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Jocelyn Simonson

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# Copwatching

Jocelyn Simonson\*

*This Article explores the phenomenon of organized copwatching—groups of local residents who wear uniforms, carry visible recording devices, patrol neighborhoods, and film police-citizen interactions in an effort to hold police departments accountable to the populations they police. The Article argues that the practice of copwatching illustrates both the promise of adversarialism as a form of civic engagement and the potential of traditionally powerless populations to contribute to constitutional norms governing police conduct. Organized copwatching serves a unique function in the world of police accountability by giving these populations a vehicle through which to have direct, real-time input into policing decisions that affect their neighborhoods.*

*Many scholars recognize that a lack of public participation is a barrier to true police accountability. When searching for solutions these same scholars often focus on studying and perfecting consensus-based methods of participation such as community policing, and neglect the study of more adversarial, confrontational forms of local participation in policing. By analyzing copwatching as a form of public participation, this Article challenges the scholarly focus on consensus-based strategies of police accountability. The Article urges scholars and reformers to take adversarial, bottom-up mechanisms of police accountability seriously—not just as protest,*

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*but as true participation. Doing so requires respecting observation and contestation as legitimate civic gestures worthy of protection.*

Introduction .....	392
I. Community and Consensus in Police Accountability .....	398
II. Copwatching as Police Accountability .....	407
A. The Tactic of Organized Copwatching .....	408
B. Copwatching as Deterrence .....	413
C. Copwatching as Data Collection.....	417
D. Copwatching as Constitutional Engagement .....	421
III. The Limits of Copwatching .....	427
A. Police Resistance .....	427
B. Privacy Concerns .....	432
C. The Ambiguity of Video.....	433
IV. Beyond Consensus.....	435
V. Respecting Observation .....	438
A. Structural Reform of Police Departments .....	438
B. Constitutional Change.....	441
C. Redefining Community Policing .....	443
Conclusion .....	444

*This Valentine's Day: Love Your Community, Watch the Cops.*<sup>1</sup>

## INTRODUCTION

Since mid-2014, events in Ferguson, Staten Island, Baltimore, and around the country have brought to the nation's attention the racial and spatial differences in how people interact with the criminal justice system, especially with respect to policing.<sup>2</sup> One cause of these differences is the gap between criminal justice involvement and democratic opportunity: residents of neighborhoods with large concentrations of poor people of color have the most frequent contact with, but the least input into, local policing policies and practices.<sup>3</sup> A wide range of commentators—including President Obama—have

1. Valentine's Day E-Card from CopwatchNYC.org (Feb. 2014) (on file with author).

2. See, e.g., David A. Graham, *Systemic Racism or Isolated Abuses? Americans Disagree*, ATLANTIC (May 7, 2015), <http://www.theatlantic.com/politics/archive/2015/05/systemic-racism-or-isolated-abuse-americans-disagree/392570> [<https://perma.cc/U2K6-32Q7>] (describing a change in how white Americans view policing between December 2014 and April 2015).

3. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 915–18 (2006); Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 983–85 (2008).

increasingly argued that expanding public participation in policing may help mitigate the “simmering distrust”<sup>4</sup> between police and communities.

This proposition has long preoccupied criminal justice scholars as well. For decades, the dominant scholarly approach to increasing local participation in policing has been to seek out collaboration and consensus between local residents and police officers, most often through the set of practices known as “community policing.”<sup>5</sup> One central goal of community policing is for communities and police departments to work together to decrease animosity and increase legitimacy.<sup>6</sup> The leading scholarly approach thus encourages deliberation and consensus building between communities and the police, while leaving direct, adversarial mechanisms of accountability, such as disciplinary hearings, to the State. The result is that adversarial forms of community participation are largely written out of the picture.

In this Article, I challenge the wisdom of this focus on consensus in public participation by exploring the phenomenon of organized copwatching—groups of local residents who wear uniforms, carry visible recording devices, patrol neighborhoods, and film police-citizen interactions in an effort to hold police departments accountable to the populations they police. Rather than seek consensus with police officers, copwatching groups take an adversarial stance toward the police: they point their cameras at officers, ask them questions about the officers’ practices and policies, and critique those practices and policies on social media and in court. Organized copwatching is not a new phenomenon.<sup>7</sup> But the practice is on the rise, particularly among poor

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4. This is President Obama’s phrase. See President Barack Obama, Remarks by the President After Meeting with Elected Officials, Community and Faith Leaders, and Law Enforcement Officials on How Communities and Law Enforcement Can Work Together to Build Trust and Strengthen Neighborhoods Across the Country (Dec. 1, 2014), <http://www.whitehouse.gov/the-press-office/2014/12/01/remarks-president-after-meeting-elected-officials-community-and-faith-le> [<http://perma.cc/4GST-CYF7>].

5. See, e.g., Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 OHIO ST. J. CRIM. L. 123, 125 (2008); James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 2–8 (2004); Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1626–31 (2002); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 327–32 (1998).

6. See generally DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 86–97 (2008) (describing this rising preoccupation with participation and legitimacy with respect to policing); see also *infra* Part I. For example, Yale Law School Professor Tracey Meares, a member of the President’s Task Force on 21st Century Policing, has argued that police departments should not only listen to communities but should also help create communities. See Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 WM. & MARY L. REV. 1865, 1885 (2013) (“Policing should . . . play a role in the production of self-identity that helps to ‘construct and sustain our “we-feeling”—our very felt sense of “common publicness.”” (citing IAN LOADER & NEIL WALKER, *CIVILIZING SECURITY* 154 (2007)).

7. Indeed, organized copwatching has been a tactic of social movements since at least the 1960s. See *infra* notes 77–78 and accompanying text. Moreover, as the availability and use of smartphones has spread, individuals can and do spontaneously record police officers in public—an informal, unorganized form of copwatching—with increasing frequency. See Seth F. Kreimer,

populations of color seeking police accountability in their neighborhoods.<sup>8</sup> This is especially true after the rise of the #BlackLivesMatter movement<sup>9</sup>: the fall of 2014 saw the founding of new organized copwatching patrols in Ferguson, Chicago, and New York City.<sup>10</sup> More followed in early 2015 in Cleveland, Baltimore, Boston, and Charleston.<sup>11</sup> Legal scholars, however, have not asked whether and how copwatching should relate to larger analyses of community participation in criminal justice.<sup>12</sup>

This Article brings organized copwatching into the scholarly conversation around police accountability, and presents a critique of the prevailing notion of community participation in policing that privileges consensus over conflict. Two central claims stem from this critique.

My primary claim is that scholars and reformers should recognize that promoting public participation in criminal justice must include facilitating the ability of civilians to observe, record, and contest police practices and constitutional norms. To seek only collaboration, at the expense of dissent, is to miss out on an important piece of the puzzle that is popular police accountability. In making this argument, I draw on the concept in democratic theory of agonism—an adversarial but respectful stance toward institutions in

*Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 339–51 (2011).

8. Organized copwatching groups have proliferated over the last two decades, cropping up throughout the United States. *See infra* Part II.A.

9. *See* Elizabeth Day, #BlackLivesMatter: The Birth of a New Civil Rights Movement, *GUARDIAN* (July 19, 2015), <http://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement> [<https://perma.cc/L347-BVBV>] (describing the growth of the #BlackLivesMatter movement into a major political force).

10. *See, e.g.*, Associated Press, *Ferguson Residents Get Body Cameras to Record Police*, U.S. NEWS & WORLD REP. (Sept. 22, 2014), <http://www.usnews.com/news/articles/2014/09/22/ferguson-residents-get-body-cameras-to-record-police> [<https://perma.cc/Z5NK-PQBR>]; Ben Kochman, *Watchdog Groups Training Citizens to Join Copwatch Movement by Catching Rogue Police in Action*, N.Y. DAILY NEWS (Oct. 1, 2014), <http://www.nydailynews.com/new-york/bronx/city-watchdog-groups-training-citizens-film-rogue-cops-article-1.1960031>.

11. Owen Boss, ‘Copwatch’ Event Aims to Inform Citizens of Rights, *BOS. HERALD* (May 29, 2015), [http://www.bostonherald.com/news\\_opinion/local\\_coverage/2015/05/copwatch\\_event\\_aims\\_to\\_inform\\_citizens\\_of\\_rights](http://www.bostonherald.com/news_opinion/local_coverage/2015/05/copwatch_event_aims_to_inform_citizens_of_rights) [<https://perma.cc/5BXA-3W9Z>] (announcing Copwatch training); *Support*, *WECOPWATCH.ORG* (describing groups in North Charleston, Cleveland, and Baltimore) [<https://perma.cc/XJ7M-2YGG>]; *see also* Poh Si Teng & Ben Laffin, *Copwatch vs. Cops: After Freddie Gray*, N.Y. TIMES (Aug. 2, 2015), <http://www.nytimes.com/2015/08/02/us/copwatch-vs-cops-after-freddie-gray.html> (“Copwatch in the last year has started to grow and take on new forms.”) (see video accompanying article).

12. Although some First Amendment scholars have analyzed the right to film the police, legal scholars have not explored how copwatching fits into larger discussions about police accountability and community inclusion. For scholarship about the First Amendment right to film the police, *see, for example*, Kreimer, *supra* note 7, at 339–51; Howard M. Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 649 (2009); *cf.* Glenn Harlan Reynolds & John A. Steakley, *A Due Process Right to Record the Police*, 89 WASH. U. L. REV. 1203, 1207 (2012) (arguing for due process protection for citizens’ right to record police).

power<sup>13</sup>—as a way to locate the normative good that comes from looking beyond consensus when seeking public participation in criminal justice from less powerful populations.

Second, I claim that organized copwatching demonstrates the potential of politically powerless populations to contribute to *constitutional* norms governing police conduct. While some scholars present individual constitutional rights as separate from,<sup>14</sup> or even in conflict with,<sup>15</sup> community interests in safety and public order, organized copwatchers call these presumptions into question through rigorous engagement with Fourth Amendment principles.<sup>16</sup> Organized copwatchers articulate the communal interests at stake in the constitutional regulation of the police.<sup>17</sup> Professor Jerome Skolnick, in his seminal study of American police officers, noted that “[a]s invokers of the criminal law, the police frequently act in practice as its chief interpreter.”<sup>18</sup> Copwatchers aim to shift this calculus by infusing their own views of what is “reasonable” or fair into everyday interactions with police officers in their neighborhoods. If Fourth Amendment reasonableness is an “immense Rorschach blot” with officers and judges as its analysts,<sup>19</sup> then copwatchers provide an alternative interpretation from the point of view of the citizen interacting with the officer.

13. See generally CHANTAL MOUFFE, *AGONISTICS: THINKING THE WORLD POLITICALLY* 1–19 (2013).

14. See, e.g., Forman, Jr., *supra* note 5, at 15–16 (arguing that community policing holds more promise for improving policing practices than does Fourth Amendment enforcement through courts); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 768–81 (2012) (describing the limits of the Constitution in regulating police conduct).

15. See, e.g., TRACEY L. MEARES & DAN M. KAHAN, *When Rights Are Wrong: The Paradox of Unwanted Rights*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 3, 4–5 (Joshua Cohen & Joel Rogers eds., 1999) (arguing that there is a conflict between democratic rule and individual rights with respect to the policing of minority communities); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 52–74 (1997).

16. Although scholars are correct to highlight the shortcomings of the Fourth Amendment in holding police accountable for individual instances of wrongdoing, my claim here is that they are too quick to turn away from on-the-ground popular engagement with the Fourth Amendment by disempowered populations as itself a form of lay participation in criminal justice. For critiques of the efficacy of the Fourth Amendment, see generally I. Bennett Capers, *The Fourth Problem*, 49 TULSA L. REV. 431, 431 (2013) (reviewing STEPHEN J. SCHULHOFER, *MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY* (2012) and TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT’S EXCLUSIONARY RULE* (2013)) (“These days, to say there is a problem with the Fourth Amendment, the ‘most litigated constitutional provision in the nation’s courts,’ is to pretty much restate the obvious.” (internal citation omitted)); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 833 (2006) (“The law of policing might work reasonably well—better than the current system—without any constitutional regulation.”).

17. This articulation is itself a form of demosprudence, members of social movements engaging with constitutional principles. See Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2757–68 (2014).

18. JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 14 (1966).

19. Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 393–94 (1974).

The existence of organized copwatching thus challenges the well-entrenched scholarly dichotomy between community participation in policing and state-driven accountability of police officers. There are ways other than copwatching to document police behavior—for example, by requiring officers to wear lapel or body cameras, a practice hailed of late by scholars, politicians, and activists alike.<sup>20</sup> But organized copwatching is different in kind than police-worn cameras because it combines public participation and accountability in one practice. Local residents become the subjects, rather than the objects, of policing: civilians set the terms of engagement by deciding when and where to record, which recordings to save, who can have access to the footage, and how to frame the narratives surrounding the release of any recordings.<sup>21</sup> Traditionally powerless populations are able to have direct input into discretionary policing decisions and constitutional norms in the context of a criminal justice system that largely excludes those populations from learning about its inner workings.

My claim is not that copwatching is an easy fix to the longstanding problem of police accountability to populations living in areas with a high police presence. To the contrary, organized copwatching groups do not “represent” any larger public other than themselves,<sup>22</sup> and their presence may at times exacerbate existing tensions between police officers and neighborhood residents.<sup>23</sup> But at a time when the nation is refocusing on the longstanding disconnect between the police and the populations they police, it is more important than ever to make sure that we know what we mean when we speak

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20. See generally Clare Sestanovich, *Our Body-Cams, Ourselves*, MARSHALL PROJECT (Feb. 10, 2015), <https://www.themarshallproject.org/2015/02/10/our-body-cams-ourselves> [http://perma.cc/PS9F-TP4X] (describing “broad (and rare) consensus . . . in support of [body-cameras by] advocates, legislators, and even many officers themselves”); Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 832–33 (2015) (describing the widespread support for police-worn body cameras expressed in 2014 by scholars, public officials, journalists, activists, and police departments). Since mid-2014, at least thirteen states have considered legislation mandating police to wear body cameras, and President Obama has proposed a three-year, \$263 million investment in body cameras. See Reid Wilson, *Police Accountability Measures Flood State Legislatures After Ferguson, Staten Island*, WASH. POST (Feb. 4, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/04/police-accountability-measures-flood-state-legislatures-after-ferguson-staten-island/> [http://perma.cc/XY95-PPD9]. However, most major American cities still do not have body cameras on their officers. See Dana Liebelson & Nick Wing, *Most Major Cities Still Don’t Have Body Cameras for Cops*, HUFFINGTON POST (Aug. 13, 2015), [http://www.huffingtonpost.com/entry/police-body-cameras\\_55cbaac7e4b0f1cbf1e740f9?k](http://www.huffingtonpost.com/entry/police-body-cameras_55cbaac7e4b0f1cbf1e740f9?k) [https://perma.cc/9LWE-XPGV].

21. For an extended comparison of police-worn body cameras and civilian recordings of officers, see Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. (forthcoming 2016) (manuscript at 5–9).

22. Cf. LAURA I. APPLEMAN, *DEFENDING THE JURY: CRIME, COMMUNITY AND THE CONSTITUTION* 70–91 (2015) (discussing the difficulties with defining community in relation to criminal justice); Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343.

23. I discuss this and other potential pitfalls of the practice in Parts III & IV, *infra*.

of participation, civic engagement, and repairing fractured relationships between communities and the police.

This Article is the second in a series in which I present a conception of public participation in criminal justice that includes observation and contestation alongside traditional notions of participation through deliberation.<sup>24</sup> The phenomenon of organized copwatching demonstrates that the meaningful *observation* of the criminal justice system cannot be separated from the ability of disempowered populations to provide meaningful *input into* the workings of that system. This insight has consequences for criminal justice more broadly: if we truly want to make our criminal justice system democratically accountable, we must accept feedback not just through formal state-structured mechanisms but also through means of feedback and accountability that are designed by the people.

The Article proceeds as follows. Part I describes the current scholarly focus on consensus in addressing the elusive nature of police accountability to traditionally disempowered populations, especially African Americans and Latinos. In Part II, I detail the practice of organized copwatching and its rise over the last two decades. Using the results of interviews that I conducted with representatives of eighteen copwatching organizations from around the United States, I analyze the practice of organized copwatching as a form of police accountability. In particular, I describe the ways in which copwatching deters police misconduct, contributes to the collection of public information about policing, and gives residents of policed neighborhoods input into defining the contours of Fourth Amendment reasonableness.

Part III takes on the serious challenge of police resistance to copwatching and recognizes the limits of copwatching as a tactic of police accountability. Part IV then uses the practice of organized copwatching to challenge the consensus-based focus of scholars interested in public participation in criminal justice. Part V then examines the normative commitments that flow from a recognition of the ways in which copwatching functions as a form of police accountability. For municipalities and police departments, this means promoting a climate of respect for local groups that engage in the practice of copwatching and its related activities. For the Department of Justice, local and federal policing taskforces, and actors involved in structural reform litigation, this means pushing for requirements that police departments train officers regarding the First Amendment right to observe and record, including *why* respect for such observation is important. Scholars and policy makers must recognize that participation and cooperation do not always go hand in hand,

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24. See Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2175 (2014). In the first Article, I argued that the power of observation by audience members in criminal courtrooms can play an important role in promoting the accountability of public actors—especially judges and district attorneys—in the criminal justice system. *Id.* at 2177–200.



and that some forms of adversarial participation are worthy of our respect and protection.

## I.

### COMMUNITY AND CONSENSUS IN POLICE ACCOUNTABILITY

Police departments tend to be unpopular among the residents of areas in which the bulk of police stops, frisks, and arrests take place: neighborhoods with large concentrations of poor people, especially poor people of color.<sup>25</sup> These residents feel that police officers are simultaneously underprotecting and overpolicing their neighborhoods.<sup>26</sup> In particular, the vast majority of African Americans consider violence against civilians by police officers to be a serious problem.<sup>27</sup> This distrust between people living in neighborhoods with a large police presence and the police departments in those neighborhoods is a problem for democratic accountability,<sup>28</sup> legitimacy,<sup>29</sup> and fairness.<sup>30</sup> Moreover, this distance between the police and “communities”<sup>31</sup> is a symptom

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25. See, e.g., Report of Jeffrey Fagan, *Floyd v. City of New York*, 959 F. Supp. 2d 668, 677 (S.D.N.Y. 2013) (No. 08 Civ. 1034), at \*3 [hereinafter Fagan Report] (finding that in New York City stops and frisks are concentrated in areas with a high percentage of Black and Hispanic residents). See generally Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC'Y REV. 777 (1998) (finding that dissatisfaction with police is highest in disadvantaged neighborhoods and among minority populations); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1009 (1999) (“[T]he history of antagonistic relations between the police and individuals of color has fostered general uneasiness among people of color about contact with police officers.”).

26. See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 162–64 (2002); Ronald Weitzer, *Race and Policing in Different Ecological Contexts*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 118, 121 (Stephen K. Rice & Michael D. White eds., 2010) (describing this combination of “depolicing and harsh policing”).

27. See *New Survey on Americans' Views on Law Enforcement, Violence, and Race*, NORC, U. CHI. (Aug. 5, 2015), <http://www.norc.org/NewsEventsPublications/PressReleases/Pages/new-survey-on-americans-views-on-law-enforcement-violence-and-race.aspx> [<https://perma.cc/32BB-MVH6>] (finding that three-quarters of black respondents consider violence against civilians by police officers to be an extremely or very serious problem).

28. See TRACI BURCH, TRADING DEMOCRACY FOR JUSTICE: CRIMINAL CONVICTIONS AND THE DECLINE OF NEIGHBORHOOD POLITICAL PARTICIPATION 75–104 (2013) (describing how residents of “high-imprisonment” neighborhood lack political power and democratic accountability). See generally Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015) (stressing the importance of governing police discretion through processes of democratic accountability).

29. See Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 751–55, 771 (2014) (collecting studies that demonstrate the loss of legitimacy of police officers in the eyes of young men of color).

30. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1331–37 (2012) (describing the phenomenon of misdemeanor arrests without adequate evidence in “high-volume, low-scrutiny” situations such as those found in zero-tolerance policing and routine urban street control).

31. I put the word community in quotations because it is a notoriously vague concept; people mean different things when they use it. See STEVE HERBERT, CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY 55, 72–89 (2006) (describing how police departments

of the larger decline in political power of neighborhoods in which arrests and prosecutions are concentrated.<sup>32</sup>

How, then, should we approach this ever-widening gap between police departments and the poor, minority populations that they police? Scholars and policy makers concerned with this phenomenon tend to focus on creating consensus-based mechanisms of inclusion for disempowered populations. Although these mechanisms differ substantially, they all center on police departments seeking ongoing input from and deliberation with residents and other stakeholders. As I detail below, this includes both “community policing” at the neighborhood level and efforts to bring the approach of new governance, specifically “democratic experimentalism,” to the structural reform of entire police departments. These approaches recognize the limits of traditional political and legal channels to hold police accountable to local communities. At the same time, they represent a turn away from the focus on regulating constitutional violations against individual officers.

Indeed, these consensus-based strategies may be based, in part, on a sense that two traditionally adversarial dimensions of accountability—civilian review<sup>33</sup> and Fourth Amendment enforcement—have failed to hold police

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define “community” in different terms than residents of policed neighborhoods); Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 216–17 (critiquing the amorphous concept of community in the context of policing); Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769, 1770–74 (1992) (describing different conceptions of “community” among African Americans with respect to criminal justice); Mary I. Coombs, *The Constricted Meaning of “Community” in Community Policing*, 72 ST. JOHN’S L. REV. 1367, 1372 (1998) (noting that, in the context of community policing models, “[t]he communities that suffer from under[enforcement and over[enforcement aren’t exactly the same community, even when they can each be described as ‘minority communities’”); Weisberg, *supra* note 22, at 347 (critiquing the concept of community in the rise of restorative justice). But because it is the word that many scholars and even more policy makers use, I use it here as a proxy for the idea of people who reside in a particular neighborhood and have a common stake in the policing of that neighborhood.

32. See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 34 (2012) (“Residents of high-crime neighborhoods have some personal concerns and knowledge [of the criminal justice system], but may be politically powerless and poor.”); BURCH, *supra* note 28, at 75–104 (describing lack of political power of poor populations of color from which the majority of prison populations come); AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* 199–231 (2014) (describing alienation and withdrawal from political life of individuals who had contact with the criminal justice system via stops, arrests, or confinement); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 63–120, 216–18 (2011) (describing a historical trajectory in which democratic participation dies out for African American communities affected by both crime and the criminal justice system); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1291–98 (2004) (describing how mass incarceration in African American communities erodes those communities’ ability to cultivate political power and affect the system).

33. See generally SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 144 (2005) (“To date, however, there is no evidence that civilian review boards are effective in achieving their stated goals.”); Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J.L. & SOC.

accountable to local residents. The Fourth Amendment's enforcement mechanisms are notoriously weak, both in their ability to deter misconduct and in their ability to hold officers accountable for misconduct.<sup>34</sup> This stems, in part, from the Fourth Amendment's vague standards of "reasonableness," which leave courts room to interpret those standards in favor of police officers<sup>35</sup> and give officers a monopoly over the narratives that shape courts' interpretations.<sup>36</sup> Moreover, as courts currently interpret the Fourth Amendment, much police behavior is discretionary and occurs outside the bounds of the Amendment's restrictions.<sup>37</sup> In particular, police officers can detain or arrest someone with probable cause for any criminal infraction, no matter how minor.<sup>38</sup> The Fourth Amendment, in other words, has seemingly nothing to say about how police departments decide what types of arrests to make and in which neighborhoods to make them.<sup>39</sup> This issue is of particular concern for many poor people of color in areas that engage in order-maintenance policing and other place-based initiatives.<sup>40</sup> It is in the context of these limits of the Fourth Amendment that community policing, democratic experimentalism, and other consensus-based initiatives have come to the forefront of police accountability scholarship and policy making.

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PROBS. 1, 2–12 (2009); Hector Soto, *The Failure of Civilian Oversight*, GOTHAM GAZETTE (Oct. 9, 2007), <http://www.gothamgazette.com/index.php/open-government/3683-the-failure-of-civilian-oversight> [https://perma.cc/9RCH-4U29].

34. See generally Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 N.W. U. L. REV. 1609, 1618–36 (2012) (documenting the “illusory deterrence” of traditional sanctions for Fourth Amendment misconduct); Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 689 (2011) (“[T]he substantively living protections of the Fourth Amendment are being procedurally killed—it is a death by a thousand procedural cuts.”).

35. See David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 472–73 (1999) (describing a “grey zone of morality” that police inhabit and judges accept when litigating Fourth Amendment claims); see also *infra* notes 156–67 and accompanying text.

36. See SKOLNICK, *supra* note 18, at 12; see also *infra* notes 129–133 and accompanying text.

37. See Harmon, *supra* note 14, at 768–81; Meares, *supra* note 6, at 1869; see also *infra* notes 186–87 and accompanying text.

38. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *Whren v. United States*, 517 U.S. 806, 809 (1996).

39. See Susan A. Bandes, *The Challenges of “Quality of Life” Policing for the Fourth Amendment*, in *THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA* 45, 45 (John T. Parry & L. Song Richardson eds., 2013); Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 STAN. L. REV. 987, 992–95 (2014); Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1179–81 (2012).

40. See BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 90–121 (2001) (describing effects of order-maintenance policing on populations in which arrests take place); Bandes, *supra* note 39, at 46–48 (describing how quality-of-life policing affects entire neighborhoods but is not subject to Fourth Amendment scrutiny); Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 229–31 (2012) (describing how residents of high crime areas may not think as highly of order-maintenance policing as the general public); Devon W. Carbado, *(E)Racing The Fourth Amendment*, 100 MICH. L. REV. 946, 952 (2002) (describing psychological effects on African Americans of their subjection to constant police scrutiny).

It is difficult to overstate the influence of the concept of community policing. In the United States it has been the most widely acclaimed and heavily funded policing strategy over the last three decades.<sup>41</sup> In the months following events in Ferguson and Staten Island in 2014, community policing was the go-to concept for politicians and reformers. Responding to the grand jury decision in Ferguson in December 2014, for example, President Obama explicitly vowed to use the resources of the federal government to “strengthen community policing.”<sup>42</sup> The President then created a Task Force whose mission was to “identify the best means to provide an effective partnership between law enforcement and local communities.”<sup>43</sup> The Task Force’s eventual recommendations included a panoply of consensus-based strategies to improve police-community relationships, including “collaborat[ion] with community members to develop policies and strategies.”<sup>44</sup>

Although community policing is a vague term,<sup>45</sup> it often refers to efforts to include local residents in regular collaborative meetings to solicit input on policing priorities.<sup>46</sup> Community policing initiatives vary in how they try to

41. See generally Forman, Jr., *supra* note 5, at 1; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 575 (1997); Meares, *supra* note 5, at 1600; Wesley G. Skogan & Jeffrey A. Roth, *Introduction to COMMUNITY POLICING: CAN IT WORK?* xvii, xvii (Wesley G. Skogan ed., 2004) (“Community policing is the most important development in policing in the past quarter century.”).

42. See David Hudson, *Building Trust Between Communities and Local Police*, WHITEHOUSE.GOV (Dec. 1, 2014), <http://www.whitehouse.gov/blog/2014/12/01/building-trust-between-communities-and-local-police> [<http://perma.cc/3YR3-JZ48>].

43. Establishment of the President’s Task Force on 21st Century Policing, Exec. Order No. 13684, 79 Fed. Reg. 76,865, 76,865 (Dec. 18, 2014).

44. See PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 20 (May 2015), [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [<https://perma.cc/8W26-QN5R>]. Nowhere in the one-hundred-page report does the Task Force mention civilian filming of police or recommend that police departments respect civilian filming. See *id.*

45. Cf. OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUSTICE, COMMUNITY POLICING DEFINED 3 (2014), <http://www.cops.usdoj.gov/pdf/vets-to-cops/e030917193-CP-Defined.pdf> [<http://perma.cc/WER2-GMR9>] The Department of Justice gives the following definition of the term: “[A] philosophy that promotes organizational strategies that support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime.” *Id.* “Community policing” can refer to a variety of different approaches to policing. See generally SKLANSKY, *supra* note 6, at 82 (describing community policing as a “unifying rhetoric,” “notorious for meaning different things to different people”); Michael D. Reisig, *Community and Problem-Oriented Policing*, 39 CRIME & JUST. 1, 2–40 (2010) (describing the evolution of community policing over three decades). Police officials have also used the term “community policing” to refer to order-maintenance policing and other policies of mass misdemeanor arrests, but many of those policies do not seek out community-police partnerships. See HARCOURT, *supra* note 40, at 47.

46. See, e.g., ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 56–68 (2004) (laying out the ideal of participatory deliberation in community policing using Chicago as a model); Dorf & Sabel, *supra* note 5, at 327–32 (describing the promise of community policing efforts in Chicago in the mid-1990s to include residents in formulating policing strategies at “beat meetings”); Matthew J. Parlow, *The Great Recession and Its Implications for Community Policing*, 28 GA. ST. U. L. REV. 1191, 1195 (2012) (defining community policing as “a

include “community” members in police work. These initiatives can include education through community meetings, placing community representatives on advisory councils, and enlisting the help of residents in crime detection and prevention.<sup>47</sup>

Scholars who promote community policing often focus on the benefits of deliberative and collaborative decision making. They argue that having a voice in a deliberative process both improves substantive outcomes and increases residents’ satisfaction with the policing priorities that emerge from the deliberation.<sup>48</sup> This satisfaction, in turn, promotes legitimacy and makes residents more likely to work with police officers in identifying and fighting crime.<sup>49</sup> Over the last several decades, community policing has led to a number of successes in improving police-community relationships and perhaps in reducing crime as well.<sup>50</sup> Although I do not recount these successes here, it is clear that in addition to reducing crime in some places, many community policing initiatives have changed essential aspects of how police officers view some neighborhood’s residents and vice versa.

But there are limits to the community policing approach. For instance, some scholars have highlighted the tendency of community policing efforts to exclude the most marginalized and disadvantaged people in their meetings and interactions with “stakeholders.”<sup>51</sup> This is of particular concern because these

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theoretical and practical approach to policing that focuses on crime prevention, order maintenance, and partnership with the community to achieve these goals”).

47. See generally JAMES FOREMAN [sic], JR., FIVE POLICE DEPARTMENTS BUILDING TRUST AND COLLABORATION: INNOVATIONS IN POLICING CLINIC, YALE LAW SCHOOL (2013), <http://www.bjaexecutivesessiononpoliceleadership.org/pdfs/006FivePDCaseStudiesExecSum.pdf> [<http://perma.cc/Q59C-NGBZ>] [hereinafter YALE INNOVATIONS IN POLICING REPORT] (describing specific examples of each of these approaches); Wesley G. Skogan, *Representing the Community in Community Policing*, in COMMUNITY POLICING: Can It Work?, *supra* note 41, at 57 (describing four forms of community involvement in community policing: education, assistance, coproduction of safety, and representation on advisory boards).

48. See, e.g., Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC’Y 73, 73–80 (2001) (discussing how community policing in Chicago exemplifies “Empowered Deliberative Democracy”); Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183, 204–08 (2003) (citing JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996)) (discussing how police departments can use the ideas of deliberative democracy and procedural justice to increase citizen participation).

49. See TYLER & HUO, *supra* note 26, at 198–203.

50. See Reisig, *supra* note 45, at 23–43 (collecting studies showing that “the weight of the evidence suggests that community and problem-solving policing tactics can reduce crime, albeit modestly, and improve citizens’ perceptions of neighborhood conditions”).

51. See, e.g., HERBERT, *supra* note 31, at 55–59 (describing how in Seattle’s community policing program, the same three to five people “represented” the “community” in community meetings); Forman, Jr., *supra* note 5, at 14–16, 19–21 (describing and collecting studies of the uneven inclusion of populations with little political power in community policing, especially poor people of color, and describing how youth have, for the most part, been left out of community policing efforts); Skogan, *supra* note 47, at 73 (describing how attendance at beat meetings in Chicago represents “a strong middle-class bias” and “do[es] a better job at representing already established stakeholders in the

marginalized populations are often also those with the most frequent interactions with police officers on a day-to-day basis.<sup>52</sup> Other scholars have raised the worry that community policing may co-opt community concerns rather than represent them; police may be “buying peace” rather than earning it.<sup>53</sup> And despite its name, community policing efforts remain in the control of the police, driven by the police department’s terms, schedule, and outlook.<sup>54</sup> Scholars and reformers who recognize these problems have largely responded by doubling down on the central tenets of community policing by trying to create more opportunities for public input into policing practices<sup>55</sup> and

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community than [it] do[es] at integrating marginalized groups with fewer mechanisms for voicing their concerns”).

52. See Forman, Jr., *supra* note 5, at 16–17 (describing how police are mobilized at higher rates in communities of color and therefore interact with minority youth more frequently than with white youth); Fagan Report, *supra* note 25 (finding higher rates of stops and frisks among police precincts in New York City with larger percentages of Black and Hispanic residents); cf. Amna Akbar, *National Security’s Broken Windows*, 62 UCLA L. REV. 834, 838–39 (2015) (arguing that “community policing brings new law enforcement scrutiny to an already marginalized community”).

53. Cf. Skogan, *supra* note 47, at 57 (“One reason—perhaps the major one—cities adopt community policing is to solve their legitimacy problems and buy peace in poor and disenfranchised neighborhoods.”). For discussions of co-optation, see also HERBERT, *supra* note 31, at 72–73 (finding that police constitute their own view of community and “recognize some and not other forms of input as legitimate”); Alschuler & Schulhofer, *supra* note 31, at 217 (“Far from serving the needs of the disadvantaged, the concept of community can, in the wrong hands, become another weapon for perpetuating the disempowerment and discrimination that continue to haunt urban America.”); Bowers & Robinson, *supra* note 40, at 246 (“[T]he legitimacy project for its part does not actually demand that procedures be fair, only that they appear to be.”); Stephen D. Mastrofski & Jack R. Greene, *Community Policing and the Rule of Law*, in POLICE INNOVATION AND CONTROL OF THE POLICE: PROBLEMS OF LAW, ORDER, AND COMMUNITY 80, 92–93 (David Weisburd & Craig Uchida eds., 1993) (discussing “the challenge of stimulating actual community voice rather than achieving co-optation”); M. Alexander Pearl, *Of “Texans” and “Custers”: Maximizing Welfare and Efficiency Through Informal Norms*, 19 ROGER WILLIAMS U. L. REV. 32, 47–48 (2014) (arguing that community policing imposes norms on the community that are “fundamentally external and foreign to the community,” even if they are “executed by various members of the community”).

54. See SKLANSKY, *supra* note 6, at 83 (“The theme is community *partnership*, not community *control*: with minor exceptions, community policing programs are implemented unilaterally by the police.”).

55. See, e.g., BIBAS, *supra* note 32, at 144–56 (proposing greater transparency and participation in policing through community policing strategies that include both physical meetings and electronic sources of information and feedback); Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 37–53 (2012); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1168–70 (2000). In 2013, for example, Mayor Rahm Emanuel revamped the Chicago Alternative Policing Strategy (CAPS) community policing program in Chicago based on contentions that CAPS had become too far removed from the community. See Natalie Moore, *Chicago Revamps Community Policing Program*, WBEZ CHI. (Jan. 8, 2013), [http://blogs.luc.edu/mediaclips/files/2013/01/The-BEZ\\_Chicago-revamps-community-policing-program\\_01.08.13.pdf](http://blogs.luc.edu/mediaclips/files/2013/01/The-BEZ_Chicago-revamps-community-policing-program_01.08.13.pdf) [<https://perma.cc/932G-GCV4>]. These changes, however, have led to echoes of old criticisms from community members. One local community organization, for instance, released a report criticizing CAPS as “the superficial involvement of select community members in providing police with legitimacy.” See WE CHARGE GENOCIDE, COUNTER-CAPS REPORT: THE COMMUNITY ENGAGEMENT ARM OF THE POLICE STATE 3 (Oct. 2015), <http://wechargegenocide.org/wp-content/uploads/2015/10/CAPSreport-final.pdf> [<https://perma.cc/7RTQ-4PSQ>].

emphasizing the need to reach out to “unlikely allies” in police-citizen partnerships.<sup>56</sup>

More recently, scholars, courts, and police departments have begun to channel the consensus-based ideals of community policing and “democratic experimentalism”<sup>57</sup> toward encouraging ongoing collaboration between the Department of Justice, local community groups, and entire police departments.<sup>58</sup> This has meant combining the federal power of the Department of Justice’s ability to sue municipalities under section 14141<sup>59</sup> with efforts to include stakeholders in ongoing participation in structural reform litigation. In particular, scholars hail Cincinnati as a promising example.<sup>60</sup> In Cincinnati, the police department signed not only a consent decree with the Department of Justice but also a Collaborative Agreement with the ACLU, the Cincinnati Black Front, and the local police union, requiring the department to solicit ongoing input from stakeholders as the department worked to reduce excessive force.<sup>61</sup> Democratic experimentalism places a premium on the potential of deliberation among local stakeholders to result in both better policing and policing that residents perceive as more legitimate; as with community

56. See, e.g., Forman, Jr., *supra* note 5, at 29–41 (advocating that community policing initiatives focus on youth); YALE INNOVATIONS IN POLICING REPORT, *supra* note 47, at 4–5 (describing efforts in Philadelphia, Charlotte, High Point, and Seattle to reach “unlikely allies”).

57. Dorf & Sabel, *supra* note 5, at 267 (defining democratic experimentalism as a system in which “power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances” but local lessons are shared regionally and nationally); see also Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345–47 (2004) (describing the host of terms used in legal scholarship to describe the shift from regulation to governance).

58. See, e.g., Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 101–05 (2001); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1047 (2004) (describing how community groups have litigated to achieve greater collaboration with the Justice Department); Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 389–419 (2010).

59. 42 U.S.C. § 14141 (2012); see Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 819–20 (1999); see also Michael D. White, *Preventing Racially Biased Policing Through Internal and External Controls: The Comprehensive Accountability Package*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 468, 477–79 (Stephen K. Rice & Michael D. White eds., 2010).

60. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 668, 677 (S.D.N.Y. 2013); Jay Rothman, *Identity and Conflict: Collaboratively Addressing Police-Community Conflict in Cincinnati, Ohio*, 22 OHIO ST. J. ON DISP. RESOL. 105, 105–09 (2006); Simmons, *supra* note 58, at 423–25; Elliot Harvey Schatmeier, Note, *Reforming Police Use-of-Force Practices: A Case Study of the Cincinnati Police Department*, 46 COLUM. J.L. & SOC. PROBS. 539, 556–63 (2013).

61. See Collaborative Agreement, *In re Cincinnati Policing*, No. C-1-99-317 (S.D. Ohio April 12, 2002), <http://www.cincinnati-oh.gov/police/linkservid/27A205F1-69E9-4446-BC18BD146CB73DF2/showMeta/0/> [http://perma.cc/CEU6-887C]; SAUL A. GREEN ET AL., CITY OF CINCINNATI INDEPENDENT MONITOR’S FINAL REPORT 36–51 (2008), <http://www.cincinnati-oh.gov/police/linkservid/97D9709F-F1C1-4A75-804C07D9873DC70F/showMeta/0/> [https://perma.cc/Y7Y2-TPLX].

policing, the process of consensus-driven deliberation is itself part of the point.<sup>62</sup>

And as with community policing, depending on stakeholder participation as a proxy for “community” involvement raises concerns about both who is included as representatives of the “community” and the extent to which the input of those representatives is taken seriously.<sup>63</sup> For instance, some scholars have critiqued consent decrees between the Department of Justice and police departments that do not require ongoing and meaningful inclusion of affected community groups in their monitoring.<sup>64</sup> More broadly, scholars of new governance have recognized that there is a danger that decentralized participation of this nature can become “cosmetic” or even re-inscribe existing power imbalances.<sup>65</sup> As with community policing, though, the scholarly solution is often to improve upon the inclusion of community groups in structural reform rather than to look beyond consensus-driven approaches.<sup>66</sup>

Not all legal scholars seek out consensus-based processes for public participation. Professor David Sklansky, for instance, has been a prominent critic of the focus on legitimacy and participation in policing, demonstrating

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62. See, e.g., Garrett, *supra* note 58, at 133 (“[W]hen the emphasis is on partnerships, aggressive and quasi-militaristic attitudes that risk alienating significant segments of the community are counterproductive.” (quoting Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1267–68 (2000))); Simmons, *supra* note 58, at 409 (“The opportunity for police officers and community members to deliberate about police conduct and police-citizen interactions is key to dismantling the ‘us versus them’ mentality.”). The ultimate success of these reforms remains a matter of debate. See generally Simone Weichselbaum, *Cincinnati: Ferguson’s Hope or Hype?*, MARSHALL PROJECT (Nov. 25, 2014), <https://www.themarshallproject.org/2014/11/25/cincinnati-ferguson-s-hope-or-hype> [<https://perma.cc/KWQ9-LQDV>].

63. Cf. *An Open Letter to the ACLU of Illinois Regarding Stop & Frisk*, WE CHARGE GENOCIDE (Aug. 12, 2015), <http://wechargegenocide.org/an-open-letter-to-the-aclu-of-illinois-regarding-stop-frisk/> [<https://perma.cc/V78Z-DT8C>] (laying out a community group’s dissatisfaction with settlement negotiations between the ACLU of Illinois, the City of Chicago, and the Chicago Police Department).

64. See, e.g., Garrett, *supra* note 58, at 101–05 (describing how consent decrees fail to include local residents); Sabel & Simon, *supra* note 58, at 1047 (describing the importance of the role of citizen groups in consent decrees between police departments and the Department of Justice); Simmons, *supra* note 58, at 419.

65. Jaime Alison Lee, “*Can You Hear Me Now?: Making Participatory Governance Work for the Poor*,” 7 HARV. L. & POL’Y REV. 405, 413–17 (2013) (describing problem of “cosmetic participation” in New Governance initiatives); see also Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 362 (2009) (“[P]articipatory structures may rhetorically include disempowered stakeholders but actually cede little or no power.”).

66. See, e.g., WALKER, *supra* note 33, at 187 (discussing the need for police departments to engage community representatives in their plans to design accountability systems); Garrett, *supra* note 58, at 101–05 (describing problems with many consent decrees and arguing that “[b]uilding remedies with outside groups as ‘equal partners’ can solve many of the problems these decrees have encountered”); Lee, *supra* note 65, at 406; Sabel & Simon, *supra* note 58, at 1047; Simmons, *supra* note 58, at 419 (“The DOJ should actively identify additional stakeholders in the jurisdictions affected by its Pattern or Practice legislation and invite them to participate in developing and considering the reforms.”).



powerfully the link between conceptions of democracy and conceptions of policing: as democratic theory has moved away from pluralism to focus on deliberation, so too have ideas about policing moved toward a focus on consensus, often at the expense of considering disempowered voices and the political dynamics that disempower them.<sup>67</sup> Generally, though, scholars who seek to increase local public participation in policing, and especially those concerned with disempowered minority populations, look toward designing and perfecting deliberative, consensus-based mechanisms of inclusion. These mechanisms focus not on enforcing individual constitutional rights but rather on guiding discretionary policies and practices made possible by broad interpretations of the Fourth Amendment.<sup>68</sup>

This focus on consensus and deliberation—on getting a seat at the table—misses out on a number of possibilities. It does not engage with the potential for social movements aimed at changing police practices to be a part of legal changes and even formal regulatory mechanisms.<sup>69</sup> It does not recognize the resonance that individual rights have for disenfranchised groups, even those groups who simultaneously recognize the limits of those rights.<sup>70</sup> And it does not adequately address the dangers of co-optation and legitimation when certain voices are shut out of the process.<sup>71</sup> Perfecting consensus overlooks the civic participation that the people who do not make it to the table engage in when they become frustrated with police policies and behavior in their

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67. See SKLANSKY, *supra* note 6, at 13–74. Nor do all scholars turn away from constitutional rights in thinking about public participation; some scholars have advocated that juries decide questions of Fourth Amendment reasonableness that are usually removed from larger societal norms of what is reasonable. See, e.g., Erik Luna, *The Katz Jury*, 41 U.C. DAVIS L. REV. 839, 840 (2008); Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 891–94 (2014).

68. See, e.g., *Whren v. United States*, 517 U.S. 806, 810 (1996); *Terry v. Ohio*, 392 U.S. 1 (1968); see also *infra* Part II.D (discussing Fourth Amendment reasonableness and police discretion).

69. Cf. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 28 (2005) (discussing how social movements can change constitutional law by moving the boundaries of what is plausible); Guinier & Torres, *supra* note 17, at 2750–69; Michael W. McCann, *How Does Law Matter for Social Movements?*, in HOW DOES LAW MATTER? 76, 90–100 (Bryant G. Garth & Austin Sarat eds., 1998) (describing the ways that social movements interact with formal laws); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323 (2006) (arguing that “constitutional culture channels social movement conflict to produce enforceable constitutional understandings”). But see WALKER, *supra* note 33, at 178–80 (noting the role of community groups in changing police practices).

70. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 83–84 (2d ed. 2004) (discussing the myth of rights); George I. Lovell, *The Myth of the Myth of Rights*, 59 STUD. L., POL., & SOC’Y 1, 3–7 (2012); cf. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1368 (1988) (discussing the use of legal rights ideology in the civil rights movement).

71. See MOUFFE, *AGONISTICS*, *supra* note 13, at 1–19 (laying out a theoretical critique of the legitimating functions of participatory democracy); IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 148 (2003) (“[D]eliberative processes can be manipulated by people with ulterior motives, they can marginalize the inarticulate (who may well also be those most vulnerable to domination), and they can result in stonewalling by the powerful in the face of needed changes.”); see also *infra* Part IV.

neighborhoods. Not everyone who dislikes the police withdraws from civic life, or worse, turns to crime; instead, many turn to forms of civil engagement outside of state-driven mechanisms. Organized copwatching is an example of such civic engagement: when groups of lay people come together to contest police practices through observation, recording, and dialogue, they engage in a civic gesture worthy of respect and protection.

## II.

### COPWATCHING AS POLICE ACCOUNTABILITY

This Part details the practice of organized copwatching and its rise over the last two decades. As I will show, organized copwatching gives traditionally powerless populations a way to have direct input into policing decisions that affect their neighborhoods. The “voice” of local residents comes out both in the moment, when the real-time observation of police officers deters unconstitutional conduct and promotes positive interactions, and after the fact, when copwatch members contribute to the accountability of police departments through both formal institutions and the informal public sphere. As copwatchers deter misconduct and enforce the Fourth Amendment, they also inject their own views about what the Fourth Amendment can or should be. At the same time, copwatching reveals the limits of the Fourth Amendment, asking that police officers think about more than if their conduct would pass eventual inspection at a suppression hearing.

First, I present the basics of the practice of copwatching and, in particular, some distinctions between casual filming of the police and organized copwatching. I base my account of organized copwatching on telephone interviews I conducted in early 2014 with representatives of eighteen copwatching groups from across the country. The purpose of the interviews was not to collect a full empirical data set that catalogues the practice of copwatching but rather to collect examples of the practice that go beyond second-hand accounts found in the popular media. The interviews thus serve as a source of anecdote to flesh out a thick description of a prevalent civic practice. I hope that unearthing the ever-growing practice of copwatching might inspire social scientists to conduct more rigorous studies of the effects of copwatching on individual police conduct, judicial decision making, and structural police reform, a project that would require speaking not only with copwatching groups but also with police officers, judges, and reformers. In this Part, my goal is more modest: to describe a practice using the results of interviews with representatives of copwatching organizations from around the country.<sup>72</sup>

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72. With the help of a research assistant, I conducted these semistructured interviews by telephone in early 2014 with representatives from eighteen community organizations that engage in copwatching as one of their central activities. The list of organizations, locations, and years that they began copwatching is listed in Appendix A. Many copwatching groups did not want to participate in

### A. *The Tactic of Organized Copwatching*

Copwatching—in the way that I am using the term—does not simply refer to the spontaneous recording of police officers in public by civilians but rather to organized groups of local residents who patrol their neighborhoods, monitor police conduct, and create videos of what they see. Individual, spontaneous recordings of police officers can of course have a big, real-world impact—from the spontaneous video recordings of the beating of Rodney King in 1991<sup>73</sup> to more recent smartphone recordings of the killings of Eric Garner in New York City in 2014<sup>74</sup> and Walter Scott in South Carolina in 2015,<sup>75</sup> individual recordings have a history of sparking outrage and dialogue about police practices throughout the nation. Today, given the widespread use of smartphones, civilian recording of police officers is ubiquitous. Professor Seth Kreimer termed this phenomenon “pervasive image capture” and argued that ubiquitous videotaping, especially of public officials, has the potential to enhance public discourse and accountability.<sup>76</sup>

Organized copwatching, though, does more than capture video. Indeed, as a tactic of police accountability, copwatching predates smartphone technology and even predates handheld video recording devices. Organized copwatching groups emerged as early as the 1960s in urban areas in the United States when the Black Panthers famously patrolled city streets with firearms and cameras, and other civil rights organizations conducted unarmed patrols in groups.<sup>77</sup> In Watts, for example, African American residents formed the Community Alert Patrol. They drove their own “patrol cars” to heavily policed areas, where they

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the telephone interviews or were difficult to contact; as a result, the groups surveyed are not a representative sample but rather a snapshot of what the diverse practices of copwatching can look like. Moreover, these interviews predate the rapid expansion of copwatching in conjunction with the #BlackLivesMatter movement between August 2014 and August 2015.

73. See Kreimer, *supra* note 7, at 347–48 (describing “iconic” videotape of Rodney King made spontaneously from George Holliday’s window).

74. See Gene Demby, *What We See in the Eric Garner Video, and What We Don’t*, NPR.ORG (July 29, 2014), <http://www.npr.org/blogs/codeswitch/2014/07/29/335847224/what-we-see-in-the-eric-garner-video-and-what-we-don't>.

75. See Melanie Eversley, *Man Who Shot S.C. Cell Phone Video Speaks Out*, USA TODAY (Apr. 9, 2015), <http://www.usatoday.com/story/news/2015/04/08/walter-scott-feidin-santana-cell-phone-video/25497593/> [<https://perma.cc/B8B5-VF6F>].

76. Kreimer, *supra* note 7, at 343–47; cf. Damien Cave & Rochelle Oliver, *The Videos That Are Putting Race and Policing Into Sharp Relief*, N.Y. TIMES (updated Oct. 24, 2015), <http://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html> (“Raw video has thoroughly shaken American policing.”).

77. See JOSHUA BLOOM & WALDO E. MARTIN, JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* (2013) (describing the Black Panther Party’s community patrol in Oakland, including its demise when the California legislature banned the open carrying of firearms); Regina Austin, *The Next “New Wave”: Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809, 864–65 (2006) (“A movie camera can be a powerful ally of the vulnerable and a potent weapon in the hands of the disadvantaged. That was clear to the Black Panthers who filmed street encounters between citizens and the police.”); Terence Cannon, *A Night with the Watts Community Alert Patrol*, MOVEMENT, Aug. 1966, at 1, 3.

observed police conduct and wrote down their observations contemporaneously on notepads.<sup>78</sup> These practices of organized patrols to monitor police behavior have continued sporadically since then, with a particular tradition among African American urban communities.<sup>79</sup> There is also a vibrant and longstanding history of using video as a mechanism of protecting individuals engaged in protest<sup>80</sup> and fighting human rights abuses throughout the globe.<sup>81</sup>

In the last two decades, copwatching groups have proliferated at an unprecedented rate. Of the eighteen groups I conducted interviews with in 2014, all but two began copwatching in the past two decades,<sup>82</sup> and eleven began copwatching within the past five years.<sup>83</sup> Since mid-2014, new organized copwatching patrols have sprung up in Ferguson, St. Louis, Chicago, New York City, Baltimore, and Boston,<sup>84</sup> and copwatching continues to expand to new regions of the country.<sup>85</sup> Many of these new copwatching groups are either affiliated with a local movement for police accountability or began as a direct, organized response to a well-publicized incident of police violence caught on camera. Indeed, veteran copwatchers have traveled to cities such as Ferguson and Baltimore to train groups in best practices for organized copwatch patrols.<sup>86</sup>

Organized copwatching groups generally differ from casual bystanders filming the police in three important ways. First, organized copwatchers are strategic—the central idea is to prevent police misconduct rather than to catch it. Some copwatchers speak of the “three Ds of copwatching”: deter, de-

78. See Cannon, *supra* note 77, at 1, 3 (describing the Community Alert Patrol in Watts).

79. See Telephone Interview with Malcolm X Grassroots Movement, Brooklyn Chapter (Apr. 18, 2014) [hereinafter MXGM Interview] (describing how the group modeled their copwatching practices on similar patrols in Brooklyn that took place in the 1970s and 1980s).

80. See, e.g., Colin Moynihan, *To Get '04 Tapes, City Cites Lost Evidence*, N.Y. TIMES (July 26, 2008), <http://www.nytimes.com/2008/07/26/nyregion/26video.html> (describing the group I-Witness Video's efforts to aggregate hundreds of videotapes of police conduct during protests against the 2004 Republican National Convention).

81. See, e.g., Sam Gregory, *Introduction*, in VIDEO FOR CHANGE: A GUIDE FOR ADVOCACY AND ACTIVISM 12 (Sam Gregory et al. eds., 2005) (describing tradition of using video for change dating from the 1930s). The organization WITNESS, for example, was founded in 1992 to support the filming of human rights abuses using handheld cameras; the organization has since become a leader in helping grassroots groups use smartphones as a form of human rights advocacy. See *Our Story*, WITNESS, <http://witness.org/about/our-story/> [<https://perma.cc/F8B9-MNXR>].

82. The two oldest copwatch organizations with which I spoke were Berkeley Copwatch (founded 1990) and Portland Copwatch (founded 1992).

83. See Appendix A (list of copwatching organizations and years they began copwatching).

84. See, e.g., Associated Press, *supra* note 10 (describing a new group in Ferguson, the “Canfield Watchmen,” in which two dozen residents have formed a copwatch team); Kochman, *supra* note 10 (describing a copwatching organization that is training new copwatching groups in all five boroughs of New York City in fall 2014); see also *supra* notes 10–11 and accompanying text.

85. See, e.g., *Midwest WeCopwatch Regional Groups Form*, WECOPWATCH (Jan. 4, 2015), <http://www.wecopwatch.org/midwest-wecopwatch-regional-groups-form/> [<http://perma.cc/BA7Z-8TBL>] (describing a coalition of people interested in forming copwatching groups in Wisconsin, Michigan, Ohio, Illinois, and Missouri).

86. See *id.* (describing trainings in Missouri and Baltimore conducted by WeCopwatch).

escalate, and document.<sup>87</sup> The heart of organized copwatching is planned group patrols, in which members patrol specific neighborhoods with video cameras, often but not always in uniforms such as t-shirts, badges, or hats.<sup>88</sup> Members of the patrol are frequently drawn from the neighborhood in which the patrol is happening; for some groups, this is a requirement.<sup>89</sup> Many groups require that patrols consist of at least four people at a time, with at least two cameras—one held by someone close to the police encounter, and one aimed at the person doing the recording.<sup>90</sup> The filming is often thoughtful and deliberate; copwatchers may ask the police questions about their actions and engage in dialogue about constitutional principles.<sup>91</sup> The copwatchers also explain to people interacting with the police what the copwatchers are doing, and seek permission to film.<sup>92</sup> The reported experience of copwatchers engaging in organized patrols is that police officers view copwatchers differently than the police do casual observers or recorders. One organization representative described it this way:

[W]hen [we] do [our] patrols and wear the cop watch patches, [I] learned quickly that there was a sort of respect that we got that was different than if it was a regular person without some kind of label on them—police try to intimidate, etc. When [we] would go out in groups of [three to five] people with the labels, made the police see another uniform—you are doing your job, we are doing our job.<sup>93</sup>

Second, unlike casual observers of the police, organized copwatching groups engage in a series of additional activities that support and complement their group patrols. Every group with which I spoke, for example, conducts

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87. See Alex-Quan Pham, *Cop Watch Trains Community to Document NYPD*, GOTHAM GAZETTE (Oct. 10, 2014), <http://www.gothamgazette.com/index.php/government/5376-cop-watch-trains-community-to-remain-vigilant-in-documenting-nypd> [<http://perma.cc/3BTE-PUDS>] (describing the discussion of the three Ds of copwatching at a training).

88. See, e.g., MXGM Interview, *supra* note 79; Telephone Interview by Sophie Gebreselassie with Redwood Curtain Copwatch (Mar. 7, 2014) [hereinafter Redwood Interview]; *Copwatch Network Description*, PEOPLE'S JUSTICE, <http://www.peoplesjustice.org/site/index.php/Cop-Watch-Network-Description/Cop-Watch-Network-Description.html> ("Part of the purpose of Cop Watch is to be visible to our community members and to the NYPD. By identifying ourselves, our community members will not only know who we are, but we will also demonstrate an organized and unified resistance to police misconduct and brutality. Therefore, teams should wear Cop Watch buttons or clothing and distribute Know Your Rights and Cop Watch materials.")

89. See, e.g., Telephone Interview with L.A. Cmty. Action Network (May 9, 2014) [hereinafter LA CAN Interview]; MXGM Interview, *supra* note 79.

90. See, e.g., *Copblocking 101*, COP BLOCK, <http://www.copblock.org/copblocking101> [<http://perma.cc/P8TW-KEBG>] (describing best practices as including two different cameras); MALCOLM X GRASSROOTS MOVEMENT, COP WATCH PROGRAM MANUAL (undated) (on file with author) (laying out the roles of different members of copwatch teams).

91. See *infra* notes 169–70 and accompanying text.

92. See LA CAN Interview, *supra* note 89; see also Forrest Stuart, *Constructing Police Abuse After Rodney King: How Skid Row Residents and the Los Angeles Police Department Contest Video Evidence*, 36 LAW & SOC. INQUIRY 327, 340–45 (2011) (describing filming strategies of LA CAN community patrol teams on Skid Row).

93. Redwood Interview, *supra* note 88.

“Know Your Rights” trainings in the neighborhoods they patrol. The vast majority of groups maintain websites, Facebook pages, or online video databases that catalog and describe videos of interest.<sup>94</sup> Many groups also attend court proceedings that relate to the videos they record or the police practices they contest.<sup>95</sup> Although these basic tactics remain constant across copwatching organizations, the political orientations of the groups vary greatly—some groups advocate a libertarian perspective, some a progressive one, some a more anarchist bent, and some a range of political perspectives.<sup>96</sup> As a result, some groups—ten of the eighteen with which I spoke—engage in larger efforts at political advocacy, including attending community policing meetings, lobbying for reform, and pushing for affirmative class action litigation; while others, in contrast, withdraw from formal political processes entirely.

Third, although police accountability is a primary purpose of organized copwatching, for many but not all copwatching groups this accountability function goes hand in hand with a secondary purpose—the building of power and organizing for larger change in the criminal justice system. In other words, many organized copwatchers are part of social movements.<sup>97</sup> Here are some examples of how copwatching organizations describe their relationships to larger movements for change:

[We are] building a movement against police violence and systemic racism in New York City . . . [and dedicated] to strengthen[ing] and empower[ing] Latino communities to hold police accountable.<sup>98</sup>

[Our mission is to] organize and empower community residents to

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94. Of the eighteen groups, fifteen maintain websites, fifteen maintain Facebook pages, and eleven manage public online video databases.

95. Eleven of eighteen groups reported engaging in courtwatching.

96. See, e.g., Telephone Interview by Sophie Gebreselassie with Peaceful Streets Project Austin (Feb. 21, 2014) [hereinafter PSP Austin Interview] (describing how the group has both conservatives and liberals as members, as well as representatives from both Occupy Austin and the Tea Party).

97. See Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1508 (2005) (“[P]rogressive social movements are instances of insurgent political activity, usually initiated by or on behalf of low-status or socially marginal citizens, that are unmediated by the state or conventional political structures.”); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. & SOC. SCI. 17, 23 (2006) (defining a social movement as a “sustained series of interactions between power-holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation, in the course of which those persons make publicly visible demands for changes in the distribution or exercise of power” (quoting Charles Tilly, *Social Movements and National Politics*, in STATEMAKING AND SOCIAL MOVEMENTS: ESSAYS IN HISTORY AND THEORY 306 (Charles Bright & Susan Harding eds., 1984))); Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories About We the People*, 71 MD. L. REV. 1052, 1068 (2012) (“Social movements are different than interest groups or political organizations because they usually make their claims in ways that are more dynamic, contentious, and participatory than the usual interest group or civic association.”).

98. Telephone Interview with The Justice Committee N.Y.C. (May 5, 2014) (quoting in part from the organization’s website) [hereinafter Justice Committee Interview].

work collectively to change the relationships of power that affect our community.<sup>99</sup>

Our overriding goal is to create a climate of resistance to abuse of authority by police organizations and to empower local people with a structure that can take on police brutality and actually bring it to an end.<sup>100</sup>

We are part of a larger effort to reassert community control over the police. Police should be servants—not oppressors—of the community.<sup>101</sup>

While not every copwatching group with which I spoke views their mission in these precise terms, every group sought to articulate a vision of a world in which police officers act differently with respect to disempowered populations—a world, moreover, in which those power imbalances were reduced or dismantled. Since I conducted these interviews in early 2014, many copwatching groups—both new and old—have formed close links to the #BlackLivesMatter movement and other movements against police violence, thus enhancing their connections to larger efforts at social and political change.<sup>102</sup>

Copwatching is not a unitary practice. One considerable variation is in the extent to which groups are willing to work with police departments to seek piecemeal reforms: some groups meet with police officers regularly; some groups participate in “stakeholder” meetings with local police departments engaged in community policing; some groups lobby for local policing changes; and some groups, in contrast, refuse to work with police departments in any way. Not surprisingly, copwatching organizations disagree with each other over which of these approaches is preferable.<sup>103</sup> So while I am not describing a universal practice, I tease out the different ways in which copwatching functions as a form of police accountability below.

Organized copwatching connects police conduct toward individuals to the effect of that conduct on communities. At the same time, copwatching substantiates the effect of policing on communities: but for distrust of and anger over police conduct, copwatching might not be so prevalent. Copwatching functions as a form of participatory police accountability in at least three ways: for deterrence of police misconduct, for data collection, and

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99. LA CAN Interview, *supra* note 89.

100. Telephone Interview with Communities United Against Police Brutality (Apr. 14, 2014) [hereinafter CUAPB Interview] (quoting from the organization’s website).

101. Telephone Interview by Sophie Gebreselassie with Copwatch of East Atlanta (Feb. 29, 2014) [hereinafter Copwatch of East Atlanta Interview] (quoting from the organization’s website).

102. See *supra* notes 9–11 and accompanying text.

103. See, e.g., Telephone Interview with Peaceful Streets Project N.Y.C. (Mar. 14, 2014) (describing another group as too “militaristic”); Telephone Interview by Sophie Gebreselassie with Virginia Copblock (Apr. 21, 2013) [hereinafter Virginia Copblock Interview] (“[T]he way that [other groups] conduct themselves is counterproductive.”). I express my own normative preference for agonistic over antagonistic forms of organized copwatching in Part IV, *infra*.

for the substantive contours of Fourth Amendment reasonableness doctrine. This Part explores each of these functions in turn.

### B. Copwatching as Deterrence

Deterring police misconduct is notoriously difficult.<sup>104</sup> For example, studies show that the remedy of excluding evidence insufficiently deters unconstitutional police conduct,<sup>105</sup> in part because suppression hearings are infrequent and remote in time.<sup>106</sup> Moreover, police officers are indemnified from liability in the vast majority of civil rights lawsuits that they lose.<sup>107</sup> Also, although the Department of Justice has the ability to sue—and has sued—police departments for a pattern and practice of constitutional violations, such lawsuits require an abundance of data about policing practices that is often difficult to acquire.<sup>108</sup>

Copwatching deters police misconduct in real time. With copwatching, observation itself serves as a form of deterrence.<sup>109</sup> Social science confirms that people behave better when they know that they are being watched.<sup>110</sup> With respect to policing, studies show that police behave differently when they know they are being recorded by surveillance cameras<sup>111</sup> or are in the presence of

104. See Bar-Gill & Friedman, *supra* note 34, at 1618–36 (documenting the “illusory deterrence” of traditional sanctions for misconduct); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2548–49 n.368 (1996) (describing how weak enforcement mechanisms in criminal procedure can “‘legitimate’ the exercise of police power”).

105. See, e.g., Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 469–71 (2010) (providing an economic analysis of why current Supreme Court doctrine surrounding the exclusionary rule does not deter police misconduct); William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 361 n.123 (1991).

106. See Bar-Gill & Friedman, *supra* note 34, at 1618–36 (discussing remoteness and infrequency of suppression hearings); see also *infra* notes 130–36 (discussing additional problems of discovery, narrative, and doctrine that skew the results of suppression hearings).

107. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–17 (2014) (showing that police officers are indemnified from damages under section 1983 suits more than 99 percent of the time).

108. See Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1122 (2013) (“[W]hile existing federal law and agency efforts provide for some data collection about policing, those efforts are flawed, stymied by institutional and legal limitations.”).

109. Cf. I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959, 986 (2013) (“[C]amera surveillance has the potential ‘to increase the police’s accountability to the public, while decreasing their *account ability*,’ or their ability to ‘patrol the facts.’” (internal citations omitted)); Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 102–03 (2012) (describing the disciplining effect of government-controlled surveillance of the police).

110. See, e.g., Mir Adnan Ali et al., *Measuring the Effect of Sousveillance in Increasing Socially Desirable Behavior*, 2013 IEEE INT’L SYMP. ON TECH. & SOC’Y 266, 266–67; Melissa Bateson et al., *Cues of Being Watched Enhance Cooperation in a Real-World Setting*, 2006 BIOLOGY LETTERS 412.

111. See, e.g., Benjamin J. Goold, *Public Area Surveillance and Police Work: The Impact of CCTV on Police Behavior and Autonomy*, 1 SURVEILLANCE & SOC’Y 191, 194 (2003) (finding that



spectators.<sup>112</sup> Not only do copwatching organizations film police officers, they also engage the police in dialogue about officer behavior and constitutional rules.<sup>113</sup> Research in the social sciences demonstrates that pausing to think through or articulate a reason for an action limits the effects of implicit biases on that action.<sup>114</sup> By speaking with the officers on camera, copwatchers may be able to bring constitutional rules to the forefront of officers' minds and limit the effect of unconscious biases on officers' behavior.

Although copwatching shares some deterrent effects with police-worn cameras,<sup>115</sup> copwatching has the potential to be a more powerful deterrent than police-worn cameras because the cameras and footage remain in the control of civilians rather than the state. This means that the observation of copwatchers is backed up by the implicit threat that any video captured can be used in the future, not only in formal legal proceedings—civilian review boards, internal monitoring agencies, and courts—but also in the “wild” (i.e., unregulated) public sphere.<sup>116</sup> The vast majority of copwatching organizations post videos on their websites or Facebook pages, and many of them maintain YouTube feeds as well. When residents are doing the filming, police officers cannot turn

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two-thirds of British police officers interviewed reported that they were more careful when under surveillance of CCTV cameras).

112. See HANS TOCH, COPWATCH: SPECTATORS, SOCIAL MEDIA, AND POLICE REFORM 39 (2012) (describing interviews with police officers who stated that they behave differently in the presence of spectators). Some studies also show that complaints of abuse go down in jurisdictions in which police are required to wear cameras on their uniforms. See Rory Carroll, *California Police Use of Body Cameras Cuts Violence and Complaints*, GUARDIAN (Nov. 4, 2013), <http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto> [<http://perma.cc/U79B-DTRL>]; OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING: RESEARCH AND BEST PRACTICES (2004), <http://ric-zai-inc.com/Publications/cops-w0404-pub.pdf> [<https://perma.cc/Q6E2-Q937>].

113. See *infra* notes 169–70 and accompanying text.

114. See Bar-Gill & Friedman, *supra* note 34, at 1637–46, 1643 (collecting studies and arguing that “[t]he debiasing and accountability literatures suggest that police decision[ ]making can be improved if accountable police officers are forced to consider counterarguments and to think about the harm caused by their actions”); cf. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1153–55 (2012) (describing how implicit social cognitions impair the ability of police officers to determine what constitutes “reasonable suspicion”).

115. Police-worn body cameras are a reform for which a number of scholars have advocated in recent years. See Ronald J. Bacigal, *Watching the Watchers*, 82 MISS. L.J. 821, 825 (2013); Bar-Gill & Friedman, *supra* note 34, at 1673–74; David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 357–60 (2010); Luna, *supra* note 55, at 1169–70; Christopher Slobogin, *Community Control over Camera Surveillance: A Response to Bennett Capers's Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 993, 997 (2013). *But see* Wasserman, *supra* note 20, at 839 (arguing that “the deterrent effect [of body cameras] may not be as great as many hope”).

116. See TOCH, *supra* note 112, at 91–130 (describing the effect of social media on police practices in Seattle); Jürgen Habermas, *Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research*, 16 COMM. THEORY 411, 416 (2006) (“[A]ttitudes [about political issues] are influenced by everyday talk in the informal settings or episodic publics of civil society at least as much as they are by paying attention to print or electronic media.”).

off the cameras when they do not want to be filmed,<sup>117</sup> require complicated discovery requests before the footage is released,<sup>118</sup> or refuse to turn over any footage at all<sup>119</sup>—all problems that have emerged with police-controlled cameras. Moreover, the “misconduct” that copwatchers prevent is not only the constitutional misconduct that is the traditional subject of litigation, but also what the copwatchers perceive as misconduct—for example, foul language or other forms of disrespect—and might therefore submit to social media as such.<sup>120</sup> These potential consequences of misconduct, perceived or real, may loom larger in a police officer’s mind than, say, the remote threat that if she recovers contraband it may someday be excluded from a trial. Unlike with video evidence relevant to a suppression hearing, there need not be contraband recovered—or even an arrest—for the video to have an effect.

Copwatching uses group observation backed up by cameras to transfer power from the police to the people. Social theorists have termed the turning of surveillance instruments on those in power—watching the watchers—as “sousveillance,” or surveillance from below.<sup>121</sup> *Sousveillance* serves as a counter to the disciplining effects of *surveillance*; it is a technique for pushing back against the monopoly of those in power over information, technology, and control.<sup>122</sup> With *sousveillance*, observation becomes a form of resistance.<sup>123</sup>

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117. See, e.g., Robert Gammon, *OPD Needs to Start Using Its Lapel Cameras*, EAST BAY EXPRESS (Nov. 6, 2013), <http://www.eastbayexpress.com/oakland/opd-needs-to-start-using-its-lapel-cameras/Content?oid=3756595> [<http://perma.cc/5DMA-YYHD>]. In Los Angeles, one internal inspection found that about half of the estimated eighty cars in one patrol division had cameras or microphones that had been tampered with or removed by officers. See Joel Rubin, *LAPD Officers Tampered with In-Car Recording Equipment, Records Show*, L.A. TIMES (Apr. 7, 2014), <http://articles.latimes.com/2014/apr/07/local/la-me-lapd-tamper-20140408> [<http://perma.cc/MDF6-JT4R>].

118. See, e.g., Sara Libby, *Even When Police Do Wear Cameras, Don’t Count on Seeing the Footage*, CITYLAB (Aug. 18, 2014), <http://www.citylab.com/crime/2014/08/even-when-police-do-wear-cameras-you-cant-count-on-ever-seeing-the-footage/378690/> [<http://perma.cc/68KT-B2JG>]; Sestanovich, *supra* note 20 (“The urgent question now is not who will use the cameras, but who will be allowed to see the footage.”). That said, there are privacy concerns with releasing all footage—concerns that will be discussed in Part III.A, *infra*.

119. Libby, *supra* note 118.

120. See Tracey L. Meares et al., *Lawful or Fair? How Cops and Laypeople View Good Policing* (Yale Law Sch., Pub. Law Working Paper No. 255, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2116645](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116645) [<https://perma.cc/JFY5-ZWTL>] (showing that lay people’s conceptions of good policing fall more along the lines of fairness than lawfulness); Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 350–62 (2011) (arguing that, to maintain legitimacy, police should not limit their conceptions of fairness to the constitutional minimum).

121. See, e.g., Steve Mann & Joseph Ferenbok, *New Media and the Power Politics of Sousveillance in a Surveillance-Dominated World*, 11 SURVEILLANCE & SOC’Y 18, 26 (2013) (“The practice of viewing from below when coupled with political action becomes a balancing force that helps—in democratic societies—move the overall ‘state’ toward a kind of veillance (monitoring) equilibrium . . .”).

122. Professor Steven Mann, who coined the term, describes *sousveillance* as a technique “toward uncovering the panopticon and undercutting its primacy and privilege.” Steve Mann et al.,

And *sousveillance* is a technique of deterrence, much like Jeremy Bentham's original panopticon, which was designed to prevent prison misconduct through a constant threat of surveillance.<sup>124</sup>

The reported experiences of copwatching organizations bear out this function of copwatching as deterrence. For although copwatchers seek to record misconduct if it happens, for the most part they report that their routine patrols (in contrast to patrols of planned protests) are relatively uneventful. One organization representative reported that in the first six years of copwatching, their patrols did not come upon any active scenes of police brutality, which to him “doesn't mean [police abuse] doesn't exist, but means that the presence of an organized body of people with camera[s] prevents it.”<sup>125</sup> Another group's representative stated that, in the group's experience, “when people stop and watch the police and the police are aware that they're being watched, it frequently has the impact of deescalating the situation or not allowing the situation to escalate.”<sup>126</sup> Although it may not be surprising in a self-reported study, every group with which I spoke reported that they believe that their practice of copwatching changes police behavior to some degree.

The deterrent effect of copwatching is surely an uneven one; unlike police-worn cameras or a twenty-four-hour surveillance camera, copwatchers are not always present, nor is their footage always preserved. But copwatching does not operate at the expense of other forms of deterrence or enforcement, including those that use deliberative processes to bring the “voice” of community residents to the “ears” of police departments. Indeed, a number of copwatching organizations have been actively involved in community policing activities or meetings between police departments and community organizations related to federal litigation.<sup>127</sup> Copwatching thus serves as a

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*Sousveillance: Inventing and Using Wearable Computing Devices for Data Collection in Surveillance Environments*, 1 SURVEILLANCE & SOC'Y 331, 333 (2003); see Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 66–67 (2007) (describing how *sousveillance* can be an empowering activity in the context of public protests).

123. Resistance, here, refers to the Foucaultian concept of the diffuse resistance to power that can come in everyday activities. See generally Michel Foucault, *The Subject and Power*, in MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208, 210 (Hubert L. Dreyfus & Paul Rabinow eds., 2d ed. 1983).

124. See JEREMY BENTHAM, *Letter VI*, in THE PANOPTICON; OR, THE INSPECTION-HOUSE (Dodo Press 2008) (1787); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 195–231 (Alan Sheridan trans., Vintage Books ed. 1979) (1975); cf. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1953 (2013) (“[T]he gathering of information affects the power dynamic between the watcher and the watched, giving the watcher greater power to influence or direct the subject of surveillance.”).

125. MXGM Interview, *supra* note 79. Since that time, however, MXGM has caught several instances of police violence on film. *Id.*

126. Justice Committee Interview, *supra* note 98.

127. See, e.g., *id.* (describing the Justice Committee's involvement with the *Floyd* litigation and their hope to participate in the stakeholder meetings mandated by the NYPD settlement); LA CAN Interview, *supra* note 89 (describing their attendance at community policing meetings and their advocacy for more of those meetings); Telephone Interview by Sophie Gebreselassie with Portland

complement to, and not a substitute for, already existing mechanisms of deterrence, including police-worn cameras and formal community meetings.

### C. Copwatching as Data Collection

Copwatching also complements current efforts to improve the collection of evidence of potential misconduct and data about policing practices more broadly.<sup>128</sup> As data collectors and aggregators—both of individual instances of misconduct and of larger policing trends—copwatchers bump up against the traditional monopoly that police departments possess over the evidence of and narratives structuring their behavior on the street.<sup>129</sup>

Police departments have long controlled official narratives of their officers' behavior.<sup>130</sup> To begin with, in the world of plea bargaining, victims of police misconduct claims rarely have the opportunity to air those claims in open court or even to receive copies of police videos or documentation.<sup>131</sup> When claims do reach open court, evidence of reasons for a stop or search comes almost exclusively from police officers themselves, which allows room for police to craft doctrine-friendly narratives,<sup>132</sup> fudge the truth,<sup>133</sup> and claim good faith.<sup>134</sup> When combined with the bias inherent in a judicial determination

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Copwatch Project (Apr. 16, 2014) (describing their involvement with public hearings relating to the specifics of the police department's settlement with the Department of Justice).

128. For calls for better data collection about department-wide practices, see, for example, Fan, *supra* note 109, at 101–03; Harmon, *supra* note 59, at 29–30; Luna, *supra* note 55, at 1167–70.

129. See SKOLNICK, *supra* note 18, at 12; Kreimer, *supra* note 7, at 344, 357; Jim Dwyer, *When Official Truth Combines with Cheap Digital Technology*, N.Y. TIMES (July 30, 2008), <http://www.nytimes.com/2008/07/30/nyregion/30about.html?> [https://perma.cc/6DND-EL5W] (describing how videos of police behavior by spectators using mobile technology have “ended a monopoly on the history of public gatherings that was limited to the official narratives”).

130. See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 852 (1994) (describing “the inevitable bias injected by hindsight in decision[ ]making, the problems of police perjury, and the unreliability of police officers as the primary administrators of amorphous standards of ‘reasonableness’”).

131. Cf. Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 321 (2005) (“Once an officer makes an arrest, it is for all intents and purposes insulated from any meaningful challenge or review.”). Moreover, after *United States v. Armstrong*, 517 U.S. 456 (1996), defendants are limited in their ability to collect information about policing or prosecutorial practices from discovery in criminal cases.

132. See Ron Bacigal, *A Brave New World of Stop and Frisk*, 18 WASH. & LEE J. C.R. & SOC. JUST. 83, 87–89 (2011) (describing how police craft narratives); Dorfman, *supra* note 35, at 472–73 (describing a “grey zone of morality” that police inhabit and judges accept when litigating Fourth Amendment claims); Reynolds & Steakley, *supra* note 12, at 1204 (describing “testimonial advantage” of police officers).

133. See Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 5–12 (2010) (collecting studies documenting police perjury and “testilying” in suppression hearings).

134. See, e.g., *Herring v. United States*, 555 U.S. 135 (2009). For a description of the expanding scope of good faith exceptions in the last two decades, see generally TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT’S EXCLUSIONARY RULE* 302–48 (2013).

in the face of seized contraband,<sup>135</sup> the result is that defendants lose the vast majority of suppression hearings.<sup>136</sup>

Copwatching changes this calculus in two senses—first, by documenting video evidence from the point of view of the lay bystander; and second, by collecting data controlled by the public rather than the state. Whether on the internet or in the courtroom, having videos and testimony from the point of view of observers rather than the police takes away the traditional monopoly that police officers have to narrate and draw conclusions about the facts of day-to-day encounters. Literally, the point of view matters: people perceive videos differently based on the angle from which they are shot and who has done the shooting.<sup>137</sup>

More than that, the context of videos recorded as part of copwatching patrols may affect the interpretation of those videos. The presence of observers from the neighborhood who have seen fit to distribute a given video is a reminder to the viewer that officer conduct affects not only the person interacting directly with the police but also that person's neighbors, friends, and others who interact with those same officers.<sup>138</sup> This point of view—of, for lack of a better word, the community—is one missing from the adjudication of individual cases and many popular accounts of criminal justice as well. Moreover, videos taken by organized copwatching groups are more likely to contain footage that shows an interaction from beginning to end, rather than only filming from a moment of conflict or violence, as a casual bystander might.<sup>139</sup>

I do not mean to overstate the power of video.<sup>140</sup> Video is not objective, but rather depends on the context, point of view, and cultural experiences of its viewers.<sup>141</sup> Some copwatchers recognize this, adjusting by engaging in

135. See Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 788 (1970) (“Under the exclusionary rule, judicial attention is focused upon an evidentiary product of the practices rather than upon the practices themselves.”); Bar-Gill & Friedman, *supra* note 34, at 1623 (“[P]ost hoc bias has done more to undermine the utility of exclusion—and indeed the Fourth Amendment generally—than any other quality of the exclusionary rule.”); Steiker, *supra* note 130, at 853–55.

136. Cf. Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1 (2013) (documenting that since 1990, the Supreme Court has sided with government interests in approximately eight out of ten criminal procedure cases).

137. See Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1347–60 (2010) (discussing the social science of camera perspective bias and its impact on video evidence in court).

138. Cf. TOCH, *supra* note 112, at xvii–xxi, 3–5 (describing how when spectators gather near police conduct, it gives the police conduct public significance); Simonson, *supra* note 24, at 2202–05 (describing this phenomenon in the context of the audience in the courtroom).

139. See Stuart, *supra* note 92, at 339–40 (describing importance of video capturing an interaction from start to finish).

140. For more on the drawbacks of video, see *infra* Part III.C.

141. See Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012) [hereinafter Kahan et al., *Protest*]; Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*,

dialogue with officers during the taking of video so as to lock them into an explanation<sup>142</sup> or simply remaining skeptical as to the public reception of their videos.<sup>143</sup> Other copwatchers, in contrast, believe that “cameras don’t lie.”<sup>144</sup> But the point remains that videos recorded by members of the public, and especially by organized copwatchers, are different in kind than those recorded by surveillance or police-worn cameras.

Similarly, copwatching organizations’ control over their videos is important not just for its deterrent effect, described above,<sup>145</sup> but also because the videos are in the possession of populations that have historically lacked access to data about policing practices.<sup>146</sup> Part of the power of copwatching as sousveillance is this control over the video evidence<sup>147</sup>: the power to edit or delete videos, post them to larger databases, and provide context or commentary to them. This control over videos and information gives copwatching organizations the ability to share their experiences with more privileged populations who may not experience the same day-to-day interactions with the police—to “document [police practices] so that we c[an] convince others that this [i]s actually happening.”<sup>148</sup> An official police effort to frame an event or a policy may quickly be disputed by counternarratives from copwatching groups that are ready and waiting. In New York City, for instance, copwatching groups were an integral part of a Twitter campaign to respond to an NYPD request for photos of citizens with police officers; already in possession of countless photos and videos, copwatching groups flooded Twitter with pictures of police abuse under the “#mynypd” hashtag, making front page news.<sup>149</sup> For example, one photo retweeted more than a thousand times in 24

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122 HARV. L. REV. 837, 879–81 (2009) [hereinafter Kahan et al., *Whose Eyes?*] (discussing study showing that conclusions about the police conduct in *Scott v. Harris* video vary based on demographic characteristics); Stuart, *supra* note 92, at 328–33 (discussing the “social construction of video evidence”).

142. See, e.g., Stuart, *supra* note 92, at 341–43 (describing LA CAN’s Community Watch Commander’s strategy of asking police officers questions about their training and knowledge while videotaping their interactions with Skid Row residents).

143. See, e.g., LA CAN Interview, *supra* note 89; MXGM Interview, *supra* note 79; Telephone Interview with People’s Justice for Cmty. Control & Police Accountability (Apr. 25, 2014) [hereinafter People’s Justice Interview].

144. Virginia Copblock Interview, *supra* note 103.

145. See *supra* notes 109–27 and accompanying text.

146. See Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59, 64–65 (2004) (describing problem of lack of data and knowledge within low-income communities).

147. See Mann et al., *supra* note 122, at 332–34 (describing control over captured footage as a key component of sousveillance).

148. BERKELEY COPWATCH, THE BERKELEY COPWATCH HANDBOOK: AN INTRODUCTION TO CITIZEN MONITORING OF THE POLICE 3 (2014) (on file with author) (describing founding of Berkeley Copwatching in 1990 in response to order-maintenance policing initiative).

149. See Lauren Victoria Burke, *#MyNYPD: NYPD Hashtag Blows up into Embarrassing Social Media Fiasco*, POLITIC 365 (Apr. 22, 2014), <http://politic365.com/2014/04/22/mynypd-nypd-hashtag-blows-up-into-embarrassing-social-media-fiasco/> [<http://perma.cc/97AP-8LLJ>] (“The folks at @copwatch had a particularly energetic time using the #MyNYPD hashtag.”); Thomas Tracy et al.,

hours showed a picture of a police officer wielding a baton over the body of an unarmed man, captioned in part, “the #nypd engages with its community members.”<sup>150</sup> Through social media, copwatching organizations have the power to convert individual police encounters into public events. Moreover, when copwatchers are part of larger protests in response to police violence, such as those in Ferguson and Baltimore, they are able to provide real-time updates via social media that often contradict official reports in the popular media.<sup>151</sup>

Copwatching organizations also engage in larger data collection practices that do not involve video. For example, one organization is collecting data on individuals who the police have brought into custody for noncustodial ticket offenses. This practice of ticketing may not look out of the ordinary on video, but when captured in the aggregate, it can say a lot about the exercise of police discretion in particular neighborhoods.<sup>152</sup> Another organization engages in “People’s Investigations” in response to incidents of police brutality, whether or not there is video; they interview witnesses, submit Freedom of Information Act requests, and write up public reports on their findings.<sup>153</sup> As with videos, these larger data collection practices are no substitute for internal, comprehensive collection efforts already in practice and sometimes distributed to the public.<sup>154</sup> However, the information copwatching organizations collect could certainly be useful to police supervisors and administrators as a form of public feedback.<sup>155</sup> And these information-collecting practices are an important function of copwatching organizations as data collectors on behalf of the public.

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*#myNYPD Twitter Campaign Backfires, Promotes Photos of Police Brutality Instead of Positive Encounters with Public*, N.Y. DAILY NEWS (Apr. 23, 2014), <http://www.nydailynews.com/new-york/nypd-twitter-campaign-mynypd-backfires-article-1.1765159#ixzz32BDZiVKt> (describing the barrage of police brutality photos under the #mynypd hashtag).

150. Occupy Wall Street (@OccupyWallStNYC), TWITTER (Apr. 22 2014, 2:12 PM), <https://twitter.com/OccupyWallStNYC/status/458684716447973376> [<https://perma.cc/RC82-NN3G?type=image>].

151. See Day, *supra* note 9 (describing how in Ferguson and Baltimore “activists [took] to Twitter to highlight the contradictions between police reports and eyewitness accounts”).

152. See E-mail Newsletter from People’s Justice (May 20, 2014) (on file with author).

153. See, e.g., BERKELEY COPWATCH, PEOPLE’S INVESTIGATION: IN-CUSTODY DEATH OF KAYLA MOORE (2013), [http://www.berkeleycopwatch.org/resources/Peoples\\_Investigation\\_Kayla\\_Moore\\_2013.pdf](http://www.berkeleycopwatch.org/resources/Peoples_Investigation_Kayla_Moore_2013.pdf) [<http://perma.cc/7XYN-VZUM>].

154. Cf. Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L.J. 1, 84–85 (2014) (critiquing the “rule of experts” in seeking evidence-based strategies for reentry).

155. Cf. Lior Jacob Strahilevitz, “How’s My Driving?” For Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1763–64 (2006) (proposing “How’s My Policing?” program that aggregates citizen feedback on police officers).

#### D. Copwatching as Constitutional Engagement

Copwatching is also a way for local populations to express—to each other, to their neighbors, to the police, and to the larger public—their communal stake in the *constitutional* regulation of the police. In particular, copwatching challenges the control that courts and police officers have in determining what is “reasonable” or “suspicious” with regard to the Fourth Amendment. A flip side of this constitutional engagement is that copwatching reveals the limits of the Fourth Amendment: through their presence, copwatchers require that police officers pay attention to seemingly extraconstitutional concerns such as dignity and fairness. This pressure, in turn, lends popular legitimacy to efforts to expand the possibilities of what the Fourth Amendment can do.

Two aspects of the Fourth Amendment’s search and seizure doctrine stand out in the context of copwatching, both of which require a determination of “reasonableness” based on the realities of human experience and behavior,<sup>156</sup> but in practice do not account for the day-to-day experiences of disempowered populations.<sup>157</sup>

The first is the “reasonable suspicion” that an officer must possess to conduct a *Terry* stop, or a “stop and frisk.”<sup>158</sup> Reasonable suspicion is satisfied when a reasonable *officer*, based on “experience and specialized training,” can articulate sensible—sensible to her and to a court—reasons for the stop.<sup>159</sup> This means that, for example, when a court evaluates whether a police officer has reasonable suspicion to stop someone who runs away from the police, it does not matter whether the person running away reasonably fears police brutality because of years of harassment and arrests of people who look like them in

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156. See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (“In reviewing the propriety of an officer’s conduct, . . . the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.”).

157. See Janice Nadler, *Consent, Dignity, and the Failure of Scattershot Policing*, in *THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA*, *supra* note 39, at 93–94 (“[T]he Court tends to take the perspective of law enforcement, and so the rules of engagement created by the Court are sometimes based on highly questionable assumptions about what citizens in these situations believe and understand.”); Bowers & Robinson, *supra* note 40, at 223 (describing how when the Court determines “reasonableness” in the context of criminal procedure, “the Court has done almost no work to determine whether its conceptions of the reasonable layperson dovetail with what people actually find fair in a given context”); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 *DUKE L.J.* 727, 730–31 (1993) (describing results of study indicating that society’s views of reasonable expectation of privacy differ from that of the Supreme Court). For discussions of how this plays out in the context of race, see Paul Butler, *The White Fourth Amendment*, 43 *TEX. TECH L. REV.* 245, 247–53 (2010); Carbado, *supra* note 40, at 970–78; David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 *IND. L.J.* 659, 660–75 (1994); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 *ARIZ. ST. L.J.* 267, 268–73 (2012); Thompson, *supra* note 25, at 998–99.

158. See *Terry v. Ohio*, 392 U.S. 1, 10 (1968).

159. *United States v. Arvizu*, 534 U.S. 266, 273 (2002); see *Terry*, 392 U.S. at 9–10.



their neighborhood.<sup>160</sup> Nor can a court consider any harm to neighborhoods or communities when deciding the reasonableness of an officer's conduct.<sup>161</sup> Instead, courts and officers are the sole judges of whether an officer's suspicion was reasonable.

Second, a similar dynamic plays out in the definition of a seizure in the context of street encounters. According to the Court, a seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away,"<sup>162</sup> or when "a reasonable person would have believed that he was not free to leave."<sup>163</sup> This test "presupposes an innocent person."<sup>164</sup> These two standards of reasonableness interact: in *Wardlow*, for instance, the Court held that if a person runs away from the police, that fact can contribute to an officer's "reasonable suspicion."<sup>165</sup> A court's determination of reasonableness, though, may not align with the views of society,<sup>166</sup> much less of minorities residing in high crime areas who may interact with police officers more frequently.<sup>167</sup>

Copwatchers bring the expertise of the people to bear on determinations of what constitutes reasonable conduct—both in the moment and after the fact. They do this in a number of ways: by educating themselves and bringing what they learn to other avenues of reform, by speaking with officers on the street, by their presence in court, and by their contributions to the public sphere. When copwatching groups watch or criticize police behavior, this criticism comes not from a lone criminal suspect simultaneously trying to avoid prosecution but from residents and citizens with an interest in reducing crime in

160. See *Wardlow*, 528 U.S. at 132 (Stevens, J., concurring in part and dissenting in part) (describing innocent reasons that people, "particularly minorities and those residing in high crime areas," might be afraid of contact with the police); see also Bacigal, *supra* note 132, at 92 ("The price for a colorblind Fourth Amendment is that the Court ignores real people and determines constitutional rights according to the perceptions of hypothetical persons, reasonably prudent or otherwise."); Butler, *supra* note 157, at 250–51 (discussing the problem of colorblindness in *Wardlow*); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1328 (1990) (observing that the reasonable suspicion standard "gravely limits the right[s]" of individuals to move about the streets freely by "permit[ting] the Court to defer to police intuition and subjectivity").

161. See Baradaran, *supra* note 136, at 20–30; cf. Harmon, *supra* note 14, at 778 ("Every arrest harms an individual, and perhaps a community, no matter how lawful.").

162. *Terry*, 392 U.S. at 16.

163. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); see also *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (holding that a seizure does not occur when "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter").

164. *Bostick*, 501 U.S. at 438 (emphasis omitted).

165. *Wardlow*, 528 U.S. at 124–25.

166. See Bowers & Robinson, *supra* note 40, at 223; Luna, *supra* note 67, at 846 (questioning whether judges should determine society's reasonable expectations of privacy); Slobogin & Schumacher, *supra* note 157, at 730–31 (finding that society's views of reasonable expectation of privacy differ from that of the Supreme Court).

167. See *Wardlow*, 528 U.S. at 132 (Stevens, J., concurring in part and dissenting in part) (criticizing the Court majority for overlooking innocent reasons that people, "particularly minorities and those residing in high crime areas," might fear contact with the police).

their neighborhoods and encouraging good police behavior in line with constitutional principles. They are “innocent” people, but not the “innocent” people who usually make official determinations of what is reasonable.<sup>168</sup>

The constitutional engagement of copwatchers begins on the street or in the road. Members of copwatch groups who take out their cameras in public consciously inject their own view of what is “reasonable” into a police officer’s calculus of whether they are acting within the bounds of the Fourth Amendment. Copwatchers come to these interactions with a thorough knowledge of the rights of individuals with respect to the police.<sup>169</sup> Rather than challenge an officer’s reasonable suspicion to stop someone up front, they advocate practices like asking, “Am I free to go?” and saying calmly, “I do not consent to this search.” When they are copwatching, they ask these questions on behalf of others, saying, for example, “Officer, is this man free to go?” This tactic is not just about ensuring that people know their rights. When copwatchers ask the question “Am I free to go?” or “Is he free to go?” and do so while wearing uniforms and presenting themselves as a neighborhood group, they remind the officer both of the constitutional rule itself and of the reality that a person who lives in their neighborhood may *not* feel free to go even in a situation where courts *tend to hold* that they are free to go.<sup>170</sup>

This constitutional engagement continues beyond individual encounters, making its way both into courtrooms and into the public sphere. A majority<sup>171</sup> of copwatching organizations engage in courtwatching: if an incident they film ends up in court, they attend the court proceeding in a group and as a visible

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168. *Bostick*, 501 U.S. at 438. By describing individuals engaged in copwatching as innocent, I mean that they are not the individuals under suspicion by police officers but rather the ones observing police conduct. Indeed, all copwatchers may not be “innocent” in the way that the Court meant in *Bostick*; instead, copwatchers call into question the traditional contrast in the Court’s jurisprudence between law-abiding or “innocent” citizens and “criminals” or individuals under suspicion by police officers.

169. Every copwatch organization with which I spoke conducts “Know Your Rights” trainings both with their members and in their communities. See also MALCOLM X GRASSROOTS MOVEMENT, *supra* note 90, at 154 (describing importance of legal education). Copwatching trainings involve in-depth “Know Your Rights” education with respect to the First and Fourth Amendments. These trainings take place not only with official copwatchers, but also in the community. People’s Justice, for instance, conducts “Know Your Rights” trainings throughout the city. See People’s Justice Interview, *supra* note 143.

170. See David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment’s Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 52–59 (2009) (presenting interview results showing that most people would not feel “free to leave” a police encounter in situations in which the Court has held that they would).

171. See Telephone Interview by Sophie Gebreselassie with Berkeley Copwatch (Mar. 29, 2014) [hereinafter Berkeley Copwatch Interview]; Telephone Interview by Sophie Gebreselassie with Copwatch L.A. – South Cent. Chapter (Apr. 21, 2013) [hereinafter Copwatch LA Interview]; CUAPB Interview, *supra* note 100; Justice Committee Interview, *supra* note 98; LA CAN Interview, *supra* note 89; MXGM Interview, *supra* note 79; Telephone Interview with October 22nd the Coalition to Prevent Police Brutality Survey (Apr. 28, 2014); People’s Justice Interview, *supra* note 143; PSP Austin Interview, *supra* note 96; Redwood Interview, *supra* note 88; Virginia Copblock Interview, *supra* note 103.

presence, wearing their t-shirts, badges, or other indicia of group identity. Like copwatching, the purpose of courtwatching is both to support someone and to remind the other players in the courtroom, prosecutors, defense attorneys, and judges, that the individual case on the record affects not just the defendant but also other people who live in that defendant's neighborhood or who experience similar interactions with the police.<sup>172</sup> If a judge is deciding an issue of constitutional importance, that judge might be reminded that one case impacts larger cases and that the judge's point of view is not necessarily that of all "reasonable" people who live in her jurisdiction.<sup>173</sup>

Copwatching groups also participate in class action litigation that targets specific department-wide practices. To take a recent example, one dynamic overlooked in analyses of the 2013 decision holding New York City's stop-and-frisk practices unconstitutional is that the trial in that case was accompanied by intense organizing efforts, including by copwatching groups. Members of copwatching groups were involved in the planning and organizing of the lawsuit, including serving as named plaintiffs.<sup>174</sup> Every day the courtroom was packed with members of a different community group, each of which held a press conference outside of the courthouse during the lunch break.<sup>175</sup> It is impossible to draw direct inferences from this grassroots pressure to the *Floyd* court's eventual finding that NYPD's practices violated the Fourth and Fourteenth Amendments, especially since the case relied heavily on extensive data collection and expert testimony. However, it is worth noting that the unprecedented opinion cited not only traditional Fourth Amendment doctrine, but also concepts of dignity and race rarely seen in such litigation.<sup>176</sup>

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172. See JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 300–10 (2011) (describing ability of public attendance in criminal court to convert private adjudication into public phenomena); Simonson, *supra* note 24, at 2231–32 (describing the use of courtwatching by social movements to remind judges and prosecutors that their policies affect entire communities).

173. Courts articulate this possibility in the context of the right to a public trial. See, e.g., *United States v. Rivera*, 682 F.3d 1223, 1230 (9th Cir. 2012) ("The presence of the public at sentencing reminds the participants, especially the judge, that the consequences of their actions extend to the broader community.").

174. See *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013); see also Justice Committee Interview, *supra* note 98 ("[Our organization] was a big part of the precursor to the *Floyd* lawsuit.").

175. See, e.g., Email Flyer from Malcolm X Grassroots Movement, People's Justice Coalition, and the Justice Committee (Mar. 29, 2013) (on file with author) (advertising a day of packing the court and a press conference outside the courthouse on April 2, 2014).

176. See *Floyd*, 959 F. Supp. 2d at 673 ("[I]t is 'clear and plain' that the public interest in liberty and dignity under the Fourth Amendment, and the public interest in equality under the Fourteenth Amendment, trumps whatever modicum of added safety might theoretically be gained by the NYPD making *unconstitutional* stops and frisks."); cf. Bowers, *supra* note 39 (critiquing irrelevance of dignity to current Fourth Amendment jurisprudence); Nadler, *supra* note 157. *Floyd* was also an equal protection case, which perhaps explains the focus on race—but the point, here, is that the district court discusses race in the context of the Fourth Amendment as well. See *Floyd*, 959 F. Supp. 2d at 673.

These debates over the contours of the Fourth Amendment take place in the public sphere. Popular narratives of criminal justice matter—not just to public debate and politics but also to formal legal narratives and judicial decisions.<sup>177</sup> After conversations with police officers about constitutional rights, copwatching groups post videos of and comment on those conversations.<sup>178</sup> In addition to contributing to social and popular media, organized copwatching groups participate in lawsuits and lobbying, both of which invoke constitutional rights and use videos to substantiate claims with respect to those rights. Moreover, organized copwatchers have increasingly served as observers and documenters of public protests in response to police violence throughout the nation.<sup>179</sup> The larger public, in turn, looks to videos from copwatchers when the legality or fairness of police conduct becomes a matter of public debate.<sup>180</sup>

Through each of these practices, copwatching organizations can help change constitutional meaning.<sup>181</sup> Scholars of legal change have recognized the power of social movements to shift legal meaning.<sup>182</sup> Professor Jack Balkin, for instance, has studied how social movements can “reshape constitutional common sense, moving the boundaries of what is plausible and implausible in the world of constitutional interpretation, what is a thinkable legal argument

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177. See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 167–93, 168 (2001) (describing the “political values, cultural sensibilities, and criminological conceptions” in modern crime control); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 4 (2007) (discussing importance of “the flow of information, discourse, and debate” to how the state approaches issues of criminal justice); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 123–30 (2012) (discussing the relationship of public conceptions of the convergence of immigration and criminal law to official conceptions of those laws).

178. See, e.g., *Falmouth, Maine Traffic Stop*, COPBLOCK (Feb. 21, 2014), <http://www.copblock.org/47056/flamouth-maine-traffic-stop/> [<http://perma.cc/XYR6-FV8F>] (discussing a video of a conversation with an officer and the writer’s friend about the Fourth and Sixth Amendments that the writer believes led the officer to decide not to issue a ticket).

179. See, e.g., Andrea Platten, *Berkeley Copwatch’s ‘Know Your Rights’ Event Teaches Police-Observation Tactics*, DAILY CALIFORNIAN (July 8, 2015), <http://www.dailycal.org/2015/07/08/berkeley-copwatchs-know-your-rights-event-teaches-police-observation-tactics/> [<https://perma.cc/S5MC-8CLK>] (discussing Berkeley Copwatch training that “specifically discussed how to approach an event such as the December Black Lives Matter protests”). This support of protests through observation and documentation is of course a part of a long tradition of legal observing at political protests. See *supra* note 80 and accompanying text.

180. See TOCH, *supra* note 112, at 91–145 (documenting effect of social media recordings of police on recent police reforms in Seattle).

181. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 6–11 (1983) (describing how legal meaning can be generated by the people and not just by courts).

182. See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946 (2006); Guinier & Torres, *supra* note 17, at 2757–62; McCann, *supra* note 69, at 81.

and what is constitutionally ‘off the wall.’”<sup>183</sup> More recently, Professors Lani Guinier and Gerald Torres have introduced the concept of demosprudence—the law of social movements—through which “the language of law is stretched to accommodate the language of the people.”<sup>184</sup> There is a performative aspect to organized copwatching that lends power to the ability of copwatching groups to participate in broader debates over the legal meaning of the Fourth Amendment. Even though copwatching groups are engaged in observation, their act of observation is recorded, discussed, and remembered. The performance of copwatching extends beyond the act itself,<sup>185</sup> and the “language of the people” makes its way into the public sphere. While it may usually be “off the wall” to think about race and dignity when determining whether an officer had reasonable suspicion to stop someone, the engagement of copwatchers with these concepts moves them closer to “the wall” of what is constitutionally possible.

By engaging with the legal meaning of the Fourth Amendment, then, copwatching has the potential to expand the Amendment’s reach. As Courts currently interpret the Fourth Amendment, it does not extend to questions that govern many police practices and policies: for example, whether police should be arresting people for low-level crimes, whether they should be targeting particular neighborhoods, whether they should consider the racial or ethnic make-up of those neighborhoods, or whether they should take everyone they arrest into custody pending arraignment.<sup>186</sup> Nor does the Fourth Amendment require that police officers be polite, explain their behavior, or conform to other notions of procedural justice—behavior people interacting with the police care about as much as, if not more than, the constitutionality of officer conduct.<sup>187</sup>

But it does not have to be this way. Copwatchers invoke the Constitution even as they contest police practices beyond its reach.<sup>188</sup> Through their

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183. Balkin, *supra* note 69, at 28; *see also* Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171, 176 (1993) (“Law . . . is not merely the formal official rules adopted by legislatures, courts and executives nor solely the procedures of those institutions. Law is also the practices of governance and resistance people develop behind and beyond the public institutions. Those practices may alter formal, public law; they also alter the meaning and shape of law and provide a potentially rich context for social change.”).

184. Guinier & Torres, *supra* note 17, at 2781.

185. *See* Jeremy Perelman & Lucie E. White, *Stones of Hope: Experience and Theory in African Economic and Social Rights Activism*, in *STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY* 149, 154 (Lucie E. White & Jeremy Perelman eds., 2011) (“[P]erformances can sometimes disrupt or reverse entrenched power hierarchies,” especially when “moments of power reversal get *remembered* and *retold* in ways that sustain their politicizing effect over time.”).

186. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *Whren v. United States*, 517 U.S. 806, 809 (1996); *see also* Bowers, *supra* note 39, at 992–95; Harmon, *supra* note 14, at 768–81; Sekhon, *supra* note 39, at 1179–81.

187. *See* Meares, *supra* note 6; Schulhofer et al., *supra* note 120, at 350–62; Tyler et al., *supra* note 29.

188. *Cf.* Wasserman, *supra* note 12, at 646 (“[R]egardless of how policy[ ]makers themselves interpret and understand the video, they must consider whether the public or some subcommunity

presence, they ask that officers consider the experience of residents of entire neighborhoods with respect to their practices. They ask that police officers consider the dignity of those residents. They bring issues of race and class to the forefront. And they do all of this through an adversarial stance from a group of people who care deeply about the neighborhood. Indeed, it is the adversarial nature of copwatching—the ability of copwatchers to contest police practices in the moment—that gives the practice the potential to change legal meaning.<sup>189</sup>

### III.

#### THE LIMITS OF COPWATCHING

If the above description seems rosy, it should not imply that copwatching is all roses. To the contrary, it is messy and diffuse. And it carries with it a series of risks—including the risks of intruding on others’ privacy interests and of relying too heavily on the medium of video. I discuss these limits of the practice below. I begin by addressing the widespread police resistance to being filmed, and in particular to organized copwatching, asking whether it represents a fatal impediment to the success of copwatching as a form of police accountability. My conclusion is a qualified no: police resistance does not mean that organized copwatching is a futile enterprise, but does demonstrate the limits of organized copwatching as any full “solution” to filling gaps in accountability between police and civilians.

#### A. *Police Resistance*

Police officers often resist being filmed by civilians, whether those civilians are casual bystanders or organized copwatchers. This resistance plays out in a number of ways—most visibly, in the arrest of individuals who are filming the police.<sup>190</sup> In some jurisdictions, the First Amendment clearly protects the observation and open filming of police officers when doing so does not physically interfere with the officers.<sup>191</sup> However, in practice, officers do

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(united by demographics, ideology, political concerns, or some combination) will see unconstitutional behavior.”).

189. See *infra* Part IV.

190. See Kreimer, *supra* note 7, at 357–64 (collecting cases); Daniel Denvir, *The Legal Right to Videotape Police Isn’t Actually All that Clear*, CITYLAB (Apr. 10, 2015), <http://www.citylab.com/crime/2015/04/the-legal-right-to-videotape-police-isnt-actually-all-that-clear/390285/> [https://perma.cc/7FFQ-LHAA] (describing “widespread, continuing pattern of law enforcement officers ordering people to stop taking photographs or video in public places, and harassing, detaining and arresting those who fail to comply” (quoting ACLU of South Carolina Legal Director Susan K. Dunn)).

191. See, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (describing the parameters of the First Amendment right to record the police in public); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (same); cf. *Reynolds & Steakley*, *supra* note 12, at 1204 (“Though the issue has not yet reached the Supreme Court, it seems safe to say that the case for First Amendment protection regarding photos and video of law enforcement officers in public is quite strong, and is in the process of being resolved.”). In some jurisdictions, however, the First Amendment right to record is not yet “clearly established”—or established at all. See *infra* note 271 (comparing cases). For a discussion of the

not always recognize this distinction. In some states, police officers arrest individuals for filming police in public under state wiretapping statutes<sup>192</sup>—although courts are increasingly finding these police practices unconstitutional.<sup>193</sup> More commonly, police arrest copwatchers for charges that can include failure to obey an officer, interference with police conduct, harassment, and disorderly conduct.<sup>194</sup> Some recorders report that their images or videos have been erased after being seized by police officers.<sup>195</sup> Officers have also arrested bystanders for failing to turn over cameras and images of police conduct.<sup>196</sup> This has led to a slew of lawsuits against police departments for arresting individuals engaged in recording police conduct from a distance,<sup>197</sup> many with organized copwatchers as named plaintiffs.<sup>198</sup>

Copwatching organizations vary in their experiences with respect to police resistance. The groups report an array of police responses to their conduct, ranging from respect and cooperation to systematic deployment of officers to block cameras, shine lights into camera lenses, physically intimidate

current ambiguity surrounding the right to record in many jurisdictions, see Simonson, *supra* note 21, at 2–4, 13–15.

192. See Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian's Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 533–45 (2013) (collecting wiretapping statutes).

193. See, e.g., *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014); *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

194. See Kreimer, *supra* note 7, at 361 (“Where wiretap prohibitions do not apply, officers faced with defiant videographers frequently turn to broader criminal statutes that provide substantial enforcement discretion.”); Michael Potere, Note, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273, 302–06 (2012) (collecting cases); Garry Reed, *Orlando CopWatch Activist Not Guilty, Goes to Jail Anyway*, EXAMINER.COM (July 8, 2011), <http://www.examiner.com/article/orlando-copwatch-activist-not-guilty-goes-to-jail-anyway> [<http://perma.cc/5H8A-ENV3>].

195. See Larry Krasner, *Cellphone Videography as Spontaneous Protest*, YOUTUBE (Apr. 25, 2014), <https://www.youtube.com/watch?v=ybFkDTUuTp8> [<http://perma.cc/FH47-FFWU>] (showing an officer confiscating cell phones after someone videotaped him beating a suspect); see also *id.* (“[It is] very important to remember that they’re going to go for your videos.”); Potere, *supra* note 194, at 302–06 (collecting cases and describing a series of situations in which “police are . . . threatening recorders at the scene, confiscating their cameras, arresting them, or . . . punishing them after the video has been disseminated”).

196. See, e.g., Sean Gardiner, *The NYPD Harasses a Photographer at Coney Island*, VILLAGE VOICE (New York) (June 10, 2008), <http://www.villagevoice.com/news/the-nypd-harasses-a-photographer-at-coney-island-6428922> [<https://perma.cc/R5QX-E2W9>]; see also Kreimer, *supra* note 7, at 363–66 (describing “the ‘crime’ of photographic defiance of authority”).

197. See, e.g., Jacob Sullum, *D.C. Police Officially Declare Photography Is Not a Crime*, REASON.COM (July 23, 2012), <http://reason.com/blog/2012/07/23/dc-police-officially-declare-photography/print> [<http://perma.cc/ZU9Z-P2KG>] (describing arrest of student-photographer Jerome Vorus for filming the police in Washington, D.C.); see also Ray Sanchez, *Growing Number of Prosecutions for Videotaping the Police*, ABC NEWS (July 19, 2010), <http://abcnews.go.com/US/TheLaw/videotaping-cops-arrest/story?id=11179076> [<https://perma.cc/H4G8-32NK?type=image>].

198. See *infra* notes 201–02 (collecting cases).

copwatchers, and arrest individuals for filming.<sup>199</sup> Some copwatching organizations, for instance, report experiencing little resistance from police officers.<sup>200</sup> At the other end of the spectrum, at least two organizations have experienced a pattern of what they believe to be retaliation against their group for their filming and posting of videos—in both cases lawsuits are pending against the individual officers and the police departments.<sup>201</sup> And in more than one case, lawsuits from individual copwatchers against police officers for interfering with filming in public have led to formal changes in police department policies.<sup>202</sup> Police officer resistance to copwatching can have a chilling effect on groups who would like to engage in the practice. For instance, one group representative with whom I spoke explained that her group engaged in a pilot copwatching practice for six months, but stopped, in part, out of concerns for the safety of the participants.<sup>203</sup>

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199. See, e.g., BERKELEY COPWATCH, *THE CRIMINALIZATION OF COPWATCHING: REPORT ON STATE VIOLENCE, POLICE REPRESSION AND ATTACKS ON DIRECT MONITORING* 6 (2011), [http://berkeleycopwatch.org/resources/Criminalization\\_of\\_Copwatching\\_2011.pdf](http://berkeleycopwatch.org/resources/Criminalization_of_Copwatching_2011.pdf) [<https://perma.cc/WG9M-9RMZ>]. The report collects experiences of copwatching organizations who have seen resistance from police officers and states that “[t]he most common tactic encountered was police officers lying to their detainee by saying that the Copwatchers would post video online to humiliate those being detained. The detainees would then ask for the Copwatchers to stop filming. Along similar lines, police often shine their lights in the direction of those filming to make it impossible to focus the cameras.” *Id.* LA CAN Interview, *supra* note 89. LA CAN reported experiencing “everything from blocking cameras to intimidating members on watch to targeting and arresting folks to pretty trumped up charges. It started pretty quickly—the harassment and trying to stop filming started like six months in after we started getting some media attention and built in intensity over time.” *Id.*

200. Indeed, one organization representative reported that he started the organization so as to try to be more respectful toward police when holding them accountable, and that he had found that respect returned. As he explained, “Honestly one of the reasons [we are] doing [copwatching] is that I’ve always hated the ‘f\*\*\* the police’ people.” See Telephone Interview by Sophie Gebreselassie with Tucson Ariz. Copblock (July 29, 2014). In turn, the same representative reported that some officers have told members “that videoing allows people to trust the police.” *Id.*

201. See *Buehler v. City of Austin*, No. A-13-CV-1100 ML (W.D. Tex. July 24, 2014) (denying city’s motion to dismiss claim that Austin police officers unlawfully targeted the founder of Peaceful Streets-Austin when he was engaged in a group patrol to record officers at traffic stops); Complaint, *Cangress v. City of Los Angeles*, No. CV14-1743 (C.D. Cal. Mar. 10, 2014) (describing retaliatory conduct against LA CAN’s community watch program).

202. See, e.g., METRO. POLICE, D.C., GENERAL ORDER NO. 304-19, VIDEO RECORDING, PHOTOGRAPHING, AND AUDIO RECORDING OF METROPOLITAN POLICE DEPARTMENT MEMBERS BY THE PUBLIC (July 19, 2012), [http://legaltimes.typepad.com/files/go\\_304\\_19.pdf](http://legaltimes.typepad.com/files/go_304_19.pdf) [<https://perma.cc/U2WC-H5NW>] (police recognizing the right of individuals to film the police, issued as part of a settlement with Jerome Vorus); Nathan Diebenow, *Atlanta Police Agreed to Back Off Citizens Who Videotape*, RAW STORY (Feb. 14, 2011), <http://www.rawstory.com/rs/2011/02/14/atlanta-police-agreed-to-back-off-citizens-who-videotape/> [<http://perma.cc/3M4L-TX7L>] (describing settlement of lawsuit by member of East Atlanta Copwatch for confiscating his camera phone, which settlement included a revision to the Atlanta Police Department’s policies regarding the filming by civilians of officers on duty).

203. Telephone Interview with Copwatch Providence (Mar. 24, 2014). This organization engaged in copwatching for six months in 2011 but is now defunct. Copwatch Providence, Minutes from Pilot Project Wrap-Up Meeting (Aug. 3, 2011) (on file with author).



Why might well-meaning officers resist being filmed?<sup>204</sup> Some may be concerned about safety. For example, in the wake of Eric Garner's death, Police Commissioner William Bratton implied that the filming by bystanders of Garner's arrest may have contributed to the police conduct, telling reporters that the filming of police officers by onlookers is "interference [that] certainly exacerbates the situation, raising the officers' tension . . . that is of concern."<sup>205</sup> Bratton emphasized that the filming of officers can make it harder for those officers to apprehend suspects in a peaceful manner.<sup>206</sup> Police leaders from across the country have echoed similar concerns.<sup>207</sup> But while concern for officer safety might explain disapproval of filming extremely close to an officer, it does not fully explain officer resistance—after all, it is just as plausible that someone stopped by the police would behave less violently knowing that they are on camera.<sup>208</sup> Indeed, the Department of Justice has argued that protecting the right to film police officers promotes rather than impedes officer safety.<sup>209</sup>

Beyond a concern with officer safety, officers may resist copwatching because they experience it as a form of disrespect. Studies demonstrate that disrespect or perceived disrespect for the police makes officers more likely to

204. Not all officers, of course, are well-meaning. Certainly for some, it may be because they intend to engage in conduct they know to be unlawful or unsavory. One recent video in Harrisburg, Pennsylvania, for instance, reveals an officer pushed a suspect to the ground with several onlookers gathered around him, and then turned only to the person with the camera and attempted to confiscate his camera and arrest him. See Carlos Miller, *Pennsylvania Cops Single Out Man with Camera, Ordering Him Away from Police Abuse Incident*, PINAC (July 29, 2014), <http://photographyisnotacrime.com/2014/07/29/pennsylvania-cops-single-man-camera-ordering-away-police-abuse-incident/> [<http://perma.cc/NS4J-ZNDL>].

205. Anthony M. DeStefano, *NYPD Commissioner Bratton: Interfering with Arrests Makes It Harder for Cops to Nab Suspects*, NEWSDAY (July 28, 2014), <http://www.newsday.com/news/new-york/nypd-commissioner-bratton-interfering-with-arrests-makes-it-harder-for-cops-to-nab-suspects-1.8910655> [<http://perma.cc/J5YW-SGDT>] (quoting Commissioner Bratton). Although a prolonged discussion of this comment from Commissioner Bratton goes too far afield of my point here, it bears mentioning that in this case, the individual filming the arrest, chokehold, and death of Mr. Garner never came physically near the officers nor did he speak to them. *Id.*

206. *Id.* Some officers also claim that they confiscate cell phones because they look like guns. See *My Camera is a Weapon, But It's Not a Gun Stupid*, WECOPWATCH (May 25, 2013), <http://wecopwatch.org/my-camera-is-a-weapon-but-its-not-a-gun-stupid/> [<http://perma.cc/A9V3-ZUSA>].

207. See, e.g., Matt Stout, *Boston Police Commissioner Wants Law to Push Back on Camera-Toting Cop Watchers*, BOS. HERALD (Aug. 10, 2015), [http://www.bostonherald.com/news\\_opinion/local\\_coverage/2015/08/boston\\_police\\_commissioner\\_wants\\_law\\_to\\_push\\_back\\_on\\_camera](http://www.bostonherald.com/news_opinion/local_coverage/2015/08/boston_police_commissioner_wants_law_to_push_back_on_camera) [<https://perma.cc/2DPH-NBEL>]; Alysia Santo, *Why Cops Aren't Ready for Their Close-Up*, MARSHALL PROJECT (Apr. 24, 2015), <https://www.themarshallproject.org/2015/04/24/why-cops-aren-t-ready-for-their-close-up> [<https://perma.cc/BJ8L-D58A>] (interviewing Dallas Police Association President Ron Pinkston).

208. Cf. Carroll, *supra* note 112 (describing a study showing that police behave better when being filmed).

209. See Letter from Jonathan M. Smith, Chief, Special Litig. Section, Civil Rights Div., U.S. Dep't of Justice to Mark H. Grimes, Office of Legal Affairs, Balt. Police Dep't (May 14, 2012), [http://www.justice.gov/crt/about/spl/documents/Sharp\\_ltr\\_5-14-12.pdf](http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf) [<http://perma.cc/BB53-SHDB>].

decide to arrest someone.<sup>210</sup> No matter how politely a bystander speaks to them, a police officer may feel that a camera focused on them while they work is a challenge to their authority<sup>211</sup> and to their expertise.<sup>212</sup> In the words of FBI Director James Comey, officers feel attacked—“under siege”—when cell phones are pointed at them.<sup>213</sup> In many ways, the adversarial dimension of copwatching invites this type of resistance because it aims to transfer power from State actors to civilians by asking that those State actors—police officers—relinquish some power and authority to the people whom they serve.

Copwatchers remind police officers that they are accountable to more than their supervising officers and elected officials—that there is also a public whom they serve and which includes those very people observing them.<sup>214</sup> As the Supreme Court has stated in the context of verbal altercations with police officers, “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”<sup>215</sup> As I will argue in Part V, to the extent that the police resist filming from a respectful distance, it

210. See TOCH, *supra* note 112, at 45–50 (collecting police officers’ statements regarding their reactions to perceived disrespect from spectators); Elizabeth E. Joh, *Privacy Protests: Surveillance Evasion and Fourth Amendment Suspicion*, 55 ARIZ. L. REV. 997, 1021 (2013) (collecting studies and stating that “[s]ociologists have repeatedly demonstrated that perceived disrespect for the police is an important—indeed perhaps the primary—factor in determining the degree to which police interfere with an individual’s liberty”).

211. One journalist describes this police reaction in this way: “When the police act as though cameras were the equivalent of guns pointed at them, there is a sense in which they are correct. Cameras have become the most effective weapon that ordinary people have to protect against and to expose police abuse.” Kyle VanHemert, *Are Cameras the New Guns?*, GIZMODO (June 2, 2010), <http://gizmodo.com/5553765/are-cameras-the-new-guns> [<http://perma.cc/8PEE-NZYX>].

212. See HERBERT, *supra* note 31, at 67 (concluding based on interviews with officers that many police officers view themselves “as members of a politically embattled institution whose unique base of expertise needs protection from the uninformed meddling of biased community activists”).

213. James B. Comey, Director, Fed. Bureau of Investigation, Remarks at the University of Chicago School of Law (Oct. 23, 2015), <https://www.fbi.gov/news/speeches/law-enforcement-and-the-communities-we-serve-bending-the-lines-toward-safety-and-justice> [<https://perma.cc/C23U-MHJ4>].

214. Copwatching may also give some support to officers who do *not* like the way that their fellow officers treat people. Just like residents of a neighborhood, police officers within a department do not think as one—especially now that many urban police departments are diverse along lines of race, ethnicity, gender, and sexuality. Cf. SKLANSKY, *supra* note 6, at 147–51. For officers who disagree with their department’s treatment of particular populations or neighborhoods, it is possible that copwatching opens up the space for these officers to have a voice within their department. See, e.g., *id.* at 150 (describing how minority officer organizations frequently work with minority groups outside of the police departments); CUAPB Interview, *supra* note 100 (describing how some police officers and retired police officers support their efforts); cf. BLEA USA, *Black Law Enforcement Organizations* [sic] *Denounce NYPD Commissioner Bratton*, YOUTUBE (July 30, 2014), <https://www.youtube.com/watch?v=0-xsnBF4Tx8> [<http://perma.cc/77NZ-2UBR>] (video of press conference in which Black Law Enforcement Organizations denounce policy of broken windows policing in New York City).

215. *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987).

is the job of courts, the Department of Justice, and police departments themselves to discourage this resistance.

### B. Privacy Concerns

Organized copwatching may also intrude on the privacy interests of third parties and those under arrest. People may not like being filmed, no matter what they are doing.<sup>216</sup> As scholars of privacy have argued, surveillance can have a chilling effect on how people speak and write, both in traditionally private areas and in the public sphere.<sup>217</sup> In particular, if copwatching groups are expressing disapproval of policing policies while holding cameras, this may discourage people who agree with police actions from voicing their opinions. If people filming officers are expressing appreciation for a specific police action, the reverse may be true. Some copwatching groups mitigate these privacy risks by asking the person interacting with the officer for permission to film them and then permission to post any film.<sup>218</sup>

Filming by copwatchers may also discourage individuals from helping police officers gather information and solve crimes. This is the central concern of Judge Richard Posner, who dissented from a Seventh Circuit decision recognizing a First Amendment right to film officers in public.<sup>219</sup> Posner worries that filming in public can “impair the ability of police both to extract information relevant to police duties and to communicate effectively with persons whom they speak with in the line of duty.”<sup>220</sup> He gives the example of a police officer who meets with an informant on a park bench—the risk that they may be filmed and that information distributed can discourage the cooperation of that informant.<sup>221</sup> This concern, however, may not be as alarming as Judge Posner suggests. Police officers live in a world where their actions may always be on video—from government surveillance cameras, private surveillance cameras, and individual recorders alike.<sup>222</sup> And people who want to cooperate with police officers, too, know that it may not be wise to do so on the open road or street. But there are real privacy concerns here that

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216. See DAVID LYON, *SURVEILLANCE STUDIES: AN OVERVIEW* 190–91 (2007) (describing “varieties of surveillance experience”); Joh, *supra* note 210, at 1012 (“[Some] individuals object to the growing presence of surveillance in their lives no matter whether it comes from public or private entities.”); Richards, *supra* note 124, at 1945–52 (discussing the dangers of surveillance to “intellectual privacy”).

217. See, e.g., Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 199–200 (2008); Richards, *supra* note 124, at 1937–42.

218. See, e.g., Berkeley Copwatch Interview, *supra* note 171 (describing practice of asking for permission before filming and consulting a lawyer before posting any material).

219. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 611 (7th Cir. 2012) (Posner, J., dissenting).

220. *Id.*

221. *Id.* at 613.

222. See Capers, *supra* note 109, at 960–65; Joh, *supra* note 210, at 1018–22; Richards, *supra* note 124, at 1937–42.

underscore the limited ability of copwatching groups to “represent” any neighborhood or community.

### C. *The Ambiguity of Video*

Finally, there is a limit to how far video can go in leading to change within police departments. First, concentrating on videos of specific acts by individual officers can further a focus on “bad cops,” rather than the institutional dynamics that guide police behavior.<sup>223</sup> Conflating the behavior of individuals with the workings of larger institutions can leave institutional problems in place and larger power dynamics unchanged.<sup>224</sup> Videos are anecdotal—they cannot replace the comprehensive data collection and empirical work needed for courts, legislators, and agencies to regulate the police effectively.

Second, the medium of video presents its own limitations. Although video can seem objective, how a viewer interprets a video depends on the narratives structuring that video,<sup>225</sup> how it is framed,<sup>226</sup> and the biases<sup>227</sup> and experiences<sup>228</sup> of the viewer. The different interpretations that two different juries drew from the video of the beating of Rodney King is a classic example of this: the two juries, drawn from different counties, received different narratives and edits of the video and came to different conclusions about the police officers’ behavior.<sup>229</sup> More recently, polls show that a majority of Americans, as well as a majority of New Yorkers, disagree with the decision of a New York City grand jury to decline to indict Officer Daniel Pantaleo in the

223. See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 455 (2004) (“[R]eform efforts have focused too much on notorious incidents and misbehaving individuals, and too little on an overly aggressive police culture that facilitates and rewards violent conduct.”).

224. See Cohen, *supra* note 217, at 199–200 (“As political performance art, sousveillance is brilliant. . . . [B]ut sousveillance does not change the architectural conditions of surveillance or the underlying inequalities that they reinforce.”); Torin Monahan, *Counter-surveillance as Political Intervention?*, 16 SOC. SEMIOTICS 515, 515 (2006) (“[C]urrent modes of activism tend to individualize surveillance problems and methods of resistance, leaving the institutions, policies, and cultural assumptions that support public surveillance relatively insulated from attack.”).

225. See Kahan et al., *Protest*, *supra* note 141, at 883–84 (describing a study testing motivated cognition and its effects on viewers); Kahan et al., *Whose Eyes*, *supra* note 141, at 879–81.

226. See Benforado, *supra* note 137, at 1347–60 (exploring the importance of framing and point of view for observers).

227. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160–61 (2012) (describing how the availability of video evidence may actually increase the impact of implicit bias, as viewers feel they have license when looking at objective video to make judgments).

228. See Kahan et al., *Whose Eyes?*, *supra* note 141, at 881–902 (describing the varying perspectives behind a finding of legitimacy in the *Scott* decision).

229. See Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DENVER U. L. REV. 283, 285–86 (1993) (describing how the video of the beating of Rodney King was both physically and symbolically mediated during the civil trial of the officers, changing an unambiguous video to “ambiguous slices of time in a tense moment that Rodney King created for the police”); Stuart, *supra* note 92, at 330–33 (describing the social construction of video in the Rodney King trial).

death of Eric Garner despite a video of the incident—evidence that interpretations of the video vary greatly.<sup>230</sup> In a series of recent studies, Professor Dan Kahan and his coauthors have demonstrated that individuals perceive videos of police conduct differently depending on their backgrounds, experiences, and political beliefs.<sup>231</sup> Similarly, people from different backgrounds and with different views of policing in their neighborhoods will have very different reactions to video of copwatchers engaging with police officers.

Moreover, it can be difficult for copwatchers, no matter how organized, to control the narratives of their videos. Sociologist Forrest Stuart details this difficulty in his ethnography of the LA CAN Community Watch's attempt to document police actions toward the homeless on Skid Row in Los Angeles.<sup>232</sup> Although the Skid Row residents engaged in dialogue with officers on video in an effort to document those officers' training and intentions in a particular moment, police officers also engaged in counterstrategies on video that served to undermine the credibility of the copwatchers themselves. For example, police referred to the political tattoo of someone holding the camera.<sup>233</sup> Analyzing this phenomenon, Stuart worries that certain police responses to being filmed "may . . . actually lead to an increase in police ability to present and defend their own interpretations."<sup>234</sup>

These are legitimate concerns facing groups seeking change through the medium of video. But copwatching organizations do more than capture videos—they look beyond individual videos as the answer to any one problem and instead seek a broader approach to changing the status quo through, among other tactics, the power transfer entailed in group observation and filming. Video can help in these efforts by not only deterring misconduct, but also by providing more data points, more perspectives, and less opportunity for police officials to dominate the conversation over what policing can and should be.<sup>235</sup>

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230. See Ariel Edwards-Levy, *Most Americans, Black and White, Disapprove of Lack of Charges in Eric Garner Case*, HUFFINGTON POST (Dec. 9, 2014), [http://www.huffingtonpost.com/2014/12/09/eric-garner-poll\\_n\\_6295872.html](http://www.huffingtonpost.com/2014/12/09/eric-garner-poll_n_6295872.html) [<http://perma.cc/Y3G2-UPYN>]; Anna Sanders, *Poll Finds Most New Yorkers Oppose Eric Garner Grand Jury Decision*, SILIVE.COM (Dec. 12, 2014), [http://www.silive.com/news/index.ssf/2014/12/eric\\_garner\\_grand\\_jury\\_poll.html](http://www.silive.com/news/index.ssf/2014/12/eric_garner_grand_jury_poll.html) [<http://perma.cc/ZT9N-Q8TQ>].

231. Kahan et al., *Protest*, *supra* note 141, at 883–84; Kahan et al., *Whose Eyes*, *supra* note 141, at 879–81 (2009) (studying perceptions of video of police officers driving a car off the road).

232. See Stuart, *supra* note 92, at 335–36.

233. *Id.*

234. *Id.* at 343.

235. Cf. DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* 31 (1998) (“Cameras don’t have imaginations. . . . In fact, when their fields of view overlap, we can use them to check on each other. Especially if a wide range of people do the viewing and controlling.”).

For copwatching, video is a form of advocacy as much as it is a form of documenting the truth.<sup>236</sup>

#### IV.

#### BEYOND CONSENSUS

Copwatching may not be perfect, but it can nevertheless be a productive and provocative form of participation in criminal justice. In a given neighborhood, it may represent one point of view among many. But it is a point of view often left out of efforts to solicit public input into policing practices. To recognize that copwatching has a place—not as a panacea, but as a piece of the puzzle—changes the scholarly conversation about lay participation in policing. It means that part of being serious about public participation, especially from disempowered populations, is creating the conditions for the disempowered to participate in their own ways outside of formal institutions and procedures. In the focus on consensus-driven mechanisms that seek partnerships between police officers and community members to identify policing priorities,<sup>237</sup> there is a danger of losing sight of the value of more adversarial methods of engagement.

Copwatching organizations take a clearly adversarial stance toward police officers in their neighborhoods when they take out their cameras. This adversarialism itself has a use. The control of copwatchers over their own actions, recordings, and participation in formal institutions turns the tables on the traditional control that officers have to dictate the terms of public participation.<sup>238</sup> This power shift promotes democratic engagement so that other forms of accountability—legislative, executive, and administrative, both federal and local—can more accurately represent the people to whom they are supposed to be accountable.

In its ideal form, organized copwatching displays a faith in both the Constitution and political engagement. This faith takes the shape of a confrontational practice that seeks change through a combination of official and grassroots channels, through both law and politics. However, although organized copwatching is adversarial, it need not be antagonistic. To the contrary, copwatching in its most productive form is what political theorist Chantal Mouffe would call *agonistic*.<sup>239</sup>

Agonism takes an adversarial stance toward practices and ideologies of institutions in power, but it does so through engagement with those institutions

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236. See Gillian Caldwell, *Using Video for Advocacy*, in VIDEO FOR CHANGE: A GUIDE FOR ADVOCACY AND ACTIVISM, *supra* note 81, at 1–19 (describing contemporaneous recording of human rights violations as a form of advocacy); cf. Austin, *supra* note 77, at 847–49 (describing the concept of “visual legal advocacy” through film).

237. See generally Skogan & Roth, *supra* note 41, at xvii.

238. See *supra* notes 130–36 and accompanying text.

239. See generally CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 80–105 (2000) [hereinafter MOUFFE, PARADOX]; MOUFFE, *supra* note 13, at 1–19.

rather than withdrawal, by acknowledging intractable differences but respecting the adversary who disagrees.<sup>240</sup> Agonism serves as a contrast to, on one end, *antagonism*, through which groups withdraw from political institutions altogether,<sup>241</sup> and on the other end, *deliberation*, which emphasizes consensus through rational dialogue.<sup>242</sup> Because no one idea can be representative of a diverse modern population, “[t]oo much emphasis on consensus, together with aversion toward confrontations, leads to apathy and to a disaffection with political participation.”<sup>243</sup> Agonism thus pushes up against the exclusion that can come from avoiding conflict through consensus, but maintains that change can come through contestation that engages with formal democratic processes.<sup>244</sup> Although there are other democratic theories that critique the deliberative turn toward consensus through dialogue,<sup>245</sup> the concept of agonism is useful in its ability to discern different kinds of non-consensus-based strategies for change.

In particular, the distinction between agonism and antagonism is a useful way to draw out some of the differences in how various copwatching organizations approach legal change. A minority of groups with which I spoke—five of eighteen—are not agonistic but rather antagonistic: they withdraw from participation in formal institutions, often identifying with anarchist forms of communal governing.<sup>246</sup> In contrast, the majority of groups

240. MOUFFE, PARADOX, *supra* note 239, at 100–05.

241. *Id.* at 102.

242. *Id.* at 90–98 (citing JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 127 (1996)).

243. MOUFFE, *supra* note 13, at 7.

244. Legal scholars have used Mouffe’s concept of agonism to argue for the benefits of various forms of contestation in the legal world. *See, e.g.*, Bernadette Meyler, *Accepting Contested Meanings*, 82 FORDHAM L. REV. 803, 826 (2013) (discussing adversarial debates around the initial writing of the Constitution, discussing contestation of the interpretation of the Constitution by social movements, and stating that “social movements’ work to affect constitutional interpretation has brought such agonism to the fore today”); Martin H. Redish & Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1361 (2009) (discussing an adversarial conception of the First Amendment); *cf.* Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1336–40 (2010) (discussing Mouffe’s concept of agonism in the context of other theorists who acknowledge the need for disagreement in politics).

245. *See, e.g.*, JEFFREY EDWARD GREEN, THE EYES OF THE PEOPLE: DEMOCRACY IN AN AGE OF SPECTATORSHIP 58–63 (2010) (putting forth a “vocal model of popular empowerment” in contrast to the model of deliberative democracy); PHILIP PETTIT, ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 5–26 (2012) (describing contrast between republicanism and deliberative democracy); SHAPIRO, *supra* note 71, at 10–50 (discussing the limits of deliberative democracy in preventing domination by the most powerful); IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 36–51 (2000) (critiquing deliberative democracy for privileging civil discourse over disruptive political practices); *see also* SKLANSKY, *supra* note 6, at 59–105 (laying out the contrast between pluralist conceptions of democracy and those of deliberative democracy and connecting that distinction to similar distinctions in policing policy).

246. *See, e.g.*, Copwatch LA Interview, *supra* note 171 (mission statement includes “fighting for change without a reformist consciousness”); Copwatch of East Atlanta Interview, *supra* note 101 (describing roots of organization in the “anarchist” tradition); PSP Austin Interview, *supra* note 96 (describing their deliberate decision to divorce themselves from political activity). Mouffe

with which I spoke follow an agonistic model. They actively contest police officers' individual actions and express profound, at times complete, disagreement with the practices and priorities of their local police departments. They seek to shift power from police officers to the populations that they police. But they do so through civic engagement with the processes in place—they make sure that their actions comport with First Amendment protections for filming in public; they solicit the support of public officials and join in local lobbying efforts; they participate in lawsuits and seek institutional reform of police departments; and they attend community policing meetings and attempt to join local conversations about policing priorities. This engagement with formal institutions may lie at the periphery of a copwatching organization's work, but nevertheless demonstrates the agonistic nature of much of the practice.

When a copwatching group takes an agonistic stance toward local police practices, it seeks both power and participation. In this way, an agonistic practice of copwatching falls somewhere between what Professor Heather Gerken calls “dissenting by deciding,” where political minorities make a decision from within a formal state process such as a jury or a school board,<sup>247</sup> and “civil disobedience,” where dissenters purposefully disobey an existing law in an effort to change law or policy.<sup>248</sup> Agonistic copwatching acknowledges and celebrates profound disagreement with current policing practices but works to change those practices through contestation both within and outside of official channels.

Copwatching challenges leading accounts of community participation in policing that eschew the adversarial in all forms, whether agonistic or antagonistic.<sup>249</sup> Copwatching challenges, too, the tendency to group the “community” as a force in opposition to all arrestees and defendants, and, therefore, in opposition to individual constitutional rights.<sup>250</sup> In this way, copwatching also presents a challenge to a local police department's claim to represent “the people” by removing from the street or the road those who the police decide have violated community norms. Copwatching reveals that individual rights and community interests are not always at odds; it depends, rather, on how you define “community.”

Scholars who are worried about the wide scale civic disengagement and disenfranchisement of people who live in highly policed neighborhoods should

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characterizes “withdrawal from” political institutions as the central indication of an antagonistic approach to politics. See MOUFFE, *supra* note 13, at 65–84.

247. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005).

248. See JOHN RAWLS, A THEORY OF JUSTICE 320 (rev. ed. 1999) (defining civil disobedience as a “public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government”).

249. See *supra* notes 48–50 and accompanying text.

250. See, e.g., MEARES & KAHAN, *supra* note 15, at 8–11 (arguing that there is a conflict between democratic rule and individual rights with respect to the policing of minority communities).



be excited about both the performative and pragmatic dimensions of agonistic copwatching. As a complement to initiatives that seek participation through deliberation, lay-driven forms of police accountability can serve as a partial anecdote to the danger of co-optation by government-driven collaborative approaches. For example, copwatching can work in tandem with the creation of formal mechanisms of engagement such as community policing and its outgrowths. Indeed, some recent proposals for new consensus-based reforms are promising: we would do well to solicit ongoing local feedback into official police policies, whether through court-supervised consent decrees,<sup>251</sup> the convening of juries,<sup>252</sup> or the solicitation of public comments regarding police procedures prior to their implementation.<sup>253</sup> But we should also respect the inherent conflict that comes when we ask a policed “community” to tell us what they think about local policing—we should respect the agonism displayed by much organized copwatching.

## V.

### RESPECTING OBSERVATION

What does it mean for courts, legislatures, executives, and police officers themselves to respect copwatching? Given the widespread resistance of police officers to being recorded, this is no small feat. It requires both internal and external pressures, both constitutional and extraconstitutional change. And it requires that scholars and reformers respect processes of accountability that originate outside of elite-dominated systems and debates.

#### A. *Structural Reform of Police Departments*

Police departments, executives, legislatures, and courts alike should realize that promoting respect for observation and filming is an important part of police accountability—one that can complement other forms of soliciting public input into policing practices. In the last two decades, much large-scale reform of police departments has happened through 42 U.S.C. § 14141, also known as the Police Misconduct Statute, which gives the Department of Justice the power to pursue structural reform litigation against police departments engaged in a pattern or practice of misconduct.<sup>254</sup> Consent decrees that emerge

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251. See, e.g., Garrett, *supra* note 58, at 101–05; Sabel & Simon, *supra* note 58, at 1047; Simmons, *supra* note 58, at 396–419.

252. See, e.g., Luna, *supra* note 67, at 840; Ryan, *supra* note 67, at 891–94.

253. See, e.g., BIBAS, *supra* note 32, at 149–50 (proposing the solicitation of online feedback about policing priorities); Bierschbach & Bibas, *supra* note 55, at 39–53 (proposing notice-and-comment procedures for policing and prosecutorial charging policies); Friedman & Ponomarenko, *supra* note 28, at 1879–81 (discussing benefits of public participation in rule-making surrounding police procedures).

254. 42 U.S.C. § 14141 (2012); see also Harmon, *supra* note 59, at 11 (describing the origins of section 14141); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343 (2015).

from § 14141 litigation allow courts to oversee the restructuring of police policies and procedures through ongoing monitoring and data collection.<sup>255</sup> Those consent decrees, however, rarely focus on respecting observation and filming of police as part of their solution—only three of twenty-eight federal settlements, consent decrees, and memoranda of agreement signed between the Department of Justice and local police departments in the last two decades include provisions relating to the First Amendment right to observe or record in public.<sup>256</sup> Police departments, executives, and courts alike should realize that promoting respect for observation and filming is a necessary part of true police accountability.

To promote respect for observation, police departments must focus on what policing expert Samuel Walker refers to as “PTSR”—Policy, Training, Supervision, and Review—the four pillars necessary for true police reform.<sup>257</sup> This begins with changes to written police policies, or “general orders.”<sup>258</sup> A number of police departments have issued explicit orders or policies stating that it is not a crime to film police officers in public, many of them following well-publicized incidents of interference with cameras.<sup>259</sup> The Department of

255. Rushin, *supra* note 254.

256. These are the settlements between the Department of Justice and the cities of East Haven, Seattle, and New Orleans. *See* Settlement Agreement and Order, *United States v. Town of East Haven*, No. 3:12-cv-01652, (D. Conn. Nov. 20, 2012), [http://www.justice.gov/crt/about/spl/documents/ehpdsettle\\_11-20-12.pdf](http://www.justice.gov/crt/about/spl/documents/ehpdsettle_11-20-12.pdf) [<https://perma.cc/NTT9-66UC>]; Consent Decree Regarding the New Orleans Police Department, *United States v. City of New Orleans*, No. 2:12-cv-01924 (E.D. La. July 24, 2012), <http://www.clearinghouse.net/chDocs/public/PN-LA-0001-0001.pdf> [<https://perma.cc/8VGV-5XET>] [hereinafter *New Orleans Consent Decree*]; Settlement Agreement and Stipulated Order of Resolution, *United States v. Seattle*, No. 2:12-cv-01282 (W.D. Wash. July 27, 2012), [http://www.justice.gov/crt/about/spl/documents/spd\\_consentedecree\\_7-27-12.pdf](http://www.justice.gov/crt/about/spl/documents/spd_consentedecree_7-27-12.pdf) [<http://perma.cc/E7VR-Q6TK>]; *cf.* Rushin, *supra* note 254, at 1378-88 (detailing content of multiple settlement agreements).

257. *See* SAM WALKER, RESPONDING TO THE NYPD CHOKEHOLD DEATH: A PTSR FRAMEWORK 1 (2014), <http://samuelwalker.net/wp-content/uploads/2014/07/RESPONDING-TO-THE-NYPD-CHOKEHOLD-DEATH2.pdf> [<http://perma.cc/N485-LBGV>] (describing the PTSR framework of “Policy, Training, Supervision, and Review” and explaining that “[e]ach element needs to be in place in order to achieve genuine officer accountability”).

258. *See* Wesley G. Skogan, *Why Reforms Fail*, in *POLICE REFORM FROM THE BOTTOM UP: OFFICERS AND THEIR UNIONS AS AGENTS OF CHANGE* 144, 147 (Monique Marks & David Sklansky eds., 2012) (“To a degree many outsiders find hard to fathom, little is supposed to happen in police departments without General Orders detailing how it is to be done.”).

259. *See, e.g.*, CITY OF SEATTLE, SEATTLE POLICE DEPARTMENT MANUAL § 5.160 (June 6, 2008), [http://www.seattle.gov/police/publications/manual/05\\_160\\_Citizen\\_Observation\\_Officers.html](http://www.seattle.gov/police/publications/manual/05_160_Citizen_Observation_Officers.html) [<http://perma.cc/KB57-X2X2>]; Timothy B. Lee, *DC Police Chief Announces Shockingly Reasonable Cell Camera Policy*, *ARS TECHNICA* (July 24, 2012), <http://arstechnica.com/tech-policy/2012/07/dc-police-chief-announces-shockingly-reasonable-cell-camera-policy/> [<http://perma.cc/YZ8H-CKHC>]; Boston Herald Staff, *By the Book: What Police Should—and Shouldn’t—Do*, *BOS. HERALD* (Aug. 9, 2015), [http://www.bostonherald.com/news\\_opinion/local\\_coverage/2015/08/by\\_the\\_book\\_what\\_police\\_should\\_and\\_shouldn\\_t\\_do](http://www.bostonherald.com/news_opinion/local_coverage/2015/08/by_the_book_what_police_should_and_shouldn_t_do) [<https://perma.cc/L4A2-MWNX>] (collecting police regulations regarding civilian filming from Cambridge, Chelsea, and Boston, Massachusetts).

Justice has supported these regulations.<sup>260</sup> Regulations making clear that filming an officer is not a crime, however, do not eliminate police resistance on their own. In Washington, D.C., for example, an officer arrested someone for filming just one day after his police department issued a formal—and well-publicized—regulation regarding the filming of the police.<sup>261</sup>

As much as police departments are starting to realize the importance of respecting cameras, incidents of bad reactions to filming police continue without substantial training and supervision underscoring those policies.<sup>262</sup> As scholars and reformers have documented, the actions of police officers often conform less to the formal rules and practices “on the books” than to “a different set of rules—embodied in informal norms and operational practices [that] actually govern[] the day-to-day conduct” of officers.<sup>263</sup> Police training can make a difference in changing these norms, as can leadership from supervisors and administrators emphasizing the importance of respecting filming.<sup>264</sup>

These policies would be further aided by inclusion in § 14141 structural reform litigation, whose monitoring mechanisms can add the “review” portion of PTSR necessary to make police reform stick. The three federal consent decrees that have referenced a right to record thus far—in East Haven, Seattle, and New Orleans—have included provisions explicitly mandating training regarding the right to film and observe. The New Orleans consent decree further requires that “NOPD shall ensure that officers understand that exercising this right serves important public purposes.”<sup>265</sup> These provisions are missing, however, in the vast majority of federal settlements and consent decrees. Although ongoing monitoring need not require federal intervention—it can also be done through independent police auditors put in place by

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260. See, e.g., Letter from Jonathan M. Smith, *supra* note 209 (stating that the right to record “subject to narrowly-defined restrictions, engender[s] public confidence in our police departments, promote[s] public access to information necessary to hold our governmental officers accountable, and ensure[s] public and officer safety”).

261. See Carlos Miller, *DC Cops Confiscate Phone, Steal Memory Card, Day After New Photo Policy Implemented*, PINAC (July 26, 2012), <https://photographyisnotacrime.com/2012/07/dc-cops-confiscate-phone-steal-memory-card-day-after-new-photo-policy-implemented/> [<http://perma.cc/4XR8-GU47>]; see also Andrew Rosado Shaw, Note, *Our Duty in Light of the Law’s Irrelevance: Police Brutality and Civilian Recordings*, 20 GEO. J. ON POVERTY L. & POL’Y 161, 166–80 (2012) (“Even in jurisdictions that unequivocally provide for legal surveillance of police, officers have displayed a willingness to prevent or destroy the resulting evidence and to arrest the civilians behind cameras on other frivolous charges.”).

262. Cf. Skogan, *supra* note 258, at 144–54.

263. Armacost, *supra* note 223, at 523–24; see also Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 68–71 (2012) (describing the resistance of police subculture to reforms).

264. See David Klinger, *Can Police Training Affect the Use of Force on the Streets? The Metro-Dade Violence Reduction Field Experiment*, in HOLDING POLICE ACCOUNTABLE 95, 103–06 (Candace McCoy ed., 2010) (finding that training on use of violence reduces the use of force).

265. New Orleans Consent Decree, *supra* note 256, at V.E.155.

legislators<sup>266</sup>—the Department of Justice has a chance here to lead the way toward police respect for observation.

State legislation can also aid in the protection of civilians who record the police. Two states—Colorado and California—passed laws in the first half of 2015 that reiterate the right of civilians to film the police; Colorado’s law also creates civil liability for officers who interfere with that right.<sup>267</sup> Although civil liability may not on its own deter officers from interfering with civilian filming,<sup>268</sup> state legislation can send a forceful and important message to local police departments regarding the necessity of respecting observation and filming.<sup>269</sup>

### B. Constitutional Change

Taking copwatching seriously goes beyond departmental policies that require police officers to respect residents who film them. It also means that proponents of improved accountability in policing should not give up on the possibility of constitutional change. Constitutional change should happen in two ways—first, by protecting the right to copwatch through the First Amendment; and second, by respecting the contributions of copwatching to interpretations of the Fourth Amendment.

First Amendment jurisprudence is well on its way to recognizing a right to film police officers in public—the First and Seventh Circuits have recognized the right and district courts around the country have followed suit.<sup>270</sup> However, this right is far from settled, and courts from other circuits have in recent years been divided as to whether a right to record is “clearly established”—an

266. See Walker, *supra* note 263, at 84–90 (describing such efforts in Los Angeles, Denver, and Omaha).

267. See H.B. 15-1290, 70th General Assemb., 1st Sess. (Colo. 2015), [http://www.statebillinfo.com/bills/bills/15/1290\\_enr.pdf](http://www.statebillinfo.com/bills/bills/15/1290_enr.pdf) [<https://perma.cc/L536-8DE6> (signed May 20, 2015)]; S.B. 411, 2015–16 Regular Sess. (Cal. 2015), <http://openstates.org/ca/bills/20152016/SB411/> [<https://perma.cc/44YJ-YQWQ>] (signed into law Aug. 11, 2015). In contrast, some states have proposed legislation that would criminalize certain forms of filming the police in public. See, e.g., Daniel Pérez, *Bill Restricting Rights of Citizens to Videotape Police Introduced in Texas House*, HOUSTON CHRON. (Mar. 12, 2015), <http://www.chron.com/news/politics/texas/article/Bill-restricting-rights-of-citizens-to-videotape-6130903.php> [<https://perma.cc/QWK5-LUCD>].

268. Cf. Schwartz, *supra* note 107 (showing that police officers are usually indemnified from damages when they lose civil lawsuits).

269. Cf. Adler-Bell, *supra* note 190 (quoting the policy director of the Colorado ACLU as saying that the purpose of the Colorado law is to “get the police departments to pay attention and train police about what they are and aren’t allowed to do”).

270. See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597–98 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011); cf. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property . . . .”); *Buehler v. City of Austin*, No. A-13-CV-1100 ML (W.D. Tex. July 24, 2014) (cataloguing district court decisions from around the country and finding a clearly established First Amendment right to record).

important standard for purposes of qualified immunity.<sup>271</sup> There are also a number of outstanding issues in the First Amendment doctrine, including whether the doctrine protects surreptitious recording, whether officers can seize cameras from bystanders, and the point at which police officers are justified in arresting someone who is filming them because they represent a danger to the police or civilians.<sup>272</sup> The First Amendment protection for recording cannot extend to all circumstances; there must be limits on physical proximity and allowances in truly unsafe circumstances. But up to this point, courts adjudicating First Amendment cases have neglected to recognize that the act of pointing a smartphone at a police officer is itself an act of expression and of resistance. Courts adjudicating First Amendment claims should recognize the multifaceted benefits—to democracy, to accountability, and to the protection of dissent—that accrue from the respect accorded to civilian observation and recording.<sup>273</sup>

Copwatching also provides a path through which to rethink the contours of Fourth Amendment “reasonableness” with respect to police-citizen encounters. Fourth Amendment scholars have put forth thoughtful and nuanced suggestions for ways that courts should shift their determinations of “reasonableness” so as to better map onto societal perceptions of what is reasonable<sup>274</sup> and better account for the experiences of people of color who live and work in neighborhoods with a high police presence.<sup>275</sup> Surely judges do not

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271. Compare, e.g., *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015) (finding right to record clearly established in a case involving journalist otherwise unconnected to the recorded events), and *Crago v. Leonard*, No. 2:13-CV-531-TLN-EFB, 2014 WL 3849954, at \*4 (E.D. Cal. Aug. 5, 2014), report and recommendation adopted, 2014 WL 4435954 (E.D. Cal. Sept. 9, 2014) (also finding right to record clearly established), with *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (finding no clearly established right to record during a traffic stop), *Pluma v. City of New York*, No. 13 Civ.2017, 2015 WL 1623828, at \*7 (S.D.N.Y. Mar. 31, 2015) (finding right to record is not clearly established), and *Lawson v. Hilderbrand*, No. 3:13-CV-00206, 2015 WL 753708, at \*100 (D. Conn. Feb. 23, 2015) (same).

272. See Taylor Robertson, *Lights, Camera, Arrest: The Stage is Set for a Federal Resolution of a Citizen’s Right to Record the Police in Public*, 23 B.U. PUB. INT. L.J. 117, 131–48 (2014) (discussing these open questions); Rebecca G. Van Tassell, Comment, *Walking a Thin Blue Line: Balancing the Citizen’s Right to Record Police Officers Against Officer Privacy*, 2013 BYU L. REV. 183, 189–94.

273. For an extended discussion along these lines, see Simonson, *supra* note 21.

274. See, e.g., Baradaran, *supra* note 136, at 1 (advocating for “a major shift in Fourth Amendment balancing toward considering broader statistical data and facts to inform decisions and educate courts to consider not only the defendant before them but the rights of society implicated in every case”); Bowers & Robinson, *supra* note 40, at 265–68 (suggesting ways in which the Court might consider lay perceptions of police practices in determining the constitutionality of those practices).

275. See, e.g., Bacigal, *supra* note 132, at 92 (“Once the Court adopts a constitutional standard that focuses on whether a person feels free to leave, that person should be taken as he or she is, not as the Court visualizes some hypothetical person.”); Carbado, *supra* note 40, at 970 (recommending a conception of the Fourth Amendment “more concerned with the coercive and disciplinary ways in which race structures the interaction between police officers and nonwhite persons”); Harris, *supra* note 157, at 660–61 (arguing that a high crime area should not be an allowable factor to contribute to a stop); Maclin, *supra* note 160, at 1328 (arguing that courts should consider freedom of movement in

intend to substitute their own individual views for those of all of society; but without access to information about society's views of particular practices, they are left with their own impressions of what society considers reasonable.<sup>276</sup> Copwatching and its related activities provide data points and perspectives that courts can use in determining what is reasonable in a particular neighborhood. The presence of copwatchers in a courtroom or the admission of a video taken by copwatchers into evidence gives a judge room to consider, for instance, the harm of particular practices on communities, the dignity interests at stake in a particular police action, and the neighborhood sentiment toward a particular practice.<sup>277</sup> While those factors do not solve a Fourth Amendment question on their own, they lend credence to efforts by scholars and courts to bring the concept of the "reasonable" closer to the reality of life on the streets and roads of America.

### C. Redefining Community Policing

As currently defined and practiced, "community policing" happens on the terms of the elite. Police departments and other state actors decide which community residents to consult, when and where to consult them, and the goals of those consultations.<sup>278</sup> At the same time, scholars and policy makers debate and decide the best ways to structure meetings and build partnerships.<sup>279</sup> But it does not have to be this way. The idea of "community policing"—of a method of policing that is responsive to the residents of the area that is policed—need not be elite driven. To the contrary, the concept of community policing should make room for and even prioritize reform processes that are generated by nonelites, by those traditionally outside of the system.<sup>280</sup> This kind of police reform, of which copwatching is a vibrant example, has largely been written out of scholarly discussions of community policing. Taking copwatching and other community-generated methods of accountability seriously provides a richer way of thinking about the meaning of police accountability to communities. Community policing should go beyond seeking input and building partnerships; it should mean respecting processes of accountability that originate outside of the system itself.

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Fourth Amendment determinations); Thompson, *supra* note 25, at 1004–13 (arguing that courts should consider the role of race in police officer decisions).

276. See Bowers & Robinson, *supra* note 40, at 223 (describing how, when the Court determines "reasonableness" in the context of criminal procedure, "the Court has done almost no work to determine whether its conceptions of the reasonable layperson dovetail with what people actually find fair in a given context").

277. See *supra* notes 156–89 and accompanying text.

278. See *supra* notes 52–55 and accompanying text.

279. See *supra* notes 41–57 and accompanying text.

280. Cf. BIBAS, *supra* note 32, at 29–48 (contrasting "insiders" and "outsiders" in the criminal justice system).

The last two years have seen taskforces formed at national, state, and local levels that seek to address the problems of community-police relations that have surfaced in the wake of the events in Ferguson, Staten Island, and across the nation.<sup>281</sup> The federal Task Force on 21st Century Policing has a goal of examining “how to foster strong, collaborative relationships between local law enforcement and the communities they protect”<sup>282</sup>—a goal that cannot be met with consensus-based solutions alone. Instead, scholars and policy makers alike should recognize that outside movements for social change and political inclusion—even ones that seem to advocate an adversarial stance against local police departments—are part of the larger world of local police accountability, and should be part of what we mean when we talk about “community policing.”

#### CONCLUSION

Deciding how to involve the public in criminal justice institutions depends on why you think involving the public matters. Popular engagement with policing should be related not just to internal police department policies and practices but also to larger webs of politics, power, and inequality. To treat the two separate and apart from each other—to seek only collaboration, at the expense of dissent—is to miss out on an important piece of the puzzle that is police accountability.

My goal in this Article has not been to prove that adversarial methods of participation like copwatching are normatively better than consensus-driven efforts but rather to put organized copwatching on the map as a form of public participation in policing worth taking seriously and studying in more detail. Although community policing and other consensus-based reforms are promising, adversarialism has its place. Indeed, it is through their stance as critical observers rather than partners of police officers that copwatchers provoke a broader debate about the function of local policing in neighborhoods with profound social and political inequalities. Once we recognize the importance of protecting some adversarial forms of police accountability that originate outside of the elite-driven system, we can turn to looking for combinations of accountability mechanisms—both consensus-based and adversarial, both state-driven and civilian-driven—that together have the potential to move local policing to a democratically accountable place.

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281. See, e.g., PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 44; STL POSITIVE CHANGE: THE FERGUSON COMMISSION, <http://www.stlpositivechange.org> [<https://perma.cc/EQ5R-9GXA>] (“[The charge of the Ferguson Commission is to] chart[] a new path toward healing and positive change for the residents of the St. Louis region.”); Jonathan Starkey, *Wilmington Crime Commission Clears Delaware House*, NEWS JOURNAL (Jan. 28, 2015), <http://www.delawareonline.com/story/news/local/2015/01/27/wilmington-crime-commission-clears-delaware-house/22435053/> [<https://perma.cc/YQ95-DZAU>].

282. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 44, at 5.

## APPENDIX A

## Copwatching Organizations That Participated in Telephone Interviews

Organization	Year began copwatching
Berkeley Copwatch	1990
Communities United Against Police Brutality (Minneapolis, MN)	2000
Copwatch LA - South Central Chapter	2005
Copwatch of East Atlanta	2010
Georgia Cop Block	2012
Justice Committee NYC	2007
Los Angeles Community Action Network	2005
Malcolm X Grassroots Movement (MXGM), Brooklyn Chapter	1999
Oct. 22 Coalition to Prevent Police Brutality (Albuquerque, NM)	2013
Peace House DC (Washington, DC)	1999
Peaceful Streets Project Austin	2012
Peaceful Streets Project New York	2012
People's Justice (New York City)	2006
Portland Copwatch	1992
Redwood Curtain Copwatch (Humboldt County, CA)	2007
Stop LA Spying Coalition	2011
Tuscon Arizona Copblock	2014
Virginia Copblock (Richmond, VA)	2011



