in some categories of cases and that primary aggressor laws do not negate the effect); *id.* at 152 (finding some evidence for the conclusion that cases in states with mandatory arrest provisions are less likely to result in conviction).

<sup>175</sup> See, e.g., Lilley & Boba, *supra* note 36, at 169 (considering the impact of all VAWA funding on violent crime).

<sup>176</sup> Immigration and Nationality Act of 1965, tit. II, § 287(g) (codified as amended at 8 U.S.C. § 1357(g) (2012)).

police departments to work cooperatively with ICE in order to reduce the impact of illegal immigration on their communities, often in reaction to recent rapid growth in immigrant populations.<sup>177</sup> In the vast majority of jurisdictions that have 287(g) agreements, only jail personnel—and not police officers—receive the training and authorization to check immigration status, issue immigration detainers, or charge suspects with federal immigration violations.<sup>178</sup> Since patrol officers cannot check immigration status or hold someone for illegal status, the only way for an officer to confirm or dispel suspicion that someone is illegally present in the country is to arrest the suspect—if there is probable cause for a state or local offense—and take him to jail, where such a check can occur. Ordinarily, police officers do not arrest, transport, and book suspects for traffic violations or minor crimes, though those arrests are constitutional and often permitted under state law.<sup>179</sup> Instead, they usually issue a citation or summons to appear for further proceedings.<sup>180</sup> Thus, in order to gain the benefits of increased immigration enforcement pursuant to a 287(g) agreement, jurisdictions must arrest suspects who—absent the 287(g) program—would likely have been released.

The same thing was true until the end of 2014 under the Secure Communities program, an executive branch initiative in which all arrests by local police triggered federal immigration scrutiny.<sup>181</sup> Under the controversial program, fingerprints taken from arrestees when they were booked into jail were compared to the Department of

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<sup>177</sup> See RANDY CAPPS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 23–24 (2011), available at <http://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf> (discussing use of 287(g) agreements as a response to perceived problems stemming from illegal immigration in North Carolina, Georgia, Tennessee, and South Carolina).

<sup>178</sup> See *id.* at 14–15 (describing different models for 287(g) collaborations); *id.* at 21 (finding that nineteen of fifty-two 287(g) jurisdictions use the jail model and that the jail model accounts for an overwhelming proportion of detainers executed through the program).

<sup>179</sup> See, e.g., DEL. CODE ANN. tit. 11 § 1904 (2015) (authorizing misdemeanor arrests); LA. CODE CRIM. PROC. ANN. art. 213 (2014) (same); N.H. REV. STAT. ANN. § 594:10 (2014) (same); *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001) (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment arrest the offender.”).

<sup>180</sup> According to the Police-Public Contact Survey, in 2008, 44% of citizen contacts with police officers involved drivers being stopped, amounting to more than 8% of U.S. drivers. Of those stopped, more than half received a ticket, while only 2.6% were arrested. The others either received a warning or had no action taken against them. CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEP’T OF JUSTICE, NCJ 234599, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 3 tbls.2, 7, 8 (2011).

<sup>181</sup> See *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities](http://www.ice.gov/secure_communities) (describing the Secure Communities process).

Homeland Security's database, which contains fingerprints of individuals with an immigration history, as well as to the usual FBI criminal fingerprint database. If a match with the immigration database occurred, immigration officials evaluated the arrestee's status to determine whether to issue a detainer requesting that the law enforcement agency hold the arrestee to allow ICE to take him into custody.

Secure Communities was intended to avoid some of the problems with 287(g), which permitted local officials to subvert federal immigration enforcement priorities in order to pursue local goals.<sup>182</sup> While the Department of Homeland Security claimed that Secure Communities did not change local law enforcement practices,<sup>183</sup> it is easy to see that it might have, given how it affected local incentives with respects to arrests.<sup>184</sup> Secure Communities review could not take place without a custodial arrest and could not be avoided once the local jurisdiction ran a suspect's fingerprints through the federal database. In jurisdictions seeking to avert aggressive federal immigration enforcement, the program likely discouraged some discretionary custodial arrests. In jurisdictions seeking to increase pressure on illegal immigrants, Secure Communities likely encouraged police to conduct lawful arrests they would otherwise not have made.<sup>185</sup>

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<sup>182</sup> From 2006 to 2011, almost 127,000 individuals were identified for removal in the 287(g) program. According to one study, about half of the ICE detainees issued pursuant to the program are on people who have committed only misdemeanors or traffic offenses. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE 287(G)-IDENTIFIED ALIENS FOR REMOVAL 6 (2010), available at <http://www.ice.gov/doclib/foia/reports/287g-masterstats2010oct31.pdf>.

<sup>183</sup> See U.S. DEP'T OF HOMELAND SEC., ICE RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 10–11 (2012), available at <http://www.dhs.gov/xlibrary/assets/hsac/ice-response-to-task-force-on-secure-communities.pdf> (stating that under Secure Communities local governments “continue to enforce the criminal law in exactly the same manner as they did before Secure Communities was activated”); *Immigration Enforcement Frequently Asked Questions*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/faq.htm](http://www.ice.gov/secure_communities/faq.htm) (last visited Sept. 7, 2013) (“Secure Communities does not require or permit any change to law enforcement agencies’ customary booking process.”).

<sup>184</sup> For further discussion of Secure Communities and arrest incentives, see Elina Treyger, *Collateral Incentives to Arrest* 13–33 (unpublished manuscript) (on file with the New York University Law Review), and also see Letter from Assistant Att’y Gen. Thomas E. Perez to Maricopa Cnty. Att’y Bill Montgomery 3 (Dec. 15, 2011), available at [http://www.justice.gov/crt/about/spl/documents/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf) (noting evidence that law enforcement officers engaged in “immigration-related crime suppression activities” in response to noncriminal complaints).

<sup>185</sup> The costs of additional arrests are especially significant because empirical evidence suggests that Secure Communities did not reduce violent crime. See Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from ‘Secure Communities’*, J.L. & ECON. (forthcoming Nov. 2014) (manuscript at 4), available at [www.law.uchicago.edu/files/file/does\\_immigration\\_enforcement\\_reduce\\_crime\\_082514.pdf](http://www.law.uchicago.edu/files/file/does_immigration_enforcement_reduce_crime_082514.pdf) (arguing that Secure Communities led to no meaningful reduction in the rates of FBI index

In the case of 287(g) and Secure Communities, the additional burdens fall on those who are suspected both of traffic violations or other minor misdemeanors and also of being illegally in the country. This burden is likely to be suffered disproportionately by members of racial minority groups. That fact imposes an additional kind of harm to dignity—a harm that federal law effectively encourages local law enforcement to cause. Given that every arrest is a serious and burdensome affair, programs that increase arrests must be understood to increase the costs of policing.<sup>186</sup>

## 2. *Militarism, Force, and the Threat of Force*

In addition to encouraging specific additional police actions like arrests, federal grant programs also often encourage an aggressive and militaristic style of policing that can, depending on circumstances, undermine as well as promote public security. For example, the Homeland Security Grant Program<sup>187</sup> provides hundreds of millions of dollars to state and local governments, much of which goes to local law enforcement agencies, to prevent, protect against, and respond to acts of terrorism.<sup>188</sup> Local law enforcement agencies have used the

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crimes or violent crime). The Secure Communities Program has now been replaced with the Priority Enforcement Program. Under the new program, a booking following arrest still triggers federal immigration review, but ICE only intended to seek transfer of an alien who has been convicted of a crime enumerated in federal removal priorities. See Memorandum from Jeh Charles Johnson, *supra* note 6, at 1, 3 (declaring that Secure Communities would be replaced with the Priority Enforcement Program and describing the new program). Though this program might still encourage some additional arrests in order to trigger federal immigration scrutiny, the narrowing of the category of aliens who will be transferred for removal likely mitigates the strength of the incentive to change behavior to trigger or prevent that review.

<sup>186</sup> Other federal programs encourage deprivations of autonomy more minor than arrests. As noted above, for example, equitable sharing programs incentivize traffic enforcement, which involves frequent, if brief, encounters with police, in which those pulled over are not free to leave or otherwise determine their own conduct. See, e.g., *Brendlin v. California*, 551 U.S. 249, 257–59 (2007) (finding it reasonable for police officers to control movement of drivers and passengers during traffic stops); *Pennsylvania v. Mims*, 434 U.S. 106, 111 (1977) (holding that a police officer may order a person out of his car during an ordinary traffic stop consistent with Fourth Amendment).

<sup>187</sup> 6 U.S.C. §§ 604–605 (2012).

<sup>188</sup> *Id.* Under federal law, 80% of the funds must be passed through to local or tribal jurisdictions, and at least 25% of the funds in the grant program must be allocated for law enforcement terrorism prevention. See *id.* (authorizing and stating requirements for Urban Areas Security Initiative grants and the State Homeland Security Grant Program); *id.* § 607(a) (indicating that “not less than 25 percent of the total combined funds appropriated for grants under sections 604 and 605” must be “used for law enforcement terrorism prevention activities”). In 2014 alone, that 25% amounts to more than \$200 million. See *FY 2014 Homeland Security Grant Program*, *supra* note 56 (noting that amount available for the State Homeland Security Program in 2014 is \$401,346,000, and the amount available in the Urban Areas Security Initiative is \$587 million). In recent

funding largely for new equipment, which requires less planning and ongoing commitment of resources than alternative programmatic uses for the money.<sup>189</sup> The consequence has been increasingly militarized police departments, which now have bomb-detection robots, Kevlar helmets, unmanned aerial vehicles (known as drones), and tactical armored vehicles.<sup>190</sup> Homeland Security grants are the primary source of funding for helicopters, tactical vehicles, and personal protective equipment for police departments.<sup>191</sup>

Dozens of departments have used Homeland Security grants to buy BearCats—Ballistic Engineered Armored Response Counter Attack Trucks, made by the military supplier Lenco.<sup>192</sup> These armored personnel carriers—which cost \$250,000 or more—include ballistic glass, a rotating turret, and gun ports.<sup>193</sup> A BearCat might deter some

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years, the funding in these programs has been substantially higher. *See, e.g., FY 2010 Homeland Security Grant Program*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/fy-2010-homeland-security-grant-program> (indicating higher grant amounts in the 2010 fiscal year); *FY 2008 Homeland Security Grant Program*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/fy-2008-homeland-security-grant-program> (indicating higher grant amounts in the 2008 fiscal year).

<sup>189</sup> *See* Stephen A. Morreale & David E. Lambert, *Homeland Security and the Police Mission*, 6 J. HOMELAND SECURITY & EMERGENCY MGMT. 1, 13–14 (2009) (noting that police departments use Homeland Security funding for purchasing equipment, which requires less mission revision, bureaucratic innovation, or effort than other uses of Homeland Security funds).

<sup>190</sup> *See* SEN. TOM COBURN, SAFETY AT ANY PRICE: ASSESSING THE IMPACT OF HOMELAND SECURITY SPENDING IN U.S. CITIES 36 (2012), available at <https://info.publicintelligence.net/SenatorCoburn-UASI.pdf> (describing militarized vehicles and bomb detection robots among other equipment purchased with Homeland Security grants); Andrew Becker & G.W. Schulz, *Local Police Stockpile High-Tech, Combat-Ready Gear*, CTR. FOR INVESTIGATIVE REPORTING (Dec. 21, 2011), <http://cironline.org/reports/local-police-stockpile-high-tech-combat-ready-gear-2913> (describing military equipment going to low-risk jurisdictions as a result of Homeland Security grants).

<sup>191</sup> EXEC. OFFICE OF THE PRESIDENT, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION 15 (2014), available at [http://www.whitehouse.gov/sites/default/files/docs/federal\\_support\\_for\\_local\\_law\\_enforcement\\_equipment\\_acquisition.pdf](http://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf).

<sup>192</sup> *See* COBURN, *supra* note 190, at 36–39 (describing armored vehicles purchased with Homeland Security grants and Lenco’s assistance to departments); *see also* *Law Enforcement, Lenco Armored Vehicles*, <http://www.lencoarmor.com/law-enforcement> (last visited Feb. 14, 2015) (describing, on the Lenco company website, several Lenco models available for law enforcement use, including the BearCat, the larger Bear, and variants on both models).

<sup>193</sup> Though Lenco no longer posts the specifications for BearCats on the open portion of its website, *see* *Law Enforcement-BearCat Variants*, Lenco Armored Vehicles, <http://www.lencoarmor.com/law-enforcement/bearcat-variants/g2/> (last visited Mar. 12, 2015) (stating that product information and brochures are password protected), descriptions are still available from other sources, *see* *BearCat Armored Vehicle*, FED. BUS. OPPORTUNITIES (Feb. 11, 2013, 1:34 PM), <https://www.fbo.gov/notices/e2ef5c66f3c568eef8abcfcd8128724eb> (describing Lenco BearCat BC55003 as including rotating rooftop turret, ballistic skip round shields, and more); COBURN, *supra* note 190, at 39 (describing BearCats as \$250,000

would-be terrorists, it might mitigate the expected consequences of an attack, and it might ease fear and anxiety about the risks of terrorism by signaling readiness. Similarly, it might deter, mitigate the costs of, and reassure the community about crime by enabling a police department to resolve hostage situations more quickly or to serve high-risk warrants with fewer injuries to officers.<sup>194</sup> Presumably, these benefits will be greatest in locations where the risk and fear of terrorism and crime are most significant. The Department of Homeland Security has distributed federal dollars far beyond such jurisdictions,<sup>195</sup> giving funding disproportionately to departments in less-populated communities and states, which often have both low risks of terrorism and low crime rates.<sup>196</sup>

Many have noted that the Homeland Security programs encourage militarism in policing and that militarism in policing is a bad thing.<sup>197</sup> Thinking about coercion costs helps show why. BearCats, other armored vehicles, and high-powered weaponry may sometimes decrease the use of force by the police. But other times this equipment will increase the chances that force will be used or increase the severity of force, resulting in additional physical harm and the connected costs of medical care, lost income, and pain and suffering that physical injuries entail. A department with an armored vehicle might reclassify ordinary warrant execution or other police-citizen

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vehicles); Julie Bosman & Matt Apuzzo, *In Wake of Clashes, Calls to Demilitarize Police*, N.Y. TIMES, Aug. 15, 2014, at A1 (noting that Homeland Security grants paid for the \$360,000 BearCat used in Ferguson, Missouri).

<sup>194</sup> Other military style equipment might also be used to discover missing persons or rescue individuals stranded in a natural disaster.

<sup>195</sup> See, e.g., COBURN, *supra* note 190, at 1 (summarizing the report as “expos[ing] misguided and wasteful spending” in the Urban Areas Security Initiative); Kim Murphy, *Is Homeland Security Spending Paying Off?*, L.A. TIMES (Aug. 28, 2011), <http://articles.latimes.com/2011/aug/28/nation/la-na-911-homeland-money-20110828> (describing criticisms of the program).

<sup>196</sup> See Patrick S. Roberts, *Shifting Priorities: Congressional Incentives and the Homeland Security Granting Process*, 22 REV. POL’Y RESEARCH 437, 443–44 (2005) (contending that political incentives have led to Homeland Security grants going disproportionately to small, low-risk states). By contrast, the Urban Areas Security Initiative is intended to be limited to metropolitan areas that face significant risks of terrorism. However, until 2011 when funding cuts required the list of eligible cities to be shortened, the list included Albany, New York; Omaha, Nebraska; and Providence, Rhode Island, among other cities that are rarely associated with elevated terrorism risk. Devlin Barrett, *Some Cities Lose Funding to Prevent Terrorism*, WALL ST. J., May 20, 2011, at A5.

<sup>197</sup> For some recent examples from both the left and the right, see ACLU, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 2* (2014) (describing and criticizing militarism in American policing resulting from federal programs), Abigail R. Hall & Christopher J. Coyne, *The Militarization of U.S. Domestic Policing*, 17 INDEP. REV. 485 (2013) (describing the historical rise and political economy of militarization), and Radley Balko, *Rise of the Warrior Cop*, WALL ST. J., July 20–21, 2013, at C1 (criticizing increased militarization in domestic policing).

encounters as high risk in light of available resources (and the need to maintain training on the equipment), subjecting citizens to the risk of increased harm, even when the risks to officers and the public are low.<sup>198</sup> Thus, for example, the Maricopa County Sheriff's Office in Arizona used two armored vehicles purchased with Urban Areas Security Initiative funds and a special weapons and tactics (SWAT) team to raid the house of a man suspected of cockfighting, a crime punishable by up to eighteen-months imprisonment.<sup>199</sup>

Militarism also decreases police legitimacy and increases fear of the police.<sup>200</sup> Police legitimacy has been the subject of an immense amount of academic attention in the past two decades.<sup>201</sup> This research indicates that perceptions of police legitimacy affect citizen compliance with the law and therefore police effectiveness at fighting crime.<sup>202</sup> Existing cost-benefit assessments can capture this aspect of legitimacy through the value of crime averted, though crime control is not usually an outcome measure for evaluating Homeland Security

<sup>198</sup> See ACLU, *supra* note 197, at 18 (stating that one “dramatic” consequence of police militarization is “the use of SWAT and other paramilitary teams to conduct ordinary law enforcement activities”); Hall & Coyne, *supra* note 197, at 488 (“Once domestic police forces acquire additional funding, tactical training, and weaponry, they face an incentive to use this training and equipment to justify the spending and to seek further increases.”).

<sup>199</sup> COBURN, *supra* note 190, at 43 (describing the incident); see also ACLU, *supra* note 197, at 13 (noting that Maricopa County has received a .50 caliber machine gun, 120 assault rifles, five armored vehicles, and ten helicopters mostly from federal programs).

<sup>200</sup> See EXEC. OFFICE OF THE PRESIDENT, *supra* note 191, at 5 (noting that some believe the use of military equipment by civilian police weakens community trust in the police).

<sup>201</sup> See, e.g., TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS, at xiii–xv (2002) (assessing how past experience with police affects compliance with the law); Lorraine Mazerolle et al., *Procedural Justice and Police Legitimacy: A Systematic Review of the Research Evidence*, 9 J. EXPERIMENTAL CRIMINOLOGY 245, 245 (2013) (reviewing empirical evidence on the impact of interventions designed to improve citizen perceptions of police legitimacy). Because of the centrality of legitimacy to democratic self-governance, legitimacy can provide a normative measure of the success of policing, independent of police effectiveness at reducing crime and disorder. See, e.g., DAVIS, *supra* note 60, at 1 (“Much recent thinking has argued that police performance measures need to incorporate a wider set of concerns tied to the precepts of democratic policing.”); *Race, Trust and Police Legitimacy*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/topics/law-enforcement/legitimacy/pages/welcome.aspx> (last visited Feb. 15, 2015) (“The public’s perceptions about the lawfulness and legitimacy of law enforcement are an important criterion for judging policing in a democratic society.”).

<sup>202</sup> See, e.g., Manuel Eisner & Amy Nivette, *Does Low Legitimacy Cause Crime? A Review of the Evidence*, in LEGITIMACY AND CRIMINAL JUSTICE: AN INTERNATIONAL EXPLORATION 308, 308 (Justice Tankebe & Alison Liebling eds., 2013) (reviewing research on the impact of political legitimacy, including police legitimacy, on crime); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 236 (2008) (studying whether police legitimacy leads to cooperation with the police and others to reduce crime).

grants.<sup>203</sup> Moreover, there are other consequences of undermining legitimacy, including dissatisfaction with the police, refusal to cooperate with the police, and reduced compliance with noncriminal norms and regulations.<sup>204</sup> These consequences also affect public order and communal quality of life, and they are not reflected in assessments that incorporate changes in crime.

If police legitimacy is at least a recognized concern, fear of the police has received almost no academic attention. To the degree that policy interventions increase fear of law enforcement and that fear of law enforcement (as opposed to fear of prosecution or punishment) deters crime, fear already registers in evaluations of the benefits of policing policy. But fear of the police also has substantial costs that are not factored into existing assessments. As one commentator noted:

To be black and interact with the police is a scary thing. The fear doesn't have to come from any kind of historical antagonism, which, trust me, would be enough; it can also come from many data points of personal experience, collected over time. Almost all black men have these close-call-style stories, and we collect and mostly keep them to ourselves until one of us is killed. You know how the stories go: I was pulled over one day and the cop drew his gun as he approached my window; I was stopped on the street, handcuffed and made to sit on the sidewalk because the cop said I looked like a suspect; I had four squad cars pull up on me for jaywalking. We trade them like currency. And it almost goes without saying that these stops are de facto violent, because even when the officer doesn't physically harm you, you can feel that you've been robbed of something. The thing to remember is that each of these experiences compounds the last, like interest, so that at a certain point just seeing a police officer becomes nauseating. That feeling is fear.<sup>205</sup>

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<sup>203</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, HOMELAND SECURITY, *supra* note 60, at 30–31 (criticizing Homeland Security grant programs for using output measures—like the percentage of fusion center analysts that have needed secret clearances—rather than outcome measures as performance measures for programs).

<sup>204</sup> See Mazerolle et al., *supra* note 201, at 264–65 (summarizing a review of studies indicating that changing policing strategies to be procedurally just promotes perceptions of legitimacy, cooperation with, compliance with, satisfaction with, and confidence in the police); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC. REV. 513, 534–35 (2003) (summarizing a study finding that legitimacy “was by far the dominant predictor of orientation toward the police” and affected compliance with law, and willingness to cooperate with and to empower the police).

<sup>205</sup> Lanre Akinsiku, *The Price of Blackness*, GAWKER (Aug. 17, 2014, 1:37 PM), <http://gawker.com/the-price-of-blackness-1622972582>.

One might argue that the costs of fear are too diffuse, abstract, or marginal to be considered in economic assessments of criminal justice policy. Certainly, there are challenges in specifying and measuring apprehension. The costs of fear of the police, however, are closely analogous to the costs of fear of crime, which are increasingly incorporated into estimates of the costs of crime—and consequently into assessments of the benefits of criminal justice interventions.<sup>206</sup> The Department of Justice has advised police departments that fear of crime is real and important, and that reducing it should be an explicit police priority.<sup>207</sup> It is hard to imagine that fear of the police should be taken any less seriously.

Scholars take the costs of fear of crime to include both tangible and intangible costs arising from anticipation of victimization.<sup>208</sup> Tangible costs include preventative costs, such as security measures and additional transport costs from taking a taxi rather than the subway because of the risk of victimization. Intangible costs include the health loss attributable to anxiety about crime and the loss of freedom we accept to avoid crime. Similarly, the fear of police has multiple components. These include preventative steps individuals take to avoid interactions with the police.<sup>209</sup> They also might include the steps communities take to observe police conduct. For example, one way to conceive of copwatching—the phenomenon of organized community

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<sup>206</sup> See, e.g., Paul Dolan & Tessa Peasgood, *Estimating the Economic and Social Costs of the Fear of Crime*, 47 BRIT. J. CRIMINOLOGY 121, 122–27 (2007) (describing and quantifying the costs of fear of crime); see also Matthew D. Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT L. REV. 977, 978 (2004) (“[F]ear assessment should be a component of cost-benefit analysis.”).

<sup>207</sup> See GARY CORDNER, U.S. DEP’T OF JUSTICE, REDUCING FEAR OF CRIME: STRATEGIES FOR POLICE, at iii (2010) (contending, in an introductory letter from Bernard K. Melekian, Director of the COPS Office, that “[f]ear of crime has an incredibly corrosive effect on individuals and entire communities” and that “[t]he COPS Office recognizes that people not only need to be safe, but they also need to feel safe”); *id.* at ix (“[R]educing fear should be an explicit police priority.”).

<sup>208</sup> See Dolan & Peasgood, *supra* note 206, at 123–26 (summarizing tangible and intangible costs of fear of crime).

<sup>209</sup> See, e.g., Dahleen Glanton, *What Black Parents Tell Their Sons*, CHI. TRIB. (Mar. 24, 2012), [http://articles.chicagotribune.com/2012-03-24/news/ct-met-black-sons-20120324\\_1\\_african-american-young-black-men-black-parents](http://articles.chicagotribune.com/2012-03-24/news/ct-met-black-sons-20120324_1_african-american-young-black-men-black-parents) (describing an African-American parent who does not let her sixteen-year-old son walk home from school alone); Michael Martinez et al., *Within Black Families, Hard Truths Told to Sons Amid Ferguson Unrest*, CNN (Aug. 21, 2014, 12:09 AM), <http://www.cnn.com/2014/08/15/living/parenting-black-sons-ferguson-missouri/> (“Think twice about wearing a hoodie. Pull up your pants. Shut your mouth around police. Swallow your pride. Don’t drive with more than three friends. And keep your hands where they can be seen.”); Rheana Murray, *The Conversation Black Parents Have with Their Kids About Cops*, ABC News (Dec. 8, 2014, 3:49 PM), <http://abcnews.go.com/US/conversation-black-parents-kids-cops/story?id=27446833> (describing parents’ instructions to their children about how to behave and what to wear to avoid problems with the police).

groups that patrol neighborhoods in order to watch and record police conduct—is as a cost of fear of police encounters.<sup>210</sup>

Armored vehicles and high-powered weaponry increase the intangible costs of fear of the police. In fact, police departments value this equipment precisely because its menacing presence generates “shock and awe”<sup>211</sup>—that is, because it generates this harm. Since military equipment in police hands has benefits as well as these costs, it is not obvious whether Homeland Security grants outweigh their costs. Still, even a cursory look at the programs suggest that existing grants do not minimize the costs. Many of the communities which have received BearCats, for example, are ones that face little serious crime and almost no risk of terrorist attack, such as Keene, New Hampshire and Fargo, North Dakota.<sup>212</sup> Instead of using them in response to terrorism or crime incidents, police officers carry assault weapons or drive armored personnel carriers at the Clovis, California Letterman Park Easter Egg Hunt and in the Manchester, New Hampshire St. Patrick’s Day Parade.<sup>213</sup> For communities rarely requiring the use of militarized equipment and needing little additional crime deterrence, these displays, which subject citizens to a widespread and ongoing implicit (if low-level) threat of force (as well as reassurance), may well impose more harm than they prevent.

Homeland Security grants are not the only federal subsidy for militarized policing. The Department of Defense’s Excess Property Program, usually referred to as the 1033 Program, authorizes the Defense Logistics Agency’s Law Enforcement Support Office to pro-

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<sup>210</sup> See, e.g., BERKELEY COPWATCH, THE BERKELEY COPWATCH HANDBOOK: AN INTRODUCTION TO CITIZEN MONITORING OF THE POLICE 5–6, 19–49, available at [http://berkeleycopwatch.org/resources/Handbook\\_13\\_print.pdf](http://berkeleycopwatch.org/resources/Handbook_13_print.pdf) (describing purposes and practices of Berkeley’s copwatch organization). For an informative description of the phenomenon of copwatching, see Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. (forthcoming 2016), available at <http://ssrn.com/abstract=2571470>.

<sup>211</sup> See COBURN, *supra* note 190, at 38 (“Police departments rave about [militarized] vehicles’ ‘shock and awe’ effect saying the vehicles’ menacing presence can be enough of a deterrent for would-be criminals.”); Becker & Schulz, *supra* note 190 (“Do the armored vehicles and combat dress produce a sort of ‘shock and awe’ effect? Lt. Jeremy Clark of the West Hartford Police Department in Connecticut hopes so.”); Michael Virtanen, *More Defense Surplus Equipment Heading to Local Police Departments; ACLU Concerned*, WASH. POST (Nov. 24, 2013), [http://www.washingtonpost.com/politics/more-defense-surplus-equipment-heading-to-local-police-departments-aclu-concerned/2013/11/24/44051418-555a-11e3-ba82-16ed03681809\\_story.html](http://www.washingtonpost.com/politics/more-defense-surplus-equipment-heading-to-local-police-departments-aclu-concerned/2013/11/24/44051418-555a-11e3-ba82-16ed03681809_story.html) (noting that they “deliver shock and awe” and quoting a New York sheriff who recently acquired a mine-resistant, ambush-protected vehicle as observing, “It’s armored. It’s heavy. It’s intimidating. And it’s free.”).

<sup>212</sup> See Becker & Schulz, *supra* note 190 (describing Homeland Security spending in cities with little risk of terrorism).

<sup>213</sup> See COBURN, *supra* note 190, at 38 (mentioning uses of militarized vehicles at these and other community events and parades).

vide without charge surplus Department of Defense military equipment to state and local law enforcement agencies for counternarcotics and counterterrorism activities. Through this program, departments all over the country have access to military airplanes, helicopters, drones, armored personnel carriers, body armor, and night vision equipment.<sup>214</sup> More specifically, as of late 2014, the program sent 92,442 small arms, 44,275 night vision devices, 5235 Humvees—also known as High Mobility, Multipurpose Wheeled Vehicles (HMMWVs)—617 Mine Resistant Ambush Protected vehicles (MRAPs), and 616 aircraft to law enforcement agencies around the country.<sup>215</sup>

The 1033 Program is sometimes viewed as a more efficient alternative to Homeland Security funding because it takes advantage of existing equipment, and it has provided \$2.7 billion in existing equipment to law enforcement agencies in the last five years.<sup>216</sup> However, even if it is more financially efficient for the federal government, the program also provides a broader subsidy for militarizing local police departments, unconstrained by department size, crime rates, terrorism risk, or the suitability of the equipment for the public safety threats the department faces. Law enforcement agencies themselves determine whether equipment is appropriate for the department,<sup>217</sup> and some of the largest beneficiaries of the 1033 Program have been tiny departments. They include the Fairmount, Georgia Police Department, which serves 7000 citizens and yet acquired 17,145 items in a five-year period, and the police department in Issaquah, Washington, which serves 30,000 people and received 37,000 pieces of equipment.<sup>218</sup> Departments that rarely see a violent crime have obtained M-16 and AR-15 assault rifles, bayonets, armored vehicles, helicop-

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<sup>214</sup> *1033 Program FAQs*, DEF. LOGISTICS AGENCY, <http://www.dispositionservices.dla.mil/leso/Pages/1033ProgramFAQs.aspx> (last visited Feb. 15, 2015) (including link to PowerPoint describing available property).

<sup>215</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 191, at 8.

<sup>216</sup> See COBURN, *supra* note 190, at 41 (describing and praising cities that take “[t]he frugal approach” by acquiring armored vehicles from federal government surplus rather than buying new a vehicle with Homeland Security grants).

<sup>217</sup> See EXEC. OFFICE OF THE PRESIDENT, *supra* note 191, at 7 (noting that because the Department of Defense does not have expertise in civilian law enforcement operations and needs, it is left to state coordinators and police departments to determine the appropriate types of equipment to acquire).

<sup>218</sup> Lorenzo Franceschi-Bicchierai, *Small-Town Cops Pile Up on Useless Military Gear*, WIRED (June 26, 2012, 6:31 AM), <http://www.wired.com/2012/06/cops-military-gear/all/>; see also Michael Kunzelman, *Little Restraint in Military Giveaways*, ASSOCIATED PRESS (July 31, 2013, 7:31 PM), <http://bigstory.ap.org/article/ap-impact-little-restraint-military-giveaways> (describing small low-risk communities receiving significant equipment).

ters, grenade launchers, and amphibious tanks through the program.<sup>219</sup> Recently, hundreds of departments have received eighteen-ton MRAPs, worth \$500,000 each, when the vehicles returned from Iraq. Two dozen of those departments serve communities of 25,000 people or fewer.<sup>220</sup> Because the program does not tailor the amount or kind of equipment to the public safety threats faced by the department, the program facilitates costs (from the use of force and the implicit threat of force) even when the likely benefits of the equipment (in the form of increased officer and public safety) are minimal. Nor can the equipment simply be obtained and remain unused: Recipients are required by the terms of the program to use any equipment they receive within one year,<sup>221</sup> ensuring that communities will pay some coercion costs, even if the equipment is free.

Another Department of Defense program, the 1122 Program, permits local law enforcement agencies to purchase similar military equipment for counterdrug and homeland security activities through federal suppliers at discounted rates. It is often used to subsidize the purchase of weapons and surveillance equipment,<sup>222</sup> and therefore may have effects that are similar in kind to the 1033 Program, if less extreme. In addition, forty percent of JAG funding is used for equipment. Though most of that equipment is not militaristic, a significant amount of JAG funding is used to purchase weapons, including firearms, explosive devices, Tasers, tear gas, and SWAT gear.<sup>223</sup>

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<sup>219</sup> See Shawn Musgrave et al., *The Pentagon Finally Details Its Weapons-for-Cops Giveaway*, MARSHALL PROJECT (Dec. 3, 2014, 7:35 PM), <https://www.themarshallproject.org/2014/12/03/the-pentagon-finally-details-its-weapons-for-cops-giveaway> (providing details about equipment given away in 1033 Program); see also Franceschi-Bicchierai, *supra* note 218 (providing details of equipment acquired through the 1033 Program).

<sup>220</sup> See *Oversight of Federal Programs for Equipping State and Local Law Enforcement: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 113th Cong. 6 (2014) (statement of Peter B. Kraska, Professor, School of Justice Studies, University of Eastern Kentucky), available at <http://www.hsgac.senate.gov/download/?id=7ee79f5f-3a55-4caf-8070-d4b693a05ae6> (stating that twenty-three departments serving 25,000 or fewer people have received Mine Resistant Ambush Protected vehicles (MRAPs) from the military); EXEC. OFFICE OF THE PRESIDENT, *supra* note 191, at 8 (stating that 617 MRAPs have been provided to law enforcement agencies through the 1033 Program); Virtanen, *supra* note 211 (noting 165 MRAPs delivered to New York police departments after returning from Iraq).

<sup>221</sup> See EXEC. OFFICE OF THE PRESIDENT, *supra* note 191, at 7 (noting the use requirement).

<sup>222</sup> See U.S. GEN. SERVS. ADMIN., 1122 PROGRAM EQUIPMENT AND SUPPLIES CATALOG 5–40 (2012), available at [http://www.gsa.gov/graphics/fas/1122\\_Catalog.pdf](http://www.gsa.gov/graphics/fas/1122_Catalog.pdf) (listing available equipment).

<sup>223</sup> See, e.g., LAURA WYATT ET AL., U.S. DEP'T OF JUSTICE, GRANT ACTIVITY REPORT: JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, APRIL 2012–MARCH 2013, at 4 (2013), available at [https://www.bja.gov/Publications/JAG\\_LE\\_Grant\\_Activity\\_03-13.pdf](https://www.bja.gov/Publications/JAG_LE_Grant_Activity_03-13.pdf) (reporting purchase of lethal and nonlethal weapons by local agencies with JAG grant

Like Homeland Security funding, federal equipment programs facilitate the use and threatened use of force and sometimes erode public trust in the police, something that in the aftermath of Ferguson even the federal government has begun to notice. A recent White House review of the 1033 Program noted that “when police lack adequate training, make poor operational choices, or improperly use equipment, these programs can facilitate excessive uses of force and serve as a highly visible barrier between police and the communities they secure.”<sup>224</sup>

Increased militarism in American policing goes beyond equipment. The military and police forces have a lot in common, including hierarchical organization, a reliance on coercive techniques, and a professional dependence on physical skill and strength.<sup>225</sup> Nevertheless, their missions and the legal frameworks in which they operate are distinct. Especially in the context of the “wars” on drugs and terrorism, which have been largely funded by federal grants, American police departments have been infused with military structure, culture, and techniques.<sup>226</sup> In many departments, cohesive SWAT teams, modeled on military special operations groups and trained by military veterans, execute an increasing number of no-knock warrants and other operations using military techniques to enter and secure buildings.<sup>227</sup> Federal programs also involve military personnel directly in local law enforcement. The Department of Defense’s Counterdrug Program, for example, provides local police departments with direct support for drug interdiction, including through Joint Task Force North, a military operation designed to support domestic counterdrug and counterterrorism activities.<sup>228</sup> In border towns, this means that

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funding); EXEC. OFFICE OF THE PRESIDENT, *supra* note 191, at 10–11 (noting that JAG grants can be used for firearms and Tasers).

<sup>224</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 191, at 6.

<sup>225</sup> Donald J. Campbell & Kathleen M. Campbell, *Soldiers as Police Officers/Police Officers as Soldiers: Role Evolution and Revolution in the United States*, 36 ARMED FORCES & SOC’Y 327, 327–28 (2010).

<sup>226</sup> See Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 POLICING 501, 502 (2007) (stating that empirical evidence suggests “an unprecedented cooperative relationship between the US military and US civilian police . . . including technology transfers, massive military weapons transfers, information sharing . . . , a close operational relationship . . . , and a high level of cross-training in the area of special weapons and tactics team (SWAT) and countercivil disturbance, counterinsurgency, and antiterrorism exercises”).

<sup>227</sup> See *id.* at 506 (describing SWAT teams as more militarized “culturally, organizationally, operationally, and materially” than patrol officers); *id.* at 507–08 (describing no-knock raids by SWAT teams).

<sup>228</sup> Joint Task Force North, previously known as Joint Task Force 6, was established in 1989 and continues to provide support to local, state, and federal law enforcement agencies fighting drug trafficking into the United States over the southwest border. See JOINT TASK

American military personnel provide training to police departments in small-unit tactics, interrogation techniques, and the use of pyrotechnics and booby traps designed for combat rather than securing suspects for trial.<sup>229</sup> In each case, whatever the benefits, there is also a risk of additional costly force and fear from the tactics.

Even COPS grants could be said to push militarized policing, at least indirectly. The CHP awards money to police departments to defray the salaries and benefits of new hires. In 2012, the program introduced a restriction that the approximately \$115 million in awards could only be used to hire new police officers who served in the military since 9/11.<sup>230</sup> This requirement was eliminated in 2013, but it is not the first or likely the last federal program that has linked veterans and police departments.<sup>231</sup> There are many good reasons to favor veteran hiring preferences in policing, including the age and experience of former soldiers.<sup>232</sup> But those who have served in the military may be more likely to import its culture, mission, tactics, and training to policing than other hires, a matter not considered in establishing such programs.<sup>233</sup>

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FORCE NORTH, FACT SHEET: HISTORY OF JOINT TASK FORCE NORTH (2012), available at [http://www.jtfn.northcom.mil/factsheets/jan12\\_history.pdf](http://www.jtfn.northcom.mil/factsheets/jan12_history.pdf) (describing the mission and history of the program and noting that the task force's efforts led to "a significant expansion of the partnership among active duty forces, reserve components, and the nation's law enforcement agencies").

<sup>229</sup> See Campbell & Campbell, *supra* note 225, at 330 (describing the evolution of military involvement in antidrug efforts from giving loans and equipment to providing ground troops and substantial integration of military and law enforcement efforts); Timothy Dunn, *Military Collaboration with the Border Patrol in the U.S.-Mexico Border Region: Inter-Organizational Relations and Human Rights Implications*, 27 J. POL. & MILITARY SOC. 257, 259–64 (1999) (describing the military's role in border enforcement).

<sup>230</sup> OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, COPS FY2012 APPLICATION GUIDE: COPS HIRING PROGRAM (CHP) 12 (2012), available at [http://www.cops.usdoj.gov/pdf/2012AwardDocs/CHP/2012\\_CHP\\_Application\\_Guide.pdf](http://www.cops.usdoj.gov/pdf/2012AwardDocs/CHP/2012_CHP_Application_Guide.pdf).

<sup>231</sup> In 1995 and 1999, the smaller Troops to COPS program also defrayed the costs of hiring eligible veterans. See Press Release, U.S. Dep't of Def., Defense and Justice Departments Announce "Troops to Cops" Conversion Program (May 2, 1995), available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=475> (describing previous programs facilitating veteran hiring in police departments); *Troops to COPS (1995 and 1999)*, OFFICE OF CMTY. ORIENTED POLICING SERVS., <http://www.cops.usdoj.gov/default.asp?Item=76> (last visited Mar. 2, 2015).

<sup>232</sup> See Stanley Shernock, *Changing Uniforms: A Study of the Perspectives of Law Enforcement Officers With and Without Different Military Background on the Effects of Combat Deployment on Policing*, 26 CRIM. JUST. POL'Y REV. 1, 22 (2015) (finding that police officers and supervisors believe that officers with combat experience have enhanced maturity, discipline, and leadership skills).

<sup>233</sup> See *id.* at 21 (finding in a survey that officers believed veterans bring to policing useful weapons training, experience with tactical operations, critical incidence response, and greater willingness to be involved in dangerous situations).

Not all federal grant programs encourage militaristic policing, and some may mitigate the diffuse anxiety that policing can trigger. Most notably, COPS grants were created in part to promote community-oriented policing, a policing philosophy that might lessen the intimidation that law enforcement presence otherwise triggers for some.<sup>234</sup> Still, the overall tendency of federal public safety programs is apparent. In major ways and minor ones, federal programs contribute to militarism in policing and the potential for additional force and fear. These programs therefore encourage costly policing, sometimes when it is least justified.

### 3. *Property Deprivations*

Perhaps the most obvious example of a federal program intended to encourage coercive tactics by local police is federal asset forfeiture law. While federal laws permit federal law enforcement to confiscate property connected with federal criminal activity,<sup>235</sup> and many states permit local officers to seize property connected with specific state criminal violations,<sup>236</sup> federal statutes also permit *local* police departments to seize property associated with *federal* crimes and receive a significant share of the proceeds through the federal Equitable Sharing Program.<sup>237</sup> For example, the program has permitted federal agencies to “adopt” purely local seizures of property forfeitable under

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<sup>234</sup> The COPS Office has spent more than \$11 billion in its grant programs since its inception, but overwhelmingly that money has been spent in its hiring program, which has little emphasis on community-oriented policing. See Bernard K. Melekian, *From the Director: The Office of Community Oriented Policing Services, From the Director*, POLICE CHIEF, Mar. 2011, at 14 (acknowledging that the COPS office is primarily viewed as adding officers to the streets; claiming that it has also advanced community policing through training, technical assistance, and information dissemination; and announcing changes to hiring grants to make the program more oriented toward community policing).

<sup>235</sup> For a collection of federal asset forfeiture statutes, see ASSET FORFEITURE & MONEY LAUNDERING SECTION, U.S. DEP’T OF JUSTICE, SELECTED FEDERAL ASSET FORFEITURE STATUTES (2006), available at <http://www.justice.gov/criminal/foia/docs/afstats06.pdf>.

<sup>236</sup> See MARIAN R. WILLIAMS ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 41–102 (2010) (summarizing and grading asset forfeiture laws in all fifty states).

<sup>237</sup> See, e.g., 21 U.S.C. § 881(e) (2012) (authorizing the Attorney General to share proceeds of forfeitures with local law enforcement agencies); ASSET FORFEITURE & MONEY LAUNDERING SECTION, U.S. DEP’T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 1 (2009) (explaining that equitable sharing promotes law enforcement by “fostering cooperation among federal, state, and local law enforcement agencies”). The Equitable Sharing Program includes asset forfeitures adopted from federal agencies by components of the Department of Justice including the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the Drug Enforcement Administration, the Federal Bureau of Investigation, the United States Marshals Service, the Asset Forfeiture and Money Laundering Section of the Criminal Division, and the U.S. Attorneys’ Offices. *Id.* at 1–2.

federal law.<sup>238</sup> The local seizing agencies receive up to eighty percent of the proceeds, and in this way the federal government has given billions of dollars in cash to local police departments that can be used only for local law enforcement purposes.<sup>239</sup> Local departments have sought adoption and received money under the Equitable Sharing Program even when state laws would not have permitted forfeiture under the circumstances or would not have given funds to the police department if the state forfeited the property.<sup>240</sup> Many thousands of law enforcement agencies have participated in the Equitable Sharing Program, and more than \$4.5 billion has been shared.<sup>241</sup> The Department of the Treasury administers a similar equitable sharing program, which allows local forfeitures to be adopted by additional federal agencies.<sup>242</sup> The Treasury Forfeiture Fund received more than \$1.7 billion in total net deposits and sent to state and local law enforcement agencies nearly \$123 million in 2013 alone.<sup>243</sup>

These equitable sharing programs are specifically designed to provide a financial incentive to local police departments to seize property. In one way, the costs associated with these programs are limited: Much of the value of forfeited property is transferred to the government rather than lost. Nevertheless, seizures motivated by equitable sharing have other significant costs. A person subject to forfeiture often loses income, if, for example, his seized car is his usual transportation to work. He must pay lawyers and legal costs to contest the seizure if he wants to recover his property. His quality of life will suffer when he loses his home or vehicle. These costs accrue to the families of property owners as well as the owners themselves, and they

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<sup>238</sup> See *id.* at 2, 6 (describing federal adoption of seizures).

<sup>239</sup> See *id.* at 12, 16–18 (describing calculation of shared amounts and purposes for which proceeds may be used).

<sup>240</sup> See John L. Worrall & Tomislav V. Kovandzic, *Is Policing For Profit? Answers from Asset Forfeiture*, 7 CRIMINOLOGY & PUB. POL'Y 219, 227, 237 (2008) (describing use of federal asset forfeiture law to secure proceeds in states with more restrictive forfeiture laws).

<sup>241</sup> See ASSET FORFEITURE & MONEY LAUNDERING SECTION, *supra* note 237, Foreword (stating that \$4.5 billion has been shared with state and local law enforcement agencies).

<sup>242</sup> See 18 U.S.C. § 981(e) (2012) (authorizing sharing of federal forfeitures); 19 U.S.C. § 1616a(c) (2012) (same); 31 U.S.C. § 9703(a)(1)(G), 9703(h) (2012) (creating an equitable sharing program). It also gives significant amounts of money to local law enforcement agencies expressly to encourage deprivations of property. See, e.g., EXEC. OFFICE FOR ASSET FORFEITURE, U.S. DEP'T OF TREASURY, GUIDE TO EQUITABLE SHARING FOR FOREIGN COUNTRIES AND FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AGENCIES 2 (2004), available at <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Documents/greenbook.pdf> (“The mission of the Treasury Forfeiture Fund is to affirmatively influence the consistent and strategic use of asset forfeiture by participating law enforcement bureaus to disrupt and dismantle criminal enterprises.”).

<sup>243</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 191, at 16.

are incurred regardless of whether the owner has participated in criminal activity. In addition, society suffers when frequent forfeitures by the police—like thefts—reduce the value of property rights to those who hold them, discouraging what would otherwise be productive investment.<sup>244</sup>

Beyond adding to the marginal coercion costs of law enforcement by increasing property seizures, asset forfeiture and equitable sharing programs have two effects on the police: They contribute resources, mitigating departmental budget constraints, and they lower the cost for departments of police activities that generate forfeitures relative to other activities.<sup>245</sup> Even assuming that adding resources to police departments has net benefits, changing law enforcement activities in local departments needs careful evaluation, since it easily risks making local policing less cost effective overall.

For example, asset forfeiture is closely linked to drug crime enforcement through traffic interdiction.<sup>246</sup> Drug crimes are an especially appealing target for local departments looking for equitably shared funds because they are a federal priority and often involve vehicles, real property, and large amounts of cash, all of which are valuable and forfeitable under federal law.<sup>247</sup> Traffic enforcement is both a traditional law enforcement activity and a useful means of discovering drug crimes.<sup>248</sup> An officer may permissibly stop a car with probable cause of any criminal violation, including a minor traffic infraction.<sup>249</sup> Once the car is stopped, the officer may search it without

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<sup>244</sup> See Cohen, *supra* note 67, at 273 (noting that unchecked violations of property rights lead to less productive investment and social wealth).

<sup>245</sup> See Blumenson & Nilsen, *supra* note 40, at 78 (“[B]y linking police budgets to drug law enforcement, both forfeiture laws and Byrne grants induce police . . . to neglect other, often more pressing crime problems.”).

<sup>246</sup> See Michael Sallah et al., *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST, Sept. 7, 2014, at A1 (describing the use of high interdiction to conduct asset forfeitures, the equitable sharing of the seized assets, and the private training for law enforcement road interdiction efforts).

<sup>247</sup> See CHARLES DOYLE, CONG. RESEARCH SERV., RL97-139, CRIME AND FORFEITURE 3 (2013) (noting that while “[v]irtually every kind of property . . . may be subject to confiscation,” vehicles have especially been the target of seizures); John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 171–73 (discussing the connection between forfeiture and the drug war).

<sup>248</sup> See Amaury Murgado, *Drug Interdiction for Patrol*, POLICE (Sept. 5, 2012), <http://www.policemag.com/channel/patrol/articles/2012/09/drug-interdiction-for-patrol.aspx> (counseling patrol officers to make traffic stops in order to “make an impact on the drug trade”).

<sup>249</sup> See *Whren v. United States*, 517 U.S. 806, 819 (1996) (holding that probable cause of a traffic offense renders a traffic stop reasonable).

a warrant if he receives consent from the driver,<sup>250</sup> if a drug dog alerts on the car,<sup>251</sup> or if he has probable cause to believe he will find evidence of any crime.<sup>252</sup> If the officer finds evidence of an offense for which forfeiture is permitted, he may seize the car, cash, and other property, even if he does not arrest the car's driver. If he does not find forfeitable evidence, the officer can issue a ticket or a warning. An officer can conduct many such stops in a shift.

Drug crimes can be discovered in other ways, but alternative strategies are unlikely to be as efficient at securing equitable proceeds as traffic enforcement focused on interdiction. For example, the White House suggests that coordinated, intelligence-based drug trafficking investigations are central to disrupting trafficking organizations in the long run.<sup>253</sup> But that work is resource intensive. Since the value of forfeitable property is tied to the value of the property seized rather than the significance of the crime, departments may be able to maximize equitable proceeds by frequently taking property associated with small drug crimes rather than targeting sophisticated organizations. Some critics argue that asset forfeiture actually gives police departments the incentive to permit drug crimes to continue because ongoing trafficking provides additional seizure opportunities.<sup>254</sup> Whether or not this effect exists, it would seem that additional traffic enforcement directed at drug interdiction is a predictable consequence of the federal program design.

Moreover, even if traffic enforcement is efficient as a policing strategy, asset forfeiture and the federal programs that support it can make it less so. For instance, illegal drugs are frequently transported from Mexico to be distributed throughout the United States. When police seize those drugs during stops of *northbound* traffic, they pre-

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<sup>250</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”).

<sup>251</sup> See *Florida v. Harris*, 133 S. Ct. 1050, 1058 (2013) (concluding that the drug dog alert on a car provided probable cause to search the car).

<sup>252</sup> See *California v. Acevedo*, 500 U.S. 565, 580 (1991) (“The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.”).

<sup>253</sup> See EXEC. OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY 37 (2014) (“Systematic collection, analysis and secure dissemination of accurate and timely intelligence are critical to thwarting the activities of criminal organizations.”). While the Drug Control strategy also advocates drug interdiction on highways, it encourages it narrowly, limited to “collaborative, intelligence-led policing to enhance law enforcement efforts on interstate highways specifically identified as drug trafficking corridors.” *Id.* at 42.

<sup>254</sup> See, e.g., Worrall, *supra* note 247, at 183 (arguing that police departments' dependence on the proceeds of asset forfeiture lends support to the idea “that law enforcement has a vested interest in there being a drug problem because of the money and resources that stand to be gained”).

vent the drugs from being sold or used, punish the couriers, and reduce profits for traffickers. While stopping that traffic for drug interdiction purposes can inconvenience people, more costly methods of coercion—arrests and seizures—usually happen only when drugs are found, which is to say, they mostly affect the guilty. Asset forfeiture encourages police to focus on *southbound* traffic, since if drugs are seized going north they are destroyed and the local agency gains no direct benefit, but if money is seized travelling southbound the police department can reap a significant financial reward from forfeiture.<sup>255</sup> Officers may catch drug couriers either way, but southbound seizures do not directly prevent the sale or use of the drugs.<sup>256</sup> Moreover, because they involve money rather than drugs, southbound stops may be more error-prone and generate greater litigation and precautionary costs than those on the other side of the highway. Though equitable sharing permits and incentivizes local law enforcement to dedicate additional resources to national priority crimes, by providing a disproportionate incentive to stop southbound traffic, it also encourages less effective and efficient law enforcement.<sup>257</sup>

Despite the complex costs and benefits of asset forfeiture, there are no cost-benefit analyses of federal equitable sharing programs or,

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<sup>255</sup> See John Burnett, *Seized Drug Assets Pad Police Budgets*, NPR (June 16, 2008), <http://www.npr.org/templates/story/story.php?storyId=91490480> (“If a cop stops a car going north with a trunk full of cocaine, that makes great press coverage. . . . Then they destroy the cocaine. . . . If they catch ‘em going south with a suitcase full of cash, the police department just paid for its budget for the year.” (internal quotation marks omitted)); *id.* (quoting a Texas sheriff describing southbound lanes of one highway as a “piggy bank”). Although this example comes from Texas, which has forfeiture laws even more generous to local law enforcement than federal law, the incentive structure for local law enforcement is the same throughout border states and near-border states under the federal program. See Blumenson & Nilsen, *supra* note 40, at 68 (citing Richard Minitzer, *Ill Gotten Gains*, REASON, Aug.-Sept. 1993, at 32, 34) (quoting former New York City Police Commissioner Patrick Murphy observing that police have “a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed”).

<sup>256</sup> They do, however, catch weapons being transported for sale in Mexico, a source of tension between the two countries in recent years and an increasing focus of U.S. law enforcement. See, e.g., EXEC. OFFICE OF THE PRESIDENT, *supra* note 253, at 39–40 (prioritizing disrupting the outward flow of weapons to violent drug trafficking organizations in Mexico and noting recent coordination with Mexico to stem that flow).

<sup>257</sup> The Equitable Sharing Program also acts at apparent cross purposes with other federal programs. VAWA and its reauthorizations seek to reduce violence against women by improving the criminal justice response to domestic violence and sexual assault and providing additional services to victims of these crimes. See 42 U.S.C. § 3796hh (stating that the purpose of grants is to encourage treatment of violence against women as “serious violations of criminal law”). By contrast, the equitable sharing programs give departments a conflicting financial incentive to pursue activities other than investigating rapes and assaults against women, which are unlikely to result in forfeitures.

for that matter, of asset forfeiture programs more broadly.<sup>258</sup> Instead, there is an implicit cost-benefit argument at the heart of asset forfeiture programs. The programs are based on a plausible mechanism by which they might deter crime—depriving criminals of their profits—and they seek to pay for themselves out of the proceeds of seized property. In this light, these programs look efficient and, given the absence of implementation costs, cost effective compared to almost any alternative.

In fact, both sides of this equation are suspect. The benefits of asset forfeiture and equitable sharing programs are uncertain at best, since there is no research showing that asset forfeiture reduces crime.<sup>259</sup> More importantly for the purposes of this Article, on the cost side, when the federal government adopts a seizure, the local law enforcement agency's cut is taken from the net proceeds of the seizure.<sup>260</sup> The net proceeds are calculated as the gross receipts from the sale of the forfeited property after subtracting third-party interests (e.g., valid liens or mortgages), money paid to victims, federal case-related expenses, federal property management and disposition expenses, awards paid to federal informants, payments for experts used to seize and dispose of assets, and reimbursements relating to the seizure.<sup>261</sup> This accounting incorporates some important costs of forfeiture, but it misses others, including lost income and productivity; reduced quality of life; litigation costs; precautionary costs; search, replacement, and inconvenience costs; the effect on productive investment in property; and the costs of the distortions in police incentives.<sup>262</sup>

Nor do the equitable sharing programs take into account the costs that accrue when local law enforcement agencies use the funds they receive. Funding additional law enforcement is considered an important benefit of the federal program. But the uses of the shared funds themselves generate costs as well as benefits. Funds used for overtime mean more policing overall, including a likelihood of more

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<sup>258</sup> See Baumer, *supra* note 91, at 245 (noting that no research systematically compares the costs and benefits of asset forfeiture); Worrall, *supra* note 247, at 172 (“[T]here have been virtually no empirical studies of civil forfeiture.”).

<sup>259</sup> See, e.g., JOHN L. WORRALL, U.S. DEP'T OF JUSTICE, ASSET FORFEITURE 13 (2008) (“Unfortunately, not a single published study has linked forfeiture activities to the prevalence of criminal activity.”); Baumer, *supra* note 91, at 245 (“[V]ery little empirical research exists on the possible benefits of civil asset forfeiture laws.”).

<sup>260</sup> See ASSET FORFEITURE & MONEY LAUNDERING SECTION, *supra* note 237, at 12 (describing how the equitable share of the seizing agency is determined).

<sup>261</sup> See *id.* at 15 (indicating how net proceeds of the forfeiture are to be calculated).

<sup>262</sup> See *id.* (listing the only costs that are deducted from the gross receipts of the sale of forfeited property in determining the equitable share of the seizing agency).

arrests, searches, and uses of force. And many of the encouraged uses of equitable sharing program funds are themselves coercive, and therefore especially costly. When equitably shared funds are used to pay for informants and electronic surveillance, those funds mean more deprivations of privacy. When they are used to purchase firearms or Tasers, they may mean more uses of force. These consequences should also be considered as costs of asset forfeiture. Since the calculus of costs the programs use does not include all of the marginal costs of forfeiting property or altering the incentives of law enforcement, we have no assurance that the programs really do pay their way.

Some of the problems with equitable sharing have been noticed. The Department of Justice program especially has had many critics,<sup>263</sup> and outgoing Attorney General Eric Holder recently announced changes to the Department of Justice's exercise of its equitable sharing authority.<sup>264</sup> Specifically, the Attorney General commanded federal agencies within his control not to adopt seizures carried out exclusively by local law enforcement agencies unless they relate directly to public safety.<sup>265</sup> These changes will likely reduce the impact of equitable sharing on local law enforcement some, but they are not as dramatic as they might seem at first glance. The changes only apply to federal *adoptions*.<sup>266</sup> Since most equitable sharing proceeds result from *collaborations* between federal and local agencies, such as in multijurisdictional task forces, the changes only affect a small piece of federal forfeiture.<sup>267</sup> Moreover, the changes only affect the Attorney General's exercise of discretion over equitable sharing; they do not

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<sup>263</sup> For example, many recent articles complain in their titles about "policing for profit." E.g., WILLIAMS ET AL., *supra* note 236 (POLICING FOR PROFIT); Blumenson & Nilsen, *supra* note 40, at 35 (*Policing for Profit: The Drug War's Hidden Economic Agenda*); *Policing for Profit*, NEWS CHANNEL 5, <http://www.jrn.com/newschannel5/news/newschannel-5-investigates/policing-for-profit> (last visited Feb. 15, 2015); Nick Sibilla, *Cops in Texas Seize Millions By 'Policing for Profit'*, FORBES (June 5, 2014, 4:51 PM), <http://www.forbes.com/sites/instituteforjustice/2014/06/05/cops-in-texas-seize-millions-by-policing-for-profit/>.

<sup>264</sup> OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, *supra* note 6; see Press Release, U.S. Dep't of Justice, Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety (Jan. 16, 2015), *available at* <http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law> (describing Holder's announced changes to the use of equitable sharing discretion).

<sup>265</sup> See OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, *supra* note 6 ("Federal adoption of property seized by state or local law enforcement under state law is prohibited, except for property that directly relates to public safety concerns, including firearms, ammunition, explosives, and property associated with child pornography.").

<sup>266</sup> *Id.*

<sup>267</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 43 (2012) (indicating that adopted forfeitures represented less than a quarter of

eliminate this discretion, which exists as a matter of statute.<sup>268</sup> As a result, this order is easily reversible by future Attorneys General or presidential administrations. Finally, the changes only apply to the Department of Justice's Equitable Sharing Program, and not to the Department of the Treasury's similar program. Federal programs have and will continue to provide an incentive to local law enforcement to deprive individuals of their property.

#### 4. *Privacy Deprivations*

Federal public safety programs also facilitate surveillance, the use of undercover officers, and other police activities that impinge on privacy. A variety of federal programs provide local police departments the video surveillance systems, night vision goggles, license plate readers, drones, and other equipment that facilitate monitoring private action unobserved. As noted above, the Department of Defense's 1033 Program gives this equipment directly to police departments. The Homeland Security Grant Program funds the purchase of surveillance and other equipment by local departments. The Department of Defense's 1022 Program subsidizes local purchases of such equipment. The Department of Justice's Equitable Sharing Program generates funds that may be used for equipment purchases. And High Intensity Drug Trafficking Area funds are used for surveillance equipment.<sup>269</sup> In addition, the Department of Justice's Safe Streets and Byrne JAG funding for joint task forces gives local departments access to federal equipment and expertise.<sup>270</sup>

Even beyond equipping departments, federal grants favor focusing law enforcement resources on crimes that often demand invasive investigation techniques. Several programs in the Depart-

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all equitable sharing payments to state and local law enforcement agencies in 2003 and have been declining since).

<sup>268</sup> See, e.g., 21 U.S.C. § 881(e) (authorizing the Attorney General to share proceeds of forfeitures with local law enforcement agencies).

<sup>269</sup> See, e.g., ASSET FORFEITURE & MONEY LAUNDERING SECTION, *supra* note 237, at 17 (stating that proceeds can be used for electronic surveillance equipment among other purposes); EXEC. OFFICE OF THE PRESIDENT, *supra* note 191, at 8 (noting that 44,275 night vision devices have been given to law enforcement agencies through the 1033 Program); *id.* at 9 (noting that the 1122 Program permits the purchase of night vision devices); *id.* at 10 (stating that JAG funding can be used to buy camera systems and license plate readers among other equipment); *id.* at 18 (stating that High Intensity Drug Trafficking Area Program funds can be used for wires for telephone taps and surveillance vans, among other uses).

<sup>270</sup> See *Violent Gang Task Forces*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/investigate/vc\\_majorthefts/gangs/violent-gangs-task-forces](http://www.fbi.gov/about-us/investigate/vc_majorthefts/gangs/violent-gangs-task-forces) (last visited Feb. 14, 2015) (describing intrusive surveillance techniques as key facets of Safe Streets Task Forces).

ment of Justice emphasize gang and drug crimes; in the Department of Defense, drug trafficking; and in the Department of Homeland Security, terrorism. Unlike traditional violent crime, each of these priorities pushes police departments away from traditional, reactive policing techniques, such as interviewing witnesses and collecting forensic evidence, and towards electronic surveillance and undercover operations. Of course, there may be sound reasons to prioritize these crimes, even if intrusive techniques are required. Yet, indisputably, privacy deprivations have their costs, including embarrassment, lost dignity, and precautionary costs. These costs should be counted.

### *E. Assessing the Scale of Federal Influence*

I have highlighted federal policing programs that especially incentivize more harmful policing techniques. Some federal policing programs largely avoid directly promoting intrusive policing or even discourage it. Nevertheless, a wide range of significant programs promote coercion, and these programs—including especially the Department of Justice’s VAWA grants and Equitable Sharing Program, the Department of Homeland Security’s terrorism prevention grants and 287(g) program, the Department of Defense’s 1022 and 1033 Programs, and funding for joint drug task forces—involve billions of dollars each year across several major federal agencies.

It is very difficult to get a handle on the degree to which federal incentives affect local policing. Municipalities spend more than \$50 billion per year on police protection.<sup>271</sup> This amount includes spending for more than 12,500 local police departments,<sup>272</sup> with the average department’s operating budget at about \$4.4 million.<sup>273</sup> It is unclear how much of that spending comes from the federal government,<sup>274</sup> since there is no authoritative list of federal government

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<sup>271</sup> See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, NCJ 231174, LOCAL POLICE DEPARTMENTS, 2007, at 10 (2010) (noting that local police departments cost about \$55.4 billion to operate in 2007, not including capital expenditures).

<sup>272</sup> See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, NCJ 233982, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 4 (2011) (stating that there were 12,501 local police departments that employed at least one full-time officer or equivalent in 2008).

<sup>273</sup> REAVES, *supra* note 271, at 10. The \$4.4 million figure is from 2007, the most recent year for which data is available. This average hides tremendous variation, ranging from an average operating budget of \$849 million for departments serving more than one million people to an average of \$263,000 for departments serving fewer than 2500. *Id.* at 10 tbl.4.

<sup>274</sup> See, e.g., *Justice Expenditure and Employment Extracts, 2010 – Final*, BUREAU OF JUSTICE STATISTICS (July 1, 2014) [hereinafter *Justice Expenditure*], <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5049> (follow “Comma-delimited format (CSV)” hyperlink; then open spreadsheet “jeesus1004.csv”) (indicating that municipalities spent \$58,209,547,000 on police protection in the 2010 fiscal year).

grant programs that seek to promote public safety,<sup>275</sup> and the programs vary significantly from year to year. In 2010, the last year for which data is available and a year in which violent crime was low, census data suggests that the federal government gave \$2.8 billion in intergovernmental transfers for police protection, most of which went to local governments.<sup>276</sup>

On top of these intergovernmental transfers for crime control, the federal government gives millions of dollars to local police departments for other purposes, such as the \$1.7 billion the Department of Homeland Security gave in grants to state and local governments for terrorism prevention that year, more than \$400 million of which could only be used for law enforcement readiness.<sup>277</sup> In addition, as described above, federal agencies provide local departments with equipment and resources other than grants-in-aid, including, for example, \$212.6 million in Department of Defense donations to local police through the 1033 Program,<sup>278</sup> and nearly \$400 million the Department of Justice distributed in equitable sharing disbursements in 2010.<sup>279</sup> These numbers suggest that federal public safety programs are not an insignificant force in local policing, a proposition anecdotal evidence corroborates.<sup>280</sup>

The magnitude of the effect appears even greater when federal public safety programs are contrasted with federal civil rights programs on policing. The Department of Justice's Civil Rights Division sues departments for patterns and practices of constitutional deprivations and prosecutes individual officers for misconduct. These programs loom large in scholarly and public understanding of federal involvement in policing, and many think they impact police conduct

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<sup>275</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GRANTS TO STATE AND LOCAL GOVERNMENTS, *supra* note 59, at 13 (noting that there are various inconsistent and incomplete sources of data for federal spending on grants).

<sup>276</sup> *Justice Expenditure*, *supra* note 274.

<sup>277</sup> See *FY 2010 Homeland Security Grant Program*, *supra* note 188 (indicating program funding available for the 2010 fiscal year).

<sup>278</sup> Niall McCarthy, *Chart: Pentagon Donations to Police Are Skyrocketing*, FORBES (Aug. 15, 2014, 10:12 AM), <http://www.forbes.com/sites/niallmccarthy/2014/08/15/chart-pentagon-donations-to-police-are-skyrocketing/>. This number is far, far higher today because of equipment returning from Iraq and Afghanistan. *Id.* The value of property given in the first seven months of 2014 alone was more than \$750 million. *Id.*

<sup>279</sup> *Equitable Sharing Payments of Cash and Sale Proceeds Executed During Fiscal Year 2010*, by Recipient Agency, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/jmd/afp/02fundreport/2010affr/report2b.htm> (last visited Mar. 2, 2015).

<sup>280</sup> See, e.g., NAT'L CRIMINAL JUSTICE ASSOC. & VERA INST. OF JUSTICE, THE IMPACT OF FEDERAL BUDGET CUTS FROM FY10-FY13 ON STATE AND LOCAL PUBLIC SAFETY 2-3 (2013) (reporting results of a survey of state and local criminal justice practitioners indicating that many cut services and froze hiring and salary increases in law enforcement as a result of federal budget cuts in Department of Justice grant programs).

significantly. Yet the Civil Rights Division prosecutes no more than a few dozen officers each year,<sup>281</sup> investigates only a few departments,<sup>282</sup> and spends only \$12 million per year on police misconduct.<sup>283</sup> It hardly seems likely that the billions of dollars in support the federal government offers local police departments for public safety efforts has much less influence or deserves less analysis. One might respond that civil rights enforcement has expressive value far beyond its direct incentive effect. So do federal public safety programs. Whatever the precise mix of their incentive effects, federal public safety programs—from JAG grants to the 1033 Program to Homeland Security grants—clearly communicate a federal message about policing, and that message favors coercion.

### III

#### FEDERAL PROGRAMS AND POLICE ACCOUNTABILITY

The federal failure to recognize the costs of policing in federal criminal justice programs is more important than it looks. Local governments run police departments, and they largely decide how harmful policing will be and how those harms will be distributed. While local political actors often set policy without fully accounting for the harms policing can do, much as federal actors do, they also face political pressure much more often than their federal counterparts when those harms become extreme or widespread. That pressure leads them to push police departments to lessen that harm.

For local governments to function as a check on the nonbudgetary costs of policing, the public must be able to monitor and attribute responsibility for the harm the police do, and political actors must be able to influence police conduct. Federal programs are often designed in ways that undermine these preconditions for local accountability. First, federal programs sometimes cloud responsibility for officer conduct, interfering with the public's ability to identify and react to intrusive policing by local police officers. Second, federal programs often give money, equipment, and power directly to police departments rather than to states or local governments. By doing so, federal programs disrupt the usual means by which communities exert local control over police chiefs and departments. In Part II, I illustrated how federal public safety programs encourage policing that is

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<sup>281</sup> See, e.g., CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, FY 2014 PERFORMANCE BUDGET 20 (2014) (indicating fifty-nine officers were prosecuted in the 2012 fiscal year).

<sup>282</sup> See *id.* at 36 (indicating that the Special Litigation section reached five court-enforceable agreements with law enforcement agencies in 2012, more than it had reached in the previous ten years combined).

<sup>283</sup> *Id.* at 51–52.

more socially costly than it needs to be. In this Part, I show that federal programs are also designed in ways that make policing less responsive to public concern about those costs. In this way too, federal programs may make policing more harmful.

### A. *Political Mechanisms and the Coercion Costs of Policing*

Local governments provide most policing. They decide how many officers to hire and how many substations to build. They determine how to balance reducing 911 response time with preventing terrorism. They choose how to prioritize competing concerns about property crime, violent crime, and the drug trade. These decisions, and many others, help determine how harmful policing will be. Although state and federal law constrain local policing at the margins, local political processes are the main determinant of the shape of policing, including how often and to whom the police cause harm through stops, frisks, searches, arrests, uses of force, and damage to or deprivation of property.

Ideally, governments pursue public policies that are more beneficial than harmful to the public. In practice, of course, governments are far from ideal.<sup>284</sup> As noted above, local governments often suffer from what can be thought of as political market failure, resulting in the suboptimal production of public goods.<sup>285</sup> In Part I, I described political market failures that might lead local governments to provide too little or the wrong kinds of policing. There are also political problems that lead local governments to provide too much or too intrusive law enforcement. For instance, most people in the United States never encounter a police officer in a year unless they call one or are stopped

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<sup>284</sup> See BRIAN E. DOLLERY & JOE L. WALLIS, *THE POLITICAL ECONOMY OF LOCAL GOVERNMENT* 39–70 (2001) (describing forms of failure in local government and summarizing literature); Harmon, *Problem*, *supra* note 2, at 811–12 (noting inadequate incentives for police departments and local political officials to protect civil rights). Local governments can also allocate the costs and benefits—including the intrusion costs of policing—according to morally irrelevant criteria, such as class or race. A broader conception of market failure could include both equity and efficiency criteria. CHARLES WOLF, JR., *MARKETS OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES* 19–20 (2d ed. 1988). But such an analysis adds complexity, so I confine my analysis here to the costs and benefits, rather than the equity, of policing policy. See DOLLERY & WALLIS, *supra*, at 22 (indicating factors that make analysis more complicated). In any case, recognizing nonbudgetary harms of policing as harms is a precursor to deciding how they should be fairly distributed.

<sup>285</sup> See DOLLERY & WALLIS, *supra* note 284, at 12–13 (describing political process failures); Wolf, *supra* note 41, at 53–57 (analogizing political market failure to traditional market failure and describing a decoupling between those who receive the benefits of government programs and those who pay the burdens); Charles Wolf, Jr., *A Theory of Nonmarket Failure: Framework for Implementation Analysis*, 22 J.L. & ECON. 107, 116–32 (1979) (outlining kinds of political market failures).

for a traffic offense.<sup>286</sup> A small percentage of the public, however—often disproportionately members of racial minorities<sup>287</sup>—is searched, arrested, or subject to force, sometimes repeatedly.<sup>288</sup> This suggests a decoupling between the population that experiences the benefits of policing—which are widely distributed—and the population that pays its costs, which are concentrated on a smaller, politically-weak minority, including criminal suspects. The result is that political actors have reason to serve the voting public by providing more intrusive policing than is socially efficient.<sup>289</sup>

Even with this problem, however, local governments do not entirely ignore the coercion costs of policing. Although municipalities may on balance provide overly intrusive policing, the public also constrains the societal costs of policing by registering concern at the ballot box or through social media, calls to public officials, and street protests. Once the public expresses its concern, police departments and local elected officials often respond.<sup>290</sup>

Police officers answer to department chiefs. Those chiefs answer to city officials who hire, manage, and fire them and control police department budgets.<sup>291</sup> And those city officials are subject to the local

<sup>286</sup> See, e.g., EITH & DUROSE, *supra* note 180, at 2 tbl.1 (showing contacts with the police in 2002, 2005, and 2008); LANGTON & DUROSE, *supra* note 154, at 2 fig.1 (indicating that of the 62,936,500 people age sixteen and older who had contact with the police during 2011, only 7.3% had involuntary contact unrelated to a traffic stop).

<sup>287</sup> See, e.g., EITH & DUROSE, *supra* note 180, at 10 (“Black drivers . . . were about three times as likely as white drivers . . . and about two times as likely as Hispanic drivers . . . to be searched during a traffic stop.”).

<sup>288</sup> See *id.* at 11 (indicating that fewer than 2% of individuals who had face-to-face contact with the police in 2008 had force used against them); LANGTON & DUROSE, *supra* note 154, at 9 (indicating that police conducted searches in about 3% of traffic stops in 2011); *id.* at 10 tbl.9 (indicating that only 1.5% of those stopped in traffic stops in 2011 had force used against them).

<sup>289</sup> See Wolf, *supra* note 41, at 58 (“[D]ecoupling may contribute to excess demand for government activities . . . in the sense that they entail greater social costs than benefits . . .”); *id.* (“[T]he decoupling between those who benefit from, and those who pay for, government programs, frequently result[s] in stronger incentives to expand than to confine government programs. As a result, government programs may be initiated or expanded even though they are inefficient in a micro-economic sense . . . as well as inequitable . . .”). Decoupling helps justify federal intervention into local policing through federal civil rights programs, including federal prosecution of local officers and federal civil suits for structural reform under 42 U.S.C. § 14141 (2012).

<sup>290</sup> See LARRY K. GAINES & JOHN L. WORRALL, *POLICE ADMINISTRATION* 39–40 (3d ed. 2011) (describing local political accountability for police chiefs); see also Illinois v. Lidster, 540 U.S. 419, 426 (2004) (noting that a Fourth Amendment rule governing police checkpoints was unnecessary to prevent a proliferation of police checkpoints because of “[p]ractical considerations—namely, limited police resources and community hostility to related traffic tieups”), *quoted in* United States v. Jones, 132 S. Ct. 945, 954, 956 (2012) (Sotomayor, J., concurring) (describing limited resources and community hostility as “the ordinary checks that constrain abusive law enforcement practices”).

<sup>291</sup> Harmon, *Data*, *supra* note 121, at 1122.

political process. When the costs of policing become especially significant, conspicuous, or widespread, community members register concern.<sup>292</sup> In reaction, departments and local governments work to reduce policing's harms.<sup>293</sup> Thus, in Albuquerque, New Mexico, community outrage, public protests, and media attention over police shootings led the City Council to call for and receive both a Department of Justice investigation of the city's Police Department and the police chief's resignation.<sup>294</sup> The uproar also led Mayor Richard Berry to adopt sweeping reforms to training, policy, and officer and department oversight in order to stem the use of excessive force.<sup>295</sup> Similarly, Bill de Blasio centered his campaign for Mayor of New York on opposing the New York Police Department's policy of aggressively stopping and frisking pedestrians as a means of crime control.<sup>296</sup> The issue distinguished de Blasio in a crowded electoral field, and "catapulted him from a long-shot candidate . . . to the first Democratic mayor the city had seen in two decades, winning office in a landslide."<sup>297</sup> He has since revised substantially the department's stop-

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<sup>292</sup> This is obviously less possible with respect to surveillance, undercover operations, and other secretive programs. See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 336 (2012) (noting that local oversight is "poorly adapted to government activities with very low public transparency").

<sup>293</sup> See, e.g., Heather Knight, *Ed Lee Drops Stop-Frisk Plan Amid Uproar*, SFGATE (Aug. 7, 2012, 9:44 AM), <http://www.sfgate.com/bayarea/article/Ed-Lee-drops-stop-frisk-plan-amid-uproar-3768219.php> (describing the influence of public pressure in preventing the implementation of a stop-and-frisk police program in San Francisco); Claudia Vargas, *Nutter Names 24 to Police Community Oversight Board*, PHILA. INQUIRER (Apr. 17, 2015, 3:08 PM), <http://www.philly.com/philly/blogs/heardinthehall/Nutter-names-23-.html> (describing a board established to address concerns about use of excessive force by the Philadelphia Police Department).

<sup>294</sup> See *DOJ Investigation of APD*, ALBUQUERQUE J., <http://www.abqjournal.com/apd-under-fire#timeline> (last visited Mar. 2, 2015) (collecting a comprehensive set of news articles about the Albuquerque police shootings and subsequent developments).

<sup>295</sup> See Astrid Galvan, *Changes in Store for APD*, ALBUQUERQUE J. (June 25, 2011, 2:15 AM), <http://www.abqjournal.com/38928/news/changes-in-store-for-apd.html> (detailing the policy changes adopted in the wake of the Albuquerque police shootings).

<sup>296</sup> See Michael Barbaro, *The Ad Campaign: De Blasio Speaks Against Stop-and-Frisk Tactics*, N.Y. TIMES CITY ROOM (Aug. 19, 2013, 1:00 PM), <http://cityroom.blogs.nytimes.com/2013/08/19/the-ad-campaign-de-blasio-speaks-against-stop-and-frisk/> (examining de Blasio's second campaign commercial, which dealt with his opposition to stop-and-frisk).

<sup>297</sup> Harry Bruinius, *Reviled 'Stop and Frisk' Ebbs. So Does NYPD Job Approval. What gives?*, CHRISTIAN SCI. MONITOR (June 13, 2014), <http://www.csmonitor.com/USA/Politics/2014/0613/Reviled-stop-and-frisk-ebbs.-So-does-NYPD-job-approval.-What-gives-video;> see also Khorri Atkinson, *Mayor de Blasio to Reform Stop-and-Frisk*, N.Y. AMSTERDAM NEWS (Feb. 6, 2014, 12:50 AM), <http://amsterdamnews.com/news/2014/feb/06/mayor-de-blasio-reform-stop-and-frisk> (stating that the promise to reform the stop-and-frisk program helped elect Mayor de Blasio).

and-frisk policy.<sup>298</sup> All over the country, uses of force, invasions of privacy, arrests, and stops are challenged by the public, and public officials respond by pushing for change. In this way, local citizens use political processes to change police or city leadership; improve officer training, policies, and oversight; and reduce police practices that especially impose harm.

The same phenomenon occurs in the federal government, though significantly less frequently. It happened recently when protests around the country registered concern about the state of American policing after a police officer shot Michael Brown in Ferguson, Missouri. President Obama initiated a review of federal programs that provide military equipment, proposed spending \$263 million over three years to fund body cameras for police officers, and announced the creation of a Task Force on 21st Century Policing.<sup>299</sup> Congress also held hearings on militarization of local police departments in response to images of heavily armed law enforcement officers policing protesters in Ferguson.<sup>300</sup> Before that, however, the last major federal initiatives focused on reducing police coercion or increasing police accountability were in the Violent Crime Control and Law Enforcement Act of 1994.<sup>301</sup> This bill, the largest crime bill in history, granted, *inter alia*, authority to the Department of Justice to sue police departments for patterns and practices of misconduct in what is now known as 42 U.S.C. § 14141 and enabled the Department of Justice to provide grants to advance community policing.<sup>302</sup>

Local governments are—more often than the federal government—responsive to public concerns about police coercion when individual incidents or widespread practices lead to strong public backlash.<sup>303</sup> This process can serve as a significant channel for demo-

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<sup>298</sup> See Atkinson, *supra* note 297 (describing de Blasio's efforts to deliver on his campaign promise to reform stop-and-frisk).

<sup>299</sup> Press Release, White House, FACT SHEET: Strengthening Community Policing (Dec. 1, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing>.

<sup>300</sup> See Apuzzo, *supra* note 5 (describing Congress's response to the events in Ferguson).

<sup>301</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified as amended at 42 U.S.C. § 14141 (2012)).

<sup>302</sup> *Id.*

<sup>303</sup> See O'Hear, *supra* note 40, at 858 (“[D]ecentralized decision making in many instances provides better policy and greater citizen satisfaction than federal decision making.”); Richman, *supra* note 16, at 420 (noting that local police have “greater electoral accountability” and that “[s]crutiny of police performance by the local electorate, although hardly constant, regularly occurs”); Waxman, *supra* note 292, at 326 (stating that though legal scholars doubt local political accountability in other contexts, “many policing scholars believe that local politics plays a significant role in shaping policy and constraining police behavior”). *But see* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1810–14 (2005) (arguing that local policing may not be more responsive).

cratic control over police practices. Unfortunately, several major federal programs to promote local policing are designed in ways that undermine this system.

### B. Federal Programs Disrupt Local Accountability

Democratic accountability exists when political officials are answerable to the public for the consequences of their political choices. Effective local accountability for policing cannot exist unless the public knows what the police do and political actors can effectively influence officer conduct.<sup>304</sup> Existing federal statutes granting money and power to police departments erode these conditions for accountability by inhibiting scrutiny of police department practices and by freeing police chiefs from political and budgetary constraints that are used to influence police conduct. The effect is to disaggregate local government, separating police power from political control.

#### 1. Task Forces and Accountability

Federal laws and programs creating and encouraging multijurisdictional task forces have become a centerpiece of federal efforts to strengthen public safety. Through task forces, officers from multiple agencies work together as a new entity to target a particular criminal problem that crosses jurisdictional boundaries. Despite falling crime rates in recent years, federal support for policing through task forces has intensified. Joint task forces now target not only organized and violent crime and drug trafficking, but also gun trafficking, human trafficking, terrorism, gangs, child exploitation, and computer crime.<sup>305</sup> Nationwide, tens of thousands of local police officers participate in hundreds of joint task forces, often full time.<sup>306</sup> Advocates

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<sup>304</sup> See Harmon, *Data, supra* note 121, at 1123 (arguing that for local accountability to work, “[t]he voting public needs information about crime conditions, what its police departments do, and the costs and benefits of alternative policing practices”).

<sup>305</sup> E.g., *Anti-Human Trafficking Task Force Initiative*, BUREAU OF JUSTICE ASSISTANCE, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=51](https://www.bja.gov/ProgramDetails.aspx?Program_ID=51) (last visited Feb. 11, 2015); *The Internet Crimes Against Children Task Force Program, supra* note 58; *Protecting America from Terrorist Attack: Our Joint Terrorism Task Forces*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/investigate/terrorism/terrorism\\_jtffs](http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jtffs) (last visited Feb. 11, 2015); see also REAVES, *supra* note 8, at 29–30 (noting the number of local police officers assigned to various kinds of task forces in 2007).

<sup>306</sup> In 2003, an estimated 5959 local police officers were assigned full time to a drug task force. MATTHEW J. HICKMAN & BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, NCJ 210118, LOCAL POLICE DEPARTMENTS, 2003, at 16 tbl.31 (2006). Other task forces were not significant enough to appear in the report. By 2007, the last year for which data is available, 8524 officers were assigned full time to a drug task force. REAVES, *supra* note 8, at 29 tbl.33. Nearly 5000 more were assigned part time. *Id.* Another 4558 officers were assigned to multiagency gang task forces, 722 to multiagency human trafficking task forces, and 2693 to multiagency antiterrorism task forces. *Id.* at 30 tbls.34–36.

argue that joint task forces improve coordination and communication among agencies, allowing agencies to operate efficiently and share expertise and resources.<sup>307</sup> However, multijurisdictional task forces also tend to obscure responsibility for the law enforcement activities in which they engage, denying communities information about the activities of their police departments.

Ordinarily, public law enforcement agencies exercise coercive authority on behalf of a single unit of government. Each agency is part of the government of a jurisdiction—whether town, city, state, or nation—and is subject to political control by the citizens of that jurisdiction. Some of the most basic and universal features of American police departments exist to facilitate political accountability to the relevant public. This is why police departments are hierarchical organizations with a single chief; why officers wear uniforms displaying a name, a rank, and a number that can be used to identify them; and why departments operate within a limited geographic area that maps a political unit.

Joint task forces do not share these accountability-promoting features.<sup>308</sup> They combine officers from different agencies into a single operating entity, in which there is usually no executive in charge, no obvious jurisdictional boundary to their work, and no single government to which they are answerable.<sup>309</sup> Some are the product of memoranda of understanding that define the roles and responsibilities of participants, though those memoranda are often unknown to the task

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<sup>307</sup> Advocates argue that multijurisdictional task forces represent a productive form of “cooperative federalism.” Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863, 1899–900 (2012) (quoting Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL’Y 247, 322–23 (1997)); see also *id.* at 1906–07 (citing federally funded multijurisdictional task forces under the Safe Streets program as models for pursuing crime-control objectives).

<sup>308</sup> See Blumenson & Nilsen, *supra* note 40, at 94–95 (discussing reasons why “[m]ultijurisdictional drug task forces may elude meaningful oversight”); O’Hear, *supra* note 40, at 879 (noting the lack of “political controls over local police departments” that participate in drug task forces); Waxman, *supra* note 40, at 327 (noting that memoranda of understanding that delineate roles in terrorism task forces are often unavailable).

<sup>309</sup> See, e.g., EDMUND F. MCGARRELL ET AL., PROJECT SAFE NEIGHBORHOODS—A NATIONAL PROGRAM TO REDUCE GUN CRIME: FINAL PROJECT REPORT, at iii–iv, 169 (2009) (“[I]nterviews suggested that successful [Project Safe Neighborhoods] task forces developed ‘distributed leadership.’”); Blumenson & Nilsen, *supra* note 40, at 94 (“Multijurisdictional drug task forces may elude meaningful oversight . . . [because] they are not tied to any local constituency.”); Letter from American Civil Liberties Union Coalition to Reps. John Conyers and Lamar Smith (June 17, 2008), available at <https://www.aclu.org/drug-law-reform/aclu-coalition-letter-house-judiciary-leadership-urging-them-not-reauthorize-byrne-j> (“[D]rug task forces are federally funded, state managed, and locally staffed, which means they really do not have to answer to anyone.”).

force officers, much less the public, and are seldom enforced.<sup>310</sup> Others operate without any formal allocation of power and responsibility to participating agencies.<sup>311</sup> When officers wearing Drug Task Force jackets raid your home, how do you know whom to call to complain?<sup>312</sup> This muddling of responsibility is particularly troubling because joint law enforcement task forces commonly engage in precisely those activities that local jurisdictions might well restrict because of their nonbudgetary costs, such as surveillance, electronic monitoring, and undercover operations.<sup>313</sup>

The rise of these joint task forces is largely attributable to extensive federal funding available for them. The Byrne JAG Program alone is a vast source of funding for task forces. Though Byrne JAG grants fund an array of program areas, states and localities use most of the grant money for law enforcement, and the federal government especially favors funding for multijurisdictional drug enforcement task forces.<sup>314</sup> In total, nearly a quarter of all JAG funding, approximately

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<sup>310</sup> See EVALUATION & INSPECTIONS DIV., U.S. DEP'T OF JUSTICE, NO. I-2005-007, THE DEPARTMENT OF JUSTICE'S TERRORISM TASK FORCES 76-81 (2005) (criticizing the fact that a large proportion of terrorism task force members never receive orientation or training upon joining the task force, and quoting members who indicate that this results in their inability to understand their role and the chain of command); MICHAEL PRICE, BRENNAN CTR. FOR JUSTICE, NATIONAL SECURITY AND LOCAL POLICE 37 (2013) (noting that even when a memorandum of understanding governing a task force specified that the task force must comply with state law, it provided no mechanism for ensuring that it would do so).

<sup>311</sup> See, e.g., EVALUATION & INSPECTIONS DIV., *supra* note 310, at iv, 81-82 (2005) (criticizing the fact that FBI joint terrorism and other task forces lack memoranda of understanding allocating roles and responsibility to participants, and noting that as a result, members "struggle to understand their role and mission").

<sup>312</sup> For an example of photos of such jackets, see *Drug Task Force*, NIAGARA CNTY. SHERIFF'S OFFICE, <http://www.niagarasheriff.com/drugtask.aspx> (last visited Feb. 11, 2015), and for an example of a terrorism version, see *Joint Terrorism Task Force*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/jttf/> (last visited Feb. 11, 2015).

<sup>313</sup> Although joint task forces are especially good at blurring responsibility for coercive activities by law enforcement, other federal laws and programs also obscure lines of accountability for law enforcement activities. For instance, several federal statutes allow a local police chief, on his own authority, to give the FBI power within his jurisdiction to investigate crimes that violate only state and not federal law. At his discretion, for example, a police chief can give the FBI authorization to investigate serial killings, 28 U.S.C. § 540B (2012), or a crime of violence targeting a visitor from another state, *id.* § 540A, or the killing of a police officer, *id.* § 540. These provisions permit law enforcement officials to act without notifying or seeking approval from the municipal government.

<sup>314</sup> See NAT'L CTR. FOR JUSTICE PLANNING, *supra* note 42, at 4 (describing task forces as emphasized in initial JAG funding and critical for drug crime enforcement).

\$115 million each year, is spent on task forces.<sup>315</sup> For many collaborations, it is the sole source of funds.

Other grant programs also subsidize joint task forces. The Organized Crime Drug Enforcement Task Forces Program is the “center-piece” of the Department of Justice’s drug strategy.<sup>316</sup> Project Safe Neighborhoods funds gun and gang task forces. The Enhanced Collaborative Model to Combat Human Trafficking funds human trafficking task forces. The Intellectual Property Theft Enforcement Program funds intellectual property task forces. Operation Stonegarden and other Homeland Security grants fund joint terrorism task forces. The High Intensity Drug Trafficking Areas Program supports drug task forces.<sup>317</sup> When other funding for task forces dries up, the Department of Justice’s Equitable Sharing Program permits task forces to become self-financing, so that they can outlive the grants that enabled them.<sup>318</sup>

## 2. *Federal Power to Local Police Officers*

Federal law also permits federal agencies to grant federal enforcement powers to local police officers in ways that expand authority and blur control over local officers. Through the 287(g) program, for example, the Department of Homeland Security enters agreements with law enforcement agencies to give federal immigration power to designated local officers, who then serve under federal command in exercising those powers.<sup>319</sup> More generally, any federal law enforcement agency can request that the U.S. Marshals Service provide federal deputy status to a local law enforcement officer under

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<sup>315</sup> *Id.* at 1 (indicating that JAG funding has been around \$500 million per year); *id.* at 5 (noting that most states use JAG funding for task forces and that task force spending accounts for 23% of all Byrne JAG formula spending).

<sup>316</sup> *Organized Crime Drug Enforcement Task Forces*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/taskforces/ocdetf.html> (last visited Feb. 11, 2015).

<sup>317</sup> In 2013, the DEA State and Local Task Force Program managed 259 state and local task forces, for example. *DEA Programs: State & Local Task Forces*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/ops/taskforces.shtml> (last visited Mar. 3, 2015).

<sup>318</sup> See Blumenson & Nilsen, *supra* note 40, at 50–51, 94 (describing self-funding by task forces).

<sup>319</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009-546, 563–64 (1996) (codified as amended at 8 U.S.C. § 1357(g) (2012)) (authorizing the Attorney General to enter written agreements delegating functions of immigration officers in investigation, apprehension, and detention of aliens to state and local officers); *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/287g> (last visited Feb. 11, 2015) (describing 287(g) as “one of ICE’s top partnership initiatives” and indicating that the program permits local law enforcement agencies to receive delegated authority for immigration enforcement).

a statute that permits the U.S. Marshals Service to command “all necessary assistance to execute its duties.”<sup>320</sup> This delegation of authority permits the deputized officer to enforce all orders of federal courts and to make arrests without warrants for federal crimes, powers otherwise unavailable to local police officers. The process for deputizing police officers is trivially easy, requiring a letter from a federal agency to the U.S. Marshals Service, after which U.S. Marshals Service personnel swear the police officer in for one year or for the duration of the investigation. From start to finish the process can take less than twenty-four hours.<sup>321</sup>

Local police officers are creatures of municipalities and states; they ordinarily have only that enforcement power provided by state law. They enforce state criminal law and local ordinances within the jurisdictional boundaries and under the supervision of the municipality that employs them, except where state law provides otherwise. Federal deputation and 287(g) allow local officers to operate outside those constraints. In each case, local governments can be left out of the process of governing local law enforcement use of coercive power against their citizens.

### 3. *Federal Programs and Police Budgets*

Federal law also attenuates police accountability by freeing local police departments and specialized units within them from local financial control. Overwhelmingly, police department funds come from local governments, and policing consumes a large part of municipal budgets.<sup>322</sup> Those budgets provide a crucial form of political control over police departments,<sup>323</sup> one which federal programs disrupt.

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<sup>320</sup> 28 U.S.C. § 566(c) (2012); GERARD R. MURPHY & CHUCK WEXLER, *MANAGING A MULTIJURISDICTIONAL CASE: IDENTIFYING THE LESSONS LEARNED FROM THE SNIPER INVESTIGATION* 39–40 (2004).

<sup>321</sup> MURPHY & WEXLER, *supra* note 320, at 39–40. The Attorney General may also give local officers the power to carry firearms, execute search and arrest warrants, make arrests without warrants, seize property, or carry out any other law enforcement duty the Attorney General sees fit to designate. These transfers of power are especially common in joint drug task forces. 21 U.S.C. § 878(a) (2012). Federal equitable sharing has similar effect. The program allows local police officers investigating state criminal violations (that are also violations of federal law) to seize property that might not be forfeitable under state law—for example, because of a higher standard of proof—in the expectation that the seizure will be adopted federally. Thus, police officers can seize property beyond what state law authorizes, invisibly empowered by federal law.

<sup>322</sup> See TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, NCJ 236218, *JUSTICE EXPENDITURES AND EMPLOYMENT, FY 1982–2007 – STATISTICAL TABLES 6 tbl.4* (2011) (indicating that 70% or more of police protection expenditures were by local governments in the years 1982–2007); GAINES & WORRALL, *supra* note 290, at 421 (“The police consume a large part of any jurisdiction’s budget.”).

<sup>323</sup> See GAINES & WORRALL, *supra* note 290, at 40 (“The municipal police administrator

When a chief proposes a budget, he must specify and justify his goals, his planned programs and activities, and the resources those activities require. This process gives local government officials and voters an opportunity to weigh in on both the means and ends of law enforcement and it provides a standard by which they can later measure the department's performance.<sup>324</sup> The budgeting process therefore not only allocates scarce resources, it provides an important mechanism for local governments to reject law enforcement activities that—although lawful—are inconsistent with local interests and priorities.<sup>325</sup>

When federal programs provide funding, equipment, or power to obtain resources (through equitable sharing) to departments, they give local police departments the means to secure their resources without this local check. As a White House review of federal equipment programs recently noted: “These programs often permit [law enforcement agencies] to request equipment outside of a local government's standard budget process and without civilian (nonpolice) government approval. Local elected officials are frequently not involved in the decision-making, and the general public is similarly unaware of what their [law enforcement agencies] possess.”<sup>326</sup> More generally, federal laws that give local police departments resources directly can subvert critical community input into local police activities.

The most significant cost in any police department's budget, often comprising 80% or more of the budget, is personnel costs, including salaries, overtime, wages, and fringe benefits for uniformed officers and nonuniformed employees.<sup>327</sup> In the budget process, most local governments authorize the number and rank of officers the depart-

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is directly responsible to the mayor, city manager, and/or council, since they determine the police department's budget and can mandate changes through the budgetary process and through political persuasion.”)

<sup>324</sup> See JAMES J. FYFE ET AL., *POLICE ADMINISTRATION* 251–59 (5th ed. 1997) (describing budgeting processes); *id.* at 251 (noting that agency budgets “are an integral part of the government's managerial accountability process, serving as both a fiscal plan and a managerial control device”).

<sup>325</sup> See *id.* at 259–60 (describing line item budgeting as the most common method of police department funding and noting that it provides political actors with “strong control over expenditures” allowing them to “shift or eliminate items they consider excessive or inappropriate”); GAINES & WORRALL, *supra* note 290, at 429 (noting that most governments and police departments use line-item budgets in part because they give political officials “maximum control over expenditures and agency heads”).

<sup>326</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 191, at 4; see also O'Hear, *supra* note 40, at 864 (“[F]ederal grants and equitable sharing insulate local drug enforcement units from normal budgetary politics . . .”).

<sup>327</sup> See, e.g., SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA: AN INTRODUCTION* 64 (2011) (indicating that “[p]ersonnel costs, including salaries and fringe benefits, consume about 85 to 90 percent” of police department budgets).

ment may hire and the salaries of those officers. These decisions affect how many officers are on the streets, how carefully they are supervised, and how educated, trained, and professional they are likely to be. The CHP seeks to increase policing resources by facilitating hiring by local police departments. By providing funds directly to law enforcement agencies to hire officers, the CHP expands local capacity to hire, but also limits local political control over uniformed personnel decisions. And it has done so to the tune of billions of dollars for many tens of thousands of officers.

In addition to COPS, other federal grant programs provide salaries for officers in specialized units—such as those that fight drug trafficking—or for joint task forces.<sup>328</sup> The result is to free officers engaged in some of the most intrusive law enforcement activities from local budgetary scrutiny or control.<sup>329</sup> In the programs that fund officers engaged in joint task forces, the problem of accountability is compounded; officers are freed from both direct local command and also from financial dependence on the local government for which they work. The consequence is to reduce local police department dependence on local funding for their personnel.<sup>330</sup> This funding can have substantial advantages for small or underresourced departments that are otherwise unable to provide as much policing as the public would prefer, but it can also have implications for political control over policing's nonbudgetary costs.

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<sup>328</sup> See, e.g., WYATT ET AL., *supra* note 223, at 1, 2 fig.2 (noting that 64% of JAG grants are used for law enforcement and that they can fund “hiring and maintaining staff [and] paying for overtime” as well as other activities); *DEA Programs: State & Local Task Forces*, *supra* note 317 (describing the DEA State and Local Task Force Program which “pay[s] investigative overtime” to induce state and local law enforcement participation).

<sup>329</sup> A Ninth Circuit opinion, *United States v. Reese*, provides an example. The court upheld the convictions of officers in a special drug suppression task force created with federal funds within the Oakland Housing Authority Police Department. *United States v. Reese*, 2 F.3d 870, 873–74, 897 (9th Cir. 1993). Six new officers were hired for the task force, and the opinion provides an extended account of the abuses of the unit, including excessive force, false arrest, and racist and rude treatment of citizens. *Id.* at 874–80. The head of the unit, who operated largely independently of the police department, explicitly advised that his task force members “go out and kick ass,” in order to develop statistics that could be used to justify future federal funding. *Id.* at 874 (internal quotation marks omitted).

<sup>330</sup> Departments are encouraged to seek grants for this very reason. A website popular with local police departments supplying information on grant funding states as its primary reason for seeking grants: “You could always use more money. . . . Well, grants are designed to do just that and there are grant opportunities for everything from equipment to personnel and the training they will need. A little research and time could mean that extra personnel request the city council just turned down.” *10 Reasons to Go for That Next Police Grant*, POLICEGRANTSHelp.COM, <http://www.policegrantshelp.com/news/3774362-10-reasons-to-go-for-that-next-police-grant> (last visited Feb. 11, 2015).

Although personnel costs constitute the majority of most police department budgets, nonpersonnel costs are significant and often easier politically for local government officials to cut or control in order to influence police practices. These costs include weapons and equipment; materials and supplies; fixed assets such as land, offices, and vehicles; the overhead costs for operating those assets; travel and transportation costs; contractual services; and other general and administrative expenses.<sup>331</sup> A variety of federal programs allow police departments to secure these resources without local government participation. The 1033 Program permits the transfer of vehicles, office supplies and equipment, body armor, surveillance equipment, and communications equipment directly to the police department. The Equitable Sharing Program gives local police chiefs the power to secure and utilize equitably-shared funds, which must be used for non-salary law enforcement purposes but may not supplant local funding. Police departments are counseled that they may buy firearms and other weapons, or use the money for surveillance equipment, “payments to informants; ‘buy,’ ‘flash,’ or reward money; and the purchase of evidence.”<sup>332</sup> Yet these are precisely the activities local governments might refuse to fund. In this way, the Equitable Sharing Program is expressly designed to subsidize some of the most intrusive activities in which police departments engage—the use of force and covert policing—precisely when local governments decline to support them.

Because there is so little attention given to the processes of local accountability, some federal programs are designed in ways that actually permit police departments to bypass the terms of other federal programs that facilitate local accountability. For example, several federal programs permit police departments to seek funding or resources directly, but in practice necessitate governmental support because the programs’ terms require some local funding (often in the form of matching a percentage of the grant).<sup>333</sup> Such requirements ensure local commitment to the funded priority. But other federal programs provide resources that can be used by departments to satisfy the contribution requirements, removing the need for local political support.

Asset forfeiture proceeds shared by the federal government with local departments do this doubly. First, police departments may use equitable sharing funds to satisfy the “local law enforcement agency’s

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<sup>331</sup> FYFE ET AL., *supra* note 324, at 256.

<sup>332</sup> ASSET FORFEITURE & MONEY LAUNDERING SECTION, *supra* note 237, at 16–17.

<sup>333</sup> *See, e.g.*, 42 U.S.C. § 3796dd(g) (2012) (requiring that COPS grant awards not pay for more than 75% of the funded activity and, with respect to hiring grants, that this amount decrease over time to ensure increasing local funding).

matching contribution or share in a federal grant program.”<sup>334</sup> More subtly, equitable sharing funds compound the accountability-depleting effects of federal funding for task forces. Federal grant programs often provide officer salaries for local participation in task forces, but leave operational costs to local resources. When asset forfeiture funds are used to pay those costs, the task forces are effectively self-sustaining.<sup>335</sup> They “eat what they kill,” leaving them subject to the constraints of departmental leadership rather than local government.

Similarly, though local departments may receive massive amounts of equipment through the Department of Defense’s 1033 Program at no cost, local departments are required to supply the resources necessary to transport and store the equipment.<sup>336</sup> This might provide a limited local political check on obtaining large items or large amounts of equipment, but the Department of Homeland Security permits its grants to be used to fund the transport and storage of 1033 equipment.<sup>337</sup>

Federal programs that provide equipment may empower police chiefs vis-à-vis other local officials even more strongly than programs that provide grants. When federal funding comes to local police departments, local officials sometimes mitigate its accountability consequences by offsetting federal resources. Though the practice is forbidden by the terms of federal grant and equitable sharing programs, municipalities sometimes decrease police budgets or divert funding to other purposes when a department receives outside funds.<sup>338</sup> When federal programs provide nonmonetary resources directly to departments, through training opportunities, vehicles, weapons, or assistance through task forces, the aid will be harder to offset.<sup>339</sup> Thus, nonfinancial resources may have an even greater effect on local accountability than traditional grants-in-aid, making their emphasis on intrusive policing harder for local officials to resist.

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<sup>334</sup> ASSET FORFEITURE & MONEY LAUNDERING SECTION, *supra* note 237, at 16–17.

<sup>335</sup> See Blumenson & Nilsen, *supra* note 40, at 80–92 (arguing that asset forfeiture frees police departments from congressional judgments about how federal money should be spent).

<sup>336</sup> See 10 U.S.C. § 2576a(b)(3) (2012) (requiring that the transfer of defense equipment from the federal government to other agencies be made without any federal expenditure).

<sup>337</sup> See EXEC. OFFICE OF THE PRESIDENT, *supra* note 191, at 15 (“HSGP funds may be used to facilitate the transport, receipt and storage of equipment from DOD’s 1033 programs . . .”).

<sup>338</sup> See, e.g., Evans & Owens, *supra* note 88, at 193–94 (finding that COPS grant recipients hired half as many officers as the funding was designed to achieve and used some of the extra funding to increase the number of fire fighters in the same communities).

<sup>339</sup> See O’Hear, *supra* note 40, at 850 (noting that in-kind aid is harder for local officials to offset).

In many cases, the community, public officials, and the police department are all on the same page, and federal resources and power are welcome. Where this is not the case, however, these examples show that federal efforts to improve local policing can undermine the political checks that ordinarily ensure that policing pursues public purposes, that it is effective and efficient, and that it is responsive to community concerns. These effects are possible whenever federal intervention reduces transparency, local political influence, or budgetary control of local departments. The recent emphasis in federal law and programs on task forces and multijurisdictional coordination highlights the inherent tension in federal programs. On one hand, funding and support for task forces has the potential to correct the overly local enforcement of criminal law that can result from local control of policing. On the other, these same federal programs erode local capacity to shape local law enforcement.

These effects are especially ironic given the emphasis in federal civil rights efforts on promoting accountability in local police departments. Most notably, the Civil Rights Division enforces § 14141 in ways that are intended to facilitate local control over policing. As other scholars and I have noted elsewhere, the Department of Justice's § 14141 settlements are designed to promote both officer responsiveness to departments and departmental accountability to the public.<sup>340</sup> The § 14141 settlements require departments to foster clear expectations for officers by clarifying internal policies, especially on the use of force and other coercive activities. They demand measures to hold officers responsible when they violate policy, including by strengthening complaint procedures, internal investigations, and disciplinary mechanisms.<sup>341</sup> In addition, they mandate that departments collect and share with the public key data about officer use of coercion.<sup>342</sup> Yet even as the Civil Rights Division is seeking to strengthen administrative and political accountability in policing, many federal public safety programs, including those administered by other compo-

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<sup>340</sup> See SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 5 (2005) (describing common elements in § 14141 settlements); Harmon, *Promoting*, *supra* note 121, at 18–19 (same). Ongoing structural reform also interferes with ordinary local policymaking and control, at least in the short run, since it mandates specific remedial measures and the resources to implement them.

<sup>341</sup> See Harmon, *Promoting*, *supra* note 121, at 18–19 (noting common demands of § 14141 settlements).

<sup>342</sup> *Id.* Since I described these core reforms in 2009, the Civil Rights Division has continued to seek similar institutional changes in its § 14141 settlements. See, e.g., City of Newark and United States of America Agreement in Principle 6–8, July 22, 2014, *available at* [http://www.justice.gov/crt/about/spl/documents/newark\\_prinagree\\_7-22-14.pdf](http://www.justice.gov/crt/about/spl/documents/newark_prinagree_7-22-14.pdf) (setting out similar requirements in a recent consent decree).

nents of the Department of Justice, are subverting public control over police coercion.

### C. Federal Programs and States as Checks on Policing

While states are usually perceived to be weak regulators of local policing, they do sometimes constrain the coercion costs of policing and facilitate police accountability. State statutes, for example, restrict the legal bases for custodial arrests, limit strip searches, and constrain the use of traffic control to generate municipal income.<sup>343</sup> They also set hiring and training standards for officers, and decertify officers who have engaged in substantial misconduct or criminal activity.<sup>344</sup> State budgets and sentencing statutes shape local criminal enforcement priorities.<sup>345</sup>

Some federal programs facilitate state regulation of local policing by funneling federal grants through state agencies, which set priorities for the local use of federal money. Several Homeland Security grants and Byrne JAG grants, for example, give states influence over local distributions of funds. Less obviously, however, other federal programs undermine state policies that might limit the intrusiveness of local policing.

For example, while all states permit asset forfeiture under at least some circumstances, states take a range of approaches to balancing the competing interests of law enforcement, the public, and individual property owners.<sup>346</sup> Some states permit forfeiture broadly, while others permit it only for a narrow range of crimes or only in criminal proceedings.<sup>347</sup> Eight states authorize forfeitures, but forbid law

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<sup>343</sup> See, e.g., ARK. CODE ANN. § 12-8-401 to -404 (2009) (forbidding use of traffic enforcement for the purpose of raising revenue rather than protecting public safety and setting presumptive limits on municipal revenue from highway traffic tickets); VA. CODE ANN. § 19.2-74 (2014) (requiring officers to issue summons rather than make custodial arrests for some misdemeanor violations); WIS. STAT. ANN. § 968.255 (West 2014) (restricting strip searches).

<sup>344</sup> See Roger L. Goldman, *Police Officer Decertification: Promoting Police Professionalism Through State Licensing and the National Decertification Index*, POLICE CHIEF, Nov. 2014, at 40 (noting that states certify officers, decertify officers for misconduct, have agencies known as Peace Officers Standards and Training Commissions, specify selection standards for police officers, and mandate training for the police).

<sup>345</sup> See, e.g., O'Hear, *supra* note 40, at 851–52 (discussing ways federal programs can undermine state drug enforcement policy).

<sup>346</sup> See Jefferson E. Holcomb et al., *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 273 (2011) (stating that all states permit forfeiture and forfeiture laws); *id.* at 276 (indicating that state laws vary with respect to how difficult it is for the government to seize property and prevail in forfeiture actions).

<sup>347</sup> See *id.* at 276–78 (describing variation in state laws on the innocent owner defense, standards of proof, and connection with criminal activity).

enforcement agencies from benefiting directly from the proceeds, turning over forfeited proceeds instead to the state's general fund or education spending.<sup>348</sup> Other states permit agencies to receive proceeds, but cap the percentage of proceeds that are returned to law enforcement agencies.<sup>349</sup> States also erect procedural barriers to forfeiture, such as giving the government the burden of overcoming an innocent-owner defense.<sup>350</sup> These constraints make state forfeitures more difficult to complete and less financially rewarding for departments that carry them out.<sup>351</sup>

Local police departments may bypass many of these state-created obstacles by using federal forfeiture law rather than state law in states that limit forfeiture. In a state with civil forfeiture rules more restrictive than federal law, a department may seize property and seek equitable sharing under federal law's laxer rules, even after Attorney General Holder's recent adjustments to the program. Research suggests this is precisely what police departments do. Police departments in states with restrictive forfeiture laws are significantly more likely to choose to pursue federal equitable sharing than departments in states that make forfeiture more profitable to police departments.<sup>352</sup> In this way, federal asset forfeiture undermines state efforts to reduce the harms of asset forfeiture and constrain its distorting effect on policing. Since, as described earlier, the Equitable Sharing Program also frees departments from ordinary local political checks on police conduct, the federal program effectively ensures that police departments (in forfeiture-restrictive states) are subject neither to the full financial constraints of local budgets nor to the restraint of state law.

Asset forfeiture is an extreme example of potential federal interference with state law enforcement policy decisions because it permits police departments to determine the scale of their forfeiture activities and because it gives largely unrestricted money directly to police departments. Other federal laws have analogous, if more subtle, effects. Whenever federal law puts a thumb on the scale for some law enforcement activities, it potentially interferes not only with local efforts to set law enforcement priorities, but also with state criminal justice policy that limits the harmfulness of policing.

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<sup>348</sup> *Id.* at 276, 277 tbl.1.

<sup>349</sup> *See id.* at 277 tbl.1 (listing states by the percentage of forfeiture proceeds they permit to be given to law enforcement agencies).

<sup>350</sup> *See id.* at 276–77, 277 tbl.2 (discussing variation in the innocent owner defense).

<sup>351</sup> *See id.* at 276 (“In some states, forfeiture laws are more restrictive, meaning that it is more difficult for the government to prevail in forfeiture actions.”).

<sup>352</sup> *See id.* at 280 (finding that law enforcement agencies in states with generous forfeiture laws received substantially lower equitable sharing payments than agencies in restrictive states, and noting that this corroborates earlier research on the subject).

VAWA provides another example. VAWA's Arrest Program encourages states to adopt pro-arrest laws in much the same way it encourages local departments to do so.<sup>353</sup> Despite the financial incentive created by federal grants, twenty-one states continue to permit police officers discretion over whether to make a warrantless arrest for a domestic violence crime.<sup>354</sup> Wyoming, for example, provides that a "local law enforcement officer responding to the request for assistance may take whatever steps are reasonably necessary to protect the victim from further domestic abuse," and specifically lists advising the victim about services, facilitating medical care or housing, and "[a]rresting the abusing household member when appropriate."<sup>355</sup>

As noted above, conditioning Arrest Program funds on a pro-arrest policy, as VAWA requires, provides no additional incentive to municipalities in states that already mandate or prefer arrest. But it does encourage local governments and departments to adopt pro-arrest policies when their states do not have such laws. If arrest-neutral states are trying to preserve officer discretion to arrest—rather than defer to local preferences—the Arrest Program undermines those states' policy judgments. Any program that provides funding to local departments directly can have similar effect, marginalizing the impact of state efforts to reduce the coercion costs of policing.<sup>356</sup>

Federal law that empowers officers rather than giving money can also interfere with state policy. The Federal Law Enforcement Officers Safety Act (FLEOSA), passed in 2004 and amended several times since, authorizes qualified police officers and qualified retired officers to carry a concealed firearm in any jurisdiction in the United States.<sup>357</sup> The law expressly permits officers certified in one state to carry weapons in all others, even when doing so conflicts with the laws of the state in which they are present.<sup>358</sup> States differ enormously in

<sup>353</sup> 42 U.S.C. § 3796hh(b)(1), (c)(1)(A) (2012).

<sup>354</sup> April M. Zeoli et al., *A Summary and Analysis of Warrantless Arrest Statutes for Domestic Violence in the United States*, 26 J. INTERPERSONAL VIOLENCE 2812, 2825, 2826 tbl.2 (2011). Several other states prefer or mandate arrest only in limited situations, such as when aggravating factors are present. *Id.*

<sup>355</sup> WYO. STAT. ANN. § 35-21-107(b) (2013).

<sup>356</sup> Others have noted similar effect. See Richman, *supra* note 16, at 406 (suggesting that federal involvement in local law enforcement could increase local power relative to states).

<sup>357</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239 § 1089, 126 Stat. 1632, 1970–71 (amending 18 U.S.C. §§ 926B–926C (2012)); Law Enforcement Officers Safety Act Improvements Act of 2010, Pub. L. No. 111-272, 124 Stat. 2855 (amending 18 U.S.C. § 926B (2006)); Law Enforcement Officers Safety Act of 2004, Pub. L. No. 108-277, 118 Stat. 865 (codified as amended at 18 U.S.C. §§ 926B–926C (2012)).

<sup>358</sup> See 18 U.S.C. § 926B(a)–(b) (2012) (permitting officers to carry concealed firearms "[n]otwithstanding any other provision of the law of any State or any political subdivision thereof," except to the degree the state permits private property owners to restrict

their minimum qualifications for officers, their training standards (both with respect to firearm performance and the law),<sup>359</sup> and their concealed-carry laws.<sup>360</sup> State certification of police officers ensures that officers are familiar and compliant with the laws of their state. FLEOSA enables officers to leverage the certification, training, and weapons possession laws of the least restrictive states to encroach upon the policy judgments of more restrictive ones.

Though state and federal interests often align, in each of these examples, federal public safety programs act as a one-way ratchet that likely raises the costs of policing. Federal programs have no effect on states that facilitate costly policing, such as states with permissive asset forfeiture laws or those that encourage arrests, but they undermine state policies that could reduce those costs—by reducing property deprivations, arrests, or uses of force—in favor of federal policies that subsidize or facilitate them.

As several scholars have noted, states and municipalities are not powerless to respond to federal encroachment through grants of power and authority. Both states and municipalities participate in the development of federal programs, and they frequently influence the form of those programs.<sup>361</sup> When they cannot shape them, states and cities can still refrain from applying for conditional grants. States can also bar local governments and police officers from using federal power or money in ways inconsistent with state law or policy. They could set limits on deputation of local officers, restrict local participation in federal asset forfeiture, or prohibit local law enforcement agencies from operating drones, making it irrelevant whether they receive them through federal money. Some scholars have taken the power to refuse and high-profile instances of state and local resistance to fed-

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concealed firearms or the state restricts possession on state property); *id.* § 926C (using the same preemption language for a rule permitting retired law enforcement officers to carry concealed firearms).

<sup>359</sup> See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, NCJ 222987, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2006, at 6 (2009) (indicating that nearly all police training academies use state mandates to guide curriculum and citing median hours for firearms and legal instruction among academies); *id.* at 13 app'x tbl.1 (indicating percentages of law enforcement training academies using various firearms training methodologies); Harmon, *Problem*, *supra* note 2, at 806 (describing state agencies that establish requirements for training, including firearms training).

<sup>360</sup> For a recent summary of the existing variation, see Nicholas Duva, *Gun Laws Vary State by State: CNBC Explains*, CNBC (Nov. 20, 2014, 8:47 AM), <http://www.cnbc.com/id/102102794#>.

<sup>361</sup> See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 866 (1998) (describing lobbying by local and state actors to influence federal programs); *id.* at 883 (describing intergovernmental competition to influence Congress).

eral programs to suggest that we need not worry much about federalism concerns arising from federal programs.<sup>362</sup>

In practice, however, state and local power to resist federal programs is less substantial than formal mechanisms suggest. As Roderick Hills has pointed out, the argument that states can merely refuse federal money and power or forbid local law enforcement agencies access to those resources “mistakes legal theory for political reality.”<sup>363</sup> Occasionally, a state or city will resist, as jurisdictions have done with Secure Communities.<sup>364</sup> But that resistance is rare. Instead, state and local governments often compete with each other for federal funding and authority, since refusing funds effectively exports state residents’ tax dollars to other states.<sup>365</sup> For this reason alone, voters may punish state or local actors who fail to use available federal resources.<sup>366</sup> Local political sentiment will less frequently meet the threshold necessary for police reform with federal resources subsidizing coercive practices.

Sometimes resistance is not even legally viable. FLEOSA, for example, expressly preempts state laws inconsistent with it.<sup>367</sup> During debate over the law, amendments were offered to allow states to opt out of the law and to narrow the statute so that it would not operate where it conflicted with state law. Those proposals failed after the National Rifle Association and law enforcement groups supported the broader statute.<sup>368</sup> Similarly, in the face of efforts by states, municipalities, and departments to restrict cooperation between federal immi-

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<sup>362</sup> See, e.g., 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, 6–8 (2006) (detailing state refusal to enforce federal immigration law); Richman, *supra* note 16, at 407–10, 418–19 (describing friction between federal and local officials over homeland security efforts after 9/11 and suggesting it represents a local ability to influence ongoing law enforcement policy); Waxman, *supra* note 292, at 315–17 (describing local pushback to post-9/11 national homeland security policy and noting that some scholars view such pushback as evidence that “state and local governments can operate as checks on federal policy”).

<sup>363</sup> Hills, *supra* note 361, at 878.

<sup>364</sup> See *Text of TRUST Acts*, CALIFORNIA TRUST ACT, <http://www.catrustact.org/text-of-trust-acts.html> (last visited Mar. 12, 2015) (listing and linking to state and county policies resisting law enforcement cooperation with Secure Communities).

<sup>365</sup> See Hills, *supra* note 361, at 879 (describing state and local competition for federal funds).

<sup>366</sup> *Id.* at 876.

<sup>367</sup> See 18 U.S.C. § 926B(a)–(b) (2012) (applying general concealed-carry rule “[n]otwithstanding any other provision of the law of any State or any political subdivision thereof,” except those that “permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property” or “prohibit or restrict the possession of firearms on . . . government property”).

<sup>368</sup> See S. Rep. 108-29, at pts.v, ix, x (2003) (describing proposed amendments not in the final bill).

gration agents and local law enforcement pursuant to Secure Communities,<sup>369</sup> the federal government announced that its once-voluntary program was mandatory.<sup>370</sup> The possibility of federal preemption can leave states and localities with no alternative to the political arena to preserve state interests in federal policing policy, and in that arena, federal interests often lead to costly policing.

## CONCLUSION

Policing is a crucial and complicated social project. Law enforcement is essential to protecting public order and safeguarding the conditions of liberty, but intrusive and coercive policing also imposes costs on individuals and communities. The legal problem of policing is deciding “how to regulate police officers and departments to protect individual liberty and minimize the social costs the police impose” while promoting the goals of policing: reducing fear, protecting civil order, and facilitating law enforcement.<sup>371</sup> Scholars have often focused their attention on federal law that pursues the first part of this equation, protecting individual liberty and minimizing the social costs of policing through constitutional law and its remedies. Of course, this project is important. The federal government remains a critical actor in solving policing’s problem.<sup>372</sup> State and local governments face majoritarian pressures that prevent them from adequately weighing individual and minority community interests against the need for police effectiveness. Federal remedies and civil rights programs have

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<sup>369</sup> See Christopher N. Lasch, *Resistance to Secure Communities Continues to Grow—King County (Washington) Passes Ordinance Restricting Immigration Detainer Compliance*, IMMIGRATIONPROF BLOG (Dec. 6, 2013), <http://lawprofessors.typepad.com/immigration/2013/12/resistance-to-secure-communities-continues-to-growking-county-washington-passes-ordinance-restrictin.html> (listing state and local ordinances and policies seeking to limit compliance with federal immigration detainers issued pursuant to Secure Communities).

<sup>370</sup> See U.S. DEP’T OF HOMELAND SEC., *supra* note 183, at 11 (“[A Secure Communities] jurisdiction cannot choose to have the fingerprints it submits to the federal government processed only for criminal history checks. Further, jurisdictions cannot demand that the identifications that result from DHS’s processing of the fingerprints not be shared with local ICE field offices in that jurisdiction.”); Memorandum from Riah Ramlogan, Deputy Principal Legal Advisor, U.S. Immigration & Customs Enforcement, to Beth N. Gibson, Assistant Deputy Dir., U.S. Immigration & Customs Enforcement 1 (Oct. 2, 2010), *available at* <http://images.politico.com/global/2012/01/icefoiaoptoutdocs.pdf> (stating that program is mandatory).

<sup>371</sup> Harmon, *Problem*, *supra* note 2, at 762.

<sup>372</sup> See *id.* at 811–16 (describing the essential federal role in ensuring that local policing protects civil rights); Harmon, *Limited Leverage*, *supra* note 62, at 53–54 (discussing the essential federal role in ensuring adequate information about policing).

been and will be essential in promoting lawful, effective, and rights-protective policing.<sup>373</sup>

But the federal government has also long been pursuing the second aim, promoting effective policing. And the programs it uses towards this end complicate the picture of federal regulation of the police.<sup>374</sup> Federal public safety programs funnel an enormous amount of money and power into local policing, dwarfing civil rights programs in size and in influence over contemporary American policing.

In seeking to promote public safety, these programs have overlooked the need to minimize the coerciveness of policing. Rather, federal public safety programs are designed, implemented, and evaluated without attention to costs beyond those associated with the budgetary costs of the programs themselves. The consequence is that federal programs often subsidize and empower especially harmful policing. Even if they make local policing more effective, these programs also likely make it less efficient and less cost effective overall.

Only by assessing the full costs and benefits of policing can we be assured that federal programs are good for local policing. That is hardly an impossible task. Analogous efforts to assess the costs of crime have been refined over decades, and they offer many lessons for those who would improve the evaluation of federal programs that shape local law enforcement. Efforts to assess the costs of policing can build on these prior efforts. With this improved assessment, we could better allocate federal resources. We could also be assured that federal intervention into local law enforcement does not do more harm than good.

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<sup>373</sup> See Harmon, *Problem*, *supra* note 2, at 811–16 (discussing the importance of federal civil rights programs).

<sup>374</sup> Daniel Richman has already pointed in this direction. See Richman, *supra* note 16, at 421 (suggesting that local police departments can sometimes help promote civil rights when those rights arise in “interactions with the local community that have little to do with their ordinary order maintenance or crime-fighting responsibilities”).