

# OUR FRAGMENTED APPROACH TO PUBLIC SAFETY

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## ABSTRACT

*This Essay explores the ways in which the division of funding and responsibility for various social services across local, state, and federal governments disincentivizes sound approaches to societal problems—particularly when it comes to addressing the needs of the unhoused. Whereas local governments primarily are responsible for funding and directing the police, most other services, including housing, healthcare, and substance abuse treatment, are funded and overseen by other government units. This Essay demonstrates how this fragmentation of authority has contributed to society’s overreliance on policing and criminal punishment in addressing the problem of homelessness. First, because fiscal responsibility for various government services is distributed across the various levels of government, no one government unit may have the financial incentive to depart from the more punitive status quo. Second, fragmentation creates a familiar sort of collective action problem: Unless all of the municipalities in a particular region step up to do their part, the few who do may find themselves carrying the burden for the region as a whole. Finally, even if all of the actors at various levels of government were equally invested in pursuing a more humane and cost-effective approach, fragmentation makes it more difficult to mount a coordinated response to problems that invariably spill over across jurisdictions and policy domains. This Essay concludes by pointing out that fragmentation may, if anything, be of still greater concern when it comes to the broader project of reimagining public safety and redefining the role of the police.*

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## INTRODUCTION

In the wake of George Floyd's murder in May of 2020, a growing chorus of advocates called on cities to reimagine public safety by "defunding" the police, and investing some or all of the billions spent annually on the criminal system directly into the communities that have traditionally been plagued by both violent crime and widespread police abuse.<sup>1</sup> Some framed their demands in the language of abolition, insisting that the carceral state is fundamentally and irrevocably unjust.<sup>2</sup> Others acknowledged that police may have a limited role to play in assuring public safety—but insisted that their role ought to be considerably narrower than it is at present.<sup>3</sup> The latter argument is, at its core, an argument about the misallocation of resources: we under-invest in schools, housing, childcare, and mental health; and we criminalize those who predictably fall through the cracks.

Nowhere is this misallocation more evident than in our approach to individuals experiencing homelessness—the subject of Barry Friedman's lecture, *Are the Police the Key to Public Safety?: The Case of the Unhoused*.<sup>4</sup> Our collective response to homelessness, writes Friedman, is both short-sighted and ineffective. Instead of addressing the root causes of homelessness, we deploy the police to push the unhoused further and further out of sight. He notes that dozens of major cities have laws on the books that specifically target the unhoused by prohibiting camping or sleeping in public—or lying down on public sidewalks or in public parks.<sup>5</sup> Others prohibit sleeping in cars,<sup>6</sup> or even sharing food with those in need.<sup>7</sup> And even in the absence of such legislation, general prohibitions against loitering and trespassing are too often deployed against those who have little choice but to spend their days and nights on the streets. In Portland, Oregon, for example, the unhoused made up three percent of the population but accounted for fifty-two percent of all arrests made by the police department in 2017.<sup>8</sup> Yet as police officials themselves acknowledge, arresting those who are experiencing homelessness does

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1. See, e.g., Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), <https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer/>; Annie Lowrey, *Defund the Police*, THE ATLANTIC (June 5, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/defund-police/612682/>.

2. See, e.g., Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>; Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1814–37 (2020).

3. See, e.g., Anthony D. Romero, *Reimagining the Role of Police*, ACLU (June 5, 2020), <https://www.aclu.org/news/criminal-law-reform/reimagining-the-role-of-police/>.

4. Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused*, 59 AM. CRIM. L. REV. 1597 (2022) (published concurrently with this Essay).

5. *Id.* at 1613 (citing NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE 18, 22 (2019) [hereinafter NO SAFE PLACE], [https://homelesslaw.org/wp-content/uploads/2019/02/No\\_Safe\\_Place.pdf](https://homelesslaw.org/wp-content/uploads/2019/02/No_Safe_Place.pdf)).

6. *Id.* (citing NO SAFE PLACE at 22).

7. *Id.* (citing NO SAFE PLACE at 24–25).

8. *Id.* at 1618 (citing Rebeca Woolington & Melissa Lewis, *Portland Homeless Accounted for Majority of Arrests in 2017, Analysis Finds*, OREGONIAN (June 27, 2018), [https://www.oregonlive.com/portland/2018/06/portland\\_homeless\\_accounted\\_fo.html](https://www.oregonlive.com/portland/2018/06/portland_homeless_accounted_fo.html)).

virtually nothing to address the underlying causes of homelessness, and arrests may often set already vulnerable individuals further back.<sup>9</sup> Indeed, studies suggest that criminalizing homelessness costs jurisdictions quite a bit more than providing the housing and support that individuals need.<sup>10</sup>

Friedman argues that this misguided approach reflects two sorts of democratic dysfunctions around policing and public safety: First, a failure on the part of state and local governments to engage in cost-benefit analysis to identify more promising approaches for addressing societal problems like homelessness; and second, an overly narrow conception of public safety that puts far too much emphasis on the role of the police.<sup>11</sup> Friedman does not talk specifically in terms of “defunding” the police or “reimagining” public safety (although he has written on the latter topic elsewhere),<sup>12</sup> but his critique of the status quo picks up on many of the same underlying themes. By privileging law enforcement at the expense of community health and safety, we waste billions of dollars each year on interventions that do little to solve the underlying problems, while imposing immeasurable harm.

Part of the problem, of course, is that there is no one decision maker responsible for implementing society’s approach to the needs of the unhoused. Society’s response to the problem of homelessness is the product of the collective choices of tens of thousands of individual decisionmakers at all levels of government, each of whom is accountable to a different constituency and responsible for only a tiny slice of the government’s response.

This fragmentation of authority and responsibility complicates Friedman’s account in a number of ways. First, the fact that responsibility for various functions is vertically fragmented across different levels of government makes it considerably less likely that “government” as a whole will produce an optimal mix of policy tools. Frank Zimring and Gordon Hawkins note, for example, that local governments often fail to internalize the costs of their “tough on crime” policies because the costs of incarceration are paid primarily by the state—a phenomenon they dubbed the “correctional free lunch.”<sup>13</sup> And as Richard Bierschbach and Stephanos Bibas point out, these sorts of misalignments are pervasive throughout

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9. *Id.* at 1619 (citing Robert H. McNamara, Charles Crawford & Ronald G. Burns, *Policing the Homeless: Policy, Practice, and Perceptions*, 36 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 357, 367 (2013)).

10. *See, e.g.*, SARAH B. HUNTER, MELODY HARVEY, BRIAN BRISCOMBE & MATTHEW CEFALU, RAND CORP., HOUSING FOR HEALTH: A STATE-OF-THE-ART PROGRAM FOR REDUCING HOMELESSNESS IN LOS ANGELES COUNTY (2017), [https://www.rand.org/pubs/research\\_briefs/RB10000.html](https://www.rand.org/pubs/research_briefs/RB10000.html); GREGORY A. SHINN, IMPACT HOMELESSNESS, THE COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA (2014), <https://shnny.org/uploads/Florida-Homelessness-Report-2014.pdf>; JULIA BAUSCH, ALISON COOK-DAVIS & BENEDIKT SPRINGER, ARIZ. ST. UNIV. MORRISON INST. FOR PUB. POL’Y, “HOUSING IS HEALTH CARE”: THE IMPACT OF SUPPORTIVE HOUSING ON THE COSTS OF CHRONIC MENTAL ILLNESS (2021), [https://morrisoninstitute.asu.edu/sites/default/files/housing\\_is\\_health\\_care\\_report\\_2021.pdf](https://morrisoninstitute.asu.edu/sites/default/files/housing_is_health_care_report_2021.pdf).

11. Friedman, *supra* note 4, at 1600–01.

12. *See* Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 980 (2021).

13. FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 140, 211–15 (1991).

the criminal system.<sup>14</sup> Second, when it comes to homelessness, horizontal fragmentation creates a familiar sort of collective action problem: unless all of the municipalities in a particular region step up to do their part, the few who do may find themselves carrying the burden for the region as a whole.<sup>15</sup> Finally, even if all of the actors at various levels of government were equally invested in pursuing a more humane and cost-effective approach, fragmentation makes it more difficult to mount a coordinated response to problems that invariably spill over across jurisdictions and policy domains.<sup>16</sup>

Friedman acknowledges the problem in passing, noting that “[t]here are going to be deeply complicated issues about which level of government is paying for which approach, . . . or whether governments have coordinated their responses.”<sup>17</sup> The goal of this Essay is to suggest that fragmentation is more than a minor obstacle on the way to more rational policymaking—and that it deserves far more attention than it has thus far received. In doing so, this Essay builds on the work of scholars like Zimring, Bierschbach, and Bibas—and demonstrates how the problems they identify become more pervasive when we broaden the frame from punishment and criminal justice to the capacious vision of public safety that Friedman urges us to adopt.

Part I briefly describes the extent of the homelessness problem in Phoenix, as well as the various approaches that local and county officials have adopted to date.<sup>18</sup> Part II demonstrates the various ways in which fragmentation has undermined rational policymaking around homelessness. Part III explains why reforms designed to minimize fragmentation within the punishment bureaucracy may be less effective in changing our societal response to the needs of the unhoused. And it points out that fragmentation may, if anything, still be a greater concern when it comes to the broader project of reimagining public safety and redefining the role of the police.

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14. Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 194–96 (2017); see also W. David Ball, *Tough on Crime (on the State’s Dime): How Violent Crime Does Not Drive California Counties’ Incarceration Rates—and Why It Should*, 28 GA. ST. L. REV. 987, 991–93, 1074–77 (2012) (analyzing the “ways in which county governments contribute to overpopulation in the adult prison system”).

15. See, e.g., Christina Estes & Lauren Gilger, *Phoenix Mayor Kate Gallego: Others Need to ‘Step Up’ on Homelessness*, KJZZ 91.5 (Feb. 9, 2020, 9:26 PM), <https://kjzz.org/content/1430506/phoenix-mayor-kate-gallego-others-need-step-homelessness> (noting that although the original plan had been to establish a series of shelter campuses throughout Maricopa County, no one wanted to step forward to allow them, leaving the Phoenix campus as the only large-scale provider).

16. Cf. Matt Markovich, *San Francisco and Seattle: A Tale of Two Cities Mired in a Homeless Crisis*, KOMO NEWS (July 23, 2019), <https://komonews.com/news/local/san-francisco-and-seattle-a-tale-of-two-cities-mired-in-a-homeless-crisis> (noting that unlike in San Francisco, where “[t]he city and county . . . operate as one,” “in Seattle, nearly all behavioral and drug abuse treatment is funded through King County,” and that thus “[t]he city of Seattle has no control over how that funding is allocated”).

17. Friedman, *supra* note 4, at 1630.

18. I chose Phoenix specifically because it is home to Arizona State University, where Barry Friedman delivered his distinguished lecture, to which this Essay responds.

## I. WHAT PHOENIX IS (AND IS NOT) DOING FOR THE UNHOUSED

According to the Department of Housing and Urban Development's (HUD) "Point-in-Time" (PIT) estimate, there were at least 7,419 people experiencing homelessness in Maricopa County in January of 2020.<sup>19</sup> As Friedman tells us, however, this estimate is likely an undercount for several reasons.<sup>20</sup> First, because the PIT estimate offers a snapshot of the shelter population on a single night, it does not account for unhoused persons who are not staying in shelters,<sup>21</sup> such as those who are "doubled up" with friends or family; those who are temporarily staying in hospitals, substance abuse facilities, prisons, or jails; or those who, for any number of reasons, simply go out of their way to avoid being seen.<sup>22</sup>

But even if we use the HUD figure as the official number, the inadequacy of the city's (and county's) approach becomes readily apparent. As of January 2020, there were just 4,006 shelter beds throughout the county.<sup>23</sup> And although both the City and County also fund various forms of subsidized and supportive housing, waitlists often take months or years.<sup>24</sup> Each night, thousands of individuals have little choice but to sleep on the streets. As of the January 2020 count, 3,767 people, or fifty-one percent of the county's unhoused population, were unsheltered.<sup>25</sup> Nationwide, approximately thirty-nine percent of those who are experiencing homelessness are unsheltered, though in some jurisdictions the figure is quite a bit higher. In California, for instance, it was over seventy percent.<sup>26</sup>

As the City's unsheltered population has grown, so too have complaints from business owners and residents about the growing number of tent encampments that dot city streets.<sup>27</sup> Even if we discount at least some of these complaints as the inevitable grumblings of those who prefer not to confront the problem of homelessness up close, it is important to acknowledge that concentrated homelessness imposes

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19. *PIT and HIC Data Since 2007*, HUD EXCHANGE (Feb. 2022) [hereinafter *2020 PIT Estimates*], <https://www.hudexchange.info/resource/3031/pit-and-hic-data-since-2007/> (follow link to "2007 - 2021 Point in Time Estimates by CoC (XLSX)" and navigate to "2020" tab of downloadable spreadsheet).

20. Friedman, *supra* note 4, at 1610–11.

21. *Id.*

22. *Id.*

23. *2020 PIT Estimates*, *supra* note 19 (follow link to "2007 - 2021 Housing Inventory Count by CoC (XLSX)" and navigate to "2020" tab of downloadable spreadsheet).

24. See Courtney Holmes, *Section 8 Housing Vouchers in Short Supply for Arizona Families*, ABC 15 (Mar. 3, 2021, 9:02 PM), <https://www.abc15.com/news/rebound/coronavirus-money-help/section-8-housing-vouchers-in-short-supply-for-arizona-families> (noting that the average wait time for those on the waitlist in Phoenix is 4 years—but that the waitlist had not been open since 2016).

25. *2020 PIT Estimates*, *supra* note 19.

26. MEGHAN HENRY, TANYA DE SOUSA, CAROLINE RODDEY, SWATI GAYEN & THOMAS JOE BEDNAR, U.S. DEP'T OF HOUS. & URB. DEV., *THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 8, 11* (Jan. 2021), <https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf>.

27. Jessica Boehm, *Phoenix Could Get New Homeless Shelters. Here's Where and What They Might Look Like*, AZ CENTRAL (Mar. 1, 2021, 6:01 AM), <https://www.azcentral.com/story/news/local/phoenix/2021/02/28/phoenix-provides-funding-many-four-new-homeless-shelters/6806646002/>.

significant costs on the community as a whole. Businesses struggle.<sup>28</sup> Families become wary of using public parks.<sup>29</sup> Crime and victimization creep up as well.<sup>30</sup> Like most cities, Phoenix has responded to the growing homelessness problem in ways that are both helpful and counterproductive. In 2020, Phoenix alone spent over \$100 million on housing, with Maricopa County contributing at least \$6.7 million more.<sup>31</sup> Most of those funds, however, went toward affordable housing in general, as opposed to supportive housing or temporary shelter for those experiencing homelessness.<sup>32</sup> Under a program dubbed Phoenix C.A.R.E.S., the City employs nine teams of outreach workers tasked with connecting unhoused individuals with services that can help.<sup>33</sup> Both the City and County also fund a variety of supportive services including job training, nutrition, and substance abuse or mental health treatment.<sup>34</sup>

Still, consistent with Friedman's account, Phoenix also routinely relies on the police. The amount that Phoenix spends on criminal enforcement is difficult to quantify, in part because the City does not classify arrests by housing status. But there is evidence to suggest that criminal enforcement continues to be a core part of the City's response. A 2017 survey found that roughly one in four individuals booked into the Maricopa County Jail reportedly went without housing at some point in the prior year.<sup>35</sup> That same study identified fifty-nine individuals—all unhoused—who had collectively been arrested more than 1,000 times in just two years, mostly for low-level misdemeanors such as littering or drinking in public.<sup>36</sup>

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28. Jessica Boehm, *Phoenix Cleanup Near Human Services Campus Spurs Bigger Questions About Homelessness*, AZ CENTRAL (Feb. 5, 2020, 8:47 PM), <https://www.azcentral.com/story/news/local/phoenix/2020/02/05/phoenix-cleanup-near-human-services-campus-temporarily-relocates-400/4660687002/>.

29. Jessica Boehm, *How Metro Phoenix's Inaction on Homelessness Burdens Working-Class Neighborhoods*, AZ CENTRAL (Mar. 9, 2022, 8:01 AM), <https://www.azcentral.com/in-depth/news/local/phoenix/2022/03/09/how-phoenix-inaction-homelessness-burdens-neighborhoods/6175756001/>.

30. See Paul Walsh, *Tent Encampment a Powder Keg as Crime Grips Powderhorn Park*, STAR TRIBUNE (July 8, 2020, 5:51 AM), <https://www.startribune.com/sunday-sexual-assault-at-powderhorn-park-is-the-third-since-late-last-month/571659532/>.

31. See CITY OF PHOENIX, PHOENIX 2019–2020 SUMMARY BUDGET 132 (2019) [hereinafter PHOENIX 2019–2020 SUMMARY BUDGET], <https://www.phoenix.gov/budgetsite/budget-books/SummaryBudgetBook2019-20.pdf>. The way Maricopa County reports its budget figures is a bit more difficult to parse, but the County receives at least \$6.7 million from HUD, which is earmarked for housing development. See MARICOPA COUNTY, MARICOPA COUNTY BUDGET FY2020 314 (2019) [hereinafter MARICOPA COUNTY BUDGET], <https://www.maricopa.gov/ArchiveCenter/ViewFile/Item/4784>.

32. Maricopa County, for example, budgeted approximately \$750,000 for emergency shelter services and permanent supportive housing in fiscal year 2020. See MARICOPA COUNTY BUDGET, *supra* note 31, at 32.

33. Jessica Boehm, *Phoenix Residents Reported 1,500 Homeless Encampments. See Where They Are*, AZ CENTRAL (May 7, 2019, 5:24 PM), <https://www.azcentral.com/story/news/local/phoenix/2019/05/06/phoenix-homelessness-increase-reported-encampments-community-services/3410072002/>.

34. See PHOENIX 2019–2020 SUMMARY BUDGET, *supra* note 31, at 142–43; MARICOPA COUNTY BUDGET, *supra* note 31, at 379.

35. See Rebekah L. Sanders, *Could One Checkbox at Maricopa County Jails Avert Hundreds of Arrests?*, AZ CENTRAL (Aug. 15, 2017, 8:47 AM), <https://www.azcentral.com/story/news/local/phoenix/2017/08/15/could-maricopa-county-jails-program-avert-future-arrests/530530001/>.

36. *Id.*

People experiencing homelessness routinely complain of police harassment, including unnecessary citations and arrests.<sup>37</sup>

More recently, complaints have centered on the City's practice of conducting routine "cleanups" at the various tent encampments.<sup>38</sup> Although cleanups ostensibly are designed to address legitimate sanitation concerns, their frequency—in some places as often as three times per week—has led critics to believe the City conducts this practice because it "moves people along."<sup>39</sup> At the City's largest encampment, police arrive to wake residents up two hours in advance of the 7:00 a.m. cleanup.<sup>40</sup> Any items left unattended are routinely thrown into the trash.<sup>41</sup> In August 2021, the United States Department of Justice opened an investigation into the Phoenix Police Department to determine, among other things, whether the cleanups violate the due process rights of the unhoused.<sup>42</sup>

Putting aside the obvious moral objections to these sorts of tactics, there is lots of evidence to suggest that in the long run (and perhaps even in the short run) these tactics end up costing taxpayers more than it would to provide housing and services to those in need. A study conducted by the Morrison Institute for Public Policy at Arizona State University, for example, found that providing supportive housing to individuals with chronic mental illness in Maricopa County would save taxpayers thousands of dollars per person per year as compared with leaving them chronically unhoused.<sup>43</sup> Studies in a number of other jurisdictions have found similar cost savings as well.<sup>44</sup>

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37. See Madeline Ackley, *Phoenix Still Criminalizes Homelessness, Despite Court Ruling, Protesters Say*, AZ MIRROR (Jan. 9, 2020, 9:13 AM), <https://www.azmirror.com/2020/01/09/phoenix-still-criminalizes-homelessness-despite-court-ruling-protesters-say/>.

38. See Jessica Boehm, *As DOJ Investigates, Phoenix Says There's No Evidence of Illegal Cleanups at Homeless Encampments*, AZ CENTRAL (Sept. 21, 2021, 6:00 AM), <https://www.azcentral.com/story/news/local/phoenix/2021/09/21/gallego-zuercher-say-no-evidence-illegal-cleanups-homeless-camps/5757388001/>.

39. *Id.*

40. *Id.*

41. *Id.* (relating accounts from multiple outreach workers and individuals experiencing homelessness of police officers routinely throwing items into the trash); see also Jessica Boehm, *'You Have Some Justice for Me?': Homeless People Say Phoenix Police Frequently Throw Away Tents*, AZ CENTRAL (Aug. 16, 2021, 8:14 AM), <https://www.azcentral.com/story/news/local/phoenix/2021/08/16/homeless-say-phoenix-police-frequently-throw-away-belongings/5543513001/> (quoting a man who believes his possessions were disposed of by Phoenix sanitation workers).

42. Merrick B. Garland, U.S. Att'y Gen., Remarks Announcing a Pattern or Practice Investigation into the City of Phoenix and the Phoenix Police Department (Aug. 5, 2021), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-announcing-pattern-or-practice>.

43. See BAUSCH ET AL., *supra* note 10, at 12. The study estimates savings of more than \$20,000 a year, but this estimate is based on a number of assumptions that are inconsistent with the reality on the ground. For example, the study assumes that unhoused individuals spend 365 days a year in emergency shelters, and as a result, cost the City \$12,585 per person per year. *Id.* at 12, 28. Given that over seventy percent of chronically homeless individuals in Phoenix are unsheltered, this is not a tenable assumption. See 2020 PIT Estimates, *supra* note 19.

44. See, e.g., HUNTER ET AL., *supra* note 10, at 2; SHINN, *supra* note 10, at 30; BAUSCH ET AL., *supra* note 10, at 4. But see ANGELA A. AIDALA, WILLIAM MCALLISTER, MAIKO YOMOGIDA & VIRGINIA SHUBERT, COLUM. UNIV. MAILMAN SCH. OF PUB. HEALTH, FREQUENT USERS SERVICE ENHANCEMENT 'FUSE' INITIATIVE: NEW YORK CITY FUSE II EVALUATION REPORT 50–51 (2014), [https://www.csh.org/wp-content/uploads/2014/01/FUSE-Eval-Report-Final\\_Linked.pdf](https://www.csh.org/wp-content/uploads/2014/01/FUSE-Eval-Report-Final_Linked.pdf) (finding the costs of housing only partially offset by the drop off in

## II. FRAGMENTED RESPONSIBILITY

So why are cities like Phoenix not doing more? Friedman argues that part of the answer lies in the fact that governments rarely employ cost-benefit analysis around policing and public safety.<sup>45</sup> Had local governments been in the habit of scrutinizing policing decisions in the same way that the White House Office of Management and Budget scrutinizes proposed regulations, we might already have had a larger number of shelter beds (and perhaps fewer police). This Part suggests that the fragmentation of financial and decision-making responsibility across multiple levels of government is a big part of the story as well.

### A. *Paying for the Unhoused*

When it comes to homelessness, “the cost of doing nothing is not nothing.”<sup>46</sup> Every approach that a city might take entails at least some budgetary costs—not to mention of course the social costs imposed on the unhoused themselves.

The extent of those costs, however, varies considerably, as does the level of government that ultimately foots the bill. As this section makes clear, although it may in fact be cheaper to provide housing to those who lack it, the government entities responsible for making those choices may not always see it that way with respect to their own budget books.

Existing studies have focused primarily on three buckets of costs: criminal system costs (including police, court costs, and incarceration); housing and support services (including substance abuse treatment, career counseling, and case management); and healthcare (including emergency room visits, routine healthcare, and pharmacy costs).<sup>47</sup> The conventional wisdom is that increased spending on housing and wraparound services may be offset by savings in criminal system and healthcare costs.

Although cities rarely pay the full tab for their tough-on-crime policies, when it comes to policing people experiencing homelessness, the City of Phoenix pays for a lion’s share of the criminal system costs. The City pays for policing, including the time officers spend responding to calls for service, issuing citations, or taking individuals into custody. And importantly, at least in the case of misdemeanor offenses—including the sorts of quality of life offenses that often are deployed against the unhoused—the City also pays the costs of adjudication and incarceration.<sup>48</sup> Although

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emergency healthcare and criminal system costs, but noting that the study omitted a number of criminal system costs, including policing costs and court costs).

45. Friedman, *supra* note 4, at 1624–30; *see also* Barry Friedman & Elizabeth G. Jánosky, *Policing’s Information Problem*, 99 TEX. L. REV. 1, 45–46 (2020) (arguing that failing to undertake a robust cost-benefit analysis can lead to “suboptimal regulation” of police).

46. SHINN, *supra* note 10, at 20.

47. *See* BAUSCH ET AL., *supra* note 10, at 12. n

48. *See* Memorandum from Shelby L. Scharbach, Assistant Cty. Manager & Lee Ann Bohn, Chief of Admin. on jail per diem billing rates to Maricopa County Cities and Towns (Feb. 1, 2017), <https://www.gordonthompsonattorney.net/wp-content/uploads/2017/07/2017-2018-Maricopa-County-Jail-Costs.pdf>.



most people who are arrested in the county are taken to the Maricopa County Jail, municipalities are required to reimburse the County for all expenses associated with both pre- and post-conviction confinement for any person arrested for violating a municipal ordinance, as well as any offense that is classified as a misdemeanor under state law.<sup>49</sup> At least for low-level offenses, then, there is no “correctional free lunch.”

By increasing available housing, Phoenix could bring these costs down significantly. A detailed study prepared by the Urban Institute for Denver, Colorado found that providing supportive housing to 363 chronically unhoused individuals reduced criminal system costs by \$4,775 per person per year.<sup>50</sup> A similar study in New York found a reduction in jail costs of \$2,683 per person per year.<sup>51</sup> Assuming a comparable ratio between jail and other criminal system costs, that would suggest overall savings in the neighborhood of \$4,000 per person per year in New York.<sup>52</sup> To be sure, at least some of these are “fixed” costs (for example, police personnel), which means that immediate savings may be lower. At the same time, these figures also likely understate the *potential* cost savings from adopting a less punitive approach. In Denver, for example, individuals who received supportive housing were still routinely stopped or arrested by the police—often for low-level offenses like trespassing or public intoxication—and they still spent an average of thirty days per year in jail.<sup>53</sup> In short, Denver could easily have reduced expenditures by quite a bit more.

In most jurisdictions, however, criminal system costs are dwarfed by the cost of emergency medical and psychiatric care. In Colorado, taxpayers spent \$35,218 per year on medical treatment for each person experiencing chronic homelessness—a figure that dropped by nearly \$16,000 for those enrolled in supportive housing.<sup>54</sup> In Los Angeles, a similar program reduced healthcare costs by \$22,788 per person after just one year.<sup>55</sup> And in Albuquerque, healthcare savings accounted for the biggest reduction in overall costs, saving the City nearly \$12,000 per person in the first year alone.<sup>56</sup>

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49. *Id.*

50. SARAH GILLESPIE, DEVLIN HANSON, JOSH LEOPOLD & ALYSE D. ONETO, URB. INST., COSTS AND OFFSETS OF PROVIDING SUPPORTIVE HOUSING TO BREAK THE HOMELESSNESS-JAIL CYCLE 15 tbl.5 (2021), <https://www.urban.org/research/publication/costs-and-offsets-providing-supportive-housing-break-homelessness-jail-cycle>.

51. AIDALA ET AL., *supra* note 44, at 48.

52. In Colorado, jail cost savings (\$3,098) constituted sixty-four percent of all criminal system costs avoided (\$4,775). GILLESPIE ET AL., *supra* note 50, at 15 tbl. 5. Applying a similar ratio to the New York jail cost numbers would suggest overall criminal system cost savings of \$4,192.

53. MARY CUNNINGHAM, DEVLIN HANSON, SARAH GILLESPIE, MICHAEL PERGAMIT, ALYSE D. ONETO, PATRICK SPAUSTER, TRACEY O'BRIEN, LIZ SWEITZER & CHRISTINE VELEZ, URB. INST., BREAKING THE HOMELESSNESS-JAIL CYCLE WITH HOUSING FIRST 27–28 & tpls. 11–12 (2021), [https://www.urban.org/sites/default/files/publication/104501/breaking-the-homelessness-jail-cycle-with-housing-first\\_1.pdf](https://www.urban.org/sites/default/files/publication/104501/breaking-the-homelessness-jail-cycle-with-housing-first_1.pdf).

54. GILLESPIE ET AL., *supra* note 50, at 16 tbl.6.

55. HUNTER ET AL., *supra* note 10, at 2.

56. PAUL GUERIN & ANNE MINNSEN, INST. FOR SOC. RSCH., CITY OF ALBUQUERQUE HEADING HOME INITIATIVE COST STUDY REPORT FINAL 28 tbl.18 (2016), <http://isr.unm.edu/reports/2016/city-of-albuquerque->

The problem, however, is one of fragmentation: when it comes to healthcare costs, cities and counties rarely end up footing the bill, which means they also do not benefit from any savings that might accrue. Healthcare expenses are primarily paid for by Medicaid, which is funded jointly by the federal government and the states. And some costs may not be borne by government entities at all. In the Denver study, for example, Medicaid billings (that is, invoices submitted for reimbursement) were considerably higher than Medicaid *payments* (the amount that the government actually paid), which suggests that various public and private hospitals also picked up a portion of the tab.<sup>57</sup>

Finally, there is the cost of housing itself. In Denver, supportive housing costs somewhere in the neighborhood of \$15,000 per year.<sup>58</sup> The Morrison Institute study put the cost of permanent supportive housing in Maricopa County at \$11,315—but that is surely an undercount given that they based this figure on the market rate for an efficiency unit in the county (without including the various costs of services themselves).<sup>59</sup> These estimates also do not include the cost of building new housing where it does not already exist—and thus understate the up-front investment required to expand the affordable housing stock.<sup>60</sup>

Although Phoenix currently spends little of its own money on affordable housing, new investments in supportive housing or emergency shelter would likely need to be paid from the City's general fund. In 2020, less than one percent of the \$100 million that Phoenix spent on affordable housing was paid for out of the City's general fund.<sup>61</sup> The rest came from various state and federal grants, primarily from HUD.<sup>62</sup> The problem is that the vast majority of federal housing funds are allocated to states and localities based on predetermined formulas—as opposed to matching grants—which means that cities cannot simply ask for more.<sup>63</sup>

In short, although society *as a whole* could save money by investing in supportive housing, individual *cities* are unlikely to realize these gains. Indeed, because of how costs for various services are allocated across the different levels of

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heading-home-initiative-cost-study-report-final.pdf; see also SHINN, *supra* note 10, at 27 (estimating emergency medical costs for chronically unhoused people in three Florida counties to be \$20,187 per person per year).

57. See GILLESPIE ET AL., *supra* note 50, at 16 tbl.6.

58. See *id.* at 18 fig.2 (estimating the annual per-person supportive housing costs for two providers and noting the funding sources for those services).

59. See BAUSCH ET AL., *supra* note 10, at 12 fig.4.

60. Some of these costs could potentially be offset by savings on emergency shelters—but only to the extent that jurisdictions already provide shelter to a significant percentage of the unhoused. These offsets are likely to be quite modest in a city like Phoenix, in which roughly half of those experiencing homelessness are unsheltered. See 2020 PIT Estimates, *supra* note 19.

61. PHOENIX 2019–2020 SUMMARY BUDGET, *supra* note 31, at 132.

62. *Id.*

63. See *The Home Program: Home Investment Partnerships*, U.S. DEP'T OF HOUS. & URB. DEV., <https://www.hud.gov/hudprograms/home-program> (last visited Sept. 29, 2021) (describing how funding is allocated). But see GILLESPIE ET AL., *supra* note 50, at 26 fig.6 (showing that some of the costs in Denver were offset by using federal and state voucher programs).

government, it may be that there is no single unit of government that can fully offset the costs of housing through savings elsewhere.

Of course, as Friedman reminds us, governments also have an obligation to consider the *social* costs of their various policies<sup>64</sup>—and the social costs of criminalizing homelessness undoubtedly tip the scale in favor of a more humane and effective approach. Incorporating these costs into local governments' decision-making, however, may not be quite as clear-cut as Friedman suggests.

Cost-benefit analysis is, to some extent, a one-way ratchet: the answers it provides are far more decisive when the costs of a particular program exceed the benefits (as opposed to when the benefits exceed the costs). It is easy to say that government should not engage in activities that generate few benefits, while imposing significant budgetary or social costs. But it does not necessarily follow that a city must pursue every program for which the social benefits exceed the budgetary costs. One can imagine any number of programs that generate outsized benefits. Think parks, for example,<sup>65</sup> or subsidized childcare for families with young children.<sup>66</sup> Because cities have limited budgets, they must necessarily make choices among them. And it is not necessarily irrational for a city to choose to spend its funds someplace else.

It may be, as Friedman suggests in the second half of his paper, that the *first* job of government is to provide for those who are unable to provide for themselves—and that as a result, the needs of the unhoused must come first. But in the absence of that broader obligation, cost-benefit analysis alone is unlikely to get cities to where Friedman would like them to go.

### B. A Failure of Collective Action

The lack of affordable housing—and in particular, of emergency shelter beds—also reflects a problem with the division of responsibility across multiple local government units within a particular region or state, known as *horizontal fragmentation*. It is a familiar problem of collective action: unless all neighboring municipalities work together, the few that take affirmative steps to address the needs of the unhoused may end up carrying the burden for the region as a whole.

Although Phoenix can certainly be criticized for its lack of affordable housing, the reality is that its neighboring jurisdictions likely bear a greater share of the blame. As of the most recent census, Phoenix accounted for just thirty-six percent

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64. Friedman, *supra* note 4, at 1625–27.

65. See Susan Wong, *Research Finds Taxpayers Get More Than 4 Times Return on Investment in Maricopa County Parks and Recreation*, ASU NEWS (Jan. 13, 2021) (noting that Maricopa County brings in four dollars for every dollar spent on parks in revenue alone, which does not include the various additional benefits that parks provide to residents), <https://news.asu.edu/20210113-research-finds-taxpayers-get-more-4-times-return-investment-maricopa-county-parks-and>.

66. See Lynn A. Karoly, *The Economic Returns from Investing in Early Childhood Programs in the Granite State*, RAND CORP. (2017) (finding returns of two to four dollars for every dollar New Hampshire spent on childcare subsidies to low-income families), [https://www.rand.org/pubs/research\\_briefs/RB9952.html](https://www.rand.org/pubs/research_briefs/RB9952.html).

of the total population in Maricopa County.<sup>67</sup> But in 2019, the City provided approximately eighty-five percent of the County's emergency shelter beds.<sup>68</sup> That was not the original plan. When the Human Services Campus first opened in downtown Phoenix in 2005, it was supposed to be one of several large facilities throughout the County designed to combine emergency shelter beds and various supportive services in the same place.<sup>69</sup> But plans for the other shelters never got off the ground.<sup>70</sup> Everyone, it seems, preferred that the shelters were located in someone else's backyard. In 2021, the County renewed efforts to develop a regional approach to homelessness. But Phoenix City Manager Ed Zeurcher expressed skepticism regarding the County's ability to follow through: "[W]hen the time comes for a community who doesn't have the services or the shelters currently . . . to put money and rezoning and face their own neighbors with those questions in their community, what happens if they say, 'Nah, we're not going to do it?'"<sup>71</sup>

Indeed, the availability of housing and supportive services in Phoenix—however limited—potentially empowers more aggressive enforcement strategies in neighboring towns. The City of Surprise, Arizona, made headlines when it adopted an urban camping ordinance that authorized officers to arrest individuals camping on public property.<sup>72</sup> Under the Ninth Circuit's decision in *Martin v. City of Boise*, which Friedman discusses at length in his lecture, officers are prohibited from arresting people for sleeping in public when there is nowhere else for the people to go.<sup>73</sup> At the time, Surprise did not maintain any shelter facilities.<sup>74</sup> But the ordinance provided a loophole of sorts by defining "available shelter space" to include any shelter "within 50 miles of the city limits," which includes the large emergency shelter in Downtown Phoenix.<sup>75</sup> And even in the absence of these sorts of provisions, shelters and service providers in Downtown Phoenix inevitably become the default drop-off point for people in need.<sup>76</sup>

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67. Compare U.S. CENSUS BUREAU, QUICKFACTS: PHOENIX CITY, ARIZONA (2019), <https://www.census.gov/quickfacts/fact/table/phoenixcityarizona/PST045219> (listing the City of Phoenix's population at 1,608,139), with U.S. CENSUS BUREAU, QUICKFACTS: MARICOPA COUNTY, ARIZONA (2019), <https://www.census.gov/quickfacts/maricopacountyarizona> (listing Maricopa County's population at 4,420,568).

68. Christina Estes, *Q&A: Phoenix Mayor Kate Gallego Addresses Homelessness*, 91.5 KJZZ (Feb. 7, 2020, 7:00 AM), <https://kjzz.org/content/1430771/qa-phoenix-mayor-kate-gallego-addresses-homelessness>.

69. Estes & Gilger, *supra* note 15.

70. See *id.* (noting that although former County employees "recall talking about campuses outside Phoenix, . . . no specific plans ever reached the County Board of Supervisors").

71. Christina Estes & Mark Brodie, *Maricopa County Working on Regional Approach to Homelessness*, 91.5 KJZZ (Apr. 15, 2021, 8:46 AM), <https://kjzz.org/content/1674896/maricopa-county-working-regional-approach-homelessness>.

72. Jen Fifield & Jessica Boehm, *Homelessness Rises in Suburbs, But West Valley Offers Few Places for People to Go*, AZ CENTRAL (July 6, 2018, 10:17 AM), <https://www.azcentral.com/story/news/local/peoria/2018/07/01/west-valley-relies-phoenix-help-rising-homeless-population/731120002/>.

73. 902 F.3d 1031, 1048–49 (9th Cir. 2018), *reh'g en banc denied*, 920 F.3d 584 (9th Cir. 2019).

74. See Fifield & Boehm, *supra* note 72.

75. SURPRISE, ARIZ. MUN. CODE § 42-52(b), [https://library.municode.com/az/surprise/codes/municipal\\_code?nodeId=PTIGTEOR\\_CH42STSIOTPUPL](https://library.municode.com/az/surprise/codes/municipal_code?nodeId=PTIGTEOR_CH42STSIOTPUPL).

76. Estes & Gilger, *supra* note 15.

### C. *The Need for Coordination*

Finally, on a practical level, the fragmentation of responsibility among multiple agencies, service providers, and levels of government has made it considerably more difficult to develop a comprehensive understanding of the problem, and to mount a coordinated response.

For a long time, the economics of the homelessness crisis—in particular, the relationship between housing, healthcare, and criminal system costs—was largely hidden from view. The various agencies and organizations who worked with people experiencing homelessness undoubtedly understood that the people they worked with often faced a complex set of problems that brought them into frequent contact with both health care providers and the police. But both the frequency of those contacts and their cumulative costs had been obscured by the fact that they were disbursed across a fragmented system that had no mechanism for tracking them in a systematic way.<sup>77</sup>

Fragmentation also makes it more difficult to optimize the allocation of resources and likely generates a fair bit of administrative waste. In 2018, the Legislative Auditor General in Utah issued a report that underscored some of the costs of the State's fractured response. By way of example, the report highlighted the funding streams for just one nonprofit in Salt Lake County, which provided emergency shelter and supportive services. The entity received funds from four federal agencies (Housing and Urban Development, Health and Human Services, Veteran's Administration, and Department of Homeland Security), from the State of Utah, and from various private donors.<sup>78</sup> Only a fraction of those funds, however, are paid to the organization directly. The vast majority of funding is first allocated to one of thirteen pass-through entities at the state, county, and local level.<sup>79</sup> Funding from HUD alone passes through twelve of those thirteen entities, including seven cities, two counties, a regional Continuum of Care, a state-level coordinating committee, and a private developer.<sup>80</sup> As the Utah report notes, "Each funding stream comes with its own set of service requirements, outcome measures, and evaluation systems."<sup>81</sup> And the same pattern is replicated across the many providers who work with the unhoused.<sup>82</sup>

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77. See, e.g., ANNE MILGRAM, JEFFREY BRENNER, DAWN WIEST, VIRGINIA BERSCH & AARON TRUCHIL, HARV. KENNEDY SCH., INTEGRATED HEALTH CARE AND CRIMINAL JUSTICE DATA — VIEWING THE INTERSECTION OF PUBLIC SAFETY, PUBLIC HEALTH, AND PUBLIC POLICY THROUGH A NEW LENS: LESSONS FROM CAMDEN, NEW JERSEY 3–5 (2018), [https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/integrated\\_healthcare\\_criminaljustice\\_data.pdf](https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/integrated_healthcare_criminaljustice_data.pdf) (describing efforts to join healthcare and criminal system data in Camden, New Jersey).

78. STATE OF UTAH, OFF. OF THE LEGIS. AUDITOR GEN., A PERFORMANCE AUDIT OF UTAH'S HOMELESS SERVICES 2 (2018), [https://olag.utah.gov/olag-doc/18\\_12rpt.pdf](https://olag.utah.gov/olag-doc/18_12rpt.pdf).

79. *Id.* at 2.

80. *Id.*

81. *Id.* at 3.

82. *Id.*

### III. DEVOLVING DOWN? OR SCALING UP?

The question is what we can do about this problem. In *Rationing Criminal Justice*, Biersbach and Bibas suggest that part of the answer to the problem of vertical fragmentation within the criminal justice system, and in particular, to the “correctional free lunch,” is to devolve a greater share of fiscal responsibility to the local level. Instead of paying for prisons directly, states could issue a “violent crime block grant” to local governments to do with as they wish.<sup>83</sup> Local governments could use the funds to pay for prison beds for those whom they arrest and prosecute—or they could invest in alternative strategies that impose fewer criminal system costs.<sup>84</sup> The idea is appealing and straightforward: by making local governments internalize the full (budgetary) costs of their criminal justice practices, we can encourage local governments to more carefully consider whether their “tough on crime” policies are in fact worth the price.

It is less clear, however, that this approach would work in the context of homelessness. Although we see a similar vertical misalignment of expenditures and incentives—which points in favor of devolution—the need for collective action and the risk of free ridership may point instead in favor of scaling up. Making cities responsible for healthcare, housing, and policing (funded through block grants from the federal government and the states) would make it easier to invest in housing and other programs by enabling local governments to offset those costs with savings on emergency health. The concern, however, is that at least some jurisdictions may instead decide to try to save on both housing *and* medical expenses by pushing the unhoused across jurisdictional lines.

Of course, in the real world, budgetary considerations are not the only ones that drive decision making. Salience matters as well. When it comes to homelessness, local government officials will always feel more pressure to act than state or federal officials who are further removed from the immediacy of the crisis and are rarely the first to hear about constituent concerns. Because homelessness rates tend to be higher in major cities, state legislators from rural areas may not be inclined to spend political capital on addressing housing concerns. Even if the financial incentives were perfectly aligned, it is not obvious that states would have the political incentive to act.

There are, in short, no easy answers. And it falls well beyond the scope of this brief Essay to try to map out any particular approach that jurisdictions might take. But what the discussion in the last Part makes clear is that in order to make sense of our fractured and often counterproductive approach to the growing homelessness crisis, it is essential to develop a fuller understanding of the various decision points at each level of government that bring it about.

Focusing on governance structures may be particularly important given that fragmentation is, if anything, of still greater concern with respect to the broader set of

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83. Biersbach & Bibas, *supra* note 14, at 220–21.

84. *Id.*

debates around reimagining public safety and shrinking the role of the police. Policing routinely accounts for a significant share of municipal budgets,<sup>85</sup> but this is partly a reflection of the fact that in many jurisdictions, policing and fire protection are two of the main services that cities have historically been asked to provide. Education is often funded and supervised by independent school boards, which rely on a mix of local property taxes and state grants.<sup>86</sup> Public health responsibilities often fall to counties—with funding from the federal government and the states.<sup>87</sup> Direct cash assistance to low-income residents almost exclusively comes from the federal government but is administered primarily by the states.<sup>88</sup> Policing in 2018 accounted for around four percent of all state and local government expenditures, which is roughly where it has been for the past forty years.<sup>89</sup> Although there are steps that municipalities can take on their own to reduce their reliance on the criminal system—by investing in community violence prevention efforts or experimenting with co-response—transformative change will almost certainly require a shift in priorities (and likely new investments) at the federal, state, and county levels as well.

#### CONCLUSION

As Friedman suggests, our misguided approach to the needs of the unhoused reflects a deeper set of democratic dysfunctions around policing and public safety. And surely among them is the failure on the part of government officials to take full account of the costs that policing and incarceration can impose. But the institutional structures within which these decisions are made must necessarily be part of the story as well. When it comes to complex, multicausal problems like crime or homelessness, our fragmented governance system makes it extraordinarily difficult to develop a full accounting of costs and benefits, and harder still to optimize policy in response.

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85. See Richard C. Auxler, *What Police Spending Data Can (and Cannot) Explain amid Calls to Defund the Police*, URB. INST.: URB. WIRE BLOG (June 9, 2020), <https://www.urban.org/urban-wire/what-police-spending-data-can-and-cannot-explain-amid-calls-defund-police> (noting that across the U.S. in 2017, “police spending accounted for roughly \$1 out of every \$10 spent by counties, municipalities, and townships”).

86. See, e.g., Alia Beard Rau & Ricardo Cano, *Arizona School Funding: How It Works*, AZ CENTRAL (Nov. 13, 2017), <https://www.azcentral.com/story/news/politics/arizona-education/2017/11/13/arizona-school-funding/782457001/> (describing sources of education funding in Arizona).

87. See, e.g., MARICOPA CNTY. GOV'T FIN. OFFICERS ASS'N., MARICOPA COUNTY BUDGET FY 2022, at 545–46 (2020), <https://www.maricopa.gov/ArchiveCenter/ViewFile/Item/5301> (showing that the bulk of public health expenditures are supported by intergovernmental grants).

88. See *Public Welfare Expenditures*, URB. INST. (2021), <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/public-welfare-expenditures>.

89. *Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST. (2021), <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures> (showing that police spending has grown roughly in proportion to state and local government expenditures as a whole).