The Demise of Community Policing? The Impact of Post-9/11 Federal Surveillance Programs on Local Law Enforcement

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Abstract

Police reform over the past thirty years has been guided by the philosophy of “community policing,” or the theory that police departments overcome poor community relations by engaging in initiatives that build mutual trust. The advent of the War on Terror brought about the intermingling of federal policing initiatives with local law enforcement. The clashing goals of federal and local police entities undermine local police goals and reformation initiatives based on “community policing.” Using San Francisco as a case study, I argue that overbroad surveillance and information gathering by local police fundamentally undermines trusting relationships between police and the community. I also maintain that police legitimacy depends in part on procedural fairness. Therefore, to the extent the police engage in surveillance practices without clear standards, oversight, and accountability, they are perceived as being less legitimate in the eyes of the community. This, in turn, undermines the trust-building goals of community policing.

INTRODUCTION

Over the past thirty years, “community policing” has been proclaimed the most significant and progressive reform in policing philosophy.¹ Widely embraced since the 1980s as a solution to poor police-community relations, community policing stresses a move away from paramilitary organizational structures and police isolation from the community, and toward a rehabilitated role for the police, including greater trust building

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between police and community members in order to resolve persistent violence and crime.\(^2\) Community policing became official federal policy with the passage of the 1994 Crime Bill, and remains the dominant model of police reform today.\(^3\) Two decades after its national inception, community-policing initiatives have sprung up all over the country in urban, suburban, and rural police departments.\(^4\)

However, as more local police departments are engaged in efforts to build horizontal police practices that engender trust within the communities they serve, the federal policing environment has been changed dramatically by the War on Terror, and has since moved away from formal community policing—embracing top-down policies that undermine community confidence.\(^5\) Federal police agencies like the Federal Bureau of Investigation (FBI) and the Department of Homeland Security (DHS) have shifted their priorities from crime fighting to pre-emptive, non-criminal intelligence gathering on certain communities, and have encouraged local police departments to do the same.\(^6\)

Nevertheless, both local and federal law enforcement officials continue to espouse the community-policing rhetoric and agree that police-community trust remains vital to the success of policing efforts, including the prevention of terrorism.\(^7\) Yet, empirical research has found that post-September 11th federal counterterrorism efforts, and particularly pre-
emptive surveillance, have had the opposite effect: they have led community members to fear federal police. This research, conducted by the Vera Institute of Justice between 2002 and 2005, concludes that the communities most impacted by post-September 11th policing initiatives (namely, Arab Americans) harbor significant “goodwill” towards local law enforcement, but have less positive feelings about federal law enforcement—citing suspicion and fear of federal police, due in part to preemptive intelligence-gathering practices.

Since the time of Vera Institute’s research, federal intelligence-gathering policies have grown more intrusive, and an increasing number of local police departments have become voluntarily implicated in these initiatives. While the theory behind combined federal-local counterterrorism efforts is that vital intelligence can emerge from trusting relationships between local police and the communities they serve, the entanglement of local and federal police has the ironic potential to undermine this confidence and incite community outrage. Rather than facilitating mutual trust, the increasing confluence between federal and local authorities has undermined the nearly three decades of local community policing reform, which has played a positive role in the fight against violent crime, including terrorism.

This Article examines the recent growth in joint federal and local surveillance programs and what happens to local policy when it becomes entangled with federal counterterrorism initiatives. Primarily, I argue that the federal focus on unpredicated, “pre-emptive policing” destabilizes the mutual trust that is fundamental to the letter and spirit of local community-policing reforms. In Part I, I use San Francisco as a case study for this national trend. I describe the history of both community policing and surveillance in San Francisco and highlight the San Francisco Police Department’s role in two little understood joint federal-local

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9. Id. at 21.
10. See Berman, supra note 5, at 5, 17–22. For example, in December 2008, Attorney General Mukasey issued new Attorney General Guidelines governing FBI surveillance activity. These guidelines, discussed later in this Article, have been widely criticized for creating a new type of investigation, “assessments,” that can be opened without any factual predicate. Such “assessments” permit FBI agents and informants to spy on religious services and political gatherings; to question family, friends, neighbors, and coworkers of an investigative target without revealing that they are FBI agents; and to engage in 24-hour physical surveillance of targets. Id. at 22. As I later discuss, local law enforcement officers assigned to the FBI’s Joint Terrorism Task Force often abide by these loose federal guidelines to guide their activity, rather than the more restrictive local policies governing surveillance.
counterterrorism programs: the FBI’s Joint Terrorism Task Force (JTTF) and the DHS’s Suspicious Activity Reporting Initiative (SAR Initiative). In Part II, I contend that while local law enforcement officers should continue to play a role in the fight against terrorism, they must remain accountable to the communities they serve and gather intelligence only where clear guidelines and oversight mechanisms are in place. In making this argument, I draw on the extant literature on procedural justice and maintain that under current arrangements, federal-local surveillance partnerships limit the legitimacy of local law enforcement in the community, and by extension, the success of counterterrorism efforts. Due to its unique history of community policing and intelligence reform, the case study of San Francisco offers an important lens on the post-September 11th policing environment.

I. CONTEXT

A. History of Community Policing Reform in San Francisco

The San Francisco Police Department (SFPD) began its community-policing reforms as early as 1989, when the Mission District Station instituted a beat (or foot) patrol encouraging officers to form connections with the communities they served. 12 Nationally, this method was seen as a particularly important change in policing low-income neighborhoods and communities of color where residents perceived the police to be an occupying army and were sometimes reluctant to cooperate with investigations. 13 Despite the success of community-policing efforts throughout the country in the 1990s, subsequent efforts in San Francisco to mandate such reforms were met with repeated resistance. In 2006, for example, a pilot program to institutionalize foot patrol requirements was rejected by the city’s chief of police, who cited budget constraints. 14 Four years later, in 2010, San Francisco voters struck down a ballot measure to require an SFPD written policy on community policing. 15

Finally, in March 2011, amid concerns about rising homicide rates and diminishing community trust, and after a decades-long debate on what

13. Id.
formal community-policing reforms should take hold in the SFPD, Supervisor David Campos introduced legislation to make community policing as a crime-fighting strategy part of San Francisco City Code.\footnote{Joshua Sabatini, Community Policing in San Francisco Could be More Defined by Legislation, S.F. EXAMINER (Mar. 3, 2011), http://www.sfexaminer.com/local/2011/03/community-policing-san-francisco-could-be-more-defined-legislation.} The legislation embraced the “community” element of community policing, mandating foot patrols, community working groups, community training for officers, and a lieutenant focused on community relations at each station.\footnote{Rachel Gordon, Community Policing Hot Topic at S.F. Meeting, S.F. CHRONICLE (Mar. 11, 2011), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/03/10/BAUQ18HN.DTL.} The legislation also urged the chief of police to create a Department General Order (DGO), approved by the Police Commission, to capture the spirit of community policing and integrate it into the mandatory rules and regulations followed by all SFPD officers.\footnote{See Board of Supervisors City and County of San Francisco, Agenda (Mar. 1, 2011), available at www.sfbos.org/index.aspx?page=11582.}

Less than a year later, in October 2011, the Police Commission of the City and County of San Francisco passed a DGO charging the police department to commit to community policing. DGO 1.08 defines “community policing” as: “[A] philosophy and organizational strategy in which the police work collaboratively with community members, community-based organizations, other city agencies, and others, in order to reduce violent crime, create safer communities, and enhance the health and vibrancy of neighborhoods in San Francisco.”

Similar to efforts across the country, the San Francisco Community Policing DGO places strong emphasis on “mutual respect” and working together with communities to create a more harmonious relationship between the police and the public.\footnote{S. F., CAL., Police Department General Order 1.08, Community Policing (Sept. 28, 2011), available at http://www.sf-police.org/modules/ShowDocument.aspx?documentid=24722.}

Today, an ongoing battle over the role of the SFPD in federal surveillance programs complicates the promise of this Community Policing DGO. While the SFPD adopted the rhetoric of community policing, its actions continue to endorse pre-emptive intelligence-led policing. When the chief of police presented DGO 1.08 to the Police Commission during a public hearing, community members pointed out this contradiction—applauding the rhetorical move towards community policing, but criticizing the SFPD involvement in federal surveillance initiatives, which runs contrary to the stated goals of the general order.\footnote{See Video: Public Comment from Police Commission Meeting (Sept. 28, 2011), available at http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=21&clip_id=13252.}
B. History of Police Surveillance in San Francisco

San Francisco’s long history of police surveillance broadly reflects the account of political surveillance throughout larger cities in the United States during the latter half of the twentieth century. In fact, congressional investigation into federal intelligence abuses in the mid-1970s revealed that some of federal law enforcement’s most notorious surveillance episodes involved local police agencies. In 1976, an investigation by the Church Committee (formally known as the U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities) uncovered widespread excesses and intelligence abuses among federal government intelligence agencies during the prior two decades. The investigation also revealed efforts by federal agencies to dodge criticism for their use of covert techniques by delegating the surveillance efforts to local law enforcement agencies.

To deal with the local surveillance abuses, local governments spent the next few decades reforming their intelligence units, often instituting procedural standards that prohibited investigations of persons or groups without a sufficient link to suspected criminal violations. As a result of these reforms, local police agencies like the SFPD were only able to engage in intelligence gathering with procedural safeguards and oversight in place. In the post-September 11th policing environment, at least one scholar bemoans this era of reform as reflecting “intelligence atrophy at the local level.”

In San Francisco, one of the most significant reforms to protect San Franciscans from overbroad police surveillance was enacted in 1990, following decades of police scandals involving SFPD officers spying on individuals based on their racial and ethnic backgrounds and/or political activities. This long history of scandals prompted the San Francisco Police Commission to pass a policy, now known as Department General Order 8.10, requiring that any investigation on an individual or group engaged in First Amendment-protected activity be based on a standard of reasonable suspicion of criminal activity. Rather than representing “intelligence

28. See id.; S. F., CAL., Police Department General Order 8.10, Community Policing (Oct. 1, 2008). Prior to the passing of the DGO, San Francisco communities fell victim to significant police
atrophy,” the requirement that police investigators articulate “reasonable suspicion of criminal activity” before initiating surveillance embraces a proven “best practice”—one that helps deter targeted surveillance based on racial and ethnic characteristics instead of criminal behavior.29

However, while the initial version of SFPD’s new intelligence policy ranked among the strongest in the nation, in the absence of proper oversight, it failed to prevent a new crop of scandals involving SFPD intelligence officers from unfolding in 1993. The scandals included: admission by SFPD Chief of Police Anthony Ribera that files on non-criminal political activity had not been destroyed as required by the intelligence reform;30 the published allegation by a police source that several SFPD intelligence officers had transferred files to their home computers to evade the policy reforms;31 the selling of confidential intelligence material to foreign governments and the sharing of this information with non-law enforcement, private entities;32 SFPD Inspector Tom Gerard’s entanglement with the FBI (swapping intelligence information, sharing an informant, etc.);33 and a published threat from Inspector Gerard that he would expose CIA involvement in Central American death squad activity if he was aggressively prosecuted for his role in the scandals.34 Many of the revealed intelligence files had been collected without reasonable suspicion of a crime, instead targeting legitimate First Amendment-protected political activity based on “suspect” racial and ethnic identities. Arab Americans and other San Francisco activists who had been fighting apartheid in South Africa and the U.S. interventions in Central America were informed by letter that they had

scandals for much of the 20th century. In the 1970s, the SFPD Intelligence Unit revealed that it still had files on 100,000 individuals—some dating back to the 1930s. The files included “actors and actresses who were questioned during the McCarthy era, members of the Wobbles, civil rights demonstrators, anti-war activists . . . protestors from San Francisco State . . . as well as the department’s entire ‘red file.’” Carol Pogash, Intelligence Units Sifting Garbage from its Files, S.F. EXAMINER, Apr. 23, 1975. Then, in the 1980s, more police surveillance scandals erupted, including a number of examples of abusive or overbroad SFPD intelligence practices aimed at groups peacefully exercising their First Amendment rights are exposed. See Sarah Phelan, Spies in Blue, S.F. BAY GUARDIAN, Apr. 26, 2011, at P1.

29. See, e.g., Peter Modafferi & Phil Lynn, Local Law Enforcement and Intelligence Led Policing, in INTELLIGENCE MODELS AND BEST PRACTICES 17–18 (IALEIA ed. 2009); see also Fighting Police Abuse: A Community Action Manual, ACLU.ORG (Dec. 1, 1997), http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/fighting-police-abuse-community-ac. To end “police spying,” the ACLU manual recommends a model in which police can only initiate investigations if there is reasonable suspicion of a crime and in which there is an independent police auditor to ensure that this standard is honored. Id.


32. Id.

33. Id.

SFPD intelligence files on them, though most of these files were later sealed by court order. 35

In response, the San Francisco Police Commission further strengthened the civilian oversight and auditing requirements of intelligence gathering around First Amendment-protected activity and the chief of police disbanded its intelligence unit. 36 As a result, SFPD officers who subsequently engaged in surveillance not only had very clear procedural guidelines, but were also under the watchful supervision of their superiors, civilian police commissioners, and the public, who had access to the independent, public audit of their activities. Intelligence activities by the SFPD (and civilian oversight of these activities) progressed uninterrupted, without public scandal or heightened community concern, for seventeen years under the newly fortified procedural policies of DGO 8.10. 37 It was not until 2010 that the San Francisco public and media revisited the possibility of untoward police surveillance activity by the SFPD, in light of its involvement with federal surveillance programs.

C. Changing Mandates: Federal Programs & Non-Criminal, Unpredicated Intelligence Gathering

The September 11th attacks and subsequent national security concerns have fundamentally altered the structure and priorities of federal law enforcement. In addition to undergoing significant organizational changes, the federal government has expanded the resources and legal authorities directed at pre-emptive intelligence gathering. 38 Unlike local law enforcement agencies, whose goal remains to prevent and solve neighborhood violence and crime, the post-September 11th federal law enforcement goal has shifted to detecting and preventing another act of terrorism. 39 The resulting emphasis on intelligence collection and coordination contemplates a growing role for local law enforcement agencies, where potential intelligence is perceived to reside. 40

Indeed, soon after the September 11th attacks, the U.S. Departments of Justice and Homeland Security sent a half billion dollars to the states to

40. RILEY ET AL., supra note 6, at ix–xi.
enhance local and state intelligence operations, and to improve local law enforcement agencies’ capacity to respond to any potential future attack.41 “Terrorism preparedness” has meant increasing the size of dedicated intelligence staff in local law enforcement agencies.42 New York City’s law enforcement, for example, has dedicated more than one hundred officers to the FBI’s Joint Terrorism Task Force, posted detectives overseas, and devoted half of the time of over seven hundred investigators to counterterrorism.43 In San Francisco, the transformation was not as dramatic, but the SFPD did join the FBI’s JTTF, after previously refusing. Since joining, the SFPD has assigned two officers to the task force under an agreement that places the officers under the direct supervision of the FBI and obligates them to follow federal law.44

Another example of the increased role of local law enforcement in federal surveillance came with the passage the Intelligence Reform and Terrorism Act (IRTA) by Congress in 2004.45 IRTA mandated a restructuring of intelligence-gathering institutions and called for the creation of an “Information Sharing Environment” to facilitate the exchange of terrorism-related information among federal, state, and local agencies, as well as the private sector.46 Subsequently, the Department of Homeland Security created the “Suspicious Activity Reporting (SAR) Initiative” to populate the Information Sharing Environment.47 The SAR Initiative has trained thousands of local law enforcement agents to engage in surveillance of specific, mostly non-criminal behavior, record the information, and channel it to their local DHS-funded Fusion Center, where the information is vetted and then shared nationally.48 Some argue that the SAR Initiative has reinvigorated racial and political profiling by local intelligence units by encouraging local officers to report “suspect” behavior, even when that behavior does not give rise to reasonable suspicion of a crime.49

Federal police agencies like the FBI and DHS have usurped the language of “community policing” to describe the terms of their federal-local collaborations, in attempts to allay concerns about community impact.50 However, a closer look at these programs reveals basic violations

42. Id.
43. Id. at 28–29.
44. Phelan, supra note 28, at P2.
45. Cincotta, supra note 41, at 25, 73, 86.
46. Id. at 25.
47. Id. at 87.
49. Id.; see generally Cincotta, supra note 41.
of community-policing reforms. The joint programs often seek “community engagement,” but the programs have used the engagement as a vehicle to target particular communities based on racial and ethnic characteristics and record massive amounts of non-criminal information on community members.\footnote{51}

For example, in San Francisco, internal FBI documents obtained through a Freedom of Information Act request revealed that the FBI’s JTTF officers have been attending meetings at mosques and other community organizations under the guise of “community outreach,” while recording information about the attendees’ political and religious affiliations in violation of the Privacy Act.\footnote{52} Civil rights attorneys throughout the San Francisco Bay Area report that they have represented dozens of innocent Americans in cases where local law enforcement officers, deputized to the FBI’s JTTF, approached them without any suspicion of criminal activity, only to ask about their lawful religious and political activities.\footnote{53} A Center for Investigative Reporting examination of the SAR Initiative also reveals the creation and indefinite retention of local law enforcement “suspicious reports” on innocent people. One victim, a Pakistani-American business owner, reviewed a report made on him and told reporters, “It shattered an image of the U.S. that I had, fundamentally. I don’t know, especially when I saw some of these reports. It’s definitely bothersome, how small things can just, you know, trickle up that quickly, and all of a sudden you’re labeled.”\footnote{54}

The JTTF and SAR Initiative reflect an emerging pattern across the country. A 2005 national study conducted of local law enforcement agencies found that at least two-thirds of the local agencies sampled since September 11th had received guidance from the FBI as to what type of information they should collect and pass on to the FBI field offices or to

\footnote{51}{To illustrate, from 2009 to 2011, FBI agents opened over eighty-two thousand investigations on individuals and groups that did not require a criminal predicate. Savage, supra note 39.}


the JTTFs. Almost half of these local law enforcement agencies reported that they either formally coordinated with or were an official member of at least one terrorism-related task force. Communities in cities across the country have expressed growing fear that this widespread local participation in federal surveillance programs might turn back the clock, resulting in the violation of basic civil rights and civil liberties. For example, in 2005, the police chief-turned-mayor opted the Portland Police Department (PPD) out of the FBI’s JTTF altogether. When the PPD rejoined the JTTF in 2011, community members and civil liberties groups ensured that participation in the JTTF only occurred under local procedural standards and with local accountability. Similarly, community members and civil rights organizations in Seattle, Boston, Los Angeles, and San Jose, among other major cities, have spoken out against local law enforcement participation in the DHS’s Suspicious Activity Reporting Initiative, which could create a legal loophole around local surveillance procedural safeguards.

Collaboration between local and federal law enforcement through programs mandating the collection of non-criminal, unpredicated intelligence poses troubling implications for community members unjustly targeted by this surveillance and implicates local police relationships with the communities they serve. The SFPD’s involvement in such federal initiatives and the community response provide an illustrative answer to whether federal programs, like the FBI’s JTTF and the DHS’s SAR Initiative, have the potential to facilitate the collection of useful data in the prevention of terrorism, or whether they alienate communities, disrupting decades of efforts at police reform.

1. The FBI and the Joint Terrorism Task Force

The intelligence deficiencies that failed to prevent the September 11th attacks prompted a revision of the existing intelligence systems and the creation of a domestic security infrastructure that combined the efforts of federal, state, and local law enforcement agencies. In 2002, then Attorney General John Ashcroft announced a dramatic new organizational shift,

55. RILEY ET AL., supra note 6, at 17.
56. Id.
transforming the Federal Bureau of Investigation from a primarily crime-solving entity to a pro-active domestic intelligence agency. To enable this new focus, Congress increased the FBI’s budget, the FBI increased the number of agents devoted to counterterrorism, and Attorney Generals Ashcroft and Mukasey both broadened the Guidelines governing permissible FBI activities.

Historically, the FBI (and its forerunner, J. Edgar Hoover’s Bureau of Investigation) has a long-standing pattern of extensive surveillance, disruption, and smear campaigns against suspected radicals, civil rights organizations, and anti-war groups. Most memorably, in the 1950s and 1960s, the FBI’s now infamous Counter-Intelligence Program (COINTELPRO) monitored and disrupted domestic political organizations and leaders, including Dr. Martin Luther King, Jr.

Following the revelation of such intelligence abuses and a congressional investigation, the Attorney General Guidelines were put in place to regulate FBI behavior. These Guidelines established procedural standards and oversight to ensure that FBI surveillance activities would be conducted with an eye to crime, not First Amendment-protected political activity or racial and ethnic characteristics.

Over time, changes in the Attorney General Guidelines, particularly after September 11th, have expanded the scope of information the FBI is permitted to pursue. Most notably, in December 2008, Attorney General Michael Mukasey issued new Guidelines that authorized “assessments,” or investigative stages preceding a preliminary investigation that do not require a “factual predication.” The Mukasey Guidelines, currently in place, authorize a number of techniques at this pre-textual stage, when no suspicion of criminal wrongdoing is required, including: (1) questioning people while misrepresenting the agent’s identity (2) recruiting informants to surreptitiously attend community meetings; and (3) engaging in surveillance of individuals and their homes and offices.

The Mukasey Guidelines have also abandoned many of the oversight provisions required by prior iterations of the Guidelines. For assessments, the current Guidelines do not require supervisory approval, nor do they

62. Id. at 9.
63. Id. at 10.
64. Id. at 10–12.
66. Berman, supra note 5, at 22.
require a time limit on an assessment’s duration.\textsuperscript{67} The lack of procedural standards and safeguards has resulted in widespread criticism and accusations of political and racial profiling.\textsuperscript{68} In recent years, community groups across the country have complained about the FBI’s surveillance of domestic political advocacy groups and mosques.\textsuperscript{69} An independent audit conducted by the Department of Justice’s inspector general found that the FBI had frequently misused “national security letters,” which allow agents to obtain information like phone records without a court order.\textsuperscript{70}

Further bolstering the growth of the FBI’s investigative powers has been a growth in on-the-ground resources. In June of 2002, the Department of Justice established a National Joint Terrorism Task Force to coordinate the efforts of the local Joint Terrorism Task Forces, self-described as “small cells of highly trained, locally based, passionately committed investigators, analysts, linguists, SWAT experts.”\textsuperscript{71} Across the country, over one hundred JTTF squads are directed by the FBI’s field offices and tasked with preventing terrorism and investigating potential terrorists.\textsuperscript{72} The JTTF’s pool of resources comprises multiple agencies, including local law enforcement agencies that work within the FBI offices and are supervised by the FBI.\textsuperscript{73} The SFPD was one of the many urban police departments across the country to join their local JTTF.

\textit{a. The San Francisco Police Department’s Participation in JTTF}

Unlike most cities, the San Francisco Police Department joined the FBI’s San Francisco JTTF in 2002, only after a public debate and pursuant to a written understanding that all SFPD officers assigned to the JTTF would follow local policy and regulations, instead of the looser federal

\textsuperscript{67} Id. at 17–19.


\textsuperscript{69} In Southern California, for example, public revelations made by a former FBI informant prompted a federal class action lawsuit against the FBI for “infiltrating mainstream mosques in Southern California and targeting Muslim Americans for surveillance solely because of their religion.” See ACLU/SC, CAIR and Hadess Stormer Keeney Richardson and Renec LLp Sue FBI for Illegal Surveillance in the Muslim Community, ACLU OF S. CAL. (Feb. 23, 2011), http://www.aclusc.org/releases/view/103067.


\textsuperscript{73} \textit{Joint Terrorism Task Force Description}, supra note 71.
rules and guidelines. Concerned community members and civil liberties groups were repeatedly assured by the FBI and the SFPD that all SFPD officers who worked within the auspices of the JTTF would adhere specifically to the mandates of DGO 8.10, which requires civilian oversight, written authorization, and reasonable suspicion of criminal activity when investigations are opened on individuals or groups engaged in First Amendment-protected activity.

However, in March of 2010, SFPD Chief of Police George Gascón made two revealing statements that had community members once again questioning their trust in local law enforcement. First, during a breakfast to celebrate a ballot measure to seismically retrofit city buildings, Chief Gascón commented that the Hall of Justice “is susceptible not just to an earthquake, but also to members of the City’s Middle Eastern community parking a van in front of it and blowing it up.”

The comment outraged San Francisco’s South Asian, Arab, and Middle Eastern American residents and reignited concern over racial and religious profiling that many San Franciscans claimed to have experienced at the hands of the police. A coalition of community members and civil liberties organizations swiftly came together to demand an apology. While the group, later named the “Coalition for a Safe San Francisco” (“Coalition”), did receive an apology, a few months later, Chief Gascón announced that he wanted to re-instate the infamous intelligence unit that had been disbanded after the intelligence scandals of the early 1990s.

Taken together, Chief Gascón’s two comments indicated to concerned community members that the SFPD might once again be engaging in targeted surveillance based on political activity and racial and ethnic characteristics.

Fearful that SFPD officers working with federal police were circumventing the mandates of DGO 8.10 altogether, the Coalition filed a California Public Records Act request to obtain the last ten years of audits of SFPD intelligence activity, as required by DGO 8.10. As it turned out, the Public Records Act request revealed that intelligence audits had not been conducted in over three years; in fact, many of the presiding police commissioners were unaware of their intelligence oversight responsibilities. After the Coalition pushed for these audits to be conducted, an analysis of the last eight years of audits exposed that the

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74. Phelan, supra note 28.
77. Phelan, supra note 28.
78. In my capacity as staff attorney at the Asian Law Caucus, I filed these requests on behalf of the Coalition and discovered that the audits had not been conducted for three years, and was told personally by police commissioners that they were not aware of DGO 8.10 and their oversight role.
audits did not capture any intelligence gathering activities conducted by SFPD officers assigned to the FBI’s JTTF.\(^{79}\) The Coalition’s request further uncovered a Memorandum of Understanding between the SFPD and the FBI, which the SFPD had surreptitiously signed in 2007, without public review by the City’s Police Commission or the City Attorney’s office.\(^{80}\) The secret Memorandum of Understanding contained two important clauses: (1) SFPD officers assigned to the JTTF are under the supervision of the FBI and cannot share any information with their superiors at the SFPD or the Police Commission without FBI approval and (2) SFPD officers assigned to the JTTF are obligated to follow federal law and policy, not local law and policy.\(^{81}\)

After numerous complaints from community members to the San Francisco Human Rights Commission and the Police Commission about racial and ethnic profiling by FBI-JTTF officers, advocates from the Coalition for a Safe San Francisco pushed for the SFPD to opt out of the FBI-JTTF Memorandum of Understanding.\(^{82}\) At two different hearings held at the behest of the Coalition, one before the Human Rights Commission and one jointly before the Police Commission and the Human Rights Commission, community members described how the SFPD’s involvement in the FBI’s JTTF under loose federal guidelines and without local oversight had diminished their faith that the SFPD could adequately protect them and their communities. One community member, an Indian American board member of a San Francisco mosque, stated that his congregation was fearful of the FBI and was becoming increasingly mistrustful of the SFPD as well.

The issue became so watched that at his inauguration, the newly minted SFPD Chief of Police Greg Suhr noted to reporters that it was of utmost importance to him that SFPD officers assigned to the FBI’s JTTF follow local laws and policies, not federal guidelines.\(^{83}\) However, despite these public assurances, the SFPD continued to operate under the 2007 Memorandum of Understanding.

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\(^{79}\) Along with John Crew of the American Civil Liberties Union of Northern California, I analyzed the audits to discover that no SFPD-JTTF activity was captured.

\(^{80}\) Phelan, supra note 28.

\(^{81}\) Standard Memorandum of Understanding Between the Federal Bureau of Investigation and the S.F. Police Department (2007) (obtained on April 4, 2011, through a California Records Act request to the City and County of S.F.).

\(^{82}\) See, e.g., COMMUNITY CONCERNS OF SURVEILLANCE, supra note 36.


> I think we have a real good policy with regard to our intelligence gathering and that does supersede [sic] any ask of any other agency. The officers are bound by policies and procedures. And that policy was well thought out with tremendous community and group input years and years ago, from situations that have not since repeated themselves. I think a lot of people back then couldn’t believe they happened in the first place, but I think measures were well thought out and put in place to make sure we don’t have a problem again.

Id.
Memorandum of Understanding. After spending months meeting with the SFPD and the Police Commission to change the terms of the Memorandum, the Coalition stopped engaging the police department altogether, going instead to the Board of Supervisors to create an official city ordinance to set parameters for the SFPD’s participation in the FBI’s JTTF.84

This legislation, which established concrete parameters for the SFPD’s participation in the activities of the FBI’s JTTF and other federal counterterrorism activities, was introduced in January 2012 in front of City Hall, to the fanfare of community members. Most pertinently, section B of the legislation provides:

The San Francisco Police Department’s (“SFPD”) participation in the FBI’s JTTF must be consistent with state and local law, as well as policies established by the Police Commission and Chief of Police to ensure the protection of civil liberties and civil rights, avoid profiling, avoid use of City staff and resources in federal immigration enforcement, uphold supervision and accountability procedures to provide for consistent application of SFPD’s standards, guarantee civilian oversight, provide transparency consistent with the nature of the SFPD’s mission, and enhance public confidence.85

While the mayor had initially threatened to veto the legislation, a compromise legislation was introduced and ultimately signed into law.86 The historic civil rights ordinance, crafted with substantial community input, provides a balanced model by which local law enforcement can play an important role in counterterrorism intelligence activities while remaining accountable to community policing principles and values.

2. The DHS’s Suspicious Activity Reporting Initiative

Another rapidly growing example of local law enforcement involvement in federal surveillance activities involves the Department of Homeland Security (DHS). The DHS, itself a result of a post-September 11th restructuring of the federal government, is responsible not only for immigration enforcement and border patrol but has also moved into the business of surveillance. As part of its venture into intelligence gathering, the DHS has established seventy-two “Fusion Centers” throughout the United States.87 These DHS-funded Fusion Centers collect massive amounts of criminal and non-criminal information and bring local law

84. S. F., CAL., Ordinance 120046 (Jan. 9, 2012) (amending the Administrative Code by adding § 2A.84).
85. Id. (emphasis added).
87. CINCOTTA, supra note 41, at 26–27.
enforcement agencies and users of intelligence data into a national information-sharing network.\(^{88}\) The DHS’s National Suspicious Activity Reporting Initiative trains federal, state, local, campus, and tribal law enforcement agencies to “fight terrorism” by collecting “suspicious activity reports” and feeding them into a Fusion Center.\(^{89}\) If a SAR report is determined to have a “potential nexus to terrorism,” the information is sent upward into the “Information Sharing Environment,” where it is shared nationally by federal, state, and local agencies and may result in an FBI JTTF investigation.\(^{90}\) Because the Fusion Centers do not have investigative capacity themselves, they rely on local law enforcement agencies for intelligence gathering through suspicious activity reports.\(^{91}\) Alarming, these so-called suspicious behaviors include legal activities, introducing a subjective element into reporting. Civil rights proponents have argued that this leeway risks the influence of bias.\(^{92}\)

After initially struggling to define “suspicious activity,” federal homeland security officials issued a set of standards in 2009 that included the following definition: “[o]bserved behavior reasonably indicative of preoperational planning related to terrorism or other criminal activity.”\(^{93}\) The SAR Initiative established national standards to assess such “suspicious activity,” with a uniform system for sharing and searching SAR-based data and new measures to increase the production and sharing of SAR Reports by more policing agencies.\(^{94}\) The U.S. Department of Justice reported that by the second quarter of 2011, over 18,000 local and state law enforcement agents had been trained to report suspicious activities, including legal activities that could signal “pre-operational surveillance” by terrorists.\(^{95}\) The activities that local law enforcement agents, including SFPD officers, were trained to report include: (1) Taking pictures or video of a facility or surrounding environment; (2) Showing unusual interest in a facility, for example, “observing it through binoculars, taking notes, drawing maps, or drawing structures of the facility”; and (3) “Monitoring the activity of people, facilities, processes, or systems.”\(^{96}\)

The reporting of these potentially innocuous, non-criminal, First Amendment-protected behaviors to shared federal-local law enforcement databases, where they can prompt the opening of FBI investigations, has

\(^{88}\) Id. at 27.
\(^{90}\) CINCOCCA, supra note 41, at 27, 86.
\(^{91}\) Id. at 27.
\(^{92}\) Id. at 40–41.
\(^{93}\) Schulz & Becker, supra note 48.
\(^{94}\) Id.
\(^{96}\) CINCOCCA, supra note 41, at 48.
raised the ire of civil liberties groups, members of Congress, and community members across the country. Critics have argued that too much discretion is accorded to individual law enforcement officers in deciding when an activity is "suspicious" and when an individual's private information and activities should be collected and stored. Some have argued that the initiative distracts local police officers from their role to "protect and serve" their communities, and instead turns them into intelligence agents, whose job it becomes to feed information on innocuous behaviors into the data streams of federal agencies, opening the door to racial and ethnic profiling. The number of such reports is not negligible; rather, the high reportage rate suggests a shift in the direction of local law enforcement activities and duties. Currently, more than fifteen-thousand suspicious activity reports are available to law enforcement officers and analysts through one national computer network.

a. The San Francisco Police Department’s Participation in the SAR Initiative

In 2011, the San Francisco Police Department reported that hundreds of its police officers have been trained in observing suspicious activity and reporting that information to the regional Fusion Center, the Northern California Regional Intelligence Center (NCRIC). Notably, advocates and community members were only alerted to this fact after the trainings took place. Since then, many have argued that SAR reporting can fuel anxiety and create a chilling atmosphere in which people who seem different are targeted for extra attention.

In an interesting twist, the Department of Homeland Security has tried to integrate a “community policing” philosophy into the SAR Initiative by recommending that local agencies hold a “Building Communities of Trust” event for their local communities to get input into the initiative, before sending SAR reports to their local Fusion Center. Yet in San Francisco, the Building Communities of Trust event did not happen until after the SFPD had been involved in the SAR Initiative for over two years. At the event, civil rights and other community leaders expressed grave concern about the project.

An advocate from the American Civil Liberties Union
of Northern California pointed out that NCRIC’s privacy policy conflicts with the California Attorney General Guidelines on how non-criminal identifying information should not be stored nor retained. A civil rights attorney from the Asian Law Caucus pointed out that allowing for police to collect information on non-criminal activity conflicted directly with state and local policy requiring “reasonable suspicion of criminal activity” before such information is collected. A representative from the local National Association for the Advancement of Colored People (NAACP) chapter expressed concern about profiling and what this program would do to efforts to build closer police-community relations. While the SFPD chief of police listened to the community concerns, no public changes have been made in how the SFPD interfaces with the SAR Initiative and NCRIC, the local Fusion Center.

II. ANALYSIS

Police reformation over the past thirty years has been primarily guided by the philosophy of “community policing,” whereby local police departments overcome poor community relations by enacting initiatives that build mutual trust. These initiatives have “represent[ed] the most serious and sustained attempt to formulate the purpose and practices of policing since the development of the ‘professional’ model [of policing] in the early twentieth century.”¹⁰⁴ Moving away from the limitations of a reactive stance towards crime control, community policing stresses the importance of community relations and responsiveness to prevent and solve crime.¹⁰⁵ While no single definition or model of community policing exists, the strong emphasis on building “mutual trust” between community members and the police is ubiquitous.

Over the past ten years, the advent of the War on Terror has highlighted the differences between “community policing”—the model adopted by many local law enforcement agencies—and “intelligence-led policing”—the theoretical underpinning of many federal policing programs, including the FBI’s JTTF and the DHS’s SAR Initiative. In contrast to the “mutual trust” emphasis of community policing, intelligence-led policing emphasizes preventative surveillance to achieve crime reduction. Again, there is no agreed upon model of intelligence-led policing, and scholars and police professionals disagree as to whether the two policing models are incongruent and conflicting, or potentially complementary.¹⁰⁶

¹⁰⁴ Murray, supra note 1, at 349.
Using San Francisco as a case study, I argue that the impacts of federal surveillance initiatives and their “intelligence-led” policing model on local law enforcement’s goals of crime prevention and community policing have been two-fold. First, federal surveillance initiatives such as the JTTF and SAR Initiative undermine the spirit of “community policing” because they circumvent important procedural safeguards that prevent targeted surveillance of innocent individuals based on non-criminal indicators, such as racial and ethnic identities and/or First Amendment-protected activities. Second, I maintain, as the empirical research suggests, that procedural fairness and police legitimacy are interlinked; thus, police engagement in practices that do not have clear standards, oversight, and accountability are perceived as less legitimate in the eyes of the community. This lack of legitimacy destabilizes the trust-building goals of community policing, and may hinder community assistance in combating crime. Therefore, the methodology of surveillance and whether it is conducted with an eye towards the maintenance of community trust are what ultimately determines both the effectiveness of crime prevention and the compatibility of community policing and intelligence-led policing.

A. Unpredicated Police Surveillance Undermines Community Policing

In the post-September 11th policing environment, some scholars have maintained that the heightened intelligence objectives of police necessarily conflict with democratic reforms of the past decades. But many of these proponents simultaneously argue in favor of the role of community-generated intelligence in the prevention of future acts of terrorism. The contradictory values that underlie these conclusions highlight the problematic and ineffective emphasis on unpredicated intelligence collection in the post-September 11th era. If the ultimate goal of police is security, and if community intelligence is essential to that goal, then the move away from the reforms espoused by community policing—namely the establishment of mutual trust—only undermines safety.

Community policing initiatives, like the Department General Order 1.08 recently adopted in San Francisco, support the idea that community safety and the reduction of violent crime are incumbent upon the shared sense of mutual respect between the police and the communities they serve. Intelligence-led policing, on the other hand, relies on the notion that the overbroad collection of information can lead police to act preemptively in the prevention of crime. As David Thacher has discussed and the Vera
Institute research confirms, police surveillance and information gathering may undermine trusting relationships between police and the community. In particular, unpredicated police surveillance—that is, intelligence gathering that is not based on an objective standard such as reasonable suspicion of criminal activity—may make particular communities feel unfairly targeted, thus weakening hard fought inroads in those communities.

Establishing community trust is, of course, much easier said than done. The SFPD DGO 1.08 takes the vital step of formally establishing that, “[c]ommunity [p]olicing requires a transparent and mutually respectful relationship between the police and the community.” The inherently covert nature of police intelligence operations necessitates that in order to abide by the demands of transparency and the maintenance of community respect, these operations must be conducted under clear, objective guidelines and independent oversight. Thus far, the SFPD’s intermingling with the FBI through the JTTF and the DHS through the SAR Initiative has not met these criteria. Not only was the 2007 SFPD-FBI Memorandum of Understanding signed with an utter lack of transparency, but the Memorandum also removed SFPD-JTTF officers from the clear SFPD guidelines mandating that intelligence activity be conducted with an eye to crime, subject to local oversight, and open to public scrutiny through audits. Similarly, the SFPD’s involvement in the SAR Initiative went undetected by the San Francisco public, including civil rights groups, for two years. The SFPD’s creation of SAR reports which are populated by intelligence not necessarily predicated by reasonable suspicion of criminal activity creatively allows for the SFPD to, in some cases, violate their own policies. The tactics of both the SAR Initiative and the FBI’s JTTF are not consistent with the mutual respect norms of community policing.

After decades of intelligence scandals, the strong intelligence policy standards and oversight protocol of SFPD’s DGO 8.10 resulted in over seventeen years of scandal-free intelligence gathering and growing trust between the SFPD and the local Arab-American community—a relationship that had been severely damaged after the scandals of the early 1990s. The coordinating and overlaying of federal surveillance programs with the SFPD’s own policies have swiftly undermined this trust. San Franciscans, from storeowners to students, have complained to community

109. See David Thacher, The Local Role in Homeland Security, 39 LAW & SOC’Y REV. 635, 638 (2005) (discussing the competing concerns of police harassment and crime control); see also HENDERSON ET AL., supra note 8, at 10–23 (finding, for example, that although Arab American community members reported increases in hate victimization, they expressed a greater concern about being victimized by federal policies and practices).

110. S. F., CAL., Police Department General Order 1.08, Community Policing (Sept. 28, 2011) (emphasis added).

111. In SF: Community and Civil Rights Groups Oppose Secret Agreement, supra note 37.
organizations and the San Francisco Police Commission that local law enforcement officers assigned to the JTTF have approached them for questioning about their political and religious beliefs. For example, one law-abiding university student received a call on his cell phone from an individual claiming to be an FBI agent. He agreed to meet the officer, who was a local law enforcement officer assigned to the FBI’s JTTF, and answered questions such as, “Why did you come to America from Yemen?” “At what mosque do you worship?” “What do you think of what is going on in Yemen?” “Do you know anyone who would want to harm the U.S.?” The student did not know how the officer got his cell phone number or why he was singled out for an interview, but he conveyed that this experience is very common in his community.\footnote{112}{This individual, my own client, consented to the sharing of this story and asked to remain anonymous.}

Other San Franciscans have expressed fear that when they engage in First Amendment-protected activities, like taking pictures of the Golden Gate Bridge, or writing notes during a conference, they may be deemed “suspicious” by SFPD officers and placed into a shared federal intelligence database, only to be visited by the FBI later.\footnote{113}{These sentiments were expressed at the San Francisco Building Communities of Trust event as well as during extensive public comment at the September 23, 2010 San Francisco Human Rights Commission hearing, the May 18, 2011 joint San Francisco Police Commission and Human Rights Commission hearing, and the March 1, 2012 Board of Supervisors Public Safety Committee hearing. Additionally, in my capacity as staff attorney at the Asian Law Caucus, I did extensive outreach in San Francisco’s South Asian, Arab, Middle Eastern, and Muslim American communities and often represented individuals who feared that their legal activities were unjustly scrutinized by law enforcement.} The SFPD’s shift to unpredicated, pre-emptive intelligence policing has inflamed community concerns about harassment and profiling, and sends the message that some community members are suspect based solely on their racial or ethnic identities and non-criminal political activities.

As John Murray has argued, “[t]o exclude or isolate any subgroup from a community policing service amounts to more than failing in a civic duty—it also ignores a most important source of information for police . . . .”\footnote{114}{Murray, supra note 1, at 357.} While the successful detection of criminal activity surely depends on information, it depends on the right kind of information. The blurred line between federal and local police in San Francisco is an example of how current joint local and federal law enforcement surveillance operations, which do not follow local rules, standards, and oversight, can diminish trust in local law enforcement, achieving neither the goals of community policing nor of intelligence gathering. A community-police relationship based on mutual trust is more likely to uncover matters that are helpful in identifying criminals than the indiscriminate or potentially biased collection of non-criminal information.
THE DEMISE OF COMMUNITY POLICING?

B. Police Legitimacy Relies on Procedural Justice

Police legitimacy is a characteristic that leads people to feel that police authority “is entitled to be deferred to and obeyed.”115 According to Tom Tyler, police legitimacy represents “an acceptance by people of the need to bring their behavior in line with the dictates of an external authority.”116 Since the establishment of the first formal full-time police force in the United States in 1837, police have endured many challenges to their legitimacy due primarily to numerous instances of police misconduct that have led the public to criticize and mistrust the police.117 Studies of public perception about the police typically reveal large racial and ethnic group differences, with minority group members expressing lower levels of trust and confidence.118 As illustrated by the previously discussed Vera Institute study, the surveillance practices of federal law enforcement in the post-September 11th environment has had a particularly salient impact on the legitimacy of federal police in Muslim and Arab-American communities.119

In the arena of law enforcement reform to address issues of police legitimacy, two macro theories exist. The instrumental model suggests that the success of police in achieving their goals of safety and violence prevention is linked to public perceptions that police will sanction those who break the rules and that police are effective at controlling crime.120 Traditional law enforcement strategies, including current federal surveillance initiatives, are generally hinged on this theory of deterrence—that the best way to regulate public behavior is by making undesirable behaviors risky.121 On the other hand, the procedural justice model argues: “the legitimacy of the police is linked to public judgments about the fairness of the processes through which the police make decisions and exercise authority.”122 This model is concerned with the willingness of individuals to cooperate with police and acknowledges that the effectiveness of police work is often dependent on the cooperation of the public.123

Research conducted over the last twenty years suggests that the instrumental model, and deterrence in particular, is not an effective strategy for gaining long-term compliance with the law or for eliciting cooperative behavior from community members.124 By contrast, empirical studies on

117. Sunshine & Tyler, supra note 115, at 515.
118. Id.
119. See HENDERSON, supra note 8.
120. Id. at 514.
121. Id. at 516.
122. Id. at 514.
123. Id. at 516.
124. Id. at 524.
police legitimacy prove that “legitimacy is connected with people’s internal sense of obligation to authority and therefore promotes voluntary, cooperative behavior.” Studies also confirm that due to the emphasis on trust building, community and problem-oriented policing heed the call of procedural justice research and have resulted in lower crime and improved interaction between the police and the public. While different variables have been shown to define “procedural justice,” respectful treatment and a fair process in which individuals are treated equally are two key components of perceived justice.

For example, in their study of the Boston Ten-Point Coalition (a coalition of leaders in Boston working to mobilize around issues affecting minority youth), Christopher Winship and Jenny Berrien suggest that the Boston Police Department was able to maintain support from the African-American community during an anti-gang enforcement initiative by acting within boundaries that they negotiated with the Ten-Point Coalition. As long as police respected those constraints, the community leaders offered their public support for police actions, creating an “umbrella of legitimacy” that sustained police relationships with the community. This Coalition did not end anti-gang policing, as some community members would have liked, but, according to Boston police officers, it enacted real community-policing tactics that had previously only existed on paper—addressing issues of perceived profiling and targeted policing head-on. The study concludes that by involving community members in formulating procedures that are perceived to be fair, community-policing measures in Boston played a critical role in the reduction of youth violence.

Another more recent study by Tom Tyler, Stephen Schulhofer, and Aziz Huq investigated the circumstances under which Muslim Americans voluntarily collaborate with the police to fight terrorism. The result of their study, which involved interviewing Muslim Americans in New York City, also supports the idea that people respond favorably to the police if the police activities reflect values of procedural justice. The fairness of police procedures depends on the police’s neutrality in the application of

125. Id.
126. See Thacher, supra note 2, at 769–71 (discussing the use of innovative police practices as a way to overcome value conflicts between police and the community).
127. Id. at 769 (citing Christopher Winship & Jenny Berrien, Boston Cops and Black Churches, PUB. INT., Summer 1999, at 67).
128. Id.
129. Winship & Berrien, supra note 127, at 57.
130. Id. at 67–68.
132. See id. at 385 (finding “support for the central role of procedural justice (during both policy formation and implementation) in shaping Muslim Americans’ attitudes and behaviors related to cooperation in antiterror policing.”).
the law, the transparency of their actions, their openness to community input, and their respect for members of the community.\textsuperscript{133}

The parallels to the SFPD situation are clear, and the resulting conclusions are troubling. The lack of both transparency and perceived neutrality that community members in San Francisco have felt as a result of the SFPD’s involvement in federal surveillance initiatives has resulted in distrust of police and thus potentially thwarted community cooperation in counterterrorism initiatives.

Although the shift to community-policing reforms in local police departments recognizes this empirical reality, the trend of local police departments like the SFPD to embrace federal surveillance initiatives undermines procedural justice. Non-criminal, unpredicated surveillance that lacks key procedural guidelines, including oversight, allows room for bias, potentially influencing whom a police officer perceives as “dangerous” and worthy of surveillance. This room for personal bias not only undermines community policing but also public safety by destabilizing community trust, making community members less likely to cooperate with police in real crime investigations, and isolating entire communities from police protection.

**CONCLUSION**

The problem with unpredicated, pre-emptive police surveillance is simple: it violates basic principles of fairness, respect, and transparency. Consequently, it is not perceived to be a legitimate exercise of police authority. The tensions between community policing and unpredicated community surveillance require closer examination not only because of normative unfairness, but also because these tensions hinder effective policing on both the local and federal level. The example of the SFPD is telling. The strong local procedural safeguards, including clear guidelines and local oversight, that led to a period of mutual trust between the SFPD and communities previously targeted for non-criminal surveillance quickly disintegrated when local policy was overlaid by and coordinated with federal counterterrorism initiatives that mandated the collection of unpredicated intelligence. Local law enforcement decision-makers, including police chiefs and oversight bodies, must consider carefully whether engaging in the “War on Terror” on the terms of current federal initiatives will only undermine, rather than further, their mission.

\textsuperscript{133.} *Id.* at 367.