

The Law of Homegrown (Counter)Terrorism

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On the eve of World War II, concern mounted within the Federal Bureau of Investigation (FBI) that domestic intelligence related to national security was being gathered by local police, especially by members of major metropolitan police departments, and that the police were refusing to share the information they obtained with federal authorities.¹ FBI Director J. Edgar Hoover lobbied Attorney General Frank Murphy who, in turn, engaged the President.² On September 6, 1939, FDR issued the following directive: “The attorney general has been requested by me to instruct the Federal Bureau of Investigation of the Department of Justice to take charge of investigative work in matters relating to espionage, sabotage, and violations of the neutrality regulations.”³ It went on to urge “all police officers, sheriffs, and all other law enforcement officers in the United States promptly to turn over to the nearest representative of the Federal Bureau of Investigation any information obtained by them relating to espionage, counterespionage, sabotage, subversive activities and violations of the neutrality law.”⁴

This short vignette serves as a powerful reminder that local officials and agencies have historically participated in urgent matters of national security—especially in what we would today label “intelligence”—and in

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1. See 1 NAT’L COUNTERINTELLIGENCE CTR., A COUNTERINTELLIGENCE READER: AMERICAN REVOLUTION TO WORLD WAR II 171 (Frank J. Rafalko ed., 2004) [hereinafter CT READER] (describing the creation of the New York City Police Department’s (NYPD) “special sabotage squad,” which resulted in citizens giving information regarding espionage to the local police rather than the FBI).

2. *Id.* at 169–70.

3. *Id.* at 177.

4. *Id.* The commandeering logic behind the directive would nowadays, in all likelihood, run afoul of the doctrine established in *Printz v. United States*, 521 U.S. 898, 935 (1997), which held that state police officials could not be involuntarily required to assist in the enforcement of a federal regulatory regime. *But see Dole v. South Dakota*, 483 U.S. 203, 211–12 (1987) (permitting the federal government to avoid state-sovereignty limitations on commandeering by making the receipt of federal funds conditional on state cooperation).

doing so have frequently rankled their federal counterparts.⁵ Before the rise of the Cold War bureaucracy effectively made national security synonymous with security furnished at the federal level,⁶ local police departments fielded intelligence units and carried out significant national-security-related missions.⁷

With the contemporary counterterrorism agenda giving impetus to discussions of (and practical developments in) domestic intelligence, local police have once again emerged as a significant constituency in discussions of national security.⁸ This is especially true in view of the ascendancy of homegrown terrorism,⁹ the phenomenon whereby individuals and groups

5. See BEVERLY GAGE, *THE DAY WALL STREET EXPLODED* 173 (2009) (recounting how the NYPD was actively involved in the investigation of the September 16, 1920 Wall Street bombing); Adam M. Giuliano, *Emergency Federalism: Calling on the States in Perilous Times*, 40 U. MICH. J.L. REFORM 341, 362 (2007) (“The Framers incorporated limited but significant state roles regarding national defense and homeland security.”).

6. It was precisely the distinctive structural features of the Cold War and the bipolar nuclear conflict that it ushered in that caused the role of locals in national security to recede from view. See Ian Anderson et al., *Assessing the Terrorist Threat to America*, NAT’L ASS’N COUNTY ADMINS., http://www.countyadministrators.org/index.asp?Type=B_BASIC&SEC={EA2CBDBC-E2FD-4C32-AC04-D0430ACB34A2}&DE={83EACB65-3B6B-419F-9613-580ADCF39A5E} (“The Cold War, with its theories such as deterrence and mutual assured destruction, dominated national security A centralized and hierarchical enemy demanded the same to combat it.”).

7. The historical record of local involvement in domestic intelligence, no different from federal, is decidedly mixed. As Morgan has observed, in Chicago, the police department’s intelligence unit—a true “red squad”—became very closely linked with Mayor Daley and concerned itself with spying on his political opponents. RICHARD E. MORGAN, *DOMESTIC INTELLIGENCE* 84 (1980). The NYPD’s Bureau of Special Services and Intelligence (BOSSI) enjoyed a different reputation. *Id.* “BOSSI did not respond to City Hall concerns about political opponents and prided itself on its independence.” *Id.* at 85. Unlike Chicago, “the New York operation focused on the law enforcement utility of the information it gathered.” *Id.* Mayor Lindsay and Police Commissioner Murphy (well-known as a progressive) disbanded BOSSI in the mid-1960s and replaced it with the Intelligence Division, as it is still known. *Id.* Allegations of illegal activities made against the Intelligence Division beginning in the 1970s culminated in a consent decree that continues to bind the NYPD. See *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1417 (S.D.N.Y. 1985) (approving a consent decree that governs investigation and surveillance of political-action groups by the NYPD). See generally Paul G. Chevigny, *Politics and Law in the Control of Local Surveillance*, 69 CORNELL L. REV. 735, 751–67 (1984) (discussing the circumstances leading up to and the specifics of various consent decrees in Memphis, Chicago, and New York, which had far-reaching influence); Jerrold L. Steigman, *Reversing Reform: The Handschu Settlement in Post-September 11 New York City*, 11 J.L. & POL’Y 745, 765–70 (2003) (detailing litigation in September 2002 in which the *Handschu* consent decree was relaxed).

8. See Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. (forthcoming 2010) (discussing the involvement of state and local governments in domestic intelligence); see also, e.g., Richard A. Posner, Op-Ed., *What Our Intelligence Agencies Could Learn from Silicon Valley*, WALL ST. J., May 28, 2010, available at <http://online.wsj.com/article/SB10001424052748704717004575268783383613118.html> (noting that “there are at least 20 separate U.S. intelligence agencies, not counting state and local agencies” and that “New York City’s police department, for example, has a formidable intelligence unit”).

9. Examples abound. The so-called Lackawanna Six were Yemeni-Americans who trained in an al Qaeda camp in Afghanistan before returning to the United States with no clear follow-up plan. DINA TEMPLE-RASTON, *THE JIHAD NEXT DOOR* 175–78 (2007). The six were all convicted for their activities in Afghanistan, and the reported mastermind of the plot, Ahmed Hijazi, was killed in a Predator drone strike in Yemen. James Risen, *An American Was Among 6 Killed by U.S., Yemenis*

Say, N.Y. TIMES, Nov. 8, 2002, at A13. The “Fort Dix Six,” a group of Muslim immigrants radicalized while in the United States, were convicted of conspiring to attack U.S. military personnel. See Kareem Fahim & Andrea Elliott, *In Large Immigrant Family, Religion Guided 3 Held in Fort Dix Plot*, N.Y. TIMES, May 10, 2007, at A1 (detailing the lives and families of the six immigrants). In October 2008, a Somali-American who traveled from Minneapolis to Somalia with other Somali-American youths became the first confirmed U.S. citizen to commit a suicide bombing. Andrea Elliott, *Charges Detail Road to Terror for 20 in U.S.*, N.Y. TIMES, Nov. 24, 2009, at A1. Another Somali suicide bomber may have had ties to Seattle. See Jeffrey Gettleman, *American Helped Bomb Somalia Base, Web Site Says*, N.Y. TIMES, Sept. 25, 2009, at A13 (“The Somali Web site listed a Seattle phone number for the bomber’s father, but the number [was] apparently not in service.”). Omar Hammami was raised a Southern Baptist in Alabama, converting to Islam and becoming increasingly radical in his viewpoints during high school. Andrea Elliott, *The Jihadist Next Door*, N.Y. TIMES, Jan. 31, 2010, (Magazine), at 26. Still in his twenties, he is currently believed to be among the leaders of Al Shabab, a Somali-militant organization linked to al Qaeda. *Id.* Concerns have grown over U.S. citizens immigrating to Yemen and associating with al Qaeda in the Arabian Peninsula. STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., *AL QAEDA IN YEMEN AND SOMALIA: A TICKING TIME BOMB I* (Comm. Print 2010). Law enforcement and intelligence officials believe that as many thirty-six American ex-convicts traveled to Yemen in 2009. *Id.* Sharif Mobley, an American man formerly employed at nuclear power plants in New Jersey, was recently arrested in Yemen on suspicion of being associated with al Qaeda in the Arabian Peninsula and also with the Somali movement Al Shabab. Scott Shane, *American’s Arrest Stirs Fears That Wars Radicalize U.S. Muslims*, N.Y. TIMES, Mar. 13, 2010, at A4. Following his arrest, Mobley grabbed a security official’s gun and shot two guards, one fatally. *Id.* Abdulhakim Mujahid Muhammad, born Carlos Bledsoe in Memphis, Tennessee, killed one soldier and wounded another in a shooting attack outside an army recruiting center in Little Rock, Arkansas. James Dao, *A Muslim Son, a Murder Trial and Many Questions*, N.Y. TIMES, Feb. 17, 2010, at A11. Muhammad had converted to Islam in college, becoming increasingly radicalized through studies at the Islamic Center of Nashville and a stint teaching and studying in Aden, Yemen. *Id.* Najibullah Zazi, an Afghan-born permanent resident of the United States, was arrested in September 2009 and recently pleaded guilty to attempting to detonate bombs within the New York City subway system as part of an al Qaeda plot. A.G. Sulzberger & William K. Rashbaum, *Guilty Plea Made in Plot to Bomb New York Subway*, N.Y. TIMES, Feb. 23, 2010, at A1. David Headley, a U.S. citizen “raised in elite circles in Pakistan,” has been accused of assisting in the 2008 Mumbai attack by the terrorist group Lashkar-e-Taiba as well as of conspiring to attack the Danish newspaper that published cartoons of the Prophet Mohammed. Ginger Thompson & David Johnston, *U.S. Man Accused of Helping Plot Mumbai Attack*, N.Y. TIMES, Dec. 8, 2009, at A1. Headley’s radicalization appears to be longstanding, and he is alleged to have received training by Lashkar-e-Taiba from 2002 to 2003. *Id.* Although the details are as yet unclear regarding the motive of the crime and its possible connection to radicalism and terrorism, Major Nidal Malik Hasan’s mass murder at Fort Hood may be the most serious modern incident of homegrown radicalism and terrorism committed in the United States. See Daniel Byman, *Homeland Insecurity*, WALL ST. J., Dec. 15, 2009, available at <http://online.wsj.com/article/SB10001424052748704517504574589841594836308.html> (describing the Fort Hood shootings as “the deadliest terrorist attack on U.S. soil since 9/11”). One of the unresolved issues in the case is Hasan’s relationship with Anwar al Awlaki, a Yemeni-American with alleged terrorist connections, and what influence, if any, the latter had on Hasan’s subsequent crime. See *The Fort Hood Attack: A Preliminary Assessment: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (2009) (statement of Juan Carlos Zarate, Senior Advisor, Center for Strategic and International Studies), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=70b4e9b6-d2af-4290-b9fd-7a466a0a86b6 (describing alleged communications between Hasan and al Awlaki as “troubling”); Dan Murphy, *Fort Hood Shooting: Was Nidal Malik Hasan Inspired by Militant Cleric?*, CHRISTIAN SCI. MONITOR, Nov. 10, 2009, <http://www.csmonitor.com/World/Global-News/2009/1110/fort-hood-shooting-was-nidal-malik-hasan-inspired-by-militant-cleric> (reporting that investigators are researching Hasan’s contact with al Awlaki). On May 4, 2010, Faisal Shahzad, a Pakistani-born naturalized U.S. citizen, admitted involvement in a failed attempt to

carry out attacks (or attempt to) within their native or adopted country or society.¹⁰ With the rise of homegrown terrorism has also come increased discussion of radicalization—the process by which individuals or groups are socialized into a thought world that condones, valorizes, and ultimately may require acts of violence—the production cycle, so to speak, of extremist violence.¹¹ Official efforts to understand and combat this trend, which collectively go by the name “counterradicalization,”¹² have become increasingly central to American counterterrorism policy overseas as well as

detonate a car bomb in New York City’s Times Square. Mark Mazzetti et al., *Terrorism Suspect, Charged, Admits to Role in Bomb Plot*, N.Y. TIMES, May 5, 2010, at A1. In December 2009, Pakistani police arrested five U.S. citizens in the home of a man linked to radical Islamist groups. Jerry Markon et al., *Arrests Suggest U.S. Muslims, Like Those in Europe, Can Be Radicalized Abroad*, WASH. POST, Dec. 12, 2009, at A1. What the men had hoped to accomplish on their trip to Pakistan has yet to be reported. See generally RICK “OZZIE” NELSON & BEN BODURIAN, CTR. FOR STRATEGIC & INT’L STUDIES, A GROWING TERRORIST THREAT? ASSESSING “HOMEGROWN” EXTREMISM IN THE UNITED STATES (2010), available at http://csis.org/files/publication/100304_Nelson_GrowingTerroristThreat_Web.pdf (recounting recent incidents of domestic terrorism and suggesting measures the United States should take to counter such threats); Byman, *supra* (postulating various explanations for the recent spike in homegrown terrorists); Sebastian Rotella, *A U.S. Strain of Extremism May Be Rising*, L.A. TIMES, Dec. 7, 2009, at A1 (describing 2009 as the most dangerous year in terms of domestic terrorism since 2001); Bruce Hoffman, *American Jihad*, NAT’L INT. ONLINE, Apr. 20, 2010, <http://www.nationalinterest.org/Article.aspx?id=23200> (calling for greater official attention to the phenomenon of homegrown terrorism).

10. See CTR. ON LAW & SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD (2010) (demonstrating that the majority of terrorism suspects tried in federal court in the United States in the last eight years have been homegrown terrorists). There is no agreed-upon definition of homegrown terrorism. A recent report defined it as “terrorist violence perpetrated by U.S. legal residents or citizens.” NELSON & BODURIAN, *supra* note 9, at v n.1. A proposed statute, meanwhile, would have defined homegrown terrorism as “the use, planned use, or threatened use, of force or violence by a group or individual born, raised, or based and operating primarily within the United States . . . in furtherance of political or social objectives.” Violent Radicalization and Homegrown Terrorism Prevention Act of 2007, H.R. 1955, 110th Cong. § 3 (as passed by House, Oct. 23, 2007).

11. See, e.g., QUINTAN WIKTOROWICZ, RADICAL ISLAM RISING 5–6 (2005) (explaining how individuals in the Western world are drawn to radical Islamic groups by analyzing their initial interest in the groups, the means by which they are persuaded to believe the radical group is a credible source of Islamic interpretation, and the process by which they are persuaded to engage in “risky activism”). The homegrown terrorism that I focus on mainly emanates from certain strains of radical Islam. But the concept is certainly not limited to instances of acts of violence inspired by any one religious tradition or ideology. See, e.g., Michael Brick, *For Texas Pilot, Rage Simmered with Few Hints*, N.Y. TIMES, Feb. 19, 2010, at A1 (revealing how Joseph Stack was radicalized by antigovernment rhetoric and philosophy before flying his plane into an Austin, Texas building housing the local Internal Revenue Service offices). Joseph Stack’s suicide note clearly indicates that he wanted to be a martyr and that “violence not only [was] the answer, it [was] the only answer.” Letter from Joe Stack (Feb. 18, 2010), available at <http://graphics8.nytimes.com/packages/pdf/us/20100218-stack-suicide-letter.pdf>.

12. See, e.g., PRESIDENTIAL TASK FORCE ON CONFRONTING THE IDEOLOGY OF RADICAL EXTREMISM, REWRITING THE NARRATIVE: AN INTEGRATED STRATEGY FOR COUNTERRADICALIZATION 8–20 (2009) [hereinafter REWRITING THE NARRATIVE], available at <http://washingtoninstitute.org/pubPDFs/PTF2-Counterradicalization.pdf> (surveying efforts by European governments to address extremist ideology and offering recommendations for the U.S. government).

inside the United States.¹³ Indeed, counterradicalization is rapidly becoming a key tool for addressing homegrown terrorism before it manifests itself as violent activity.¹⁴

How should federal and local programs fit into an overarching domestic-intelligence framework in view of heightened concern about homegrown terrorism and the growing official appetite to address it through counterradicalization (and specifically through the broad-gauged intelligence that counterradicalization presupposes)?¹⁵ My claim is that given the nature

13. *See id.* at 13–17 (making numerous recommendations to the Obama Administration regarding potential changes to the United States’ counterradicalization policies in the Middle East); WHITE HOUSE, NATIONAL SECURITY STRATEGY 19 (2010) [hereinafter NATIONAL SECURITY STRATEGY], *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (emphasizing the need for counterradicalization efforts within the United States).

14. *See id.* at 17–18 (discussing ways to improve domestic counterradicalization efforts). In an example of the increased focus on counterradicalization, Department of Homeland Security Secretary Janet Napolitano submitted written testimony to the Senate Homeland Security Committee detailing the efforts by the Department, especially its Office of Information and Analysis (I&A), to counter radicalization, noting that I&A “strengthen[ed] its analysis in several areas,” notably “violent radicalization and domestic terrorism.” *Eight Years After 9/11: Confronting the Terrorist Threat to the Homeland: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs*, 111th Cong. (2009) (statement of Janet Napolitano, Secretary, Department of Homeland Security), *available at* http://www.dhs.gov/ynews/testimony/testimony_1254321524430.shtm. More generally, in his Nobel Prize acceptance speech, President Obama referred to radicalization as a major threat to peace which must be countered by a correct understanding of faith as “the law of love”:

[G]iven the dizzying pace of globalization, the cultural leveling of modernity, it perhaps comes as no surprise that people fear the loss of what they cherish in their particular identities—their race, their tribe, and perhaps most powerfully their religion. In some places, this fear has led to conflict. . . . [M]ost dangerously, we see it in the way that religion is used to justify the murder of innocents by those who have distorted and defiled the great religion of Islam, and who attacked my country from Afghanistan.

Barack Obama, U.S. President, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>. Counterradicalization, which is strategic in its breadth and anticipatory in its methodology, can be distinguished from deradicalization, which aims to unwind ideological developments that have already taken place within an individual or group. OMAR ASHOUR, THE DE-RADICALIZATION OF JIHADISTS 5–6 (2009). In an interview with *Der Spiegel*, Napolitano said that the United States will expand its communication and coordination with Europe regarding deradicalization, as both face similar questions: “How do you identify a youth who is susceptible to becoming radicalized? How do you work with that youth, his family and community to give them alternatives to radicalization?” Cordula Meyer, *Away from the Politics of Fear*, DER SPIEGEL ONLINE, Mar. 16, 2009, <http://www.spiegel.de/international/world/0,1518,613330,00.html>.

15. *See supra* notes 12–14 and accompanying text. There are reasons to be concerned about the abilities of both federal and local programs. Counterradicalization implies the capacity of officials to comprehend and intervene in processes that are heavily informed by religiously inspired ideology, historically not a strong suit of law enforcement agencies. *See* RICHARD A. POSNER, COUNTERING TERRORISM 105–10 (2007) (discussing how law enforcement and intelligence agencies diverge in terms of their missions and institutional cultures). A debate rages across Western European democracies (many of which currently practice counterradicalization more vigorously and comprehensively than the United States) about the degree to which nonviolent extremists ought to be enlisted in the ideological struggle against violent extremists. *See, e.g.,*

of contemporary counterterrorism intelligence, exclusive—or even excessive—reliance on federal modalities is mistaken.¹⁶ I argue that a properly conceived approach to homegrown terrorism should leverage three main comparative strengths possessed by local intelligence. First, local intelligence has proved especially adept at supplying a conceptual framework for thinking about, and addressing, homegrown terrorism. I refer to the ability of local officials to “see” the threat in terms of local phenomena as an example of “epistemic federalism.” Second, local officials excel at what I call (following Elinor Ostrom) “coproduction” of intelligence, a form of collaborative intelligence gathering and interpretation that enlists the support of local populations.¹⁷ Third, owing to informal mechanisms and incentives, local police may be more likely to carry out aspects of their intelligence missions with greater attentiveness to issues of basic rights.

But local intelligence has its limitations and comparative disadvantages as well. First, I contend that local intelligence officials lack the analytic capacity to make full use of their institutional strengths as intelligence collectors.¹⁸ Second, for all that certain informal incentives may tend to

Lorenzo Vidino, *Europe's New Security Dilemma*, WASH. Q., Oct. 2009, at 62 (“A source of particularly heated debate among policymakers is the role that could be played in these programs by nonviolent Islamists . . .”). Furthermore, as discussed below, counterradicalization implicates concerns about basic freedoms guaranteed by the Bill of Rights, especially those embodied in the First Amendment’s Speech and Religion Clauses. See *infra* notes 112–13 and accompanying text. For a recent powerful critique of British counterradicalization policy, see ARUN KUNDNANI, SPOOKED! HOW NOT TO PREVENT VIOLENT EXTREMISM (2009), <http://www.irr.org.uk/pdf2/spooked.pdf> and COMMUNITIES AND LOCAL GOV’T COMM., PREVENTING VIOLENT EXTREMISM, 2009–2010, H.C. 65, 8–23 (criticizing official U.K. counterradicalization policy for various counterproductive and legally questionable practices).

16. I do not mean to argue that federal intelligence does not possess formidable advantages over local intelligence. Federal officials are vastly more experienced and capable in areas of electronic surveillance, including tracking material on the Internet. See DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS § 3 (2007) (summarizing the history of federal national-security surveillance from the expiration of a World War I statute barring federal wiretapping in 1919 to the War on Terror). Furthermore, although the NYPD has dispatched approximately ten of its intelligence officers to overseas posts, Adam Pincus, *Traveling Blues: Oversight Procedures on Expenses and Legal Issues Unclear for Overseas NYPD Officers*, CITY HALL, Mar. 10, 2008, <http://www.cityhallnews.com/newyork/article-285-traveling-blues.html>, it obviously remains the case that the federal government enjoys a massive intelligence advantage beyond the nation’s borders. See KRIS & WILSON, *supra*, at § 16:2 (describing federal authority to conduct intelligence activities abroad).

17. See Elinor Ostrom, *Organizational Economics: Applications to Metropolitan Governance*, 6 J. INSTITUTIONAL ECON. 109, 111 (2010) (arguing that coproduced services are provided most effectively by smaller departments that make relationships with their citizens and learn the differences between neighborhoods). Like the much more widely discussed idea of counterinsurgency, counterradicalization places emphasis on interactions between government and more general populations. Cf. MICHAEL T. FLYNN ET AL., CTR. FOR A NEW AM. SEC., FIXING INTEL: A BLUEPRINT FOR MAKING INTELLIGENCE RELEVANT IN AFGHANISTAN 4 (2010) (arguing against excessive reliance on intelligence related to insurgent violence and in favor of more broad-gauged intelligence related to “fundamental questions about the environment in which [U.S. forces] operate and the people [U.S. forces] are trying to protect and persuade”).

18. The intelligence cycle is an iterative process that includes, most basically, collection and analysis. See MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY 51 (2d ed. 2003)

impose salutary restraints on aspects of local intelligence, formal governance mechanisms to ensure that the intelligence work they carry out is respectful of basic rights (and accurate) are largely absent. I thus argue for the creation of new federal–local collaborative structures that will simultaneously enhance the analytic rigor and the legal oversight of local intelligence while leaving undisturbed and exploiting to full effect the advantages that local intelligence possesses.

Others have made ambitious, even extravagant, claims on behalf of local police and their role in intelligence.¹⁹ Indeed, such claims have, in some sense, become a staple of contemporary American counterterrorism discourse.²⁰ But regardless of whether these claims have been advanced by policy makers, commentators, or officials, they have typically ignored the issue of precisely what the local police do or should be doing under the banner of intelligence. Instead, claims of local excellence have frequently been limited to clichés about the sheer number of subfederal police departments and officers across the country and their ability to serve as “eyes and ears” of the nation.²¹ These accounts often emphasize, without analysis (and indeed,

(describing the intelligence cycle as a “perfect circle” in which the intelligence community “collects intelligence, which is then processed and exploited, analyzed and produced, and disseminated to the policymakers”).

19. See, e.g., CHRISTOPHER DICKEY, *SECURING THE CITY: INSIDE AMERICA’S BEST COUNTERTERROR FORCE—THE NYPD* (2009) (presenting a narrative portraying the NYPD as the nation’s most effective counterterrorism force); William Finnegan, *The Terrorism Beat: How Is the N.Y.P.D. Defending the City?*, *NEW YORKER*, July 25, 2005, at 58, 61 (quoting RAND expert Brian Jenkins as saying that “[a]s [international terrorism] metastasizes, . . . [w]e’re going to win this at the local level”). My focus throughout is on the role of police (federal and local) in intelligence gathering and analysis. Obviously, intelligence does not exhaust the role of police in counterterrorism work. For a thoughtful survey of some of the conceptual issues brought up by the involvement of local police in counterterrorism, see generally Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 *J. NAT’L SECURITY L. & POL’Y* 377 (2009).

20. See, e.g., *Radicalization, Information Sharing and Community Outreach: Protecting the Homeland from Homegrown Terror: Hearing Before the Subcomm. on Intelligence, Information Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Security*, 110th Cong. 12 (2007) (statement of William J. Bratton, Chief of Police, Los Angeles Police Department) (“[O]ver 700,000 local law enforcement officers in the U.S. are already on the front lines, fighting crime and gathering critical information on a daily basis.”).

21. Comments like those of former Director of National Intelligence John Negroponte are typical:

We all recognize that—while protecting the rights of our citizen—critical terrorism information can be developed by engaged police officers who patrol the streets of our nation. In fact, without engaged police officers, we may not stop the next threat. The federal government can’t be—and shouldn’t try to be—everywhere all the time. We rely mightily on the more than 13,000 state and local police departments in the United States. Our state and local colleagues are our eyes and ears throughout the nation.

John D. Negroponte, Dir. Nat’l Intelligence, Remarks to the FBI National Academy 2 (Oct. 3, 2006), available at www.dni.gov/speeches/20061003_speech.pdf; see also Dennis C. Blair, Op-Ed, *Strengthening Our Front Line of Defense*, *WASH. POST*, Dec. 18, 2009, at A31 (touting increased co-operation among FBI, local law enforcement, and intelligence agencies in the recent arrests of Americans allegedly associated with foreign terrorist organizations).

increasingly without basis in fact), that intelligence collection and criminal investigation are synergistic, as if to say that local police can engage in intelligence work passively as an incident of their primary anticrime responsibilities.²² And while certain other accounts have tended to be more precise in distinguishing between criminal investigation and pure intelligence, they have typically concluded that local officials lack the ability to engage in genuine intelligence work and inevitably turn (both as a matter of description and prescription) to their federal counterparts where intelligence is required. For example, a leading study on the subject of the role of local law enforcement in intelligence observes that federal authorities “will naturally lead in intelligence gathering that is not connected to criminal investigation” because local law enforcement agencies “have neither money nor capacity for that kind of pure intelligence.”²³ Both the excessively general accounts purporting to celebrate police intelligence and the more sophisticated treatments casting aspersions on the ability of the police to engage in true intelligence miss something important. In view of the emergence of homegrown terrorism and the mounting official preoccupation with counterradicalization, local police are well positioned—arguably better so than their federal counterparts—to engage in genuine intelligence work.²⁴

Another body of literature touts the ability of local officers to serve as effective guardians of liberty in the counterterrorism area, for a number of interrelated reasons. Some accounts have emphasized the capacity of local police to resist, on federalism grounds, overbearing federal counterterrorism initiatives.²⁵ Other narratives emphasize the presence of various informal or

22. As discussed below, counterradicalization intelligence substantially loosens any requirement for tying authority to engage in intelligence gathering to a finding of even potential criminal liability. See *infra* note 78 and accompanying text. For a discussion of the distinction between high (intelligence and security-related) and low (case-oriented) policing, see Jean-Paul Brodeur, *High and Low Policing in Post-9/11 Times*, 1 POLICING 25, 26 (2007).

23. K. JACK RILEY ET AL., STATE AND LOCAL INTELLIGENCE IN THE WAR ON TERRORISM, at xiv–xv (2005). While the report may be accurate (especially as to funding) as a descriptive matter, its conclusion is flawed in view of the fact that it is predicated on an excessively narrow, technology-based view of intelligence. See *id.* at 2 (distinguishing between “intelligence gathering” and “information gathering” on the basis of the use of electronic surveillance).

24. Contemporary European practice is of a piece with this claim. For example, “Rich Picture” represents a collaboration between local police and the British Security Service (MI5). See Gordon Corera, *Don’t Look Now, Britain’s Real Spooks Are Right Behind You*, TIMES ONLINE, Dec. 2, 2007, <http://www.timesonline.co.uk/tol/news/uk/article2982769.ece> (“The counterterrorist machinery has also spread out from London around the country, with a series of large regional MI5 stations opening to work closely with the police. . . . A joint project, Rich Picture, is designed to cast a wide intelligence net to pick up warning signs of radicalisation or unusual activity as early as possible.”).

25. See, e.g., Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1290–91 (2004) (arguing that “[f]ederalism best protects liberty over time” by providing “potential dissenters [to federal counterterrorism strategies] . . . their own [state] governmental institutions around which to organize their efforts, as well as their own constitutional space in which to implement and demonstrate the effectiveness of alternative policies”).

indirect accountability mechanisms at the local level, ranging from robust media presences to local elections, as a check on local counterterrorism practices.²⁶ Still others focus on the presence of incentives that cause local police to be more respectful of community viewpoints and sensitivities than federal officials.²⁷ While each of these theories (especially the third) has some explanatory power, the comparative advantages, in terms of liberty protection, of intelligence practiced by local officials should not be overstated. Even more so than federal intelligence, local intelligence operates in a governance vacuum.²⁸ A generation ago, governance of local intelligence agencies was furnished to a large degree by federal courts that had jurisdiction over consent decrees that resolved civil rights actions against police intelligence agencies.²⁹ In recent years, those decrees have been sharply scaled back, if not discontinued.³⁰ My account pays close attention to the vulnerability of rights in a world in which formal governance mechanisms are not fully operative.

My argument unfolds as follows. In Part I, I set out in detail the two main theoretical bases for local success in contemporary counterterrorism intelligence: the distinctive ability of local officials to “see” the threat of homegrown terrorism through a process that I refer to as epistemic federalism,³¹ and their advantage in coproducing intelligence with members of the community in furtherance of counterradicalization. I also draw attention to the main limits of local intelligence effectiveness, namely the absence of analytic capacity, intelligence training, and budgets.

Part II explores the ways in which local intelligence may be well positioned to protect rights largely through informal mechanisms and incentive structures. At the same time, it also observes that local intelligence—even more so than federal—operates within a governance vacuum, a potentially worrisome state of affairs given documented historical abuses on the part of local police intelligence.

26. See, e.g., Jerome H. Skolnick, *Democratic Policing Confronts Terror and Protest*, 33 SYRACUSE J. INT’L L. & COM. 191, 211 (2005) (emphasizing New York’s “institutions of accountability”).

27. See, e.g., Daniel Richman, *The Right Fight: Enlisted by the Feds, Can Police Find Sleeper Cells and Protect Civil Rights, Too?*, BOSTON REV., Dec. 2004–Jan. 2005, available at <http://bostonreview.net/BR29.6/richman.php> (discussing the central role of local law enforcement in ensuring public safety as part of a balanced “portfolio” which helps local officials in dealing with community leaders).

28. See *infra* Part II.

29. See Chevigny, *supra* note 7, at 751–67 (discussing the circumstances leading up to and the specifics of various consent settlement decrees in Memphis, Chicago, and New York that had far-reaching influence).

30. See *infra* notes 116–17 and accompanying text.

31. See *infra* notes 38–44 and accompanying text.

Part III brings the analysis from the conceptual to the institutional. Owing in part to political pressure,³² the national-security bureaucracy in Washington has been mobilized to engage local and state law enforcement as part of an overall counterterrorism effort.³³ The Department of Homeland Security (DHS), the Office of the Director of National Intelligence (ODNI), the FBI, and other agencies and branches of agencies are now involved in this sort of “outreach.”³⁴ But for all of these efforts, it is hard to say with confidence what the collaboration between federal and subfederal actors in this area has achieved, or even what, specifically, it is meant to achieve. I pay attention to the role of three core collaborative programs—FBI Joint Terrorism Task Forces³⁵ (JTTFs), DHS Fusion Centers,³⁶ and the Interagency Threat Assessment and Coordination Group (ITACG) (housed within the National Counterterrorism Center (NCTC) within the ODNI)³⁷—designed in large measure to coordinate local and federal intelligence work, and I criticize each of them for various inadequacies. The JTTFs essentially co-opt local officers, functionally rendering them federal officers and depriving them of the distinctive strengths possessed by members of local departments. The Fusion Centers are predicated on a devolution of intelligence from the center to the periphery, but the wrong function—intelligence sharing, rather than collection and analysis—is devolved. The ITACG, by embedding local officials within the nerve center of U.S. counterterrorism intelligence, comes closer in concept to achieving a workable and useful model, but the program places too much emphasis on local consumption of federal intelligence. I go on to adumbrate what a more successful set of collaborative institutions would look like, emphasizing the need for federal–local co-operation that enhances analytic rigor and ensures fidelity to law at the local level.

32. For an example of an association advocating more involvement of local law enforcement in homeland security and intelligence, see MAJOR CITIES CHIEFS ASS’N, TWELVE TENETS TO PREVENT CRIME AND TERRORISM 6 (2008), available at <http://www.majorcitieschiefs.org/pdfpublic/MCC%20Twelve%20Tenet%20Final%205%2021%2008.pdf>.

33. See *infra* subpart III(A).

34. See *infra* subpart III(A). For example, within DHS, the Office of Intelligence and Analysis is responsible for both the Fusion Centers formally tasked with sharing information with state and local jurisdictions and the broader policy of information sharing with subnational units. *FY2010 Budget Request: Hearing Before the Subcomm. on Intelligence, Information Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Security*, 111th Cong. (2009) (statement of Bart R. Johnson, Acting Under Secretary, Office of Intelligence and Analysis, Department of Homeland Security).

35. Federal Bureau of Investigation, Protecting America Against Terrorist Attack: A Closer Look at Our Joint Terrorism Task Forces, http://www.fbi.gov/page2/may09/jtfts_052809.html.

36. Department of Homeland Security, State and Local Fusion Centers, http://www.dhs.gov/files/programs/gc_1156877184684.shtm (last modified Sept. 16, 2009).

37. Interagency Threat Assessment and Coordination Group, <http://www.ise.gov/docs/misc/ITACG-brochure.pdf>.

I. Local Intelligence and Effectiveness

A. *Epistemic Federalism and Homegrown Terrorism*

Local counterterrorism intelligence may seem like a contradiction in terms. After all, terrorism is ostensibly a global phenomenon underwritten by a global ideology.³⁸ Local efforts would seem to be in tension with what scholars in another area have referred to as the “matching principle,” according to which “the size of the geographic area affected by a specific [problem] should determine the appropriate governmental level for responding to the [problem].”³⁹ As one commentator has put it, “no city interest counterbalances the burdens of police surveillance.”⁴⁰ One sense in which

38. See Lawrence C. Reardon, *Interpreting Political Islam's Challenge to Southeast Asia*, in *DEMOCRATIC DEVELOPMENT AND POLITICAL TERRORISM* 195, 213 (William Crotty ed., 2005) (“Radical Islamic terrorism thus is viewed as a transnational phenomenon that had been transformed from a local to a regional or global phenomenon.”). As mentioned, I am focusing primarily on homegrown terrorism related to certain varieties of radical Islam, although the concepts discussed in the Article could be applied equally to combating homegrown terrorism inspired by any ideology.

39. Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 *YALE L. & POL'Y REV.* 23, 25 (1996). For a city to practice counterterrorism, just as for a state like California to regulate greenhouse gases with an eye to redressing global warming, is to devote resources to a problem that by its nature eludes comprehensive local resolution. For a view that terrorism “must be added to the Constitution’s list of piracy and treason as unassailable redoubts of federal concern,” see Elizabeth Glazer, *A New World*, *BOSTON REV.*, Dec. 2004–Jan. 2005, available at <http://bostonreview.net/BR29.6/glazer.php>.

40. David Thacher, *The Local Role in Homeland Security*, 39 *LAW & SOC'Y REV.* 635, 669 (2005) (emphasis omitted). In the specific case of the NYPD, certain aspects of its counterterrorism program may have been designed, in part, to motivate the federal government to take similarly aggressive action, a sort of reversal of the famous Brandeisian laboratory theory of federalism in the sense that here the subnational entity played the role not of laboratory rat but of provocateur. See DICKEY, *supra* note 19, at 157–59 (giving examples of the NYPD’s more aggressive intelligence-gathering techniques that the FBI later adopted). The directive issued by FDR referenced in the introductory paragraph, itself the result of a memo written by FBI Director Hoover to Attorney General Frank Murphy on March 6, 1939, reveals a similar tension. See CT READER, *supra* note 1, at 171–72 (reporting that the sequence of events that led to FDR’s issuance of the directive began with Hoover’s memo). In that memo Hoover explained that the federal government needed to become more active in countersabotage operations because the public was beginning to assume that it was the local—and not the federal—government which would be in the lead. *Id.* Hoover had learned that the NYPD had “‘created a special sabotage squad of fifty detectives . . . and that this squad [would] be augmented in the rather near future to comprise 150 men.’” *Id.* at 171. There had been “considerable publicity” with the result that private citizens were likely to transmit information concerning sabotage “‘to the New York City Police Department rather than the FBI.’” *Id.* After informing the Attorney General of this development, “the Director strongly urged that the President ‘issue a statement or request addressed to all police officials in the United States: asking them to turn over to the FBI “any information obtained pertaining to espionage, counterespionage, sabotage, and neutrality regulations.’”” *Id.* Similarly, as Richard Stewart has underscored, there are rational explanations for violations of the “matching principle” on the part of subnational actors addressing climate change. Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 *ARIZ. L. REV.* 681, 691 (2008). First, subnational governments that lead in this area will achieve “radiator effects” by stimulating participation by other states, thereby spreading costs and increasing benefits. *Id.* Second, subnational agencies that assume

the matching problem has been ameliorated, if not entirely overcome, by local efforts at counterterrorism intelligence is connected to what I refer to as epistemic federalism.⁴¹ Institutions inevitably approach issues from distinctive perspectives as a function of their own capacities.⁴² Local agencies “see” the local factors of terrorism more clearly than national agencies that view the world through the prism of global trends.⁴³ Epistemic federalism has proved especially valuable in conceptualizing the threat from contemporary terrorism as a function of certain path-dependent truths about the nature of the threat and the nature of local intelligence capabilities.⁴⁴

leadership roles may be able to leverage their market position by causing other subnational groups to piggyback on their policies. *Id.* at 692. Third, there may be a race to the top in which benefits accrue to industry in greenhouse-gas-regulation-leader jurisdictions. *Id.* at 691. *But see* Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1965 (2007) (arguing that a race to the bottom is more likely than a race to the top); Dafna Linzer, *In New York, a Turf War in the Battle Against Terrorism*, WASH. POST, Mar. 24, 2008, at A1 (discussing the conflicts between the NYPD and the FBI). Many of the clashes Linzer describes date back two or three years and have been adequately addressed by the FBI more recently. *See id.* (“[R]ecently, officials in the FBI and the NYPD said the bitterness . . . [had] faded. . . . Both departments credit the improvement to a pivotal meeting, 2 1/2 years ago, between [Police Commissioner] Kelly and FBI Director Robert S. Mueller III.”).

41. Epistemic federalism diverges from the view that questions of institutional design are logically anterior to questions of understanding the threat. For an opposite view that politics play a greater role in the process, see William Stuntz, *Responses to the September 11 Attacks: Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL’Y 665, 670–71 (2002).

42. *See* William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 620–21 (2002) (discussing psychological literature as it relates to decisional biases).

43. As NYPD Deputy Commissioner Richard Falkenrath has observed in Congressional testimony,

In combating ‘homegrown’ threats, the burden shifts . . . almost entirely to local law enforcement. . . . This is one of the reasons why the NYPD has decided to augment its joint counterterrorism investigative work with the FBI with an organizationally distinct intelligence program operating under separate legal authorities.

Homeland Security: The Next Five Years: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs, 109th Cong. 19 (2006) (statement of Richard Falkenrath, Deputy Comm’r, New York City Police Department) [hereinafter Falkenrath, *Hearing*], available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=9f137c90-5424-4bc6-a3eb-f785acc1f82d.

44. Epistemic federalism argues for an interdisciplinary approach to problem solving that leverages the various informational capacities of government at different levels to achieve a more complete overall understanding of a phenomenon. The concept of epistemic federalism resonates with Schapiro’s concept of “polyphonic federalism” that leverages the competitive overlap between national and subnational governments. *See* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 244 (2005) (“Polyphonic federalism does not divide state and federal authority, but instead seeks to harness the interaction of state and national power to advance the goals associated with federalism.”). The core Executive Order that guides the work of the Intelligence Community also builds in this competitive impulse. *See* Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *as amended* by Exec. Order No. 13,284, 68 Fed. Reg. 4075 (Jan. 23, 2003), Exec. Order No. 13,355, 69 Fed. Reg. 53,593 (Aug. 27, 2004), Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008) (recognizing the value of analytic competition between intelligence agencies for generating sound intelligence), *reprinted as amended* in 50 U.S.C. § 401 (2006). But epistemic federalism is subtly yet fundamentally different in that it views the subnational actors not

Epistemic federalism draws its explanatory force from the fact that it is more faithful to the reality and the self-conception of the emergent trend of homegrown terrorism. While Washington (especially in the years immediately following 9/11) has tended to project a high level of formality and organizational structure onto al Qaeda,⁴⁵ much of what we refer to as al Qaeda has actually been transformed into a loosely knit network linking informal “groups of guys” who are becoming radicalized in neighborhood organizations and are recruiting themselves to participate in acts of terrorist violence.⁴⁶ Indeed, such a network structure may reflect a deliberate strategic choice.⁴⁷ Thus, the foremost ideologue of the contemporary jihad explicitly rejects the idea of the centralized, secret organization, advocating instead for a loosely networked system of action.⁴⁸

The groups of guys (or clusters) begin, as Bernard Rougier has noted, with “idle teenagers who [have] been resocialized by radical religious networks.”⁴⁹ Unchecked, the cluster may be transformed into an operational team that is capable of taking violent action.⁵⁰ And as Marc Sageman has written, it may be the building block of a global-networked enemy: “The process of radicalization that generates small, local, self-organized groups in a hostile habitat but linked through the Internet also leads to a disconnected global network . . . [which is] the natural outcome of a bottom-up mechanism of group formation”⁵¹

merely as alternative regulatory actors to the federal government but as institutional actors possessed of different perspectives on regulatory problems.

45. See, e.g., James Risen & David Johnston, *Al Qaeda May Be Rebuilding in Pakistan, E-mails Indicate*, N.Y. TIMES, Mar. 6, 2002, at A1 (“American officials believe that one of the benefits of the war in Afghanistan was to disrupt the terror network’s ability to communicate from a central command center.”).

46. See MARC SAGEMAN, LEADERLESS JIHAD 141 (2008) (describing the lack of formality in local networks). Sageman’s thesis has been criticized, especially by Bruce Hoffman, who regards al Qaeda as posing an enduring threat as a headquarters organization. See Bruce Hoffman, *The Myth of Grass-Roots Terrorism*, 87 FOREIGN AFF., May–June 2008, at 133, 134–35 (citing governmental authorities who contend that al Qaeda remains America’s most serious threat and retains top-down command capabilities).

47. See SAGEMAN, *supra* note 46, at 143 (“The process of radicalization that generates small, local, self-organized groups in a hostile habitat but linked through the Internet also leads to a disconnected global network, the leaderless jihad.”).

48. See BRYNJAR LIA, ARCHITECT OF GLOBAL JIHAD: THE LIFE OF AL-QAIDA STRATEGIST ABU MUS’AB AL-SURI 104 (2008) (excerpting a 1991 audiotape by Abu Mus’ab al-Suri, in which al-Suri discusses the need for global jihad to eliminate vulnerable command structures, prefiguring the organizational slogan he later developed, “*nizam la tanzim*,” meaning “system, not organization”).

49. BERNARD ROUGIER, EVERYDAY JIHAD 276 (2007).

50. See *id.* at 277 (“If . . . nothing is done to resume Palestinian-Israeli negotiations, Ain al-Helweh might become the vanguard of a salafist-jihadist militancy that would spread in the Palestinian territories, break through nationalist barriers, and change the scale of the struggle, the better to strike ‘the serpent’s head’ . . .”).

51. SAGEMAN, *supra* note 46, at 143. “The global Salafi jihad has a very fuzzy boundary . . . [which] raises . . . epistemological issues on a group and individual level.” MARC

If the cluster supplies the sociological building blocks of the threat, then the “node” supplies its micro-geography; it is at the node where the radicalization first takes place.⁵² In Rougier’s Ain al-Hilweh refugee camp, it is a mosque, a bookstore, a media outlet.⁵³ In the Jemaa al-Mezuak neighborhood of Tetouan, Morocco, it is the mosque, whose Imam has dispatched a dozen young men into Iraq to serve as suicide bombers.⁵⁴ In Leeds, where the July 7, 2005 London suicide bombers became radicalized, it was a local bookshop and a fitness facility dubbed the “Al Qaeda gym.”⁵⁵

If the contemporary jihad is increasingly organized around small groups of men who become radicalized at certain virtual and bricks-and-mortar nodes, it stands to reason that local police are well positioned to gather intelligence about the threat. As Marc Sageman has explained, an effective intelligence methodology

should focus precisely on how the terrorists act on the ground: how they evolve into terrorists; how they interact with others (terrorists and nonterrorists); how they join terrorist groups; how they become motivated to commit their atrocities; how they are influenced by ideas; and how they follow orders from far-away leaders. These questions call for a perspective from the bottom up to see exactly what is happening on the ground in the hope of explaining the larger phenomenon of terrorism.⁵⁶

Local police departments typically enjoy three important structural advantages in pursuing this “bottom up” perspective.⁵⁷ First, they have

SAGEMAN, UNDERSTANDING TERROR NETWORKS 151 (2004). The homegrown threat is not limited to the United States or to its Western European allies. Bernard Rougier, whose study of Islamic radicalization in the Lebanese refugee camp Ain al-Hilweh offers a powerful case study of the local origins of jihad, has written, “Whatever the nature of the ties between Islamists in Lebanon—or some of them—and Osama bin Laden or Ayman al-Zawahiri, the salafist-jihadist phenomenon exists autonomously: its development does not depend on ‘international terrorist networks.’” ROUGIER, *supra* note 49, at 275.

52. The node may be a physical location or a virtual one. See STAFF OF S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 110TH CONG., VIOLENT ISLAMIST EXTREMISM, THE INTERNET, AND THE HOMEGROWN TERRORIST THREAT 15 (2008) [hereinafter VIOLENT ISLAMIST EXTREMISM], available at http://hsgac.senate.gov/public/_files/IslamistReport.pdf (“Despite recognition in the [National Implementation Plan] that a comprehensive response is needed, the U.S. government has not developed nor implemented a coordinated outreach and communications strategy to address the homegrown terrorist threat, especially as that threat is amplified by the use of the Internet.”).

53. See ROUGIER, *supra* note 49, at 86–98 (describing the methods by which the al-Nur and Salah al-Din Mosques, al-Huda bookstore, and *al-Hidaya* newspaper provided access to radicalization theories and materials to refugees).

54. Andrea Elliott, *Where Boys Grow Up to Be Jihadis*, N.Y. TIMES, Nov. 25, 2007, (Magazine), at 70; Fiona Govan, *Town That Breeds Suicide Bombers*, DAILY TELEGRAPH, Nov. 25, 2006, at 16.

55. Christopher Caldwell, *After Londonistan*, N.Y. TIMES, June 25, 2006, § 6 (Magazine), at 41.

56. See SAGEMAN, *supra* note 46, at 23–24.

57. Cf. Richard H. Shultz Jr. & Roy Godson, *Intelligence Dominance: A Better Way Forward in Iraq*, WKLY. STANDARD, July 31, 2006, at 22, 24 (referring to a veteran foreign intelligence professional who “was describing a situation in which an operative functions somewhat like the

comparatively large staffs. The example of the NYPD is suggestive.⁵⁸ As against the FBI's approximately 13,500 Special Agents nationwide,⁵⁹ who typically spend between three and five years in any given office before being rotated to another,⁶⁰ the NYPD deploys 34,500 officers in the five boroughs of New York City alone.⁶¹ Second, local police possess the cultural and linguistic diversity that affords them access to the communities most susceptible to penetration by radical ideology.⁶² While federal intelligence agencies struggle to find individuals who speak Arabic, Persian, or Urdu, the NYPD has no shortage of individuals who speak these languages and can reach out to, or immerse themselves in, ethnic and religious communities.⁶³

policeman on the beat—constantly talking to, interacting with, and keeping tabs on the people in his neighborhood and, most of all, keeping his eyes open for slight changes or new developments in the local scene”).

58. It goes without saying that the NYPD does not supply a model of local intelligence that can be replicated in every respect by other major metropolitan, still less (the more typical) suburban or rural police departments. Still, it is useful to discuss the NYPD as offering a conceptual alternative to federal intelligence, both in terms of its institutional strengths and vulnerabilities.

59. Federal Bureau of Investigation, About Us—Quick Facts, <http://www.fbi.gov/quickfacts.htm>.

60. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 788–89 (2003).

61. NYPD Frequently Asked Questions, http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml.

62. See Colleen Long, *US Police Departments Seeking More Bilingual Cops*, DAILYNEWS, Mar. 11, 2010, http://news.yahoo.com/s/ap/20100311/ap_on_re_us/us_bilingual_cops_2 (noting that one-third of NYPD employees can speak a second language—of those, “785 are certified linguists or expert translators in 63 languages, including Bengali, Dari, Farsi, Arabic and Urdu”). As of March 2010, the Minneapolis Police Department has a dedicated Crime Prevention Specialist who speaks Somali. See Minneapolis Police Department Sector Lieutenant & Crime Prevention Specialist Contacts, <http://www.ci.minneapolis.mn.us/safe/docs/safe-staff-map.pdf> (listing a Somali contact under cultural outreach).

63. See *supra* note 62. “The FBI did not dedicate sufficient resources to the surveillance and translation needs of counterterrorism agents. It lacked sufficient translators proficient in Arabic and other key languages, resulting in significant backlog of untranslated intercepts.” NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 77 (2004) [hereinafter 9/11 COMMISSION REPORT]. Security concerns also increased the difficulty of recruiting officers qualified for counterterrorism. “Very few American colleges or universities offered programs in Middle Eastern languages or Islamic studies Anyone who was foreign-born or had numerous relatives abroad was well-advised not even to apply.” *Id.* at 92. “Similar to our findings in our previous audits, we determined that the FBI still does not have a reliable means of assessing the amount of foreign language audio, text, and electronic material it collects and reviews for its counterterrorism, counterintelligence, and criminal operations.” OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REPORT 10-02, THE FEDERAL BUREAU OF INVESTIGATION’S FOREIGN LANGUAGE TRANSLATION PROGRAM 48 (2009), available at http://www.justice.gov/oig/reports/FBI/a1002_redacted.pdf. As the *New York Times* has reported,

The report also contains new information about the bureau’s efforts to hire more translators. It showed that the number of the bureau’s linguists—both staff members and contractors—had fallen slightly to 1,298 as of September 2008, from a peak in 2005. It met its hiring targets in 2008 for only 2 of 14 targeted languages.

The process of hiring linguists has been slowed because of lengthy security vetting and competition with other intelligence agencies that are also trying to hire more translators, the report said.

Third, local police departments also have a broad mandate—embodied in the familiar motto “to serve and protect”—rather than circumscribed authority merely to enforce the law.⁶⁴ Like other local departments, the NYPD’s officers are mainly on patrol—generalist cops who walk a beat and develop complex understandings of, and working relationships with, the community.⁶⁵ The FBI, meanwhile, has historically vacillated between conceiving of itself as a detective bureau with authority to investigate the violation of specific federal criminal statutes, and regarding itself (as it currently does) as also having the mandate to gather intelligence even absent criminal predication.⁶⁶

In sum, the epistemic advantage of local police in conceptualizing and tracking the threat of homegrown terrorism draws on the distinctive capacities and authorities that local police departments possess. Local counterterrorism intelligence has been uniquely well positioned to see the emergence of the threat on the microlevel.⁶⁷ Whether by focusing on and

Charlie Savage, *F.B.I. Is Slow to Translate Intelligence, Report Says*, N.Y. TIMES, Oct. 27, 2009, at A20. The lack of native language speakers in the FBI is largely an artifact of the national-security clearance process, a holdover from the Cold War where the presence of relatives in a sensitive location overseas would tend to disqualify an individual from obtaining a clearance. See OFFICE OF THE INSPECTOR GEN., *supra*, at 77 (noting that the length of the clearance process for linguists, averaging fourteen months, is even longer for foreign-born linguists with family still living abroad). While critics rail against the anachronistic clearance process, it remains a fact of life in the federal Intelligence Community and is unlikely to change soon. Cf. DIR. OF NAT’L INTELLIGENCE, U.S. INTELLIGENCE CMTY., FOLLOW-UP REPORT ON 100 DAY PLAN: INTEGRATION AND COLLABORATION 14–15 (2007) (suggesting means to address the “[m]ultiple, complex, and inconsistent security clearance systems” that “slow the pace in filling open positions and moving personnel”). Willy-nilly, this has given local intelligence a comparative institutional advantage—so much so that the “[t]he Department of Defense recently borrowed seventeen computer-literate Arabic speakers from the N.Y.P.D. to assist its intelligence arm.” Finnegan, *supra* note 19, at 64.

64. See Steven M. Cox, *Policing into the 21st Century*, 13 POLICE STUD.: INT’L REV. POLICE DEV. 168, 168 (1990) (highlighting the roles of municipal police that extend beyond law enforcement such as assisting citizens with their private trouble).

65. BRUCE L. BERG, *POLICING IN MODERN SOCIETY* 4 (1999) (discussing the daily work of municipal police, including patrols and emergency services, that closely connects them to the local community). As Gill has observed, “the fundamental goal of the police is order-maintenance, to which end obtaining convictions is only marginally related.” PETER GILL, *POLICING POLITICS* 210–11 (1994). This is the core concept of the constable on patrol (or “cop”)—what Skolnick has called the “peacekeeper paradigm.” Skolnick, *supra* note 26, at 192.

66. See JAMES Q. WILSON, *THE INVESTIGATORS* 207 (1978) (providing an example of the conflict between the DEA and the FBI over intelligence-gathering and prosecutorial priorities); Matthew M. Johnson, *FBI’s Intelligence Woes Restir Debate on an American MI5*, CQ HOMELAND SECURITY, Oct. 23, 2007, public.cq.com/docs/hs/hsnews110-000002611323.html (discussing the struggle within the FBI to define the appropriate role for its intelligence-gathering function); see also POSNER, *supra* note 15, at 146–47 (describing the challenges facing the FBI’s domestic-intelligence operations); Scott Shane & Lowell Bergman, *F.B.I. Struggling to Reinvent Itself to Fight Terror*, N.Y. TIMES, Oct. 10, 2006, at A1 (“F.B.I. culture still respects door-kicking investigators more than desk-bound analysts sifting through tidbits of data.”).

67. For all that it seems to be the paradigm of a headquarters-driven plot, even the September 11th attacks might have been detected through local counterterrorism. The Hamburg cell—which included Mohammed Atta, Ziad Jarrah, Marwan al Shehhi, and Ramzi Binalshibh—coalesced and became radicalized in the Quds mosque in Hamburg. 9/11 COMMISSION REPORT, *supra* note 63, at

organizing the social world through “clusters” or by heeding the centrality of “nodes,” local intelligence has an important role to play as part of an epistemic federalist arrangement that regards state and local agencies as capable of “seeing” and making sense of phenomena differently from the federal government and sharing a set of methodological and forensic insights into the structure of homegrown terrorism.⁶⁸

B. *Intelligence “Coproductio” and Counterradicalization*

Not only is local counterterrorism intelligence well positioned to conceptualize aspects of the terror threat—especially the threat posed by homegrown terrorists—it is also situated to play a vital role in gathering the intelligence necessary for understanding the radicalization process. Counter-radicalization places demands on intelligence collectors to gather information widely and to adopt the perspective of social anthropologists by attending to the critical interaction between individuals and their social and institutional landscapes.⁶⁹ The intelligence required in order to engage in counterradicalization does not begin and end with known radicals or even those individuals suspected of having already embarked on a path to a radicalized future. Counterradicalization intelligence implies something

160–64. Tyler Drumheller, the retired head of the European Division for the CIA recently commented, “I always believed that the real story of 9/11 was in the notebook of a Hamburg beatcop.” Tyler Drumheller, European Div. Chief, CIA, Panel Discussion at the Center on Law and Security Conference: Intelligence in the Age of National Security (Feb. 1, 2008), *audio available at* <http://www.lawandsecurity.org/podcasts/Intelligence&theLaw.mp3>. The point about the notepad may be an exaggeration—the operational planning for the attacks took place not in Germany but in Afghanistan—but the larger observation about how a local police department might have been best positioned to know about the Hamburg cell’s radicalization is well-taken. See 9/11 COMMISSION REPORT, *supra* note 63, at 156–60 (detailing the planning and preparations that took place in Afghanistan). Drumheller also asserted that the CIA is now authorized to make direct contact with police across Europe as part of their counterterrorism work. Drumheller, *supra*. In other words, even national-level intelligence agencies have come to appreciate that the critical, ground-level information concerning the microgeometry and microgeography of the terrorist threat resides with the local authorities. That this is so suggests another sense in which the local police may have an important role to play in epistemic federalism. Notwithstanding substantial cultural and institutional differences, local police organize the world similarly regardless of the country in which they work and may therefore be well positioned to communicate with one another, employing a common set of cultural norms and a shared professional vocabulary. See, e.g., John P. Sullivan, Global Terrorism and the Police 10 (Mar. 29, 2008) (unpublished manuscript), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/2/5/4/3/3/pages254336/p254336-10.php (arguing that national police forces must co-operate with other national police officers across international borders to effectively combat the terrorist threat).

68. Thus, the ODNI decided to train members of an elite new analyst cadre by sending them on a rotation to the NYPD to learn “streetcraft.” Robert K. Ackerman, *Cultural Changes Drive Intelligence Analysis*, SIGNAL ONLINE, May 2007, http://www.afcea.org/signal/articles/templates/SIGNAL_Article_Template.asp?articleid=1311&zonaid=31.

69. See SAGEMAN, *supra* note 46, at 24 (“To answer the question ‘How do people become terrorists?’ we need to look at processes, especially the relationships between individuals and their environment.”).

even more far-reaching—namely, an intelligence effort that seeks out knowledge about social facts taking place within discrete communities, including information about individuals believed to be helpful to the authorities in pursuing their counterradicalization agenda.⁷⁰ The British, who have dubbed their equivalent form of counterradicalization intelligence “Rich Picture,” define it generally as the collection of intelligence at local levels to furnish an understanding of the makeup and dynamics of local communities where radicalization could occur and to identify individuals of authority and influence within those communities.⁷¹

Acquiring this sort of broad-gauged intelligence requires resorting to what Elinor Ostrom has referred to as coproduction, “the process through which inputs used to produce a good or service are contributed by individuals” who are “clients” of that public good.⁷² “Coproduction implies that citizens can play an active role in producing public goods and services of consequence to them.”⁷³ There are at least two senses in which the community may participate in coproduced intelligence.⁷⁴ First, local community

70. *See id.* at 71–72 (arguing that, in addition to capturing and eliminating the core group of active terrorists, law enforcement officials must have the requisite knowledge of others that may potentially be connected to terrorist networks).

71. *See* NEIL HAYNES, METRO. POLICE AUTH., MPS PREVENT DELIVERY STRATEGY (2008), <http://www.mpa.gov.uk/committees/mpa/2008/080724/08/?qu=Rich%20Picture&sc=2&ht=1> (describing Rich Picture as a system utilizing national- and local-level intelligence for counterterrorism via neighborhood policing).

72. Elinor Ostrom, *Crossing the Great Divide: Coproduction, Synergy, and Development*, in STATE-SOCIETY SYNERGY 85, 86 (Peter Evans ed., 1997). Ostrom goes on to explain,

[P]roduction of a service, as contrasted to a good, was difficult without the active participation of those supposedly receiving the service. . . . If citizens do not report suspicious events rapidly to a police department, there is little that department can do to reduce crime in an area or solve the crimes that occur. We developed the term ‘coproduction’ to describe the potential relationships that could exist between the ‘regular’ producer (street-level police officers, school teachers, or health workers) and “clients” who want to be transformed by the service into safer, better educated, or healthier persons. Coproduction is one way that synergy between what a government does and what citizens do can occur.

Id. at 99–100.

73. *Id.* at 86. In discussing coproduction, another commentator has stated,

Co-production is . . . noted by the mix of activities that both public service agents and citizens contribute to the provision of public services. The former are involved as professionals, or ‘regular producers,’ while ‘citizen production’ is based on voluntary efforts of individuals or groups to enhance the quality and/or quantity of the services they receive.

VICTOR A. PESTOFF, A DEMOCRATIC ARCHITECTURE FOR THE WELFARE STATE 160 (2009).

74. There is also a totally different use of the term *coproduction* to mean situations in which local and federal authorities jointly produce intelligence. *See, e.g.*, John P. Sullivan, *The Frontiers of Global Security Intelligence: Analytical Tradecraft and Education as Drivers for Intelligence Reform*, SMALL WARS J., Aug. 22, 2008, <http://www.smallwarsjournal.com/blog/journal/docs-temp/87-sullivan.pdf> (describing the Terrorism Early Warning program pioneered in Los Angeles where local and federal authorities work with private-sector analysts to develop counterterrorism intelligence through open-source intelligence and collaborative analysis).

members may volunteer to serve as covert informants for the police.⁷⁵ Second, and more important considering the scope of the information required, community members and local police may engage in a less formal process of collaborative intelligence work, characteristic of “community policing.”⁷⁶

The centrality of this second kind of coproduced intelligence raises questions about what role federal and local officials should play in these efforts. Of late, the federal government (mainly through the FBI) has become heavily invested in generating counterradicalization intelligence.⁷⁷ The FBI is now authorized under the Attorney General’s Guidelines to engage in this sort of proactive intelligence gathering, divorced from any allegations of criminal wrongdoing.⁷⁸ Furthermore, FBI leadership has made

75. See DAVID SHANZER ET AL., *ANTI-TERROR LESSONS OF MUSLIM-AMERICANS 3* (2010), http://www.sanford.duke.edu/news/Schanzer_Kurzman_Moosa_Anti-Terror_Lessons.pdf (arguing that in order to foster better mutual understanding between law enforcement and Muslim-Americans, “[l]aw enforcement agencies should develop policies on the appropriate use of informants in Muslim-American communities and discuss these policies openly with community leaders” while “Muslim-Americans, for their part, should understand that the use of informants is an accepted, long-standing law enforcement practice and may be necessary in appropriate cases to gather evidence on individuals who are a potential danger”); see also Jacqueline Ross, *Police Informants* (warning that engagement with informants in the criminal context is difficult because “criminal insiders” both provide the best information and have motivations that are most divergent from law enforcement goals), in *PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS* 159, 172 (Simon Chesterman & Angelina Fisher eds., 2009).

76. Community policing has been defined as “a philosophy that promotes organizational strategies, which support the systematic use of partnerships and problem-solving techniques, to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime.” COPS, U.S. Department of Justice, *Community Policing Defined*, <http://www.cops.usdoj.gov/default.asp?item=36> (last revised Dec. 15, 2009); see also ALEJANDRO J. BEUTEL, *MUSLIM PUB. AFFAIRS COUNCIL, BUILDING BRIDGES TO STRENGTHEN AMERICA 4* (2009), available at http://www.mpac.org/publications/building-bridges/MPAC-Building-Bridges--Complete_Condensed_Paper.pdf (observing that community policing “gathers and contextualizes various bits of information better to construct a fuller intelligence assessment” (emphasis omitted)). Reliance on the “community” as part of an overall intelligence strategy inevitably raises questions about who represents the community. The answer, clearly, is that no group or institution can lay claim to that sort of representative status. Instead, the community to which I refer is necessarily an artificial construct, comprising mutually opposed elements within a neighborhood or social grouping. Taking this broad view of the community goes some way to ameliorating concerns about public-choice pathologies whereby certain members of the community attempt to gain official sanction for their views.

77. See NATIONAL SECURITY STRATEGY, *supra* note 13, at 19 (“The Federal Government will invest in intelligence to understand this threat and expand community engagement and development programs to empower local communities.”).

78. Under the Attorney General’s Guidelines,

Assessments . . . require an authorized purpose but not any particular factual predication. . . . Likewise, in the exercise of its protective functions, the FBI is not constrained to wait until information is received indicating that a particular event, activity, or facility has drawn the attention of those who would threaten the national security. Rather, the FBI must take the initiative to secure and protect activities and entities whose character may make them attractive targets for terrorism or espionage.

the collection of counterradicalization-related intelligence an organizational priority under the name “domain management.”⁷⁹ But published reports of the FBI’s involvement in this area of intelligence gathering have cast an unflattering light on the Bureau’s activities, which come across as mechanical⁸⁰ or simply bizarre.⁸¹ It is unsurprising perhaps that federal officials, with more attenuated ties to the local community and a substantially smaller footprint, would struggle to furnish intelligence that originates from a combination of covert human sources and a robust network of community voices.

Meanwhile, the local police are in significant respects well positioned to tap into their relationships with the local community to useful effect.⁸² These relationships are a natural fit for local departments that have been practicing a form of community policing for over a generation.⁸³ Not only do these long-term, multifaceted relationships have the effect of potentially restraining the impulses towards overly aggressive counterterrorism measures, they form the backbone of a robust intelligence network. As David Harris has said,

The proactive investigative authority conveyed in assessments is designed for, and may be utilized by the FBI in the discharge of these responsibilities.

OFFICE OF THE ATT’Y GEN., DEP’T OF JUSTICE, ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS 17 (2008), available at <http://www.justice.gov/ag/readingroom/guidelines.pdf>.

79. See, e.g., *Intelligence Reform: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 80 (2007) (statement of John S. Pistole, Deputy Director, Federal Bureau of Investigation) (describing the domain management process as a “continuous, systematic approach designed to achieve a comprehensive understanding of a geographic or substantive area of responsibility” that “provides the basis for investigative, intelligence, and management direction by enabling leaders to consider and select courses of action through the knowledge gained, identified gaps in knowledge, and identified gaps in capability”).

80. For example, the FBI has engaged in this discretionary authority to tally the number of mosques in various jurisdictions without delving deeper into the significance of the information being gathered. See Michael Isikoff, *The FBI Says, Count the Mosques*, NEWSWEEK, Feb. 3, 2003, at 6, 6 (noting that the launch of a new FBI initiative includes counting mosques).

81. See Press Release, John Miller, Assistant Dir., Office of Pub. Affairs, Fed. Bureau of Investigation, FBI Response to Congressional Quarterly Article Alleging Willie T. Hulon and Phil Mudd’s Involvement in So-Called “Falafel Investigation” (Nov. 26, 2007), <http://www.fbi.gov/pressrel/pressrel07/editor112607.htm> (denying a story attributing to senior FBI officials a plan to detect Iranian agents by tracking falafel sales in San Francisco grocery stores).

82. The expertise at issue is not, strictly speaking, a matter of familiarity with Islamic theology or legal doctrine. It is closer to an intimate acquaintance with the sociological dimensions of what Olivier Roy has dubbed the “third generation”—meaning the young Muslim men who are themselves frequently the products of parents who sought to assimilate into the cultural mainstream of Western Europe (or, by extension, the United States). OLIVIER ROY, *GLOBALIZED ISLAM* 2 (2004).

83. See BEUTEL, *supra* note 76, at 14 (relating that community-policing practices began in the 1980s); NELSON & BODURIAN, *supra* note 9, at 10 (“[L]ocal officials are intimately connected to the communities—like the Minneapolis Somali one—that global terrorist groups may seek to exploit.”).

“[T]he best—indeed, often the only—source of information on possible terrorist cells on our soil will be Muslim communities themselves.”⁸⁴

C. *Problems with Analysis*

If local officials are more effective at the bottom-up approach to conceptualizing the threat and at coproducing intelligence, these comparative advantages give out in a number of interconnected areas related to the analysis and the integration of intelligence.⁸⁵ As a leading study of local intelligence has put it, “it is striking how limited the analytic capacity is at the local level.”⁸⁶ First, and most generally, local agencies lack the analytical resources to pull together the disparate data points that are gathered in the name of counterradicalization intelligence and stitch them into a coherent narrative.⁸⁷ Counterradicalization intelligence is, more so than intelligence that is focused on individuals or groups already suspected of involvement in terrorism, especially in need of analysis—otherwise there are merely myriad data points in search of an explanation.⁸⁸ Second, local agencies lack the ability to assess the accuracy of the intelligence they collect—there simply are not mechanisms in place for the vetting of intelligence learned at the local level.⁸⁹ Third, there is no well-established pathway for intelligence learned

84. 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, 46 (2006); see also Chevigny, *supra* note 7, at 736 (quoting the 1960s vintage National Advisory Commission on Civil Disorders to the effect that police intelligence should use “undercover . . . personnel and informants, but . . . should also draw on community leaders, agencies, and organizations in the ghetto”). More generally, as RAND experts John Arquilla and David Ronfeldt have said, “conflicts may increasingly be waged by ‘networks,’ perhaps more than by ‘hierarchies’ . . . [and] whoever masters the network form stands to gain the advantage.” John Arquilla & David Ronfeldt, *The Advent of Netwar (Revisited)*, in NETWORKS & NETWARS 1, 1 (2001); cf. Chris Wilson, *Searching For Saddam*, SLATE, Feb. 22, 2010, <http://www.slate.com/id/2245228> (exploring how social-networking techniques helped capture Saddam).

85. These analytic shortcomings are themselves related to a lack of funding and a lack of familiarity with the professional norms of the Intelligence Community, especially in the area of analysis. See ROB JOHNSTON, ANALYTIC CULTURE IN THE U.S. INTELLIGENCE COMMUNITY 28–29 (2005) (highlighting the presence of a distinctive culture within the Intelligence Community, especially among analysts).

86. RILEY, *supra* note 24, at 58.

87. See Rascoff, *supra* note 23 (explaining how local law enforcement authorities have become a part of the “domestic intelligence apparatus” but noting that there is an “absence of agencies at the state and local level that are well positioned to understand and cabin the discretion of intelligence officials”). The purpose of this sort of analysis is not to locate the proverbial “needle in the haystack” but to take measure of the haystack itself.

88. This is an example of a troubling phenomenon in intelligence, namely overcollection of intelligence relative to capacity for analysis. See *id.* For a recent example, see Christopher Drew, *Drone Flights Leave Military Awash in Data*, N.Y. TIMES, Jan. 10, 2010, at A1 (describing the inability of the military and government agencies to analyze the flood of data received for intelligence purposes from drone aircraft).

89. See Craig Horowitz, *The NYPD’s War on Terror*, NYMAG, Feb. 3, 2004, http://nymag.com/nymetro/news/features/n_8286/ (quoting Commissioner Ray Kelly’s dismissive comments about the NYPD’s own intelligence capacity prior to his comprehensive reforms: “[The

by local agencies to be combined with information learned from other local sources or with federal intelligence to create an integrated threat assessment.⁹⁰ To be valuable to counterterrorism officials, counterradicalization intelligence must be combined with insights learned from other sources and locations—at both the strategic and tactical levels.⁹¹

II. Local Intelligence and Liberty

A. *Informal Mechanisms and Certain Local Strengths*

A small but significant body of scholarship has coalesced around the view that local officials may supply an antidote to concerns about overly aggressive federal counterterrorism measures. Susan Herman⁹² has championed the cause of local counterterrorism in the context of state and local assertions of rights against an aggressive federal government that threatened to commandeer subnational resources. For example, in the aftermath of 9/11, a number of local police officials (notably the Portland, Oregon police chief) resisted FBI efforts to have officers seconded to the Joint Terrorism Task Force.⁹³ Similarly, the Dearborn, Michigan police raised serious concerns about the scope of state participation in federal post-9/11 investigatory activities.⁹⁴ And Mayor Bloomberg of New York City made it clear that local officials would not become engaged in the enforcement of federal immigration laws.⁹⁵ These assertions of local power were informed

NYPD's intelligence division] was an intelligence service in name only. We simply had to get better information. We didn't know what was going on in our own city, let alone the rest of the world.”).

90. I discuss and take critical aim at fledgling attempts by the federal government to harness the power of local intelligence. See *infra* Part III.

91. See RILEY, *supra* note 23, at 58 (asserting that the ideal division of analytical labor would have local authorities taking the general guidance provided by federal officials and applying it to their local domain).

92. Herman was recently tapped to serve as president of the American Civil Liberties Union. American Civil Liberties Union, Susan N. Herman, President of the ACLU, <http://www.aclu.org/leader/susan-n-herman-president-aclu>.

93. See Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, 41 WILLAMETTE L. REV. 941, 942 (2005) [hereinafter Herman, *Collapsing Spheres*]; Susan N. Herman, *Introduction to Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201, 1212–13 (2004) [hereinafter Herman, *National Authority*]; (listing various local departments that refused to participate in FBI interviews post-9/11); Tom Lininger, *Federalism and Antiterrorism Investigations*, 17 STAN. L. & POL'Y REV. 391, 393 (2006) (arguing for the use of state bar codes to regulate the conduct of federal government lawyers in antiterrorism prosecutions).

94. See Thacher, *supra* note 40, at 661–62 (“Local [Dearborn] police declined to conduct the interviews themselves, they went to great lengths to explain their participation in a qualified way, and they ultimately adopted the role (at least in part) of monitors for the federal agents and representatives of community concerns.”).

95. See City of N.Y. Exec. Order No. 41 (Sept. 17, 2003) (prohibiting New York City officials from reporting an immigration violation to federal authorities absent evidence of the commission of a separate crime). A similar approach was taken by the International Association of Chiefs of

by a constitutional rationale that was announced by the Supreme Court in a series of cases beginning with *New York v. United States*⁹⁶ and finding its fullest expression in *Printz v. United States*.⁹⁷ Commentators have remarked on how the anticommandeering logic of *Printz* supplied the justification for these acts of resistance by local police officials⁹⁸ and how the federalism rationale was being invoked opportunistically by political liberals opposed to the Bush Administration's post-9/11 policies.⁹⁹ But the record should not be overinterpreted: these instances of local protest are more revealing of the (inevitably contingent) interest of specific local agencies (or officials) to object to federal policy than of their ability affirmatively to practice intelligence in a manner that is more respectful of rights.

A second, related body of scholarship identifies the presence of a wide range of accountability mechanisms that cause local counterterrorism officials to be more responsive to civil liberties. As Skolnick has written,

New York is a city rich with institutions of accountability, including elections, courts, a vibrant civil liberties and civil rights bar and a free press. Its Mayor and Police Commissioner believe in the rule of law, and are responsive to public opinion. They do not reflexively support their police. With its reorganization post-9/11 to combat terror . . . the New York City Police Department has become something of a model for democratic policing in the U.S. and even around the western world.¹⁰⁰

The observation certainly provides an important perspective, but at the same time, it potentially sidesteps two highly salient facts about intelligence and counterterrorism. First, the secrecy that intelligence entails tends to impede the ability of these civil-society organizations to provide the sort of robust, informal oversight that the police might be subjected to in a more

Police, on the theory that enforcement by local officers of federal immigration laws would interfere on the vital relationships between police and immigrants, including illegal immigrants. Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *CRIME & JUST.* 377, 411 (2006).

96. 505 U.S. 144 (1992).

97. 521 U.S. 898 (1997).

98. See, e.g., Herman, *National Authority*, *supra* note 93, at 1211 (asserting that while local governments "may not resist or limit federal enforcement efforts within their jurisdictions . . . because of *Printz*, they may not be required to offer their services to help").

99. See Young, *supra* note 25, at 1280 ("[F]ederalism has no dependable liberal or conservative valence as those terms are understood today in an intuitively political sense."); cf. Richman, *supra* note 27 ("To some, the notion of police departments as bulwarks of civil liberties against federal encroachment might sound a bit odd.")

100. Skolnick, *supra* note 26, at 211–12. While Skolnick's observation pertains to New York City, the same logic may apply, with varying degrees of accuracy, to other cities and communities as well.

traditional area of law enforcement activity.¹⁰¹ Second, terrorism issues have proved especially susceptible to cognitive distortion, meaning that arguments from public acquiescence in counterterrorism measures may be overdrawn.¹⁰²

Another scholarly tendency has been to emphasize the relationship of local police officials with the communities they secure, which “move[s] mechanisms of accountability far closer to the public, providing greater ownership and control in terms of how individual communities are policed.”¹⁰³ As Richman has put it,

Local police also play a central role in maintaining order and ensuring public safety, and this gives them a more balanced “portfolio” in dealing with community leaders. The police officer who seeks information from a local Arab-American community leader has probably met and assisted that leader before—protecting his property, ironing out some administrative complexity, or ensuring his safe worship.¹⁰⁴

This balanced portfolio—and the fact that local police are inevitably “repeat players” in the communities in which they operate—does, in fact, create powerful incentives for police officers to negotiate a middle road when it comes to the more intrusive and potentially objectionable aspects of counterterrorism.¹⁰⁵ As a recent empirical study emphasizes, the perception of “procedural fairness” on the part of the (local) police contributes to the willingness of members of the Muslim community to work with authorities in matters of counterterrorism.¹⁰⁶ The federal counterterrorism bureaucracy,

101. Marina Caparini, *Controlling and Overseeing Intelligence Services in Democratic States*, in *DEMOCRATIC CONTROL OF INTELLIGENCE SERVICES* 3 (Hans Born & Marina Caparini eds., 2007).

102. See Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 133 (2003) (proposing probability neglect, which is especially likely in the context of terrorism, as a partial explanation of public overreaction to highly publicized, low-probability risks).

103. Martin Innes, *Policing Uncertainty: Countering Terror Through Community Intelligence and Democratic Policing*, ANNALS AM. ACAD. POL. & SOC. SCI., May 2006, at 222, 235–36. But see Adrian Vermeule, *Posner on Security and Liberty: Alliance to End Repression v. City of Chicago*, 120 HARV. L. REV. 1251, 1253 (2007) (“[F]or Judge Posner the central consideration in both opinions involved, not federalism or local government, but the scope of civil liberties against any level of government and the scope of executive authority to investigate potential terrorist groups.”). Vermeule takes Judge Posner to mean that there is no upshot for the protection of rights in the national-security arena as between federal and state authority. Whether or not the exegesis is accurate, the insight is overstated. As I maintain, local authorities possess certain advantages in informal governance mechanisms while formal governance is somewhat more assured at the national level. See *infra* subpart II(B).

104. Richman, *supra* note 27.

105. See Thacher, *supra* note 40, at 644 (“The Dearborn case contributes to such study [of authority] by illustrating how surveillance and information-gathering can have chilling effects on a city’s social life that may undermine trust and co-operation with police.”).

106. See Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC’Y REV. (forthcoming 2010) (explaining that fair police procedures influence the perceived legitimacy of law enforcement and the willingness of people to co-operate with them).

meanwhile, interacts with the community in a manner that is typically more one-off, meaning that it does not have a structural incentive to strike a balance in favor of rights protection.¹⁰⁷ At the same time, it is hard to know whether this logic dictates local restraint in the more elusive (and less overt) aspects of intelligence collection that, at least in theory, are likely to remain unknown to community members.

Other potential liberty benefits of practicing counterterrorism intelligence at the local level are worth mentioning. First, local agencies, more so than federal, have the ability to reallocate resources to various missions flexibly, as a function of a dynamic perception of the relative benefits and costs (including opportunity costs) of regulating the threat.¹⁰⁸ Unlike Washington agencies, whose regulatory mandates often outlive their missions, a local agency (especially an inevitably cash-strapped local police department with a wide range of institutional responsibilities) typically cannot afford to throw money at a problem that is of diminishing importance.¹⁰⁹ This flexibility helps to avoid one of the core threats to liberty of domestic intelligence—the tendency of intelligence programs, over time, to outlive their strategic missions and to become enmeshed in surveillance of activities or persons unconnected to addressing any urgent security problem.¹¹⁰

A final sense in which local intelligence officials—with their heightened reliance on partnerships with members of the community—may be more attentive to staying within constitutional boundaries relates to the First Amendment’s religion clauses. Counterradicalization necessarily

107. The Department of Homeland Security’s Office of Civil Rights and Civil Liberties has initiated dialogue on issues of radicalization, but thus far the program only covers approximately five communities across the country. VIOLENT ISLAMIST EXTREMISM, *supra* note 52, at 15. And while each of the FBI’s fifty-six field offices has a Community Relations Unit, these units do not focus on issues of radicalization or, for that matter, terrorism. *Id.*

108. See Jon M. Peha, *Fundamental Reform in Public Safety Communications Policy*, 59 FED. COMM. L.J. 517, 523 (2007) (“The advantages of local control are that local decisionmakers are able to match local resources (e.g., tax dollars) to the most pressing local needs.”).

109. See, e.g., David Johnston, *With Crime Up, a City’s Police Force Questions the Focus on Terror*, N.Y. TIMES, July 24, 2008, at A17 (reporting that the homeland security and terrorism-related focus of federal resources and grants is limiting local law enforcement in its ability to fight community crime effectively).

110. The recent abuse of national security letters by the FBI supplies a good example of the dangers of this kind of “mission creep.” See, e.g., David Stout, *F.B.I. Head Admits Mistakes in Use of Security Act*, N.Y. TIMES, Mar. 10, 2007, at A1 (describing Congress’s outraged response to reports that the FBI had used national security letters to improperly obtain personal information and business records). While it is true that local departments may want to stress their vulnerability to terrorism in order to compete for federal funding, it does not necessarily follow that the departments will actually devote resources to the issue once the cash is on hand. *Cf.* Johnston, *supra* note 109 (reporting that local law enforcement officers would prefer more discretion in the use and allocation of federal resources to fight crime).

entails engagement with Islamic culture and theology.¹¹¹ Unlike officials who practice intelligence in this area,¹¹² nongovernmental coproducers of intelligence do not run the risk of transgressing the dictates of the First Amendment by sanctioning a moderate version of Islam.¹¹³

B. *Formal Governance and Local Vulnerabilities*

Yet, for all that local counterterrorism officials have been celebrated as “offer[ing] the best premise of appropriately tempered zeal” in the post-9/11

111. See REWRITING THE NARRATIVE, *supra* note 12, at 13–20 (recommending a comprehensive approach involving a number of strategic, functional, and organizational steps to counter radical Islamist extremism).

112. The First Amendment runs only against governmental actors. Of central importance is the Establishment Clause as it functions to create “a wall of separation between Church and State.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). Establishment Clause jurisprudence is famously knotty, but has generally moved in the direction of greater tolerance for governmental endorsement of religion in society. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O’Connor, J., concurring in judgment) (“The Court has permitted government, in some instances, to refer to or commemorate religion in public life.”). However much latitude the government may have to support religion in general, the deep engagement with Islam entailed by counterradicalization would seem to implicate precisely the “excessive government entanglement with religion” that has been consistently prohibited. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); see also *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005) (refusing to permit the display of the Ten Commandments in a county courthouse because the display had a “predominantly religious purpose”); *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (“Not all entanglements, of course, have the effect of advancing or inhibiting religion. . . . Entanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.”). A recent policy paper advocates community, rather than law enforcement, involvement in counterradicalization, although seemingly for reasons of effectiveness rather than compliance with the Bill of Rights. See BEUTEL, *supra* note 76, at 16 (“Law enforcement must focus its energies on counterterrorism (i.e., criminal activities), not counterradicalization. . . . The role Muslim communities should play is in counterradicalization efforts through better religious education, social programs and long-term constructive political engagement.”).

113. President Obama has followed the pervasive federal practice of framing engagement with Islam as promoting “tolerance” and discouraging “extremism.” In his speech at Cairo University, Obama invoked both concepts, asserting that “America is not—and never will be—at war with Islam. We will, however, relentlessly confront violent extremists who pose a grave threat to our security.” Barack Obama, U.S. President, Remarks by the President on a New Beginning (June 9, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Cairo-University-6-04-09. Later in the speech, Obama began his discussion of religious freedom by noting that “Islam has a proud tradition of tolerance” before urging his audience to work to close the “fault lines” between Sunni and Shiites. *Id.* Whether governmental actors actually sidestep religious engagement by framing their normative account of Islam in these terms is an open question. See Yvonne Yazbeck Haddad & Tyler Golson, *Overhauling Islam: Representation, Construction, and Cooption of “Moderate Islam” in Western Europe*, 49 J. CHURCH & ST. 487, 511–12 (2007) (describing two interventionist policies that Western European governments have converged on in attempting to establish a new Islam: institutionalizing representative Muslim bodies and facilitating the construction of Muslim spaces); Robert Lambert, *Salafi and Islamist Londoners: Stigmatised Minority Faith Communities Countering al-Qaida*, 50 CRIME L. & SOC. CHANGE 73, 82–83 (2008) (discussing the effects of the British government’s Sufi Muslim Council’s description of two groups of U.K. Muslims, the Salafi and Islamist communities, as dangerous extremists, and openly siding with their religious opponents); Samuel J. Rascoff, Establishing “Official Islam” (June 2010) (unpublished manuscript, on file with author).

period,¹¹⁴ significant concerns remain, especially pertaining to the intelligence mission. As local police become more and more involved in “true” intelligence work, the adequacy of informal mechanisms and community relationships to supply sufficient governance becomes doubtful.¹¹⁵ A generation ago, formal governance of local intelligence agencies was supplied by consent decrees overseen by federal courts.¹¹⁶ But these consent decrees no longer effectively cabin police authority, and the internal guidelines that were promulgated to give them effect have similarly been relaxed.¹¹⁷ As a local police respondent to a RAND survey commented in explaining his department’s intelligence governance, “Issues are simply talked about as they come up.”¹¹⁸ Nor do legislative checks on executive action generally have teeth at the local level.¹¹⁹ And judicial review is notoriously unavailable in intelligence matters, owing to the convergence of

114. Richman, *supra* note 27.

115. Although my emphasis here is on the absence of formal governance mechanisms, it bears mentioning that a crucial informal tool is also missing from the local-intelligence-governance repertoire, namely historical consciousness. While measurement of historical awareness within an organization is inevitably difficult, it seems intuitively correct that practitioners of domestic intelligence at the federal level are more keenly aware of the excesses of the J. Edgar Hoover Era than local police are acquainted with the checkered history of Red Squads. To be certain, modern policing has become highly professionalized over the last generation, but that professionalization has typically come in areas of core crime fighting through modalities that allow management by numbers, such as the NYPD’s COMPSTAT program. I thank Kenji Yoshino for raising this provocative idea.

116. See Chevigny, *supra* note 7, at 747–68 (discussing consent decrees resolving federal civil rights litigation in New York City, Chicago, and Memphis).

117. See *Handschu v. Special Serv. Div.*, 605 F. Supp. 1384, 1417 (S.D.N.Y. 1985) (approving a consent decree for the NYPD in the context of investigations of political groups); see also Steigman, *supra* note 7, at 765–70 (detailing litigation in September 2002 in which the *Handschu* consent decree was modified by judicial order). But see RILEY, *supra* note 23, at 34 (noting the ways in which various local intelligence agencies have supplemented oversight by reference to external governance bodies); Raymond W. Kelly, The 2006 Paul Miller Distinguished Lecture: Safeguarding Citizens and Civil Liberties (Nov. 15, 2006) (discussing an external legal advisory board for NYPD intelligence, chaired by a distinguished member of the bar), in 59 RUTGERS L. REV. 555, 557–58 (2007).

118. RILEY, *supra* note 23, at 33.

119. For example, the New York City Council Public Safety Committee has never held a hearing about the oversight component of the NYPD Intelligence Division, which is funded entirely by private foundations. Pincus, *supra* note 16. As Committee Chair Peter Vallone Jr. put it, “The City Council does not have any real expertise in that area to conduct meaningful oversight. Perhaps some other system needs to be established.” He went on to argue, “We should have oversight. That is what our forefathers envisioned when they came up with checks and balances. There is no way to perform an effective check if we weren’t actually aware of what is happening.” *Id.* Of course, it is also true the congressional intelligence committees have fallen short in providing a robust check on Executive action. See Rascoff, *supra* note 8 (noting that intelligence gathering at the subnational level has largely gone ungoverned). See generally Anne Joseph O’Connell, *Intelligent Oversight* (calling for more centralized congressional oversight over intelligence activities and stating that even after 9/11, intelligence committees complained that they were not receiving necessary information from Executive agencies), in THE IMPACT OF 9/11 AND THE NEW LEGAL LANDSCAPE 161–64 (Matthew Morgan ed., 2009).

a host of pragmatic and doctrinal limits of federal jurisdiction.¹²⁰ In sum, local intelligence increasingly operates in a formal governance vacuum.¹²¹

III. Institutional Design

A. Existing Arrangements

The purpose of a co-operative federalist arrangement ought to be to leverage the strengths of the local actors in counterterrorism intelligence while addressing their vulnerabilities—particularly their worrisome lack of analytic capacity and formal governance mechanisms. And yet, these objectives have been effectively missing from the federal government's post-9/11 attempts to harness the power of state and local counterterrorism agencies.¹²² The FBI, DHS, and ODNI have each attempted to combine efforts with state and local officials through separate top-down institutional arrangements. Intending to draw upon the expertise and manpower of local law enforcement,¹²³ the FBI has spearheaded JTTFs,¹²⁴ DHS underwrites Fusion Centers,¹²⁵ and the ODNI (and its constituent agency, the NCTC) has begun to play a more prominent role in serving as an analytic resource for subnational-counterterrorism-intelligence practitioners.¹²⁶ All three programs are flawed.¹²⁷

120. See Rascoff, *supra* note 8 (describing how the role of judges in the governance of intelligence is limited).

121. See David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1330023 (suggesting that law enforcement and Muslim communities jointly negotiate limitations to the use of informants for counterterrorism intelligence gathering).

122. The first JTTF dates back to 1980, but the program was very substantially increased after 9/11. Press Release, Fed. Bureau of Investigation, Protecting America Against Terrorist Attack: A Closer Look at the FBI's Joint Terrorism Task Forces (Dec. 1, 2004), <http://www.fbi.gov/page2/dec04/jttf120114.htm>.

123. NYPD Deputy Commissioner Falkenrath has said, "The federal government, while well intentioned, has no overarching vision for terrorism-related information sharing with state and local agencies and no federal direction or leadership. . . . At least three Cabinet-level officers . . . have substantial oversight responsibility for the federal government's information-sharing system; none of them appears truly engaged by the topic." Falkenrath, *Hearing*, *supra* note 43, at 20.

124. Federal Bureau of Investigation, *supra* note 35.

125. Department of Homeland Security, *supra* note 36.

126. Interagency Threat Assessment and Coordination Group, *supra* note 37. As Greg Treverton, an experienced student of domestic intelligence, recently put it,

[T]hree different agencies seemed to have responsibility for intelligence connections with state and local officials after the 2004 Act [creating the Director of National Intelligence]: the DHS, which had the congressional mandate; the FBI, which had the troops in the field through its field offices and JTTFs; and the ODNI, which had the stake.

GREGORY F. TREVERTON, INTELLIGENCE FOR AN AGE OF TERROR 114 (2009).

127. Judge Posner acknowledges that neither the DHS nor the FBI model of reaching out to local officials is adequate, but believes that an MI5-like organization would do better. As he explains,

1. *JTTFs and Co-option.*—The JTTF approach—as it concerns local officials¹²⁸—is essentially one of co-option. While ostensibly designed to facilitate greater communication across jurisdictional lines and to leverage the know-how and manpower of local police forces,¹²⁹ JTTFs have tended instead to undermine the benefits of robust counterterrorism federalism by co-opting state and local officials (as well as a raft of federal officials from agencies outside the FBI) and subordinating them to FBI managers and their national agenda.¹³⁰ Although local participation on certain JTTFs may be robust—well over one hundred NYPD detectives serve on the New York JTTF, for example—in many others it is sparse, with only a handful of detectives participating in offices that are otherwise dominated by FBI special agents.¹³¹ Regardless of the absolute size of the local cohort, local officials on JTTFs are functionally federalized: they are given access to classified information and are discouraged from reaching back into their home agencies.¹³² More generally, they are also cut off from the ground-up

MI5 has been able to do what the FBI and the Department of Homeland Security have been unable to do—integrate local police into the national domestic intelligence system. It is a vital mission. Local police, border patrol, customs officers, and private security and intelligence personnel gather enormous masses of information at the source, as it were. They are well positioned to notice anomalies that may be clues to terrorist plotting. We need an agency that will integrate local police and other information gatherers into a comprehensive national intelligence network, as MI5 has done in Britain.

POSNER, *supra* note 15, at 155–56.

128. JTTFs are not designed solely to achieve collaboration between federal and subfederal actors; much of the “joint-ness” achieved by JTTFs is a function of co-operation within the federal government. Cf. Brig Barker & Steve Fowler, *The FBI Joint Terrorism Task Force Officer*, FBI L. ENFORCEMENT BULL., Nov. 2008, at 12, 13 (reporting that 24% of personnel within JTTFs are from state and local law enforcement agencies and that 17% are from non-FBI federal agencies).

129. See Robert A. Martin, *The Joint Terrorism Task Force: A Concept That Works*, FBI L. ENFORCEMENT BULL., Mar. 1999, at 23, 25 (observing that the NYPD brings insights to a JTTF that come from years of living and working with New Yorkers); Federal Bureau of Investigation, *supra* note 37 (indicating that a primary benefit of a JTTF is intelligence sharing across agencies).

130. See, e.g., Herman, *Collapsing Spheres*, *supra* note 93, at 951–53 (discussing the degree to which the terms of the JTTF agreement between the FBI and the City of Portland, Oregon, led to problematic federal control of local police officers).

131. For example, the Dearborn, Michigan police department contributes a single officer to the local JTTF. Thacher, *supra* note 40, at 665. See generally Barker & Fowler, *supra* note 128, at 13 (reporting that 24% of personnel within JTTFs are from state and local law enforcement agencies and that 17% are from non-FBI federal agencies).

132. Local politicians (including the mayor of Dearborn) emphasize that they have no dealings with the officer assigned to the JTTF to underscore that at the local level, they are not involved in the gathering of intelligence. See Barker & Fowler, *supra* note 128, at 13 (“Mayor Guido, for example, emphasized the city’s hands-off relationship with the officer who serves as their primary liaison to the task force . . .”). As one commentator has put it, “the city maintains considerable distance between [the officer dedicated to the JTTF] and the rest of city government, as if to insulate itself from the contaminating effects of offender search activities. *Id.* at 666. Although there are some 100 JTTFs around the country, Press Release, *supra* note 122, many of them have their own

methodology that is characteristic of local police work and gives local officers a natural advantage over federal agents at the sort of intelligence gathering that is necessary for counteracting contemporary threats.¹³³ Furthermore, and of clear significance, local officials deployed to JTTFs are not explicitly made part of the FBI's domain management initiatives, the Bureau's core domestic-intelligence program by which it attempts to "achieve a comprehensive understanding of a geographic or substantive area . . . to better arm our leadership with strategic domain knowledge to proactively identify and neutralize national security and criminal threats."¹³⁴

2. *Fusion Centers and (Misguided) Devolution.*—Fusion Centers are theoretically more promising because they have typically been initiated by state and local agencies and feature a more significant state and local presence.¹³⁵ But as several recent studies point out, the "devolution" model they have pursued has proved disappointing in practice.¹³⁶ First, Fusion Centers have rapidly been transformed into organizations that tackle "all threats [and] all hazards"¹³⁷—meaning that the counterterrorism intelligence

branches dedicated to monitoring foreign areas of responsibility such as the Horn of Africa, Saudi Arabia, and Iraq. Guy Lawson, *The Fear Factory*, ROLLING STONE, Feb. 2008, at 60–65. This global approach flies in the face of the ground-up counterterrorism intelligence gathering practiced by local police and is unnecessary given the availability of sound intelligence on these areas coming out of the core intelligence agencies headquartered in Washington, D.C. For a recent critical assessment of the work of the JTTFs, see Lawson, *supra*.

133. See *supra* subpart I(A).

134. *Intelligence Reform: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 80 (2007) (statement of John S. Pistole, Deputy Director, Fed. Bureau of Investigation).

135. See MICHAEL GERMAN & JAY STANLEY, AM. CIVIL LIBERTIES UNION, WHAT'S WRONG WITH FUSION CENTERS? 6 (2007), available at http://www.aclu.org/pdfs/privacy/fusioncenter_20071212.pdf ("Intelligence fusion centers grew in popularity among state and local law enforcement officers as they sought to establish a role in defending homeland security by developing their own intelligence capabilities. These centers evolved largely independently of one another . . . and were individually tailored to meet local and regional needs."). As of 2009, there were seventy-two Fusion Centers nationwide. Department of Homeland Security, State and Local Fusion Centers, http://www.dhs.gov/files/programs/gc_1156877184684.shtm (last modified Sept. 16, 2009).

136. One commentator recently noted,

[I]t is widely accepted that effective intelligence processes are essential in terrorism prevention, and that state, local, and tribal law enforcement and other public sector agencies are in a unique position to play a role in this process. There is agreement that as the majority of critical infrastructure sites in the country are owned and/or operated by the private sector, that it too has an important role to play. However, the uneven, grassroots development of fusion centers, devoid of strong federal direction and national consensus on their mission, scope, and 'ownership' threatens the value of their contribution and increases the risk of abuse.

Siobhan O'Neil, *The Relationship Between the Private Sector and Fusion Centers: Potential Causes for Concern and Realities*, HOMELAND SECURITY AFF., Apr. 2008 (Supp. 2), at 3–4.

137. Ryan Singel, *Feds Tout New Domestic Intelligence Centers*, WIRED, Mar. 20, 2008, <http://www.wired.com/threatlevel/2008/03/feds-tout-new-d>; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-35 HOMELAND SECURITY: FEDERAL EFFORTS ARE HELPING TO ALLEVIATE SOME CHALLENGES ENCOUNTERED BY STATE AND LOCAL FUSION CENTERS 5 (2007) ("The

mission has become one among many. Even when they do address terrorism, Fusion Centers have devolved the wrong function from the center to the periphery: information exchange (fusion) rather than information collection and analysis.¹³⁸ To be certain, information sharing is a *sine qua non* of an effective co-operative federalist approach to counterterrorism intelligence. But information sharing presupposes the existence of intelligence that has already been acquired and properly analyzed—goals that are not themselves advanced by Fusion Centers.¹³⁹ DHS has recently sought to provide more centralized control of the Fusion Centers and to develop “mechanisms, in coordination with federal, state, local, tribal, and territorial authorities, to improve the capability of state and major urban area fusion centers to gather, assess, analyze and share locally generated and national information and intelligence, in order to provide complete pictures of regional and national threats and trends.”¹⁴⁰ But it remains unclear how DHS will make good on these aspirations.¹⁴¹

majority [of the centers] had missions and scopes of operations that included more than just counterterrorism-related activities, such as collecting, analyzing, and disseminating criminal as well as terrorism-related information.”).

138. See Zoe Baird, *Why Information Sharing Is Not Always Enough*, FED. COMPUTER WK., Feb. 17, 2010, <http://fcw.com/articles/2010/02/22/comment-zoe-baird-markle-national-security.aspx> (“The job isn’t done when information is shared but rather when it is thoroughly analyzed by people not only collecting the dots but also connecting them.”). That Fusion Centers are distributed evenly across the states suggests another flaw: that the widely disparate vulnerabilities that states face vis-à-vis terrorism have not been accounted for. Cf. Eric Lipton, *Homeland Security Grants to New York Slashed*, N.Y. TIMES, May 31, 2006, at A1 (detailing how security grants were cut for cities such as New York City and Washington D.C. while cities such as Omaha and Louisville “got a surge of new dollars”).

139. Cf. DEP’T. OF JUSTICE & DEP’T OF HOMELAND SEC., FUSION CENTER GUIDELINES: DEVELOPING AND SHARING INFORMATION AND INTELLIGENCE IN A NEW WORLD 2 (2005), available at <http://www.fas.org/irp/agency/ise/guidelines.pdf> (“The concept of fusion has emerged as the fundamental process to facilitate the sharing of homeland security-related and crime-related information and intelligence. For purposes of this initiative, fusion refers to the overarching process of managing the flow of information and intelligence across levels and sectors of government.”). Other DHS- and FBI-led initiatives in counterradicalization-focused outreach have also proved unsuccessful at combining federal and state strengths. See VIOLENT ISLAMIST EXTREMISM, *supra* note 52, at 15 (observing that “the efforts by [DHS Office of Civil Rights and Civil Liberties] and the FBI’s Community Relations Unit are not tied into programs administered by local police departments, some of which are quite comprehensive”).

140. *I&A Reconceived: Defining a Homeland Security Intelligence Role: Hearing Before the Subcomm. on Intelligence, Information Sharing and Terrorism Risk Assessment of the H. Comm. on Homeland Security*, 111th Cong. (2009) (statement of Bart R. Johnson, Acting Under Secretary for Intelligence and Analysis, Department of Homeland Security), available at <http://homeland.house.gov/siteDocuments/20090924104844-11233.pdf>; see also *id.* (“Central to this proposal is the establishment, at the Secretary’s direction, of a new Joint Fusion Center Program Management Office”). The Department of Defense has also recently sought to share more intelligence with subnational entities via the Fusion Centers. Press Release, Dept. of Def., DOD Announces New Information-Sharing Access to Help Fusion Centers Combat Terrorism (Sept. 14, 2009), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=12974>.

141. Nevertheless, Fusion Centers remain part of the contemporary institutional landscape. See NATIONAL SECURITY STRATEGY, *supra* note 13, at 20 (“To prevent acts of terrorism on American

3. *ITACG and Consumption.*—The ODNI’s experiment—while still largely untested¹⁴²—is potentially more promising than either the FBI or the DHS models. Indeed, it might have been awareness of this fact that prompted the White House and Congress recently to expand the authority of the ODNI—and specifically the NCTC—in co-operative federalism.¹⁴³ The NCTC has begun to provide a conduit for members of the subfederal law enforcement community to gain access to classified information through the still-fledgling ITACG.¹⁴⁴ The Group brings together representatives of state, local, and tribal officers alongside national experts to expose the former to federal intelligence and the latter to the distinctive counterterrorism issues that arise at the subnational level.¹⁴⁵ The NCTC is well suited to hosting the

soil . . . [w]e will continue to integrate and leverage state and major urban area fusion centers that have the capability to share classified information . . .”).

142. See PROGRAM MANAGER, INFO. SHARING ENV’T, REPORT ON THE INTERAGENCY THREAT ASSESSMENT AND COORDINATION GROUP: SECOND REPORT FOR THE CONGRESS OF THE UNITED STATES, THE SECRETARY OF HOMELAND SECURITY, AND THE DIRECTOR OF NATIONAL INTELLIGENCE 17 (2009) [hereinafter PROGRAM MANAGER REPORT] available at http://www.ise.gov/docs/ITACG_Status_Report_PM_ISE_FINAL_24Nov09.pdf, (demonstrating the difficulty of evaluating the program at such an early stage); *id.* at 20 (listing the names of the six state and local law enforcement and emergency personnel currently assigned to the ITACG Detail).

143. See *Homeland Security Intelligence at a Crossroads: The Office of Intelligence & Analysis’ Vision for 2008: Hearing Before the Subcomm. on Intelligence, Information Sharing and Terrorism Risk Assessment of the H. Comm. on Homeland Security*, 110th Cong. (2008) (statement of Rep. Jane Harman, Chairwoman, Subcomm. on Intelligence, Information Sharing and Terrorism Risk Assessment), available at <http://homeland.house.gov/SiteDocuments/20080227111045-34957.pdf> (pronouncing that ITACG will remain and expand despite resistance by other agencies). In her prepared statement before the February 26, 2008, hearing, Chairwoman Harman castigated veteran CIA official Charlie Allen, who runs DHS’s Intelligence and Analysis office. “Bottom line, Charlie: you are not effectively serving the State and [local officials] who are the people who will prevent the next attack.” *Id.*

144. The Group began as part of WHITE HOUSE, NATIONAL STRATEGY FOR INFORMATION SHARING 18 (2007), available at http://georgewbush-whitehouse.archives.gov/nsc/infosharing/NSIS_book.pdf, and was more recently signed into law as part of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 521, § 210D, 121 Stat. 266, 328–32 (to be codified at 6 U.S.C. § 124k). The Group consists of a Detail and an Advisory Group. *Id.* § 210D(b). The purpose of the Detail is to “integrat[e], analyz[e], and assist[] in the dissemination of federally-coordinated information within the scope of the information sharing environment, including homeland security information, terrorism information, and weapons of mass destruction information, through appropriate channels identified by the ITACG Advisory Council.” *Id.* § 210D(b)(2).

145. *Id.*; see also WHITE HOUSE, *supra* note 144, at 18–19 (discussing the purposes of creating the ITACG). It was located in the NCTC over the vigorous objection of DHS, which sought a monopoly over counterterrorism information sharing with state and local entities. At a February 26, 2008, hearing of the House of Representatives Homeland Security Committee’s Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment, Chairwoman Jane Harman noted that she had “a major issue with [DHS’s] endless refusal to take the ITACG seriously and to build a robust State, local, and tribal presence at the NCTC that makes the intelligence production process for State and locals better.” *Homeland Security Intelligence at a Crossroads*, *supra* note 143. The key word here is “production”—which signifies a role for the local entity in producing intelligence, not merely in consuming it. The NYPD has actually dispatched an officer to sit among the federal

Group because it has genuine analytic expertise in the area of counterterrorism and enjoys a statutory mandate to devise overall U.S. counterterrorism strategy.¹⁴⁶ This initiative represents a welcome break from past practice in which local officials were regularly prevented from gaining access to classified threat information, even if the threats at issue carried security implications for the jurisdiction of the local officials from whom the information was being withheld.¹⁴⁷ Still, the NCTC initiative perpetuates the flawed habit of regarding subnational participants principally as consumers of federal intelligence products, rather than as representatives of agencies with the capacity to gather and analyze intelligence alongside federal counterparts. Thus, a recently issued annual report notes that the “goal of the ITACG Detail is to further enable the production of clear, tailored, relevant, official federally-coordinated threat information in a timely, consistent and usable manner” for the benefit of subnational actors.¹⁴⁸ The local officials are relegated to identifying potentially useful information from within federal intelligence databases and advising federal officials about tailoring analytic products to suit the distinctive needs and capacities of subnational intelligence consumers.¹⁴⁹

B. *Toward Homegrown Counterterrorism*

What would a properly conceived set of co-operative federalist arrangements look like in the area of counterterrorism intelligence? Three ingredients are essential. First, there ought to be robust local intelligence capacity overseen through a process of centralized “regulatory” review simultaneously aimed at providing more rights-compliant and more

officials at NCTC (not through ITACG). Tina Moore, *U.S. Snoops Get NYPD Lift to Sniff Out Qaeda*, N.Y. DAILY NEWS, Mar. 26, 2008, at 8.

146. 50 U.S.C. § 404o(d) (2006); see also RICHARD A. BEST JR., CONG. RESEARCH SERV., THE NATIONAL COUNTERTERRORISM CENTER (NCTC)—RESPONSIBILITIES AND POTENTIAL CONGRESSIONAL CONCERNS 4 (2010) (referring to the current NCTC charter which includes providing “strategic operational plans for military and civilian counterterrorism efforts and for effective integration of counterterrorism intelligence and operations across agency boundaries within and outside the US”).

147. See, e.g., Edward J. Tully & E.L. Willoughby, *Terrorism: The Role of Local and State Agencies*, NAT’L EXECUTIVE INST. ASSOCIATES ET AL., May 2002, <http://www.neiassociates.org/state-local.htm> (criticizing federal law enforcement and intelligence attitudes towards local and state agencies as the principal flaw in their ability to combat terroristic threats).

148. PROGRAM MANAGER REPORT, *supra* note 142, at 5.

149. See *id.* at 10 (detailing the daily operations of the ITACG Detail (made up of state, local, and tribal (SLT) personnel), including “assist[ing] in identifying time-sensitive terrorism threats to locations within the United States” and “identif[y]ing suitable strategic and foundational assessments as candidates for downgrading or tailoring for dissemination to SLT and private sector consumers”).

analytically rigorous intelligence.¹⁵⁰ The kind of review I have in mind, rooted in ideas of rationality¹⁵¹ and modeled generally on the role of the Office of Information and Regulatory Affairs (OIRA) within the regulatory state,¹⁵² would help plug the governance vacuum in which local intelligence currently operates. A federal overseer (potentially housed within ODNI or DHS) would help calibrate the degree to which specific local intelligence agencies could undertake certain programs of intelligence gathering and help define their scope.¹⁵³ Would such intelligence gathering be likely to yield timely and important intelligence? Or perhaps local intelligence resources would be more usefully devoted to another area or problem? For example, in the current threat environment in which there is substantial concern about radicalization within the Somali-American community,¹⁵⁴ federal regulators could help enlist local officials in cities with large concentrations of Somali-Americans like Minneapolis¹⁵⁵ or Lewiston, Maine,¹⁵⁶ to employ their human networks to collect relevant counterradicalization intelligence. Federal officials would also help to determine whether certain collection modalities would be likely to transgress basic norms, especially when viewed in the light of their (potentially modest) comparative intelligence payoffs.

A prerequisite for such a governance mechanism, of course, both as a constitutional and as a practical matter, is willing local participation,¹⁵⁷ which gets to the second pillar of the regime I am contemplating. Federal funding and know-how are needed to ensure the viability of local intelligence programs. The requirement of federal funding speaks for itself. But the need for sophisticated training in intelligence work is equally vital. Training must span all aspects of the job from the finer points of human intelligence collection (especially given the imperatives of intelligence coproduction discussed above) to intelligence analysis to the legal environment in which domestic

150. As I have argued elsewhere, these goals are mutually reinforcing. See Rascoff, *supra* note 8 (“Not only does rationality review pave the way for more accurate and more rights-protective intelligence, it also lays the methodological foundation for a more coordinated and consistent intelligence process, and one with more robust and centralized accountability mechanisms.”).

151. I use the term “rationality” in an expansive sense, to embrace ideas of cost-benefit analysis and cost effectiveness, as well as more explicitly normative judgments. *Id.*

152. See The White House, Office of Management and Budget, Information and Regulatory Affairs, http://www.whitehouse.gov/omb/infoereg_default/ (“OIRA carries out several important functions, including reducing paperwork burdens, reviewing Federal regulations, and overseeing policies relating to privacy, information quality, and statistical programs.”).

153. For an extensive discussion on the potential for regulatory oversight of intelligence, see Rascoff, *supra* note 8.

154. See, e.g., Andrea Elliott, *A Call to Jihad, Answered in America*, N.Y. TIMES, July 12, 2009, at A1 (chronicling the rise of young ethnically Somali jihadists in Minneapolis).

155. *Id.*

156. See Jesse Ellison, *The Refugees Who Saved Lewiston*, NEWSWEEK, Jan. 17, 2009, at 69 (describing the recent influx of Somali refugees into Lewiston, Maine).

157. See Michael A. Sheehan, Op-Ed., *The Terrorist Next Door*, N.Y. TIMES, May 4, 2010, at A31 (arguing that concerns about the potential financial and political costs have caused local departments to be leery of covert intelligence gathering).

intelligence operates and the civil liberties concerns that are uniquely implicated by a domestic intelligence apparatus. While there may be certain affinities between law enforcement and intelligence work, the two domains remain quite distinct.

Third, the federal government must create and maintain a virtual intelligence network available to local agencies, especially to major metropolitan police departments.¹⁵⁸ Through participation in the network, locals would be able to “push” intelligence out to other local agencies¹⁵⁹ or to Washington, and to receive timely information from the national Intelligence Community. Best practices could also be shared, as could hard-won lessons in intelligence failures.¹⁶⁰

IV. Conclusion

A decade and a half ago Stewart Baker posed the question whether our spies should be cops.¹⁶¹ In view of the advent of homegrown terrorism and the government’s commitment to counterradicalization, today’s dilemma is the reverse: should our cops be spies? If, as a strong bipartisan constituency has already signaled,¹⁶² the answer to that question is yes, the first task becomes achieving conceptual clarity about what role local officials ought to play as part of an overall intelligence strategy that conjoins elements of national and subnational authority to practice “intelligence under law.”¹⁶³ In this Article I have begun to do just that, emphasizing areas of comparative local strength as well as vulnerability, and suggesting what a rightly conceived set of institutional arrangements ought to look like. Conceptual work of this sort is a necessary foundation for homegrown counterterrorism to play a significant role in addressing homegrown terrorism.

158. Cf. NATIONAL SECURITY STRATEGY, *supra* note 13, at 20 (“We are improving information sharing and cooperation by linking networks to facilitate Federal, state, and local capabilities to seamlessly exchange messages and information . . .”).

159. Local intelligence collaboration is a vital piece of the puzzle. An example is supplied by the NYPD’s Operation Sentry, which brings together members of police departments throughout the extended New York City Metropolitan area. See Press Release, NYPD, NYPD Convenes Operation Sentry Members for Annual Conference (May 5, 2009), http://www.nyc.gov/html/nypd/html/pr/pr_2009_ph10.shtml.

160. The creation of a non-Washington-centric Information Sharing Environment in which “[a]ll players in th[e] network—including those at the edges—would be able to create and share actionable and relevant information” has been vigorously advocated by the Markle Foundation as early as 2003. TASK FORCE ON NAT’L SEC. IN THE INFO. AGE, MARKLE FOUND., CREATING A TRUSTED INFORMATION NETWORK FOR HOMELAND SECURITY 8 (2003). As of yet, nothing approaching that framework has been implemented.

161. Stewart A. Baker, *Should Spies Be Cops?*, FOREIGN POL’Y, Winter 1994–1995, at 36.

162. See *supra* Part III.

163. See James B. Comey, *Intelligence Under the Law*, 10 GREEN BAG 2D 439, 443–44 (2007) (“We know that there may be agonizing collisions between our duty to protect and our duty to that constitution and the rule of law. . . . [I]n the long-run, intelligence under law is the only sustainable intelligence in this country.”).