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# Why Do We (Still) Lack Data On Policing?

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# WHY DO WE (STILL) LACK DATA ON POLICING?

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## I. INTRODUCTION

In a symposium on the history and legacy of President Hoover’s National Commission on Law Observance and Enforcement, popularly known as the Wickersham Commission, it is impossible to ignore volume eleven, the *Report on Lawlessness in Law Enforcement*,<sup>1</sup> and in particular the more than half of the volume focused on abusive police interrogation methods, the report entitled *The Third Degree*.<sup>2</sup> This report generated an immediate and dramatic response in 1931 when it was published, and it has influenced ideas about policing for generations.

Interestingly, though written by, and often read by, lawyers, *The Third Degree* argues that politics—rather than law—is the most promising tool for mitigating police misconduct:

For these evils many remedies have been proposed. Some of them call for new legislation. But the law as it now stands is sufficient. The difficulty is that it is either not enforced or is deliberately disobeyed—and by the very persons charged with its enforcement.

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1. NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) [hereinafter REPORT ON LAWLESSNESS].

2. Zechariah Chafee, Jr., Walter H. Pollak & Carl S. Stern, *The Third Degree*, in REPORT ON LAWLESSNESS, *supra* note 1, at 13.

Statutes can not [sic] cope with the third degree nor can police regulations. Without the will to enforce them, these become words upon a printed page.

The real remedy lies in the will of the community. If the community insists upon higher standards in police, prosecutors, and judges, the third degree will cease to be a systematic practice.<sup>3</sup>

In the last paragraphs of the report, the three authors, led by Harvard Law professor Zechariah Chafee, Jr., noted an essential and non-legal precondition to political change generated by public concern:

But before the community can express its will it must know when, how, and to what extent these abuses are perpetrated. To this end certain things may prove of value:

Facts as to the detention and treatment of prisoners should be made a matter of public record so that there may be a check upon the charges of the prisoners on the one hand and upon the denials of the police on the other. One way to accomplish this is by keeping records of the times of arrest and detention; of the places to which prisoners are taken; of the interviews of police or prosecutors with prisoners; of the times at which interrogations begin and end; of the visible injuries to prisoners. Although there may be occasional failures to keep records and occasional falsifications, a routine of this kind, once established, should furnish a foundation of dependable information.

The press can accomplish much by constant publicity.

In every locality there should be some disinterested agency—bar association, public or voluntary defender, or civic body—to which a citizen, especially one who is poor and uninfluential, may report abuses with the knowledge that he will be protected against retaliation and that his complaint will be searchingly investigated.<sup>4</sup>

Thus, in discussing what could be done to improve police conduct, *The Third Degree* advocated developing empirical evidence about policing rather than refining the law.

The report itself furnished precisely the kind of concrete information about police conduct it argued was necessary. Over time, the authors'

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3. *Id.* at 191.

4. *Id.* at 191–92.

considerable effort to establish the contours of the problem of abusive police interrogation with persuasive detail and documentation has probably had more impact than their legal analysis or policy proposals. In the Supreme Court’s famous *Miranda* opinion, for example, decades after the Wickersham Commission’s work, the Court cited the *Report on Lawlessness in Law Enforcement* as clear evidence that abusive interrogation practices “flourished,” at least when the report was written.<sup>5</sup> The Court went on to discuss policing manuals for contemporary evidence of interrogation practices, and implied in doing so that similarly persuasive empirical evidence of police interrogation practices after *The Third Degree* was simply unavailable.<sup>6</sup> In a way, the report’s influence vindicates Chafee and his co-authors: it suggests dependable information about policing is crucial to governing the police effectively and yet is difficult to find.

Though *The Third Degree* emphasized this point eighty years ago, in this brief essay I argue that today we still lack enough information about what the police do to shape their conduct effectively. Governing the police through the local political process and regulating them under state and federal law both require data about local conditions and the costs and benefits of alternative policing strategies. Yet we lack that data.<sup>7</sup> The authors of *The Third Degree* understood well one of the obstacles to developing that information—the opposition of some officers. But they neglected other barriers, specifically, the reasons why police chiefs, local public officials, state legislatures and agencies, and federal actors do not require officers to collect and make accessible the kind of data about policing required to inform the political and regulatory process. Thus, *The Third Degree* failed to foresee our present situation: data collection and research efforts that fall far short of what we would need to make informed judgments about policing. Until efforts to produce information about policing improve, our

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5. *Miranda v. Arizona*, 384 U.S. 436, 445 & n.5 (1966) (quoting REPORT ON LAWLESSNESS, *supra* note 1)); *see also* *Culombe v. Connecticut*, 367 U.S. 568, 571 n.2 (1961) (citing the report’s most legal proposal for mitigating the problem of abusive interrogations); *Stein v. New York*, 346 U.S. 156, 201–02 (1953) (Frankfurter, J., dissenting).

6. *See Miranda*, 384 U.S. at 448 n.8.

7. I have noted other aspects of the data problem in policing policy and law elsewhere. *See, e.g.*, Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 772, 797 n.139, 815 (2012) [hereinafter Harmon, *The Problem*]; Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 5, 28–34 (2009) [hereinafter Harmon, *Promoting Civil Rights*].

communities cannot “express [their] will” and the body of law addressing the police—though much more extensive than that at the time of the Commission’s work—may well equally risk being mere “words upon a printed page.”

In Part I, I expand upon the work of *The Third Degree*’s authors by describing how information about police conduct assists local governance and state and federal regulation of policing. In Part II, I argue that police chiefs and local government officials do not and are unlikely to generate data about the police without external regulation. In Part III, I contend that while existing federal law and agency efforts provide for some data collection about policing, those efforts are flawed, stymied by institutional and legal limitations. As a result, we do not have the data we need to secure effective and rights-protecting policing.

## II. THE ROLE OF INFORMATION IN SHAPING POLICE CONDUCT

*The Third Degree* authors advocated three means of securing and distributing information about policing. First, they advocated creating data about the big picture by requiring police to record their activities and make those records available to the public.<sup>8</sup> Second, they argued for incident-specific investigations of police conduct by “disinterested agenc[ies].”<sup>9</sup> And third, they pushed for distributing information about police practices to the public through the press.<sup>10</sup> These mechanisms are important, but they are not always available, even today.<sup>11</sup> Even if they were, they would not provide information sufficient to guide political judgment and policy on policing.

Policing in the United States is governed first and foremost by the local political process. Local communities elect council members and mayors who hire police chiefs and fund department budgets.<sup>12</sup> Those

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8. Chafee et al., *supra* note 2, at 191–92.

9. *Id.* at 192.

10. *Id.*

11. Police departments collect some data about their activities, but not as much as would be useful, and they often share it only reluctantly with the public. *See infra* notes 30–40 and accompanying text. Allegations of police misconduct get investigated, but intermittently, as in federal lawsuits; inadequately, as by many civilian review boards; and internally, as by administrative units in the police departments themselves. By contrast, the 24-hour news cycle, the widespread availability of video recording in cell phones, and the development of social media and video-sharing websites have resulted in a level of publicity for police wrongdoing unimaginable at the time of the National Commission’s work.

12. For instance, in 2007 and 2008, aggregate local expenditures on police protection were roughly \$72.7 billion and \$77.6 billion, respectively. U.S. CENSUS BUREAU,

police chiefs and the limits of those budgets largely dictate how much and what kinds of policing we have. State and federal law also regulate the police, constraining the local process with law that prohibits some police conduct; conditioning how officers may be hired, trained, and managed; and discouraging wrongdoing by officers.<sup>13</sup> Information is crucial both to governing the police effectively through local politics and to the project of regulating them through state and federal law.

The voting public needs information about crime conditions, what its police departments do, and the costs and benefits of alternative policing practices, in order to develop and express preferences about policing in elections and other political venues. New Yorkers, for example, cannot easily decide whether to push for changes in the New York Police Department's stop-and-frisk policy if they do not know how many stop-and-frisks take place, what those practices mean to individuals and communities subject to them, what crimes stop-and-frisks deter or detect and to what extent, and whether alternative, less-intrusive policing strategies can equally serve the same goals.

Voters require similar kinds of information to uncover and mitigate agency costs imposed by public officials. Police chiefs and mayors are likely to provide too much, overly intrusive, or ill-chosen policing practices if they experience reputational and political gains from doing so.<sup>14</sup> Critics recently accused Los Angeles Mayor Antonio Villaraigosa of transferring officers from the General Services Department to the Los Angeles Police Department in order to come closer to Villaraigosa's campaign pledge of increasing the department to 10,000 officers.<sup>15</sup>

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STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 at 274 tbl.436 (2012). In the same years, federal outlays for federal law enforcement activities were \$19.6 billion and \$24.6 billion, respectively (the amount has increased considerably since the September 11th terrorist attacks). *Id.* at 312 tbl.473. And in those same years, *all* Department of Justice law-enforcement-related grants to local *and* state governments totaled roughly \$3.1 billion and \$2.2 billion, respectively. U.S. CENSUS BUREAU, FEDERAL AID TO STATES FOR FISCAL YEAR 2007 at 15 tbl.1 (2008); U.S. CENSUS BUREAU, FEDERAL AID TO STATES FOR FISCAL YEAR 2008 at 15 tbl.1 (2009).

13. See Harmon, *The Problem*, *supra* note 7, at 795.

14. See, e.g., Harmon, *Promoting Civil Rights*, *supra* note 7, at 46–47 (“Often the economic and social costs and benefits to a city are not translated efficiently into economic and political costs for the individual governmental actors, and in other cases, financial, reputational, and professional costs and benefits to agents do not accrue efficiently to the city.”).

15. See David Zahniser & Richard Winton, *LAPD Force Tops 10,000*, L.A. TIMES, Jan. 8, 2013, at AA1 (“‘It's an increase for show,’ said Kevin James, a candidate for mayor in the March 5 election who has questioned Villaraigosa's LAPD hiring goals. ‘The mayor really

Citizens can only decide whether such a management decision is serving personal rather than public ends if they have a way to determine whether it is unreasonably costly given its benefits. That determination demands data about the economic and social costs of police practices, and in this case, organizational strategies.

If data about crime rates and the costs and benefits of policing practices are crucial to voters, they are equally important to police chiefs and other high-ranking department officials who develop and implement law enforcement strategies and procedures. In every department, for example, a chief must decide whether to assign patrol officers to traditional foot beats or to put them in cars. That allocation depends in part on an assessment of the extent of local street crime and how effective foot and mobile patrols are at stopping and deterring that crime.

Whether informed or intuitive, implicit or express, chiefs make dozens of cost-benefit decisions in running a department. They use undercover officers, for example, if they believe them more effective at addressing costly crimes than they are damaging of the public trust, and engage in foot pursuits of non-violent criminals if they believe the law enforcement benefits outweigh the risks of injury to officers. Without research and data, those estimates will be unreliable, if not wildly wrong.

A similar argument can be made about city budgeting decisions for police departments, policy choices made by chiefs and local governments about daily police practices, and the like. For actors making such decisions, data about crime and social disorder informs where and what kind of policing objectives should be pursued; research about the economic and social costs of alternative police practices illuminate plausible means of pursuing those goals; and information about existing police policies and practices reveals the potential costs of changing direction.

Regulators need similar kinds of information. Legislatures and administrative agencies often shape police conduct in order to compensate for inadequate local protection of individual civil rights or to reduce agency costs by local public officials. In order to have a basis for pursuing those goals cost-effectively, state and national decision-

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wanted to get to 10,000 one way or the other before he left office, and this was the way he could do it under the current budget constraints.”); *id.* at AA2 (“Councilman Paul Koretz, who opposed the layoffs, said the movement of the 60 building patrol officers to the LAPD was ‘a little smoke and mirrors.’”).

makers need information about local crime conditions and police practices, national data for comparing localities, and research about the costs and benefits policing alternatives and reforms.

The current policy debate over how police officers should use conducted energy devices, such as Tasers, is illustrative. Some advocates have argued that because of the danger Tasers pose, police should use them more narrowly than existing practice in many departments, limiting them only to circumstances when deadly force would be permitted.<sup>16</sup> If this goal were desirable, Congress might promote it by creating a grant program to subsidize Tasers in departments with such policies, just as it presently provides funding for body armor for police departments that adopt policies mandating that officers wear that armor on patrol.<sup>17</sup> Determining whether to create such a program requires understanding the likely consequences of alternative policy choices both for suspects and for law enforcement objectives, including the physical risks of conducted energy devices on suspects and whether officers are prone to overuse them.<sup>18</sup> Without data on these consequences, Congress has little reason to know whether new programs are warranted.

Agencies also need data to regulate policing effectively. One method the Department of Justice uses to promote constitutional policing is to investigate and sue police departments that are engaged in a pattern and practice of constitutional violations under 42 U.S.C. § 14141. In these suits, the Department seeks to negotiate an agreement on a set of significant departmental reforms likely to prevent future constitutional violations. The Department's efforts under § 14141 will only be as effective as the reform measures that it endorses in its settlements. If the Department of Justice secures the wrong reforms, it could increase a department's costs or reduce its effectiveness without

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16. *E.g.*, STANFORD CRIMINAL JUSTICE CTR., USE OF TASERS BY LAW ENFORCEMENT AGENCIES: GUIDELINES AND RECOMMENDATIONS 12 (2006); *USA: Stricter Limits Urged as Deaths Following Police Taser Use Reach 500*, AMNESTY INT'L (Feb. 15, 2012), <http://www.amnesty.org/en/news/usa-stricter-limits-urged-deaths-following-police-taser-use-reach-500-2012-02-15>. As Amnesty International acknowledges, many of those deaths are attributed to other causes. *Id.*

17. U.S. DEP'T OF JUSTICE, UPDATED FREQUENTLY ASKED QUESTIONS (FAQs) FOR THE BVP PROGRAM MANDATORY WEAR REQUIREMENT (2011), *available at* <http://www.ojp.usdoj.gov/bvpbasi/docs/FAQsBVP MandatoryWearPolicy.pdf>.

18. *See, e.g.*, NAT'L INST. OF JUSTICE, POLICE USE OF FORCE, TASERS AND OTHER LESS-LETHAL WEAPONS 2 (2011).



improving civil rights protection.<sup>19</sup> The Department of Justice, like other legal actors who monitor and seek to influence police conduct, cannot assess which remedial measures are likely to be most effective and efficient without information about how particular policing management practices affect police conduct and crime control.<sup>20</sup>

State and federal actors need information about policing not only to regulate the police directly, but also to promote cost-effective criminal justice policy more broadly. Every state criminal law generates additional police discretion to search or arrest suspects and, secondarily, grants law enforcement authority to use physically coercive techniques to conduct those searches and arrests or to protect an officer engaged in them, if necessary. Every search, arrest, and use of force deprives a citizen of privacy, autonomy, or bodily integrity, as well as imposing often significant economic costs. These harms, imposed by the police, are part of the cost of criminalizing additional conduct. But it is hard for those contemplating expanding criminal law to consider such costs effectively if they have no way to assess their extent. Similarly, state criminal procedure laws, such as those mandating custodial arrests for domestic violence misdemeanors,<sup>21</sup> may deter future violations and prevent continuing violence, but also may consume valuable police resources and interfere with employment and immigration status for those arrested. Without some understanding of the effects of

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19. See Harmon, *Promoting Civil Rights*, *supra* note 7, at 41.

20. *Id.* at 5, 34. Courts also regulate the police based on empirical conclusions. Fourth Amendment doctrine, for example, requires courts to consider the nature of the intrusion on the individual, the strength of the government's interest in the intrusion, and the consequences for law enforcement of various rules interpreting the Constitution's requirements for police searches and seizures. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 449–50 (1990). *Miranda* doctrine assumes warnings are effective to dispel the compulsion inherent in custodial police interrogation. Without research on police practices, these conclusions are likely to be supported only by intuition. See, e.g., *Caballes*, 543 U.S. at 409; *id.* at 411–13 (Souter, J., dissenting); *Kyllo v. United States*, 533 U.S. 27, 29–33 (2001); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *Smith v. Maryland*, 442 U.S. 735, 741 (1979); *Brown v. Texas*, 443 U.S. 47, 50–51 (1979); Harmon, *The Problem*, *supra* note 7, at 769–71 (discussing empirical and causal judgments courts must make in Fourth Amendment and *Miranda* law).

21. E.g., CONN. GEN. STAT. ANN. § 46b-38b(a) (West 2012) (“Whenever a peace officer determines . . . that a family violence crime . . . has been committed . . . such officer shall arrest the person or persons suspected of its commission and charge such person or persons with the appropriate crime.”); D.C. CODE § 16-1031 (2012); LA. REV. STAT. ANN. § 46:2140 (2012) (“Whenever a law enforcement officer has reason to believe that a family or household member or dating partner has been abused, the officer shall immediately use all reasonable means to prevent further abuse, including: [a]rresting the abusive party . . .”).

mandatory arrests on the incidence of domestic violence, on other law enforcement goals, and on individual victims and suspects, states have little basis for deciding whether to enact such a rule.

Even when state and federal actors legislate to serve broader purposes, they frequently find judgments dependent on law enforcement data unavoidable. For example, many federal statutes are designed to protect individual privacy beyond the protection offered by constitutional law. For each such statute, Congress must determine whether law enforcement should be restricted from accessing the personal information at issue differently than others.<sup>22</sup> Thus, Congress has exempted police from regulation in the Video Voyeurism Prevention Act and the Telephone Records and Privacy Protection Act;<sup>23</sup> required law enforcement to make administrative requests for information in the Electronic Communications Privacy Act and the Health Insurance Portability and Accountability Act;<sup>24</sup> and demanded a warrant or subpoena before police gain access to information protected by Title III of the Wiretap Act or the Video Privacy Protection Act.<sup>25</sup> These choices depend on assessments of how significant the protected

22. See Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 494–99 (2013).

23. The Video Voyeurism Prevention Act of 2004, 18 U.S.C. § 1801(a) (2006), prohibits the intentional capturing of an image of a private area of an individual without consent, assuming the individual has a reasonable expectation of privacy. But it does not apply to law enforcement. See § 1801(c) (“This section does not prohibit any lawful law enforcement, correctional, or intelligence activity.”). Similarly, the Telephone Records and Privacy Protection Act of 2006, 18 U.S.C. § 1039(a), bars the fraudulent obtaining of confidential phone records but exempts law enforcement. See § 1039(g) (“This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or political subdivision of a State, or of an intelligence agency of the United States.”).

24. See Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 201(a), 100 Stat. 1848, 1861 (codified at 18 U.S.C. § 2703(c)(1) (2006)); Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191, § 3486(a)(1)(A), 110 Stat. 1936, 2018 (codified in 18 U.S.C. § 3486(a)(1)(A), 26 U.S.C., 29 U.S.C., and 42 U.S.C.); see also Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, § 152(a), 117 Stat. 1964, 1964–66 (2003) (codified at 15 U.S.C. § 1681c–2(f)).

25. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 212 (codified as amended at 18 U.S.C. § 2518) (“Procedure for interception of wire, oral, or electronic communications”); Video Privacy Protection Act, 18 U.S.C. § 2710(b)(2)(C) (codifying the warrant, subpoena, or court order requirement); 18 U.S.C. § 2710(b)(3) (requiring that any court order “issue only with prior notice to the consumer and only if the law enforcement agency shows that there is probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry”).

information is to criminal investigation, what role criminal investigation plays in detecting and deterring crime, and how much individuals suffer from police access to private information. Without the necessary research and data, such analysis is guesswork .

As these examples suggest, several kinds of political and legal actors benefit from data about policing. Local voters, police chiefs, and other local officials who make police policy use empirical judgments to form views about what that policy should be and whether it is being effectively implemented. State and federal legislatures and administrative agencies use data to regulate the police further and also to pursue other legal goals that can affect law enforcement. In their sundry tasks, actors in these institutions make judgments about the social and financial costs of particular policing strategies and about the effectiveness and efficiency of those strategies in reducing fear, crime, and public disorder. Explicitly or not, those judgments depend, first, on assessments of conditions on the ground, such as the extent and costs of crime, and, second, on predictions about the effects of alternative legal rules and policing strategies. In this way, public policy and legal decisions about policing depend heavily on empirical judgments. The availability of data and research will determine how well-founded those assessments are.

### III. POLICYMAKERS, INCENTIVES, AND INFORMATION

*The Third Degree* authors viewed officer reluctance to provide information to be the primary obstacle to a community informed about its police department's activities. They suggested that routinizing information production would help, and it has.<sup>26</sup> Police officers act much as Chafee and his co-authors imagined they would: they produce a substantial amount of information about their activities pursuant to departmental policies and procedures that mandate that they do so. Thus, police officers write reports about their arrests, their uses of force, and their responses to citizen calls for service, among other subjects. They keep daily activity logs, arrest logs, and incident logs. In fact, part of what it means to be a police officer is to write frequent reports.<sup>27</sup> Yet, despite this fact, the result *The Third Degree* authors envisioned has not

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26. Chafee et al., *supra* note 2, at 191–92.

27. Every basic training academy teaches report writing to police recruits. See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2006, at 6 tbl.11 (2009).

come to pass. The information the public has about policing remains quite limited.

The problem is that police officers are an easily overcome obstacle to information collection, but cities and police departments are not. Though officers will collect information when police chiefs and local governments require them to do so, they will collect only that information and only in the form mandated. Moreover, that information will only become public when chiefs or local governments make it so (in the absence of state or federal law). In practice, police chiefs and other local government actors often limit rather than promote information availability. Cities and police departments sometimes actively inhibit the collection of information about police by, for example, requiring secrecy when they settle civil suits for police misconduct or discouraging citizens from filing complaints about officer conduct.<sup>28</sup> Other times, police departments simply fail to produce records that could improve political and regulatory decision-making about intrusive police activities.<sup>29</sup> Thus, for example, departments often require no reports for consensual searches or for *Terry* stops. Even when departments collect information, they may do so in ways that make it impossible to aggregate the records or compare them with data from other departments. Departments often, for example, keep only paper files and use anomalous report forms and categories,<sup>30</sup> and they are much more receptive to video cameras in police cars than to collecting traffic stop data.<sup>31</sup> Finally, even if data are kept, able to be

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28. Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 760, 775–76 (2004) (discussing secrecy provisions in civil settlements against police officers and departments); AM. CIVIL LIBERTIES UNION OF N.J., *THE CRISIS INSIDE POLICE INTERNAL AFFAIRS* 9–12 (2009) (discussing common ways police departments inhibit citizens from filing complaints against police officers).

29. See, e.g., Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1045–52 (2010) (discussing major departments that do not collect information regarding civil suits and settlements for police misconduct).

30. See William A. Geller & Hans Toch, *Understanding and Controlling Police Abuse of Force*, in *POLICE VIOLENCE* 292, 297–303 (William A. Geller & Hans Toch eds., 1996) (describing the need for national data on the use of force, advocating improvements to the current national data collection system, and recommending improving and standardizing arrest reports, use of force reports, service calls, field contacts, and citizen complaint procedures to permit useful national data for comparing departments).

31. E.g., Christine Won, *Local Police Chiefs Talk about Racial Data Collection*, JOURNALTIMES.COM, Apr. 28, 2010, [http://www.journaltimes.com/news/local/article\\_6a6ddca-c-52b6-11df-bb5d-001cc4c03286.html](http://www.journaltimes.com/news/local/article_6a6ddca-c-52b6-11df-bb5d-001cc4c03286.html).

aggregated, and internally available, departments may refuse to release them to the public.<sup>32</sup> Thus, as a result of choices by police chiefs and local government officials, voters, regulators, municipalities, and even chiefs themselves lack basic information about police conduct.<sup>33</sup>

This occurs because police chiefs and mayors have inadequate incentives to provide many of the kinds of data that would facilitate effective governance and regulation. In an ideal world, public decision makers would invest in information until the marginal social benefit of additional research for improved decision-making was equal to the marginal social costs of additional research.<sup>34</sup> But the reality is that public actors who shape policing—from the officers themselves to local politicians—often face incentives that undermine data collection and research on policing as well as distribution of information about policing to the public.

On one hand, better information can make policing more effective, and those who develop and use such information are likely to be rewarded for that success. A police chief who makes good policies as a result of good investments in obtaining information can be rewarded with a good reputation, increased professional independence, and an extended and potentially lucrative career.<sup>35</sup> Thus, there are significant

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32. Those interested in information about police conduct often must litigate to obtain it. See, e.g., Kristine Cordier Karnezis, Annotation, *Validity, Construction, and Application of Statutory Provisions Relating to Public Access to Police Records*, 82 A.L.R.3d 19, 23–24 (1978) (collecting cases in which litigants seek information from police departments and are refused unless required by state law to provide the information); *Capital Newspapers Div. of Hearst Corp. v. City of Albany*, 63 A.D.3d 1336, 1336 (N.Y. App. Div. 2009) (involving refused request for “documents pertaining to the alleged use of official Albany Police Department channels to purchase military-style assault rifles for personal, nonofficial use by a number of individual police officers in the 1990s.”); *King Cnty. v. Sheehan*, 57 P.3d 307, 310 (Wash. Ct. App. 2002) (involving refused request for names and ranks of all police officers in department); Adam Dunn & Patrick J. Caceres, *Constructing a Better Estimate of Police Misconduct*, POL’Y MATTERS, Spring 2010, at 10, 14 (“Most police departments do not publish data on misconduct . . .”).

33. See, e.g., NAT’L RESEARCH COUNCIL, *FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE* 259–62 (Wesley G. Skogan & Kathleen Frydl eds., 2004) [hereinafter *FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE*] (discussing problems with data on excessive and lethal force); Geller & Toch, *supra* note 30, at 297–302; Harmon, *Promoting Civil Rights*, *supra* note 7, at 28–34 (discussing problems with data concerning police misconduct); Schwartz, *supra* note 29, at 1045–52.

34. Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1430 (2011).

35. Consider the success of William J. Bratton, who brought COMPSTAT to the New York Police Department in the 1990s and is often credited with bringing down crime rates in

incentives for police chiefs to collect and utilize data.

On the other hand, public agents often face significant counter-incentives that can lead them to underinvest in research that could improve policy. Most significantly, police chiefs and politicians experience much of the cost of increased investment in obtaining information—in the form of delayed decision-making, opportunity costs, and increased accountability—but usually internalize only some of the benefits of improved policy.<sup>36</sup> As a result, they are likely to devote fewer resources to research and data collection than the public would prefer.<sup>37</sup>

Local chiefs and political agents face a particularly exaggerated incentive gap for investments in information that require coordination across agencies and municipalities.<sup>38</sup> Collecting data that permit comparing the conduct of similar departments costs more, and the additional benefits to the actors who must coordinate are limited. For example, comparing how much force different police departments use requires departments to coordinate on standardized forms, categories for force, and methods for digitizing and aggregating the data.<sup>39</sup> The coordination necessary to create uniform standards and compliance with those centralized norms both impose additional costs on police departments. Unless the cooperation is widespread, there will be little benefit from it, and even if it is widespread, each city will receive only a fraction of the benefits created. It is also difficult to prevent free-loading by departments that do not comply fully with the standards.

As importantly, the same data that permit comparison across cities and, therefore, better decision-making and assessment, can also be used to increase accountability for ineffectual governance and to check self-interested action by public officials. This gives chiefs and politicians a further reason to avoid producing or making available this kind of

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New York City as a result. Solomon Moore, *Los Angeles Police Chief Is Quitting After 7 Years*, N.Y. TIMES, Aug. 6, 2009, at A19. COMPSTAT is a data-driven geographically-based accountability system for crime reduction and other policing goals. *Id.* After implementing COMPSTAT in New York, Bratton went on to lead the New York Police Department and the Los Angeles Police Department and now has a successful career in the private security sector. *Id.*

36. Stephenson, *supra* note 34, at 1431.

37. *Id.*

38. *Id.* at 1464–68 (discussing particular challenges of acquiring information and making decisions when multiple agents are participating in the process).

39. See *supra* notes 27–28 and accompanying text.

data.<sup>40</sup> As a result, regulators and chiefs will frequently avoid collecting or coordinating information that would allow voters or regulators to compare departments. Thus, we have little basis for judging how well chiefs avoid using force.

In this way, police chiefs generate agency costs, both when they pursue personal agendas rather than those of the voting public, and also when they deprive the public and other political actors of information that can be used to detect the agency costs they impose. They can limit public information either by refraining from collecting the information or by making it difficult to access and use. Both methods inhibit scrutiny of the chiefs' conduct, making it more difficult for the public to enforce its preferences about policing policy.

In sum, information is crucial to the project of policing. The public needs research and data to inform its preferences about the amounts and kinds of policing the local department should do. Police chiefs and local policy makers need information to make good policy choices. And state and federal courts, legislatures, and agencies need information about policing in setting criminal justice law and policy, in formulating law that incidentally affects the police, and in attempting to mitigate the costs of policing and the agency costs that local governance might entail. However, public choice problems and coordination difficulties lead to less production and distribution of information on policing than political actors and regulators need. The policing we have is likely less effective and more socially and economically costly as a result.

### III. FEDERAL LAW AND INFORMATION ABOUT THE POLICE

Today, much more than at the time of the Wickersham Commission, state and federal actors have tools to promote data production when local actors do not. In practice, however, state and federal efforts to collect information about policing have been surprisingly limited. States—which regulate extensively how police officers are trained, hired, and disciplined—demand very little information about what

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40. See, e.g., Editorial, *They Like Transparency, Until They Don't*, N.Y. TIMES, Nov. 14, 2011, at A28 (“In recent years, the New York Civil Liberties Union had to sue to get stop-and-frisk data from the police, details on the race of people shot by officers and shooting reports since 1997. Most recently, the group has filed a suit on behalf of an online columnist asking for Police Commissioner Raymond Kelly’s calendar. . . . Similarly, The Times was forced to go to court to get fuller access to police data. A judge ruled early last month that the New York Police Department had improperly withheld information about pistol owners and the locations of hate crimes.”).

police officers do. Federal law appears to do more, since federal agencies have been tasked by Congress with collecting data about policing. But agency efforts to collect national information about policing have focused far too narrowly to serve the interests of those governing and regulating the police.

States presently mandate that police departments collect some kinds of data through state executive orders, legislation, and administrative regulations. However, these efforts have been limited to a few subject areas and are often the product of lawsuits. Thus, while some states have incident-based crime reporting systems for specific crimes and some collect law enforcement data to help detect racial profiling in traffic stops, there are few other kinds of data collection about police conduct common to states.<sup>41</sup> In fact, states not only do little to encourage police departments to produce information about policing that does exist, they also often restrict public access to it through privacy laws and exemptions from open records statutes.<sup>42</sup>

One can argue that state legislators face incentives better aligned with the public's interest in investing in information about police conduct than those of local police chiefs, mayors, and city council members. After all, law enforcement issues play a lesser role in state elections and state officials can more easily coordinate across agencies and develop law enforcement expertise. But law enforcement interests can be powerfully influential at the state level, and data production may have fewer policy benefits for state actors than local voters or officials.<sup>43</sup> As a result, in data production, as in other areas, state law plays a limited role in the regulation of local policing.

Federal efforts would seem more promising. National coordination is much easier to achieve at the federal level, and Congress has long been active in regulating local law enforcement.<sup>44</sup> Several offices in the U.S. Department of Justice have been tasked with ensuring that we have

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41. *E.g.*, MO. ANN. STAT. §§ 590.650, 590.653 (West 2011); R.I. GEN. LAWS § 31-21.1-4(a)(2) (2010); TEX. CODE CRIM. PROC. ANN. art. 2.131–132 (West 2003); WASH. REV. CODE ANN. § 43.43.480 (West 2006); JUSTICE RESEARCH & STATISTICS ASS'N, USE OF DATA IN POLICE DEPARTMENTS: A SURVEY OF POLICE CHIEFS AND DATA ANALYSTS 6–7 (2005) (discussing limited state data collection on crime).

42. *See* Harmon, *The Problem*, *supra* note 7, at 808; Steven D. Zansberg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, COMM. LAW., Fall 2004, at 34–35.

43. *See* Harmon, *The Problem*, *supra* note 7, at 813–14.

44. *See id.* at 814–16.



adequate knowledge about local law enforcement.<sup>45</sup> Nevertheless, federal data collection and research falls far short of what would be needed to assure informed decision-making on policing because the administrative agencies responsible for that data collection are heavily influenced by law enforcement interests.

Federal law authorizes federal agencies to produce data on law enforcement, but those data are not well tailored to facilitate public accountability, strengthen local governance, or improve state and federal regulation of the police. The most important national source of data about the criminal justice system is the Uniform Crime Report. Pursuant to the Uniform Crime Reporting program (UCR), the FBI “[o]perate[s] a central clearinghouse for police statistics”<sup>46</sup> intended to provide a national indicator of the incidence of crime in the United States.<sup>47</sup> Although focused on the incidence of crime, the UCR provides some information that could be useful for evaluations of law enforcement, including some employee data and case clearance rates.<sup>48</sup>

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45. The mission and function of the Bureau of Justice Statistics is to “collect, analyze, publish, and disseminate information on crime, criminal offenders, victims of crime, and the operation of justice systems at all levels of government” to assist policymaking in combating crime and ensuring that justice is “efficient and evenhanded.” *About the Bureau of Justice Statistics*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=abu> (last visited Feb. 27, 2013). The mission of the Office of Justice Programs is to “provide[] innovative leadership to federal, state, local, and tribal justice systems, by disseminating state-of-the-art knowledge and practices across America, and providing grants for the implementation of these crime fighting strategies.” *About Us*, OFFICE OF JUSTICE PROGRAMS, <http://www.ojp.usdoj.gov/about/about.htm> (last visited Feb. 27, 2013). The National Institute of Justice, which is the research, development and evaluation agency of the Department of Justice, is “dedicated to improving knowledge and understanding of crime and justice issues through science” in order to provide “knowledge and tools to reduce crime and promote justice, particularly at the state and local levels.” *About NIJ*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/about/welcome.htm> (last visited Feb. 25, 2013). The mission of the FBI National Academy is “to support, promote, and enhance the personal and professional development of law enforcement leaders by preparing them for complex, dynamic, and contemporary challenges through innovative techniques, facilitating excellence in education and research, and forging partnerships throughout the world.” *The FBI Academy*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/training/national-academy> (last visited Feb. 27, 2013). The Federal Law Enforcement Training Center is an “interagency law enforcement training organization for 91 Federal agencies” that also “provides services to state, local, tribal, and international law enforcement agencies.” *Welcome to FLETC*, FED. LAW ENFORCEMENT TRAINING CENTER, <http://www.fletc.gov/> (last visited Feb. 27, 2013).

46. 28 C.F.R. § 0.85(f) (2012).

47. Uniform Federal Crime Reporting Act of 1988, 28 U.S.C. §§ 534(a)(1), (f) (2006).

48. See, e.g., FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, 2011: OFFENSES CLEARED 1 (2012), available at <http://www.fbi.gov/about->

Police departments provide data for the UCR voluntarily and have conflicting incentives in reporting crimes, given that such data can be used to evaluate agency effectiveness. The FBI has made only tepid efforts to ensure the integrity of UCR data, and many have expressed concern about the value of the data.<sup>49</sup>

The UCR gets its data through the National Incident-Based Reporting System (NIBRS), a system intended to “take advantage of available crime data maintained in modern law enforcement records systems,”<sup>50</sup> and by the older Summary Reporting System (SRS), under which police departments provide much less detail to the FBI. For each of forty-six specific crimes, the NIBRS collects data on offense, victim, property, and arrestee. Starting in 1988, the FBI began to encourage departments to use NIBRS in place of the SRS. But NIBRS has been of limited success. Some states have not yet implemented it, many departments have not yet supplied data to the FBI through NIBRS, and those departments that do supply data through NIBRS may not report all incidents.<sup>51</sup> Beyond these weaknesses, it is notable that NIBRS was never intended to collect the rest of the data available in modern law enforcement records systems, including data about case clearance, the extent and kind of contact between police and victims and offenders, officers’ duties and supervision, the nature and result of disciplinary proceedings; citizen complaints; and information about police responses to service calls. The creation and implementation of NIBRS provided an important opportunity to promote collection and aggregation of data

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us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/clearancetopic\_final.pdf; FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, 2011: POLICE EMPLOYEES 1 (2012), available at [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/policeemployees\\_main\\_final.pdf](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/policeemployees_main_final.pdf).

49. James P. Lynch & John P. Jarvis, *Missing Data and Imputation in the Uniform Crime Reports and the Effects on National Estimates*, 24 J. CONTEMPORARY CRIM. JUST. 69, 69 (2008) (noting that questions have arisen about the quality of uniform crime reporting data and citing criticisms).

50. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTING HANDBOOK 3 (2004) [hereinafter UNIFORM CRIME REPORTING HANDBOOK].

51. *Status of NIBRS in the States*, ICR RESOURCE CENTER, [http://www.jrsa.org/ibrcc/background-status/nibrs\\_states.shtml](http://www.jrsa.org/ibrcc/background-status/nibrs_states.shtml) (last visited Feb. 27, 2013) (“As of June 2012, 32 states have been certified to report NIBRS to the FBI, and three additional states and the District of Columbia have individual agencies submitting NIBRS data. Fifteen states are only submitting incident-based data, covering 100% of their state law enforcement agencies. Approximately 29% of the population is covered by NIBRS reporting, representing 27% of the nation’s reported crime and 43% of law enforcement agencies.”).

useful to those seeking to govern law enforcement as well as to those interested solely in facilitating it. That opportunity passed unrealized, and the federal government does not collect or analyze most of the extensive data produced by police departments through incident and arrest reports, COMPSTAT, Early Intervention Systems, and other computer databases that might provide a basis for governing or regulating the police.<sup>52</sup>

It is unsurprising that UCR and NIBRS are not tailored to produce data helpful in governing the police. After all, the FBI conceives of police departments as the consumers of UCR data rather than its subjects.<sup>53</sup> There is another agency tasked with collecting information *about* law enforcement as well as *for* it. Congress created the Bureau of Justice Statistics within the Office of Justice Programs of the U.S. Department of Justice to produce and disseminate information about the criminal justice system, including law enforcement. BJS has broad statutory authority to collect and analyze data about crime<sup>54</sup> and the operation of the criminal justice system, and to provide that information to federal, state, and local governments, as well as the general public.<sup>55</sup> The agency is also authorized to promote data production and analytic capacity in police departments and in local and state governments by, for example, “recommend[ing] national standards for justice statistics,”<sup>56</sup> and by improving local computer information systems.<sup>57</sup> Thus, BJS can and is intended to produce and promote the kinds information the public, local governments, and state and federal actors need to govern

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52. See NAT'L RESEARCH COUNCIL, ENSURING THE QUALITY, CREDIBILITY, AND RELEVANCE OF U.S. JUSTICE STATISTICS 205 (Robert M. Groves & Daniel L. Cork eds., 2009) (proposing that BJS become involved in “compiling crime data from local departments” that already collect such information electronically). Federal law also fails to promote uniformity in the generation of the data that would facilitate aggregation. Thus, even if UCR crime data were perfect, it would be of limited use in evaluating, governing, and regulating police conduct.

53. The purpose of the uniform crime reporting effort is to “present a nationwide view of crime.” UNIFORM CRIME REPORTING HANDBOOK, *supra* note 50, at 1. Furthermore, “[t]he culmination of [the Uniform Crime Report] national data collection effort is three annual publications: *Crime in the United States*, *Hate Crime Statistics*, and *Law Enforcement Officers Killed and Assaulted*, all of which have become sources of data widely used by law enforcement administrators, government policy makers, social science researchers, the media, and private citizens.” *Id.*

54. 42 U.S.C. § 3732(c)(3) (2006).

55. § 3732(c)(10).

56. § 3732(c)(8).

57. § 3732(c)(13).

policing. In practice, however, these data too are not tailored to the governance or regulatory needs described in Part I.

BJS does provide some extremely relevant data. It conducts the National Crime Victimization Survey (NCVS), which is an essential complement to the FBI's Uniform Crime Reports in painting a national portrait of serious criminal activity.<sup>58</sup> Thus, BJS, like the FBI, helps to gather nationally comparable crime data that can begin to build a basis for more effective governance and policy making about policing. BJS also adds a triennial supplement to the NCVS, the Police-Public Contact Survey (PPCS). The PPCS was originally intended to facilitate study of excessive force by law enforcement officers,<sup>59</sup> and it continues to provide revealing data about the nature, frequency, and context of contacts between the police and the public, as well as the views of the public about those interactions, which could be used to compare a department's practices to national averages.<sup>60</sup> BJS's data gathering efforts, however, suffer from a variety of shortcomings, both by design and due to resource limitations and execution problems, which limit their value in critical ways.

BJS's primary data-gathering tool on law enforcement is the Law Enforcement Management and Administrative Statistics (LEMAS) survey, conducted every three years.<sup>61</sup> The survey is given to all agencies with 100 or more sworn officers and to a stratified random sample of agencies with fewer than 100 sworn officers.<sup>62</sup> The survey's

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58. See FED. BUREAU OF INVESTIGATION, U.S. DEPT' OF JUSTICE, CRIME IN THE UNITED STATES 2004: UNIFORM CRIME REPORTS 510 app. IV (2004), available at [http://www2.fbi.gov/ucr/cius\\_04/documents/CIUS2004.pdf](http://www2.fbi.gov/ucr/cius_04/documents/CIUS2004.pdf) ("Each of these programs produces valuable information about aspects of the Nation's crime problem . . . . [T]he information they produce together provides a more comprehensive panorama of the Nation's crime problem than either could produce alone.").

59. 42 U.S.C. § 14142(a) (instructing the Attorney General to "acquire data about the use of excessive force by law enforcement officers").

60. E.g., CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEPT' OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 1 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp08.pdf> (summarizing the findings of the 2008 PPCS and noting highlights such as that an "estimated 9 out of 10 residents who had contact with police in 2008 felt the police acted properly" but that a "majority of the people who had force used or threatened against them said they felt it was excessive").

61. "Conducted every 3 to 4 years, LEMAS collects data from over 3,000 state and local law enforcement agencies . . . ." *Data Collection: Law Enforcement Management and Administrative Statistics (LEMAS)*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?t=y=dcdetail&iid=248> (last revised Apr. 19, 2010).

62. E.g., BRIAN A. REAVES, LOCAL POLICE DEPARTMENTS, 2007, at 8 (2010), available

questions are generally multiple choice and are “intended to be filled out with relatively little need to refer to available records,”<sup>63</sup> a measure of its limited scope. The LEMAS survey focuses on administrative matters such as employee counts and demographics, budgets, technical resources, and some specific policies.<sup>64</sup> In addition, every four years, BJS conducts a Census of State and Local Law Enforcement Agencies, the main purpose of which is to produce a sampling frame for the LEMAS survey.<sup>65</sup> This survey collects information on all state and local law enforcement agencies, but is limited to a two-page questionnaire about matters such as the number of sworn and civilian employees in the agency, the agency’s functions and primary activities, and its budget level.<sup>66</sup> BJS has also twice conducted a Census of Law Enforcement Training Academies, which provides important information about the kind and amount of training provided to law enforcement officers.<sup>67</sup> In

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at <http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd07.pdf> (“The selected local police sample includes all departments employing 100 or more full-time sworn personnel and a systematic random sample of smaller agencies stratified by size.”).

63. Groves & Cork, *supra* note 52, at 109.

64. *Data Collection: Law Enforcement Management and Administrative Statistics (LEMAS)*, *supra* note 61 (“Data are obtained on the organization and administration of police and sheriffs’ departments, including agency responsibilities, operating expenditures, job functions of sworn and civilian employees, officer salaries and special pay, demographic characteristics of officers, weapons and armor policies, education and training requirements, computers and information systems, vehicles, special units, and community policing activities.”).

65. *See id.*; *see also* BRIAN A. REAVES, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 1, 12 (2011), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslla08.pdf> [hereinafter REAVES, 2008]. BJS also conducts more focused surveys of special law enforcement agencies such as campus police forces and coroners’ offices. *E.g.*, MATTHEW J. HICKMAN ET AL., MEDICAL EXAMINERS AND CORONERS’ OFFICES, 2004 (2007), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/meco04.pdf>; BRIAN A. REAVES, CAMPUS LAW ENFORCEMENT, 2004–05 (2008) [hereinafter REAVES, 2008], *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cle0405.pdf>.

66. *See* REAVES, 2008, *supra* note 65, at 12 (“Employment data are reported by agencies for sworn and nonsworn (civilian) personnel and, within these categories, by full-time or part-time status. Agencies also complete a checklist of functions they regularly perform, or have primary responsibility for, within the following areas: patrol and response, criminal investigation, traffic and vehicle-related functions, detention-related functions, court-related functions, special public safety functions (e.g., animal control), task force participation, and specialized functions (e.g., search and rescue.”); U.S. DEP’T OF JUSTICE, 2000 CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES: LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS (2003), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cj38sp.pdf>.

67. *See* MATTHEW J. HICKMAN, U.S. DEP’T OF JUSTICE, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2002, at iv (2005), *available at*

addition, BJS has occasionally solicited information about state law enforcement agencies policies with respect to recording data on race in traffic stops.<sup>68</sup>

Unfortunately, due to the limited scope of the collection efforts, the data BJS produces do not reveal a national picture about police policies or practices or about the costs and benefits of policing as it is carried out today. We do not know enough about what police do to assess which practices best reduce crime and disorder or which practices are least intrusive. Without such information, local governments cannot easily choose effective and harm-efficient policing strategies, and states and federal legislatures cannot incentivize them to do so. Part of the problem is resources. BJS has a much smaller budget than other federal statistical bureaus and yet has a much larger mandate.<sup>69</sup> Largely as a result, even in the area in which it is most active, crime data, and certainly with respect to law enforcement practices and policies, its survey lacks subnational geographic detail and questions tailored for effective policy making. In addition, in the face of increasing costs and a flat budget, BJS has cut corners over the years, leading to degraded rather than strengthened products.<sup>70</sup>

Even within existing resources, BJS's triennial law enforcement survey suffers from an extremely narrow focus. As a recent National Research Council report concluded:

BJS's work in *law enforcement* is hindered by a sharp and overly

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<http://bjs.ojp.usdoj.gov/content/pub/pdf/slleta02.pdf>; BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2006, at 1–6 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/slleta06.pdf>.

68. Groves & Cork, *supra* note 52, at 119 (describing efforts of the BJS to collect information from state police agencies “about *policies* for recording data on race and ethnicity of persons stopped on traffic violations”); e.g., MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, TRAFFIC STOP DATA COLLECTION POLICIES FOR STATE POLICE, 2004, at 1 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tsdcp04.pdf>.

69. See Groves & Cork, *supra* note 52, at 19 (“BJS has been given more responsibilities than can be achieved with current resources. The resources provided to BJS to carry out its work are not commensurate with the breadth—and importance—of the responsibilities assigned to the agency by its authorizing legislation.”); *id.* at 209–10 (describing the funding levels of the principal statistical agencies of the federal government). The National Center for Education Statistics, the primary federal education statistics agency, for example, has direct funding levels several times that of the Bureau of Justice Statistics, as does the national Center for Health Statistics, the Energy Information Administration, the National Agricultural Statistics Service, and others.

70. *Id.* at 19–21 (discussing the implications of the fiscal constraints BJS has faced over the years).

restrictive focus on management and administrative issues; its analysis of law enforcement generally lacks direct connection to data on crime, much less providing the basis for assessing the quality and effectiveness of police programs. It is also in the area of law enforcement, with the proliferation of numerous special-agency censuses and little semblance of a fixed schedule or interconnectedness of series, where the need for refining the conceptual framework for multiple data collections is most evident.<sup>71</sup>

Beyond management and administrative information, BJS's efforts to uncover information about law enforcement are modest: The Contact Survey focuses primarily on the basis for traffic stops and uses of force.<sup>72</sup> The survey of state police agencies on traffic stops has been conducted only twice, and asked only about *policies* with respect to collecting race and ethnicity data, not about the number of stops or the justification for them.<sup>73</sup> The survey of training academies asks about how many hours of training are devoted to different subjects, but little about the content of the training. As the National Research Council concluded, "[a] look at BJS's portfolio . . . leaves the unfortunate impression that the state of knowledge about 'law enforcement' generally can be equated with the head- and resource-count totals in the LEMAS survey and agency censuses."<sup>74</sup> As a result, "BJS reports [are] silent on the most basic notions of *effectiveness* of police policies or personnel decisions," much less the harm-efficiency of those departmental practices.<sup>75</sup> Furthermore, the problem is self-reinforcing: BJS now produces the statistics made possible by its now well-established instruments,<sup>76</sup> rather than basing

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71. *Id.* at 133.

72. *E.g.*, Bureau of Justice Statistics, 2008 PPCS Final Questionnaire 1–2, *available at* [http://bjs.ojp.usdoj.gov/content/pub/pdf/ppcs08\\_q.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/ppcs08_q.pdf).

73. *E.g.*, U.S. DEP'T OF JUSTICE, 2001 STATE POLICE TRAFFIC STOP DATA COLLECTION PROCEDURES, *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/ssp1q.pdf>.

74. Groves & Cork, *supra* note 52, at 146.

75. *Id.* at 147. When BJS expresses concern about the scope of its own law enforcement efforts, it focuses almost exclusively on producing more data on force used by the police and to a lesser degree, on citizen complaints. *See, e.g.*, Jeffrey Sedgwick & Gerard Ramker, U.S. Dep't of Justice, *BJS Provides Update on Projects and Priorities*, JRSA FORUM, June 2007, at 3, *available at* [http://www.jrsa.org/pubs/forum/forum\\_issues/for25\\_2.pdf](http://www.jrsa.org/pubs/forum/forum_issues/for25_2.pdf). Others have been more critical. *See* Dunn & Caceres, *supra* note 32, at 11 ("The bureau's narrow focus likely leads to a substantial undercounting of incidents of police misconduct.")

76. Groves & Cork, *supra* note 52, at 146 ("Law enforcement statistics within BJS have been largely defined by the specific LEMAS data collection vehicle, and not a substantive

BJIS's data collection efforts on a thick conception about the purpose of law enforcement data. There have been proposals to improve federal law enforcement data collection to make it more usable for police policy evaluation,<sup>77</sup> but as of yet they have gone unheeded.

Notwithstanding the inadequacy of BJS's own data collection efforts, the Bureau also has both authority and funding to promote data collection by police departments and state and local governments that could be the basis of improved policing.<sup>78</sup> However, the State Justice Statistics program grants overwhelmingly promote databases for criminal law enforcement rather than databases that could be used to compare departments, to evaluate the costs and benefits of law enforcement practices, or for other governance and regulatory goals.<sup>79</sup>

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definition of the activities and actors that constitute law enforcement.”).

77. *E.g.*, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE, *supra* note 33, at 329 (“The committee recommends expanding data collection to encompass a wider range of policing outcomes, to enable the monitoring of the quality of police service and not just its quantity.”).

78. *See* 42 U.S.C. §§ 3732(c)(1), (13) (2006) (authorizing the Bureau to make grants and authorizing the Bureau to “provide for the development of justice information systems programs and assistance to the States and units of local government relating to collection, analysis, or dissemination of justice statistics”).

79. The State Justice Statistics Program includes the following themes that state Statistical Analysis Centers can choose:

1. Deaths in Police Custody Reporting - Obtaining statewide data on deaths occurring in the process of arrest or in pursuit of arrest.
2. Criminal justice system crisis planning
3. Increased access to data
4. Performance measurement
5. Analyses utilizing a state's criminal history records
6. Statewide crime victimization surveys
7. Analysis of the uses of new or emerging biometric technologies to improve the administration of criminal justice
8. Research using incident-based crime data that are compatible with the National Incident-Based Reporting System (NIBRS)
9. Data collection and/or research examining a special topical area:
  - a. Minority overrepresentation in the criminal or juvenile justice systems
  - b. Civil justice
  - c. Cybercrime
  - d. Human trafficking
  - e. Justice issues in Indian Country
  - f. Criminal activity in U.S. border areas
  - g. Violent crime in schools
  - h. The impact of substance abuse on state and/or local criminal



Thus, we have the Crime Identification Technology Act of 1988, the National Criminal History Improvement Program, the NICS Improvement Amendments Act of 2007 and similar statutes and grant programs that seek to improve automated fingerprint identification systems, instant criminal background check systems, and other computerized systems about crime, forensics, and criminals, but little support for a national database of police officers decertified by state administrative mechanisms and none for a database of civil suits and consent decrees against police departments.<sup>80</sup> BJS has not offered grants to promote uniform data collection by states from police departments on law enforcement subjects (other than crime), or to facilitate research on the non-financial costs of law enforcement techniques.<sup>81</sup>

BJS and the FBI produce narrow data because of institutional constraints. Like local law enforcement and political actors, these federal agencies, and the federal legislators responsible for creating and overseeing them, have inadequate incentives to produce optimal amounts of information about policing. Inadequate data collection efforts are a symptom of that problem. The FBI, the flagship federal policing agency, depends on close cooperation with local law enforcement for its work, and is thus ill-situated to collect data and

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justice and public health systems

i. Family violence and/or stalking

*State Justice Statistics Program*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=48> (last visited Mar. 24, 2013). BJS has awarded some grants to allow states to improve performance assessment tools that might include law enforcement.

80. The Crime Identification Technology Act of 1998, Pub. L. 105-251, § 102, 112 Stat. 1870, 1871 (1998). Similarly, “BJS provides direct awards and technical assistance to states and localities to improve the quality, timeliness, and immediate accessibility of criminal history records and related information” through the National Criminal History Improvement Program. *National Criminal History Improvement Program*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=47> (last revised Feb. 28, 2013).

81. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, OMB No. 1121-0329, 2010 SURVEY OF GENERAL PURPOSE LAW ENFORCEMENT AGENCIES SOLICITATION(2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sgplea10sol.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FY 2009 NATIONAL CRIMINAL HISTORY IMPROVEMENT PROGRAM (NCHIP) SOLICITATION (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/nchip09sol.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, OMB No. 1121-0323, RECOVERY ACT (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/recoveryact09.pdf>. Even in the areas that BJS does promote information technology for state and local police agencies, the agency has not always furthered the national project of data collection.

shape research to allow other political actors to supervise those departments.

Perhaps more surprisingly, given its duties, BJS is also structurally hobbled. First, because the Director of BJS is politically appointed and serves an unspecified term at the pleasure of the President, and because BJS is located within the Justice Department, BJS is subject to political influence that is likely to be favorable to law enforcement interests. This is best evidenced by events surrounding a 2005 press release announcing the results of the 2002 Police Public Contact Survey. The BJS draft of the press release provided statistics indicating that the likelihood of being stopped by police in 2002 did not differ significantly between white, black, and Hispanic drivers, but that police were more likely to carry out some type of search or use of force on a black or Hispanic driver.<sup>82</sup> The then-Assistant Attorney General ordered the Director of BJS to delete references to the higher rates of searches and uses of force for black and Hispanic drivers. The BJS Director refused and was dismissed from his position.<sup>83</sup> The report was issued without a press release and languished until news reporting over the Director's firing drew attention to it.<sup>84</sup> The next PPCS survey results were released

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82. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-340, BUREAU OF JUSTICE STATISTICS: QUALITY GUIDELINES GENERALLY FOLLOWED FOR POLICE-PUBLIC CONTACT SURVEYS, BUT OPPORTUNITIES EXIST TO HELP ASSURE AGENCY INDEPENDENCE 21–22 (2007) (“The press release that BJS sought to publish would have included the following statistical findings from the accompanying Police-Public Contact Survey report: (1) there was no statistically significant difference between the rates that white and minority drivers reported being stopped by police, and (2) once stopped, a larger percentage of black and Hispanic minority drivers reported police using or threatening to use force against them than did whites.”).

83. See Eric Lichtblau, *Democrats Want Official to Be Reinstated Over Report on Profiling*, N.Y. TIMES, Aug. 26, 2005, at A11 (“Democrats in Congress called . . . for the reinstatement of a Justice Department official who objected to his supervisors’ effort to play down the findings of a federal report on racial profiling.”); Eric Lichtblau, *Profiling Report Leads to a Clash and a Demotion*, N.Y. TIMES, Aug. 24, 2005, at A1 (“The Bush administration is replacing the director of a small but critical branch of the Justice Department, months after he complained that senior political officials at the department were seeking to play down newly compiled data on the aggressive police treatment of black and Hispanic drivers.”).

84. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 82, at 21–22 (“Despite reported efforts on the part of both parties to negotiate alternative language with respect to the content of the press release, they could not resolve their differences and the BJS Director decided that a press release would not be issued.”); Groves & Cork, *supra* note 52, at 227–28 (“In August 2005, the *New York Times*, followed by other media outlets, reported on a string of events over the previous 4 months that culminated in the removal of BJS Director Lawrence Greenfeld. The removal was precipitated by disputes within the Justice

with a statement noting that black and Hispanic drivers were more likely to be searched but without statistics detailing the matter. The release emphasized that “such racial disparities do not necessarily demonstrate that police treat people differently based on race or other demographic characteristics” and noted explicitly that the study “did not take into account other factors that might explain these disparities.”<sup>85</sup> Without more independence from political influence, it is difficult to imagine BJS providing the data necessary to ensure police accountability.

Second, BJS’s location inside the Office of Justice Programs potentially distorts its mission. The Office of Justice Programs is tasked with “provid[ing] information to the President, the Congress, the judiciary, State and local governments, and the general public relating to criminal justice.”<sup>86</sup> This mission seems ideally suited to ensuring adequate information for public governance and state and local regulation of police departments. But in practice OJP orients itself to a more circumscribed audience and therefore a more limited subject matter.

OJP is the successor to the Law Enforcement Assistance Administration, and its primary function is to provide grants to state and local law enforcement agencies.<sup>87</sup> Rather than serve both law enforcement and those who govern and regulate it, OJP remains oriented toward serving law enforcement. It seeks “[t]o be the premier resource for the justice community by: [(1)] [p]roviding and coordinating information, research and development, statistics, training, and support to help the justice community build the capacity it needs to meet its public safety goals,” and “[2)] [e]mbracing local decision-making, while encouraging local innovation through [strong and intelligent] national policy leadership.”<sup>88</sup> It also focuses on “provid[ing]

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Department over the statement of findings from the [Police Public Contact Survey].” (internal citations omitted).

85. Press Release, Bureau of Justice Statistics, Police Stop White, Black and Hispanic Drivers at Similar Rates According to Department of Justice Report (Apr. 29, 2007), available at <http://www.bjs.gov/content/pub/press/cpp05pr.cfm>.

86. 42 U.S.C. § 3712(a)(3) (2006) (listing the authorities of the assistant attorney general heading the Office of Justice Programs); see § 3711 (establishing OJP within the Justice Department with an assistant attorney general as its head).

87. Groves & Cork, *supra* note 52, at 40 (“BJS inherits a strong focus of attention on the needs of state and local law enforcement, since OJP is the legal successor of the previous Law Enforcement Assistance Administration.”).

88. *Mission and Vision*, OFFICE OF JUST. PROGRAMS,

Federal leadership in developing the nation's capacity to prevent and control crime, administer justice, and assist crime victims."<sup>89</sup>

BJS's funding is a small piece of OJP's budget, and generally, it is allocated internally within OJP rather than from outside it.<sup>90</sup> Since OJP is oriented towards law enforcement, and BJS must compete with grant programs within OJP for resources, it is not surprising that BJS too is oriented towards data useful for crime control rather than ensuring that the costs of law enforcement practices are worth their benefits. OJP—like the FBI—serves police departments more than it serves those who might govern and regulate law enforcement: the public, municipal policy makers, state police standards and training boards, state legislatures, the federal judiciary, and Congress.<sup>91</sup>

As a result, BJS plays too limited a role in producing information useful for governing or regulating policing. The data BJS provide an inadequate basis for assessing the effectiveness of law enforcement techniques, the financial and non-financial costs of existing and alternative law enforcement approaches, and the incentives facing law enforcement actors, among other information essential to effectively evaluating policing strategies. Moreover, though the interests of law enforcement and the interests of the public and political actors who regulate law enforcement are often aligned in favor of effective crime control, as noted in Parts I and II, those groups' interests can also diverge both substantively and with respect to the dissemination of information. This suggests that without external support, the needed data will never materialize.

#### IV. CONCLUSION

*The Third Degree* was a remarkable accomplishment. It brought to national consciousness a long-standing problem of policing and led to

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<http://www.ojp.usdoj.gov/about/mission.htm> (last visited Feb. 28, 2013).

89. See Leigh Benda, *Foreword* to OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, 2011 FINANCIAL GUIDE (Revised July 2012), available at [http://www.ojp.usdoj.gov/financialguide/PDFs/OCFO\\_2012FinancialGuide.pdf](http://www.ojp.usdoj.gov/financialguide/PDFs/OCFO_2012FinancialGuide.pdf).

90. See Groves & Cork, *supra* note 52, at 40 ("Administratively, BJS is an organ of OJP within the U.S. Department of Justice.").

91. Moreover, BJS's connection to law enforcement interests is not entirely external. While the PPCS has its origins in Congressional efforts to facilitate better regulation of police uses of force, the LEMAS survey—the most important of its data collection tools—has its origins in earlier police salary and administration surveys conducted by the Kansas City Police Department and the Fraternal Order of the Police.

reforms that reduced the problem. In its last paragraphs, the report suggests some of the complexity of the relationship among law, politics, and policing: law is a check on police conduct, but it must be enforced to make a difference; political will facilitates enforcement, but requires information; police officers will not always generate or share adequate information about policing, but they are necessarily part of the project of doing so. The tasks of governing and regulating the police continue today, and in light of the intricate web of local, state, and federal laws affecting the police, they are more complicated than ever.

These tasks are not at odds with promoting good policing, but rather are essential to it. Both local governance and state and federal regulation are necessary to ensure that publicly-provided policing is effective and yet minimally harmful and costly. Even more than the report's authors imagined, information is a precondition for achieving these tasks, and federal data collection tailored to governing and regulating the police is a necessary component of that information. As of yet, the agencies responsible for that data collection do not recognize—much less fulfill—this mission. Until they do, our policing policy will suffer.