TERRORISM, FEDERALISM, AND POLICE MISCONDUCT

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The defining characteristic of American criminal law enforcement—the characteristic that most distinguishes it from law enforcement elsewhere in the developed world—is its localism. There are approximately 800,000 police officers in the United States.[1] Over 660,000 of them work for local governments.[2] And personnel statistics understate the system's local tilt. There are approximately 50,000 federal criminal cases per year.[3] Criminal cases brought by local agencies each year number in the millions;[4] local district attorneys win about one million *felony convictions* per year.[5]

This imbalance is very much the historical norm. The federal government has never employed a sizable fraction of the nation's law enforcement officers or prosecutors, nor housed a large portion of its prisoners. While other traditional staples of local government—poor relief, road construction, even to some degree primary and secondary education—have migrated up the sovereignty ladder, with state and national budgets absorbing a much larger share of the burden of providing services over the past century, local governments have only

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1. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1998 31 (Kathleen Maguire & Ann L. Pastore eds., 1999) [hereinafter 1998 SOURCEBOOK] (showing 747,878 state and local police full-time equivalents). There are also approximately 75,000 federal law enforcement officers. *See* Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, 2 CRIM. JUST. 2000 82 (2000), *available at* http://www.ncjrs.org/criminal_justice2000/vol_2/02d2.pdf.

2. *See* 1998 SOURCEBOOK, *supra* note 1 at 31, tbl. 1.1.

3. *See id.* at 387-88 (reporting that federal prosecutors filed 47,277 cases in 1998).

4. *See* "Examining the Work of State Courts", 1999-2000, National Center for State Courts, Court Statistics Project, *at* http://www.ncsc.dni.us/divisions/research/csp/csp-index.html. This report indicates that in 1999, 4,924,710 cases were filed in courts of general and unified jurisdiction and 9,279,112 cases in courts of limited jurisdiction.

5. *See* 1998 SOURCEBOOK, *supra* note 1, at 431 (noting that there were 997,970 felony convictions in state court in 1996).

tightened their hold on law enforcement. As Tom Stacy and Kim Dayton noted a few years ago, the federal share of law enforcement has steadily *declined* over the course of the past half-century (and the local share has steadily risen).[6] Try to think of another government activity about which one could say that.

In short, in the United States, two levels of government—local and federal (the states do almost no criminal prosecution and very little policing)—share the job of enforcing criminal law. But they do not share that job equally. Local governments dominate, more so than in any other sphere of governance or regulation. The federal government serves only as a backstop, and not a very important backstop at that.

That long-standing truth may be about to change, for reasons that go directly to the terrorist attacks on New York and Washington this past September 11. Not fundamentally: we are not about to create a federal law enforcement bureaucracy that can process millions of cases per year, nor are we likely to have a national police force that can assign officers to walk a beat in urban neighborhoods anytime soon. But real change is a real possibility. If it happens, the heart of the change will be this: Before last September, terrorism occupied a very small place in both politics and law enforcement; today and for some time to come, it is likely to occupy a large place—not dominant, but large. And while the crimes terrorists commit are crimes under state and federal law alike, everyone assumes that the FBI's role in fighting terrorism will be primary, at least within America's borders. Local police departments will be (and already have been) powerfully affected.[7] But in this sphere, *they* are the backstop. The FBI is where the buck stops.

My goal in this brief Essay is to raise what might seem a minor question (at least, minor compared with the questions discussed elsewhere in this Special Issue): what might that change mean for the level of police misconduct in the United States? We have a large body of law devoted to policing the

6. *See* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J. L. & PUB. POL'Y 247 (1997).

7. *See, e.g.*, Clyde Haberman, *Visions of a Long Struggle, Strains on Police and Help for Victims*, N.Y. TIMES, Oct. 28, 2001, at B1. I discuss these effects, and their relationship to the law of criminal procedure, in William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. (forthcoming June 2002).

police, along with a large body of literature devoted to theorizing about police misbehavior and what the law can do about it. Both the law and the theory have focused almost exclusively on local police. In a society where local policing dominates criminal law enforcement, that is as it should be. But the fight against terrorism is likely to chip away at that dominance. It is worth thinking about what that development might mean for legal regulation of those who enforce the criminal law. Which in turn depends on what more federal power will mean for the amount of abusive behavior by law enforcers.

At first blush, more federal power in this area would seem to be a piece of very good news. We are used to thinking of the federal legal system as better, in all respects, than its state and local counterparts. A generation ago, changes in constitutional law that gave federal judges much more power relative to state judges were widely seen as an advance for the quality of justice in America.[8] So it seems natural to think that giving the FBI more power relative to local police departments would tend to lessen the level and seriousness of law enforcement misconduct.

Actually, the picture is a good deal more complicated. When it comes to minimizing misbehavior, local police departments have two large advantages. First, they are democratic. Second, they operate under severe resource constraints. The first characteristic means that local police are not likely to abuse people in ways most of the citizenry finds objectionable. (It also means they *are* likely to abuse people in ways most of the citizenry finds attractive). The second means that local police do not have time to harass people for fun or out of spite—these things can of course happen, but they are not likely to happen often. The FBI has neither characteristic and hence neither advantage. Shifting power to the FBI, while leaving the rest of the system untouched, might make law enforcement both less accountable and more prone to go off on abusive larks. But antiterrorism work has several features that may cut against these tendencies. If so, this particular change in the federal-

8. For the classic cite, whose title perfectly captured the conventional wisdom about state and federal courts, see Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

local allocation of power may raise the level of accountability and responsibility in law enforcement, not lower it.

Part I of this Essay describes the basic advantages and disadvantages of local and federal police in terms of preventing police misconduct. Part II discusses the features of antiterrorism work that might bear on the issue. Part III concludes.

I. FEDERALISM AND POLICE MISCONDUCT

It is best to begin with why the issue matters. Legal regulation of police in the United States is mostly ineffective. Not that American police are more violent, corrupt, or abusive than their counterparts around the world—we do not know enough to make good comparisons, but the likelihood is that police here are better behaved than most of their counterparts around the world. Rather, the point is that legal regulation has only marginally positive effects. In part this is because the law is filled with bad substantive rules; were the law better, its effect on police conduct would likewise be better. That could, of course, be fixed. The deeper, harder-to-fix problem stems from the limits of legal remedies. The exclusionary rule deters only those illegal searches and seizures aimed at gathering evidence for later use in court. Most police misconduct does not fit that description. Damages liability is a more serious threat, but only when officers are dealing with someone who is likely to be attractive to a jury—a characteristic that most targets of police attention do not have.[9] Injunctions would be more effective, but enjoining police departments has been, until very recently, a practical impossibility.[10] All of which means that the law's positive effects are bound to be small. The larger factors that shape police behavior—and misbehavior—are more structural: police culture, politics, institutional design,

9. The only exception—and the one area in which damages litigation may serve as a reasonably effective deterrent—is deadly force. Juries may sympathize with even *un*attractive suspects whom the police kill.

10. The impossibility stems from two Supreme Court decisions: Rizzo v. Goode, 423 U.S. 362 (1976) and Los Angeles v. Lyons, 461 U.S. 95 (1983). The qualification, "until recently," stems from the passage of 42 U.S.C. § 14141 (2001), which allows the Justice Department to sue to enjoin police departments from behavior that exhibits a pattern of constitutional violations. For the best discussion of that statute and the first cases brought under it, see Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815 (1999).

and the like. Hence the importance of the question whether local dominance makes for better- or worse-behaved police.

There are three main reasons for thinking the right answer is "worse." Corruption has long been a problem for local police departments; much less so for federal agents.[11] Shifting power from localities to the national government would likely be pure gain in terms of minimizing graft and other gross forms of dishonesty. The second reason involves a combination of personnel and bureaucratic control. The rungs on the sovereignty ladder seem positively correlated with training and professionalism: FBI agents have more of these things than local police. Not coincidentally, the FBI has something else that is valuable in reining in misbehavior—a large, centralized bureaucracy.[12] Small local departments (the story may be different in large cities) probably have a harder time controlling rogue officers than does a large federal agency.

The third reason may be the most important, at least in a society like ours, though it is also the hardest to sort out. Local police and local prosecutors have more of a history of discrimination than federal law enforcement agencies. And the difference is not just historical. As of 1996, 49% of state prisoners were black; only 39% were white. (Keep in mind that state prison beds are filled by local prosecutions, which in turn follow from local arrests.) Meanwhile, 59% of the much smaller federal prison population was white and 38% black.[13] The difference between these two pairs of percentages would be even larger were it not for the huge disparity federal law mandates between sentences for crack offenses and sentences for comparable crimes involving cocaine powder. It would seem that the forces that lead law enforcers to target black suspects and defendants weigh more heavily on local agencies than on their federal counterparts.

And yet that conclusion may be too simple. One kind of police discrimination—the use of law enforcement personnel to

11. On the problem of local police corruption, the best source may be the Mollen Commission report on corruption in the New York Police Department. *See* Report of the New York City Commission to Investigate Allegations of Police Corruption and the Anti-corruption Procedures of the Police Department (July 7, 1994).

12. For the best account of how that bureaucracy functions, see JAMES Q. WILSON, THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS (1978).

13. *See* 1998 SOURCEBOOK, *supra* note 1, at 498.

enforce color lines, to punish those who engage in inappropriate interracial association—is indeed historically more associated with local police than with the FBI.[14] But while that kind of police discrimination may still exist in some places, it plainly has declined, and equally plainly is not the primary cause of the large racial disparities in arrest and incarceration statistics. Those disparities seem to flow instead from a combination of three facts: crime is concentrated in poor urban neighborhoods, those neighborhoods are disproportionately black, and (the third fact is easiest to miss but may be most important) arrests and prosecutions in poor urban neighborhoods are cheaper for the government than arrests and prosecutions elsewhere.[15] To the extent that these three facts are driving the racial tilts in our criminal justice system, those tilts would probably exist, probably in roughly the same measure, no matter who was assigned responsibility for street-level policing in American cities.

Still, even if discrimination is a wash, the institutional allocation question seems easy—all moves away from local policing are good moves, at least in terms of their effect on police misbehavior. And that may be true. Certainly the regime we have now is unusual. I am unaware of any other country that has one just like it and few that have anything similar. In its institutional design, our criminal justice system seems to be an outlier, and outliers usually get it wrong. Strong institutional patterns, like stable equilibria in well functioning markets, usually exist for a reason. Bucking them tends to be a bad idea.

Yet for all its oddity, two large factors cut in favor of something like the existing institutional arrangement. The first is democracy. The single biggest constraint on local police behavior is local politics: police chiefs usually are not elected officials (although many county sheriffs are), but they work for elected city or county councils that can limit their behavior in a

14. For a classic example of this kind of policing, see Papachristou v. Jacksonville, 405 U.S. 156 (1972), where the arrest and prosecution were nominally for vagrancy but actually for something akin to interracial dating.

15. For a detailed argument along these lines but focused on drug enforcement, see William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998). The dynamic described in the text is more powerful in that context than in criminal law enforcement as a whole, but it applies to a substantial degree to all law enforcement.

variety of ways, most obviously by fixing their budgets. The level of political independence Daryl Gates's department enjoyed in Los Angeles is famous—and, after the Rodney King beating, infamous. It is also unusual. When local political winds blow, the police feel the breeze. Not so the FBI, which has a degree of political independence that local police forces would find unimaginable.[16] This is not a matter of institutional design—some federal agencies are quite plainly under the thumb of elected politicians in Congress and in the White House. The FBI might have become one of those agencies, but for the career of its longest-serving Director. J. Edgar Hoover's tenure ensured that the FBI would, in this respect, resemble Gates's LAPD and not the average city police department.

The difference matters a great deal. Democratically accountable police may oppress minorities: that is the standard rationale for constitutional regulation of the police. But they will not oppress *majorities*. That is easy to take for granted in a reasonably well-functioning free society, but the experience of many other countries suggests it is no small problem.[17] The twin facts that America's national government has never had a large police force under its control and that local police forces have traditionally been under the thumb of local electorates may have more than a little to do with our survival as a free country.

And given historical housing patterns, democratic policing offers large benefits to racial and ethnic minorities as well. Such groups, at least the ones that tend to be poorer than the national average (and outside the South, where different patterns have prevailed until recently), have historically been concentrated in cities. That has produced an urban politics in which minorities enjoy a great deal more power than at the state or national levels. This is a substantial protection against the worst kinds of abusive policing. Thanks to this dynamic,

16. *See* WILSON, *supra* note 12. Wilson's classic book on the FBI emphasizes that agency's striving for autonomy. For the best discussion in the legal literature of the power of federal law enforcement agencies, see Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999).

17. For some good examples of the problem, see PAUL CHEVIGNY, EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS (1995). Several of Chevigny's chapters discuss police misconduct under regimes that were either autocratic or only partly democratic.

the Irish—the oppressed minority of the day—enjoyed a lot of influence over city police forces in the late nineteenth century, as African Americans enjoy substantial influence today.[18]

This last point seems in tension with the observation that discriminatory law enforcement is a greater problem at the local level than at the national level. But both points are true. Local law enforcement *does* generate greater racial disparities than federal law enforcement. Yet the victims of those disparities enjoy greater power over policing at the local level than over its federal counterpart. Nor does the second point cancel out the first, with politics taking care of any discrimination problem: that happy conclusion runs squarely into the polling data that show enormous levels of black distrust of and hostility toward America's overwhelmingly local criminal justice system.[19] Something is clearly wrong. The best conclusion is both modest and complicated: the forces driving police discrimination are strong, and yet the effects of those forces are mitigated by local democracy.

The second great advantage of local policing is a double-edged sword. Relative to their state and federal counterparts, local police operate under severe budget constraints. The reason is not hard to find. Policing is redistributive: its benefits accrue disproportionately to the poor (because crime disproportionately afflicts the poor), but it is paid for mostly by the middle and upper classes. It is hard for local governments to fund redistributive services. Their wealthier residents can too easily get the benefit of those services without paying for them: they can keep their jobs in the city and still move to a neighboring suburb where crime rates and taxes are lower. The predictable result is that cities with high crime rates (and in America today that means most cities) are under-policed—the police are always stretched too thin, because there is a limit to the cities' ability to ask their wealthier residents to buy police protection for their poorer ones.[20] This is an especially large

18. For an interesting discussion of the parallels between the late-nineteenth-century Irish and late-twentieth-century African Americans, see MICHAEL BARONE, THE NEW AMERICANS 17-115 (2001). For an argument that African Americans' power in urban politics undermines the rationale for constitutional regulation of policing, see Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

19. The data are summarized in Stuntz, *supra* note 15, at 1797-98 & n.6.

20. Another result is the rise of private police, which allow the wealthy to pay

problem today given the added demands the war on terrorism has placed on many local police departments.

So how can this budgetary curse be an advantage? The answer is a variant on an old adage: idle hands are the Devil's workshop. When combined with political accountability, budget constraints tend to suppress one of the worst temptations police can have: the temptation to harass those the police do not like, for no reason other than spite or bigotry. It is one thing to abuse a suspect for kicks when the alternative is leisure. It is quite another when the alternative is police work that the public demands (and hence that one's superiors demand as well). In most American cities, there is *always* more police work that the public demands than there is time and manpower to do it. Constrained budgets ensure that that is so. And democratic accountability ensures that the public's demands will be heard, at least to some degree. All of which reduces substantially the amount of gratuitous violence and harassment by local police officers.[21]

But not by FBI agents. Other forces—professionalism and bureaucratic control—are likely to restrain them, but limited budgets are not, at least not to anything like the degree to which they restrain local police. The point is not simply that federal agencies tend to be more flush than local ones, though that is true. The key difference is that while local police have primary responsibility for the mass of crime control, FBI agents have primary responsibility for very little. About 70% of federal criminal cases involve crimes covered by state and federal law alike;[22] just about all of this portion of federal criminal dockets can fairly be called discretionary. And the proportion is actually larger than that: about 20% of federal criminal cases—two-thirds of the exclusively federal portion of the criminal docket—involve immigration offenses,[23] which are

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only for what they use. For the best discussion of this phenomenon, see David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

21. It also means that a disproportionate amount of gratuitous violence and harassment probably takes place outside of large cities, in small towns and suburbs where crime rates are low and police officers have time on their hands.

22. Of the 47,277 criminal cases filed in federal court in 1998, 31,851 fell into one of the following categories: assimilative crimes, i.e., state-law crimes being tried in federal court, theft offenses, drug offenses, violent crimes, and fraud-type crimes. Virtually all of these are crimes at the federal and state levels alike. *See* 1998 SOURCEBOOK, *supra* note 1, at 387-88.

23. *See id.* (showing 10,080 criminal immigration cases filed in 1998).

mostly policed by the INS. To put it simply, local police have a great deal they must do, and little money with which to do it. The FBI has very little they must do (though a lot they *can* do), and a large resource base to work with.

One consequence is that the odds that an innocent man or woman will be the victim of a police vendetta are probably higher when the police officer is a federal agent than when she is a local cop. As, perhaps, are the odds that an innocent is *innocently* railroaded, that the police in good faith get the wrong man. Resource constraints mean that local cops must cut corners, and corner-cutting presumably leads to more errors. But resource constraints also mean that local cops and prosecutors do not have the luxury of going after many weak cases; there are more than enough strong cases to occupy their time. FBI agents and assistant U.S. attorneys do have that luxury, at least to some degree. It may be, then, that there are proportionally more innocent people in federal prisons than in state penitentiaries.

These cross-cutting factors yield no clear bottom line. It may be that a national police force would be better behaved than a host of local ones. Or it may be that the existing system has it right, that decentralized policing coupled with democratic accountability is better than the alternatives. But this much *is* clear: the FBI is less accountable than local police forces, and almost certainly less accountable than it should be. FBI agents also have more freedom to target the wrong people than do local cops—in part because the local cops have primary responsibility for day-to-day law enforcement. If we are to add to the FBI's power, we would do well to worry about those two problems.

II. TERRORISM AND POLICE RESPONSIBILITY

Notice four features of the task—fighting terrorism—that the FBI has been given in the wake of September 11. First, the task is large. It will consume the time of large numbers of agents and a sizable fraction of the Bureau's budget, and these things will probably hold true for some time. Of course, the FBI has dealt with terrorism before; the task is not entirely new. But its scale and scope *are* new. Second, it involves the most serious of crimes. Agents might let mail fraud cases slide for a time, but no one thinks that way about mass murder. Third, it is

preventive. The prime concern is to avoid disasters like the attacks on the World Trade Center, not to investigate and catch the perpetrators after the fact (important as that second goal is). That means failure is more salient than is usually the case with criminal investigations; the public will certainly know when the next attack is successfully carried out. Fourth, the task is functionally exclusive. Again, local police are obviously involved, but it seems equally obvious that federal responsibility is and will be primary. The first three characteristics suggest that the FBI's handling of this class of criminal investigations will be unusually visible. The fourth characteristic suggests that the FBI will be held responsible for what it does and does not accomplish.

Consider how those four characteristics relate to the FBI's two largest structural problems—its relative lack of political accountability and its budgetary freedom. At first blush, accountability seems not to enter into the equation. Nothing about the fight on terrorism changes the basic institutional structure within which federal law enforcers operate; they remain unconnected with any local political constituency—unlike police departments and local prosecutors. But accountability is more subtle than that; the difference between officials who are and are not responsive to the larger public does not simply track the line between those who are and are not elected. With respect to unelected administrators, there are two key factors that promote accountable decision-making.[24] The first is oversight by elected officials and those close to them. The second is publicity, and the consequent knowledge that the public is paying attention to the agency's behavior.

The war on terrorism puts both factors in play. Because the Administration is likely to be held responsible for the war's outcome, it is certain to monitor law enforcement agencies more closely than when those agencies investigate, say, run-of-the-mill white-collar crime. The current Attorney General's identification with the fight against terrorism is evidence of this truth, if evidence is needed. And unlike other sorts of crime that are primarily the job of local law enforcement, here the

24. This is no more than a gross generalization. The literature on the subject is much too large to cite, but for an excellent recent discussion of how federal agencies might be made more accountable, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

primacy of federal responsibility is likely to seem clear to the public, hence not easily evaded by federal agents. As for publicity, the extent of the news coverage of anti-terrorism activity since September 11 suggests, unsurprisingly, that the FBI is not flying under the radar. To be sure, a measure of secrecy is common in law enforcement; in anti-terrorism work it is a necessity. But publicity is a necessity too. It ensures that the public knows at least the broad outlines of what public agencies are doing. That kind of publicity is absent from most law enforcement work, and perhaps especially from the kind of work the FBI does. Here, it is omnipresent.[25]

As for resource constraints, the effect of the war on terrorism is both obvious and strong. If the FBI is given primary responsibility for a task that absorbs a large fraction of its manpower and budget—a task that its political superiors and the citizenry as a whole are likely to follow closely, so it cannot be minimized or sloughed off—all *other* tasks agents perform must meet a higher threshold in order to justify their costs. Vendettas, even simple misjudgments, become much more costly. To see the point, compare Kenneth Starr-style independent counsels with ordinary district attorneys. The former had functionally unlimited budgets with no clear responsibilities (they were always free not to prosecute their targets). The latter face the opposite conditions—sharply limited budgets with a wide range of responsibilities. It is no mere coincidence that the central complaint about independent counsels was their tendency to go overboard, to make mountains out of molehills. That is a natural tendency for law enforcers who face no opportunity cost. District attorneys behave very differently—they may do many things wrong, but they are exceedingly unlikely to spend months or years pursuing high-profile targets on puffed-up charges, because they do not have the time or the manpower to do so. One way to sum up the likely effect on the FBI of what happened on September 11 is this: the opportunity cost of agents' time will

25. Publicity and oversight work together when the public demands a certain degree of transparency. There is evidence that, in this setting at least, it does. While a large majority of the citizenry approves of tactics like extended detention of aliens who are suspected of terrorist activity, a small majority—but still a majority—disapproves of trials by secret military tribunals. *See* Robert Toner & Janet Elder, *Public is Wary But Supportive On Rights Curbs*, N.Y. TIMES, Dec. 12, 2001, at A1.

rise (and has risen) sharply. Today, FBI agents are much less like independent counsels and much more like district attorneys than they were a few months ago. Notice that now, the FBI calls on local police to help in its antiterrorism work; before September 11, local police departments called on the FBI to do *their* jobs. The fact that the FBI is now a supplicant, where before it was the agency to which supplicants came for relief, suggests a large change in the degree to which it feels constrained by the tasks it must perform. The likely upshot is better law enforcement and less misconduct in the universe of cases that fall *outside* the Bureau's anti-terrorism work.

What about the cases *inside* the anti-terrorism universe? There is certainly reason to worry: ethnic targeting of suspects, pretextual seizures, illegal detentions—these things seem to be happening in depressingly large quantity. For anyone troubled by them, it is hard to believe that this growth in the FBI's power is an improvement.

The question, though, is improvement relative to what? The counter-factual is hard to imagine, but suppose local and state police were doing the work the FBI is doing now. Does anyone think that the level of any of the three things mentioned in the preceding paragraph—discrimination, pretextual seizures, and illegal detentions—would be much lower? It seems far more likely that the problems we see are the inevitable reaction of *any* police agency to terrorist attacks on the scale of those that struck New York and Washington. Democracy, after all, is not much of a check when the voting public is calling for blood.

Actually, the kind of accountability the FBI enjoys may be, in this instance, an improvement on democracy. Anti-terrorism operations (and not just the ones in Afghanistan) are the subject of constant news coverage—it is hard to think of a time when any aspect of criminal law enforcement has received such sustained attention from the national press. Abuses are happening, and no doubt there will be more, but they are not likely to happen in secret, at least not often. Voters may be willing to tolerate a lot of abusive policing if it can be justified as part of the war on terrorism. But they are probably less likely to tolerate abusive policing they know about than the kind that is kept safely under wraps. (It helps that journalists probably care more about the abuses than does the public: this is one area where media bias is a useful regulatory tool.) In this

setting, the press—the kind of scrutiny that large news organizations can bring to bear, and with it the exposure to public embarrassment and scandal that such scrutiny threatens—may be the best regulator of policing we have available.

In short, before September 11 the federal government's role in criminal law enforcement offered the rare combination of large opportunities with very little responsibility. Federal criminal law and state criminal law mostly cover the same ground. The public treats almost all of that ground as the job of local police and local prosecutors. For the most part, federal officials get to pick the cases they want, and no one has a strong incentive to monitor what cases they pick or how those cases are handled. The war on terrorism has changed all that. The sphere of federal responsibility is now both larger and much more visible. By raising the opportunity cost of FBI agents' time, this new war on crime has also reduced agents' freedom to follow whatever investigative paths might appeal to them. Less opportunity, more responsibility, and more visibility—these may turn out to be large gains in terms of protecting the public against the worst kinds of law enforcement abuses.

III. CONCLUSION

Institutional allocation is not the prime issue in the war on terrorism. What we should—and should not—do by way of fighting terrorists is vastly more important than which agencies should do it. And I have had nothing to say about that vastly more important question.

But while other questions loom larger now, institutional allocation may just be the prime issue when it comes to the sensible regulation of criminal law enforcement. If so, it is an issue that has been too little examined. A lot of attention has been paid to various sorts of police behavior and how they ought to be regulated, but very little attention has focused on the "who" question in criminal law enforcement. That is a large mistake, for who performs a given police task has a large effect on how that task is performed. Local police and federal agents each have their own advantages and disadvantages. It makes sense to pay attention to the differences when allocating large tasks, like the fight against terrorism, to one or the other.

In the past, almost all law enforcement tasks have been allocated to both—with primary responsibility placed on the shoulders of local police and prosecutors. The result has been local agencies constrained by budgets and politics and accountable for their behavior, and federal agencies that are neither accountable nor constrained. The war on terrorism will change that. Not on the local side—the likely effect on local police is even more constraint, as (for example) officers devote time and energy to guarding public spaces that were previously left unguarded, thereby putting more pressure on the many other things local police must do. The larger change is likely to focus on the federal government: because of the domestic half of this new war, federal law enforcement will be, and probably already is, both less able to pursue cases for wrong reasons and more attentive to the public's needs and concerns. That should make for better federal law enforcement. Even if the prediction proves wrong, it should tell us something about how different institutional arrangements might work in the sphere of policing. A small thing, perhaps, compared to questions about the scope of civil liberties or the degree of public safety in the face of massive threats. But in the end, the policing of police is not such a small thing, for this or any other society. And in such an important sphere of activity, even small gains are worth achieving.