

## COPWATCHING

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## Abstract

*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.*

*While many scholars recognize that a lack of public participation is a barrier to true police accountability, when searching for solutions these same scholars are often preoccupied with studying and perfecting consensus-based methods of participation such as community policing, neglecting 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, but as true participation. Doing so requires respecting observation and contestation as legitimate civic gestures worthy of protection.*

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## INTRODUCTION

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

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

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<sup>1</sup> *Valentine’s Day E-Card from copwatchnyc.org, February 2014* (on file with author).

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

<sup>3</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 915-20 (2006); Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 983-85 (2008).

increasingly argued that increasing 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> The goal of community policing is for communities and police departments to work together, for animosity to decrease so that legitimacy can increase.<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 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 through an exploration of 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 towards the police: they point their cameras at officers, ask them questions about their 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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<sup>4</sup> This is President Obama’s phrase. See Remarks by President Barack Obama, Dec. 1, 2014, The White House, Office of the Press Secretary, available at <http://www.whitehouse.gov/the-press-office/2014/12/01/remarks-president-after-meeting-elected-officials-community-and-faith-le>.

<sup>5</sup> 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 CAL. L. REV. 1593, 1626-31 (2002); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 327-33 (1998).

<sup>6</sup> 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 Part I, *infra*. 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 Meares, *The Good Cop*, 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)).

<sup>7</sup> Indeed, organized copwatching has been a tactic of social movements since at least the 1960s. See *infra* notes 78-79 and accompanying text. Moreover, as the availability and use of smartphones has spread, individuals can and do spontaneously record police

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, St. Louis, 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 introduces the practice of organized copwatching to the debates about police accountability and public participation in criminal justice, presenting a critique of the prevailing notion of community participation in policing that privileges consensus over conflict. Stemming from this critique are two central claims. My primary claim is that scholars and reformers should recognize that promoting public participation in criminal justice must include

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officers in public – an informal, unorganized form of copwatching – with increasing frequency. See Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 339-51 (2011).

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

<sup>9</sup> See Elizabeth Day, *#BlackLivesMatter: the birth of a new civil rights movement*, THE GUARDIAN (Jul. 19, 2015), <http://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement> (describing the growth of the #BlackLivesMatter movement into a major political force).

<sup>10</sup> See, e.g., Associated Press, *Ferguson Residents Get Body Cameras to Record the Police* (Sept. 22, 2014), <http://www.usnews.com/news/articles/2014/09/22/ferguson-residents-get-body-cameras-to-record-police>; Ben Kochman, *Watchdog groups training citizens to join Cop Watch movement*, 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>; WBEZ Chicago Public Radio, *How do you safely record and report police brutality?* (Oct. 18, 2104).

<sup>11</sup> See We Copwatch N. Charleston, GogetFunding page, <http://gogetfunding.com/wecopwatch-n-charleston-camera-drive/> (announcing formation of North Charleston Copwatch group following the shooting of Walter Scott and describing related groups in Cleveland and Baltimore); *Copwatch Event Aims to Inform Citizens of Rights*, BOSTON 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) (announcing Copwatch training). See also Poh Si Tang, *Copwatch v. Cops: After Freddie Gray*, N.Y. TIMES (August 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.””).

<sup>12</sup> 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, e.g., Kreimer, *supra* note 7 at 339-5; 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 (2013).

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 towards institutions in 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 as its chief interpreter.”<sup>18</sup> Copwatchers aim to shift this calculus by infusing their own views of

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<sup>13</sup> See generally CHANTAL MOUFFE, *AGONISTICS* 1-19 (2013).

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

<sup>15</sup> See, e.g., Tracey L. Meares & Dan M. Kahan, “When Rights are Wrong: The Paradox of Unwanted Rights” 3, 4-5 in JOSHUA COHEN & JOEL ROGERS, EDs., *URGENT TIMES POLICING AND RIGHTS IN INNER-CITY COMMUNITIES* (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).

<sup>16</sup> 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 (2013) (book review) (“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 Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 833 (2006) (“The law of policing might work reasonably well - better than the current system - without any constitutional regulation.”).

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

<sup>18</sup> JEROME SKOLNICK, *JUSTICE WITHOUT TRIAL* 12 (1966).

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.

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

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<sup>19</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 378-79 (1974).

<sup>20</sup> See generally Clare Sestanovich, *Our Body-Cams, Ourselves*, THE MARSHALL PROJECT (Feb. 10, 2015), <https://www.themarshallproject.org/2015/02/10/our-body-cams-ourselves> (describing “broad (and rare) consensus . . . in support of [body-cameras by] advocates, legislators, and even many officers themselves”); Howard Wasserman, *Moral Panics and Body Cameras*, WASH. U. L. REV. COMMENTARIES 2-3 (Nov. 18, 2014) (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 13 states have proposed 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*, 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/>. 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*, Huff. Post (Aug. 13, 2015), [http://www.huffingtonpost.com/entry/police-body-cameras\\_55cbaac7e4b0f1cbf1e740f9?kv](http://www.huffingtonpost.com/entry/police-body-cameras_55cbaac7e4b0f1cbf1e740f9?kv).

<sup>21</sup> For an extended comparison of police-worn body cameras and civilian recordings of officers, see Jocelyn Simonson, *Resistance, Obedience, and the Right to Record the Police*, 104 GEORGETOWN L. J. (forthcoming 2016).

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 of participation, of civic engagement, and of 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 underscores that facilitating the meaningful *observation* of the criminal justice system cannot be separated from the ability of generally 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 18 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 functions as a form of deterrence of police misconduct, contributes to the collection of public information about policing, and gives residents of policed neighborhoods input into the contours of Fourth Amendment reasonableness. Part III then takes on the serious challenge of police resistance to copwatching

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<sup>22</sup> Cf. SKLANSKY, *supra* note 59 at 1811-12 (describing the heterogeneous interests of any community with respect to the police); LAURA 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 (2003).

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

<sup>24</sup> See Jocelyn Simonson, *The Criminal Court Audience in a Post-trial World*, 127 HARV. L. REV. 2174 (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 2177-2200.

and recognizes the limits of copwatching as a tactic of police accountability.

Part IV uses the practice of organized copwatching to challenge the consensus-based focus of scholars interested in public participation in criminal justice, and 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 policymakers must recognize that participation and cooperation do not always go hand in hand, 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 majority of police work takes place: neighborhoods with large concentrations of poor people, especially poor people of color.<sup>25</sup> These residents feel that police officers are simultaneously under-protecting and over-policing 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

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<sup>25</sup> See generally Robert J. Sampson & Dawn 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.”).

<sup>26</sup> See TOM TYLER & YUEN HUO, TRUST IN THE LAW 162-64 (2002); Ronal Weitzer, “Race and Policing in Different Ecological Contexts”, in STEPHEN K. RICE & MICHAEL D. WHITE, EDS., RACE, ETHNICITY AND POLICING 118, 121 (2010) (describing this combination of “depolicing and harsh policing”).

<sup>27</sup> See New Survey on Americans’ Views on Law Enforcement, Violence, and Race, NORC (Aug. 5, 2015)

<http://www.norc.org/NewsEventsPublications/PressReleases/Pages/new-survey-on-americans-views-on-law-enforcement-violence-and-race.aspx> (survey finding that three-quarters of black respondents consider violence against civilians by police officers to be an extremely or very serious problem).

police departments 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 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 policymakers concerned with this phenomenon tend to

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<sup>28</sup> See TRACI BURCH, *TRADING DEMOCRACY FOR JUSTICE* 75–104 (2013); Barry Friedman, Book Manuscript, Chapters 6 & 7 (draft on file with author).

<sup>29</sup> See Tom Tyler et. al. *Street Stops and Police Legitimacy*, J. OF EMP. LEG. STUDIES (Forthcoming 2015), draft at 1-7, available at [http://web.law.columbia.edu/sites/default/files/microsites/tax-policy/files/LTW/police\\_stops\\_and\\_legitimacy\\_january\\_22\\_2014.pdf](http://web.law.columbia.edu/sites/default/files/microsites/tax-policy/files/LTW/police_stops_and_legitimacy_january_22_2014.pdf) (collecting studies that demonstrate the loss of legitimacy of police officers in the eyes of young men of color).

<sup>30</sup> See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1331-37 (2012) (describing 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).

<sup>31</sup> 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* 55 72-89 (2006) (describing how police departments define “community” in different terms than do 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 (1998) (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, 1774 (1989) (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, 1370-75 (1998); Weisberg, *supra* note 22 at 347 (critiquing the concept of community in the rise of restorative justice and problem-solving courts). 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.

<sup>32</sup> See STEPHANOS BIBAS, *THE MACHINERY OF 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* 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 (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).

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 are 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 do their jobs of holding police 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 occurs outside the bounds of the Amendment’s restrictions.<sup>37</sup> In particular, police officers can arrest someone with probable cause for any criminal infraction, no matter how

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<sup>33</sup> See generally SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 144 (2005) (“To date, ... 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. 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>.

<sup>34</sup> See generally Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. 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.”).

<sup>35</sup> See generally David N. Dorfman, *Proving the Lie: Litigating Police Credibility* 26 AM. J. CRIM. L. 455, 472-3 (2013) (describing a “grey zone of morality” that police inhabit and judges accept when litigating Fourth Amendment claims); see also *infra* notes 157-168 and accompanying text.

<sup>36</sup> See generally SKOLNICK, *supra* note 18 at 12; see also *infra* notes 130-134 and accompanying text.

<sup>37</sup> See generally Harmon, *supra* note 14 at 768-81; Meares, *supra* note 6 at 1869; see also *infra* notes 186-187 and accompanying text.

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> an issue 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, then, that community policing, democratic experimentalism, and other consensus-based initiatives have come to the forefront of police accountability scholarship and policymaking.

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, it has been the go-to term 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

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

<sup>39</sup> See Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity”*, 66 STAN. L. REV. 987, 992-95 (2014); Nirej Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1179-81 (2012); Susan Bandes, “The Challenges of ‘Quality of Life’ Policing for the Fourth Amendment,” in PARRY & RICHARDSON, EDS., *THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE* 45, 45 (2013).

<sup>40</sup> See BERNARD E. HARCOURT, *ILLUSION OF ORDER THE FALSE PROMISE OF BROKEN WINDOWS POLICING* pages (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*, 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 subordinate position and vulnerability to constant police scrutiny).

<sup>41</sup> See generally James 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); Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1600 (2002); Wesley Skogan & Jeffrey A. Roth, “Introduction,” in WESLEY G. SKOGAN, ED., *COMMUNITY POLICING (CAN IT WORK)?* xvii, xvii (2004) (“Community policing is the most important development in policing in the past quarter century.”).

<sup>42</sup> See David Hudson, *The White House Blog, Building Trust Between Communities and Local Police* (Dec. 1, 2014), <http://www.whitehouse.gov/blog/2014/12/01/building-trust-between-communities-and-local-police>.

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> referring to a variety of approaches to policing,<sup>46</sup> in the context of improving relationships between residents of policed neighborhoods and local police departments it often refers to efforts to include those residents in regular collaborative meetings to solicit input about and report back on policing priorities.<sup>47</sup> Community policing initiatives vary in how they try to include “community” members in police work, and can also include education through community meetings, placing community representatives on advisory councils, and enlisting the help of residents in crime detection and prevention initiatives.<sup>48</sup>

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<sup>43</sup> Exec. Order No. 13684, 79 Fed. Reg. 76865 (Dec. 18, 2014).

<sup>44</sup> See THE FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING (May 2015), available at [http://www.cops.usdoj.gov/pdf/taskforce/TaskForce\\_FinalReport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf). Nowhere in the 100-page report does the Task Force mention civilian filming of police or recommend that police departments respect civilian filming. *Id.*

<sup>45</sup> Cf. U.S. DEP’T OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, COMMUNITY POLICING DEFINED, <http://www.cops.usdoj.gov/pdf/vets-to-cops/e030917193-CP-Defined.pdf> (giving the following definition of the term: “[A] philosophy that promotes organizational strategies, which 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.”).

<sup>46</sup> 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, 2-41 (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 (2001).

<sup>47</sup> See, e.g., ARCHON FUNG, EMPOWERED PARTICIPATION 56-68 (2004) (laying out the ideal of participatory deliberation in community policing using Chicago as a model); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 327-33 (1998) (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. 1193, 1197 (2012) (defining community policing as “a theoretical and practical approach to policing that focuses on crime prevention, order maintenance, and partnership with the community to achieve these goals”).

<sup>48</sup> See generally Wesley G. Skogan, “Representing the Community in Community Policing,” in WESLEY G. SKOGAN, ED., COMMUNITY POLICING (CAN IT WORK)? 57, 57-74 (2004) (describing four forms of community involvement in community policing:

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>49</sup> This satisfaction, in turn, promotes legitimacy and makes residents more likely to work with police officers in identifying and fighting crime.<sup>50</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>51</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 neighborhoods 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>52</sup> This is of particular concern because these marginalized populations are often also those with the most frequent interactions with police officers on a

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education, assistance, coproduction of safety, and representation on advisory boards); Yale Law School Innovations in Policing Clinic, Five Police Departments Building Trust and Collaboration (January 2014), report available at [http://www.law.yale.edu/documents/pdf/Clinics/InnovationsPolicing\\_BuildingTrust.pdf](http://www.law.yale.edu/documents/pdf/Clinics/InnovationsPolicing_BuildingTrust.pdf) [hereinafter *Yale Innovations in Policing Report*] (describing specific examples of each of these trends).

<sup>49</sup> See, e.g., Eric Luna, *The New Data: Over-representation of Minorities in the Criminal Justice System*, 66 LAW & CONTEMP. PROB. 183, 204-07 (2003) (citing JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996)) (discussing deliberative democracy and procedural justice); Archon Fung, *Accountable Autonomy*, 29 POLITICS & SOC'Y 73, 73-80 (2001) (discussing how community policing in Chicago exemplifies “empowered deliberative democracy”).

<sup>50</sup> See TYLER & HUO, *supra* note 26 at 198-204.

<sup>51</sup> See Reisig, *supra* note 47 at 26-42 (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”).

<sup>52</sup> See, e.g., HERBERT, *supra* note 31 at 25 (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 (describing and collecting studies of the uneven inclusion of populations with little political power in community policing, especially poor people of color); *id.* at 19-21 (describing how youth have for the most part been left out of community policing efforts); Skogan, *supra* note 48 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 community than they do at integrating marginalized groups with fewer mechanisms for voicing concerns”).

day-to-day basis.<sup>53</sup> Other scholars have raised the worry that community policing may coopt community concerns rather than represent them; police may be “buying peace” rather than earning it.<sup>54</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>55</sup> Scholars and reformers who recognize these problems have largely responded by doubling down on the central tenets of community policing, trying to create more opportunities for public input into policing practices<sup>56</sup> and emphasizing the need to reach out to “unlikely allies” in police-citizen partnerships.<sup>57</sup>

More recently, scholars, courts, and police departments have begun to channel the consensus-based ideals of community policing and “democratic experimentalism”<sup>58</sup> towards encouraging ongoing

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<sup>53</sup> See Forman, Jr., *supra* note 5 at 12-17; 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”).

<sup>54</sup> Cf. Skogan, *supra* note 48 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 cooptation, see also HERBERT, *supra* note 31 at 72-3 (finding that “police constitute their own view of community and recognize some but 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 Mastrofski & Jack Greene, “Community Policing and the Rule of Law,” in POLICE INNOVATION AND CONTROL OF THE POLICE 92-3 (1993) (discussing “the challenge of stimulating actual community voice rather than achieving cooptation”); 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”).

<sup>55</sup> See SKLANSKY, *supra* note 6 at 85 (“The theme is community partnership, not community control: with minor exceptions, community policing programs are implemented unilaterally by the police.”).

<sup>56</sup> See, e.g., BIBAS, *supra* note 32 at 144-53 (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. 101, 139-53 (2012); Eric Luna, *Race, Crime, and Institutional Design*, LAW & CONTEMP. PROBS. 183, 184-85 (2003).

<sup>57</sup> See, e.g., Forman, Jr. *supra* note 5 at 30-42 (advocating that community policing initiatives focus on youth); Yale Innovations in Policing Report, *supra* note 48 at 3-4 (describing efforts in Philadelphia, Charlotte, High Point, and Seattle to reach “unlikely allies”).

<sup>58</sup> Dorf & Sabel, *supra* note 47 at 267 (defining democratic experimentalism as a system in which “power is decentralized to enable citizens and other actors to utilize their local

collaboration between the Department of Justice, local community groups, and entire police departments.<sup>59</sup> This has meant combining the federal power of the Department of Justice’s ability to sue municipalities under § 14141<sup>60</sup> with efforts to include stakeholders in ongoing participation in structural reform litigation. In particular, scholars hail Cincinnati as a promising example;<sup>61</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>62</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 policing, the process of consensus-driven deliberation is itself part of the point.<sup>63</sup>

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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 host of terms used in legal scholarship to describe the shift from regulation to governance).

<sup>59</sup> *See, e.g.*, Brandon Garrett, *Remedying 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. 1015, 1047 (2004); Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 390-419 (2010).

<sup>60</sup> *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); Michael E. White, *Preventing Racially Biased Policing through Internal and External Controls: The Comprehensive Accountability Package*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS (2010).

<sup>61</sup> *See, e.g.*, Simmons, *supra* note 59 at 425; Jay Rothman, *Identity and Conflict: Collaboratively Addressing Police-Community Conflict in Cincinnati, Ohio*, 22 OHIO ST. J. ON DISP. RESOL. 105, 105-110 (2006); *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046217, at \*5 (S.D.N.Y. Aug. 12, 2013); 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).

<sup>62</sup> *See* Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department (April 12, 2002), <http://www.cincinnati-oh.gov/police/linkservid/27A205F1-69E9-4446-BC18BD146CB73DF2/showMeta/0/>; Saul Green et. al., *City of Cincinnati Independent Monitor's Final Report 36-51* (2008), available at <http://www.cincinnati-oh.gov/police/linkservid/97D9709F-F1C1-4A75-804C07D9873DC70F/showMeta/0/>.

<sup>63</sup> *See, e.g.*, Simmons, *supra* note 59 at 425 (“The opportunity for police officers and community members to engage in deliberation about police conduct and police-citizen interactions is key to dismantling the ‘us v. them’ mentality . . . .”); Garrett, *supra* note 59 at 133 ([W]hen the emphasis is on partnerships, aggressive and quasi-militaristic attitudes that risk alienating significant segments of the community are counterproductive.”).

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>64</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>65</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 reinscribe existing power imbalances.<sup>66</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>67</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 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 towards a focus on consensus, often at the expense of considering disempowered voices and the political dynamics that disempower

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<sup>64</sup> Cf. An Open Letter to the ACLU of Illinois Regarding Stop and Frisk (Aug. 12, 2015), <http://wechargegenocide.org/an-open-letter-to-the-aclu-of-illinois-regarding-stop-frisk/> (laying out dissatisfaction from a community group with settlement negotiations between the ACLU of Illinois, the City of Chicago, and the Chicago Police Department).

<sup>65</sup> See, e.g., Garrett, *supra* note 59 at 101-05 (describing how consent decrees fail to include local residents); Sabel & Simon, *supra* note 59 at 1047 (2004) (describing importance of the role of citizen groups in consent decrees between police departments and the Department of Justice); Simmons, *supra* note 59 at 419.

<sup>66</sup> Jaime Allison Lee, *Can You Hear Me Now? Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL. 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.”).

<sup>67</sup> 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 59 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 66 at 406; Sabel & Simon, *supra* note 65 at 1047; Simmons, *supra* note 59 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.”).

them.<sup>68</sup> Generally, though, scholars who seek to increase local public participation in policing, and especially those concerned with disempowered minority populations, look towards designing and perfecting deliberative, consensus-based mechanisms of inclusion – mechanisms that 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>69</sup>

This focus on consensus and deliberation – on getting a seat at the table – misses out on a number of things. 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>70</sup> It does not recognize the resonance that individual rights have for disenfranchised groups, even those who simultaneously recognize the limits of those rights.<sup>71</sup> And it does not adequately address the dangers of cooptation and legitimation when certain voices are shut out of the process.<sup>72</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 neighborhoods. Not everyone who dislikes the police withdraws from civic life, or worse,

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<sup>68</sup> 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., Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 891-94 (2014); Eric Luna, *The Katz Jury*, 41 U.C. DAVIS L. REV. 839, 840 (2008).

<sup>69</sup> See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968); *Whren v. United States*, 517 U.S. 806 (1996). See also Part II(D), *infra* (discussing Fourth Amendment reasonableness and police discretion).

<sup>70</sup> Cf. Michael McMann, “How Does Law Matter for Social Movements?,” in *HOW DOES LAW MATTER?* 76, 90-100 (1998); 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); Guinier & Torres, *supra* note 16 at 2750-69; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006) (arguing that “constitutional culture channels social movement conflict to produce enforceable constitutional understandings”). But see WALKER, *supra* note 67 at 178-80 (noting the role of community groups in changing police practices).

<sup>71</sup> See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* 83-84 (2d Ed. 2004) (discussing the myth of rights); George Lovell, *The Myth of the Myth of Rights*, 59 STUDIES IN LAW, POLITICS, & SOC’Y 1, 3-7 (2012); cf. Kimberle’ Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1368 (1988).

<sup>72</sup> See CHANTAL MOUFFE, *AGONISTICS* 1-19 (2013) (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 Part IV, *infra*.

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 section 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 vehicle through which 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 infuse 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. The practice of copwatching also presents a host of challenges and limitations, which are discussed below in Part III.

First, though, I present the basics of the practice of copwatching and in particular some distinctions between casual filming of the police and organized copwatching. My account of the practice of organized copwatching is based in part on the results of telephone interviews that I conducted with representatives of eighteen copwatching groups from around the country in early 2014. 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. Indeed, it is my 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>73</sup>

#### A. *The tactic of organized copwatching*

Copwatching – in the way that I am using the term – does not simply refer to the 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>74</sup> to more recent smartphone recordings of the killings of Eric Garner in New York City in 2014<sup>75</sup> and Walter Scott in South Carolina in 2015,<sup>76</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 has 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>77</sup>

Organized copwatching, though, does more than capture video. Indeed, as a tactic of police accountability, copwatching predates smartphone technology and even 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

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<sup>73</sup> These semi-structured interviews were conducted 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, *infra*. Many copwatching groups did not want to participate in the telephone interview and/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.

<sup>74</sup> See Kreimer, *supra* note 7 at 347-48 (describing “iconic” videotape of Rodney King made spontaneously from George Holliday’s window).

<sup>75</sup> 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-dont>.

<sup>76</sup> See Melanie Eversely, *Man who shot S.C. cell phone video speaks out*, USA TODAY (April 9, 2015), <http://www.usatoday.com/story/news/2015/04/08/walter-scott-feidin-santana-cell-phone-video/25497593/>.

<sup>77</sup> 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 (Aug. 12, 2015) <http://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html> (“Raw video has thoroughly shaken American policing.”).

conducted unarmed patrols in groups.<sup>78</sup> In Watts, for example, African-American residents formed the Community Alert Patrol, in which they drove their own “patrol cars” to heavily policed areas, where they observed police conduct and wrote down their observations contemporaneously on notepads.<sup>79</sup> These practices have continued sporadically since then, with a particular tradition among African-American urban communities.<sup>80</sup> There is also a vibrant and longstanding history of using video as a mechanism of protecting individuals engaged in protest<sup>81</sup> and fighting human rights abuses throughout the globe.<sup>82</sup>

In the last two decades, though, copwatching groups have proliferated at an unprecedented rate. Of the eighteen groups I conducted interviews with, all but two began copwatching in the past two decades,<sup>83</sup> and eleven began copwatching within the past five years.<sup>84</sup> Since mid-2014, new organized copwatching patrols have sprung up in Ferguson, St. Louis, Chicago, New York City, Baltimore,

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<sup>78</sup> See JOSHUA BLOOM & WALDO E. MARTIN, *BLACK AGAINST EMPIRE* (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/There is a Movement Starting in Watts*, *MOVEMENT*, Vol. 2 No. 7, Aug. 1966.

<sup>79</sup> See Cannon, *supra* note 78 at 1-3 (describing the Community Alert Patrol in Watts).

<sup>80</sup> See Telephone interview with Malcolm X Grassroots Movement, Brooklyn Chapter (hereinafter “MXGM interview”) (describing how the group modeled their copwatching practices on similar patrols in Brooklyn that took place in the 1970s and 1980s).

<sup>81</sup> 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).

<sup>82</sup> See, e.g., Gillian Caldwell, “Using Video for Advocacy,” in SAM GREGORY ET AL., *VIDEO FOR CHANGE* xii (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 hand-held cameras; the organization has since become a leader in helping grassroots groups use smart phones as a form of human rights advocacy. See WITNESS: Our story, <http://witness.org/about/our-story/>.

<sup>83</sup> The two oldest copwatch organizations with which I spoke are Berkeley Copwatch, (founded 1990) and Portland Copwatch (founded 1992).

<sup>84</sup> See Appendix A (list of copwatching organizations and years they began copwatching).

and Boston,<sup>85</sup> and continue to expand to new regions of the country.<sup>86</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 travelled to cities such as Ferguson and Baltimore to train groups in best practices for organized copwatch patrols.<sup>87</sup>

Organized copwatching groups differ from casual bystanders filming the police in three important ways. First, they are organized and strategic – the central idea is to prevent police misconduct rather than to catch it. Some copwatchers speak of the “Three Ds of Copwatching”: deter, deescalate, and document.<sup>88</sup> The heart of organized copwatching activities consists of planned group patrols, in which members patrol specific neighborhoods with video cameras and in uniform – usually t-shirts, badges, or hats.<sup>89</sup> Members of the patrol are often drawn from the neighborhood in which the patrol is happening; for some groups, this is a strict requirement.<sup>90</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

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<sup>85</sup> See, e.g., Associated Press, *supra* note 10 (describing 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); WBEZ Chicago Public Radio, *supra* note 10 (describing coalition of groups in Chicago beginning a series of trainings about copwatching in October 2014). See also notes 10-11 *supra* and accompanying text.

<sup>86</sup> See, e.g., *Midwest WeCopwatch Regional Groups Form*, wecopwatch.org, (Jan. 4, 2015), <http://www.wecopwatch.org/midwest-wecopwatch-regional-groups-form/> (describing coalition of people interested in forming copwatching groups in Wisconsin, Michigan, Ohio, Illinois, and Missouri).

<sup>87</sup> See *id.* (describing trainings in Missouri and Baltimore conducted by WeCopwatch).

<sup>88</sup> 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> (describing the discussion of the three Ds of copwatching at a training).

<sup>89</sup> See Telephone Interview with Redwood Curtain Copwatch (hereinafter Redwood interview); MXGM Interview; People’s Justice, *Copwatch Network Description*, available at <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.”).

<sup>90</sup> See, e.g., MXGM interview; Telephone interview with Los Angeles Community Action Network (hereinafter LA CAN interview).

recording.<sup>91</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>92</sup> They also explain to people interacting with the police what they are doing, and seek permission to film.<sup>93</sup> The reported experience of copwatchers engaging in organized patrols is that police officers view them differently than casual observers or recorders. One organization representative described it this way:

[W]hen we do our patrols and we wear copwatch patches, we make it very visible that we are copwatch. I learned quickly that there was this sort of . . . respect that we got that is different than when somebody is standing there and trying to observe. You know, regular person without any kind of label on them, the police tend to target them and try to intimidate them and everything. But when we would go out in group of three or five people, and we'd wear copwatch on us, it was almost like . . . the fact that they wear a uniform and we're wearing this label, you know, made them like "oh, well we're doing our job and you're doing your job" ....<sup>94</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 “Know Your Rights” trainings in the neighborhoods in which they patrol. The vast majority of groups maintain websites, Facebook pages, or online video databases that catalog and describe videos of interest.<sup>95</sup> Many groups also attend court proceedings that relate to the videos they record or the police practices they contest.<sup>96</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

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<sup>91</sup> See, e.g., CopBlocking 101, available at <http://www.copblock.org/copblocking101> (describing best practices as including two different cameras); MXGM Cop Watch Program Manual (on file with author) (laying out the roles of different members of copwatch teams).

<sup>92</sup> See *infra* notes 170-171 and accompanying text.

<sup>93</sup> See LA CAN interview. 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).

<sup>94</sup> Redwood interview.

<sup>95</sup> Of the eighteen groups, 15 maintain websites, 15 Facebook pages, and 11 manage public online video databases.

<sup>96</sup> Eleven of eighteen groups reported engaging in courtwatching.

political perspectives.<sup>97</sup> As a result, some groups – ten of 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>98</sup> Here are some examples of how copwatching organizations describe their relationship to larger movements for change:

[We are] building a movement against police violence and systemic racism in New York City and to strengthen and empower Latino communities to hold police accountable.<sup>99</sup>

[Our mission is to] organize and empower community residents to work collectively to change the relationships of power that affect our community.<sup>100</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>101</sup>

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<sup>97</sup> See, e.g., Telephone Interview with Peaceful Streets Project Austin (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).

<sup>98</sup> See MICHAEL MCCANN, *LAW AND SOCIAL MOVEMENTS* xiii-iv (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* 306 in BRIGHT & HARDING, EDs., *STATEMAKING AND SOCIAL MOVEMENTS* (1984)); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1501 (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.”); 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.”).

<sup>99</sup> Telephone interview with the Justice Committee NYC (hereinafter Justice Committee interview).

<sup>100</sup> LA CAN interview.

<sup>101</sup> Telephone interview with Communities United Against Police Brutality (Minneapolis, MN) (hereinafter CUAPB interview).

We are part of a larger effort to re-assert community control over the police. Police should be servants – not oppressors – of the community.<sup>102</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>103</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>104</sup> So while I am not describing a universal practice, below I tease out the different ways in which copwatching functions as a form of police accountability.

Organized copwatching connects police conduct towards individuals to the effect of that conduct on communities. At the same time, copwatching is a substantiation of 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 for the substantive contours of Fourth Amendment reasonableness doctrine. This section explores each of these functions in turn.

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<sup>102</sup> Telephone interview with Copwatch of East Atlanta (hereinafter Copwatch of East Atlanta interview).

<sup>103</sup> See notes x-y, *supra*.

<sup>104</sup> See, e.g., Telephone interview with Virginia Copblock (“The way that [another group] conducts themselves is counterproductive”); Telephone interview with Peaceful Streets Project NYC (describing another group as too “militaristic”). I express my own normative preference for agonistic over antagonistic forms of organized copwatching in Part IV, *infra*.

### B. Copwatching as deterrence

Deterring police misconduct is a notoriously difficult enterprise.<sup>105</sup> For example, studies show that the remedy of excluding evidence is of limited force in deterring unconstitutional police conduct,<sup>106</sup> in part because of the infrequency of suppression hearings and remoteness in time of those hearings.<sup>107</sup> Moreover, police officers are indemnified from liability in the vast majority of civil lawsuits that they lose,<sup>108</sup> and 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>109</sup>

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

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<sup>105</sup> See Carol S. Steiker, *Counter- Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2548-9 (1996) (describing how weak enforcement mechanisms in criminal procedure can “‘legitimate’ the exercise of police power”); Bar-Gill & Friedman, *supra* note 34 at 1618-36 (documenting the “illusory deterrence” of traditional sanctions for misconduct).

<sup>106</sup> See, e.g., 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. REF. 311, 361 n 123 (1991).

<sup>107</sup> See Bar-Gill & Friedman, *supra* note 34 at 1618-36; see also *infra* notes 131-137 (discussing additional problems of discovery, narrative, and doctrine that skew the results of suppression hearings).

<sup>108</sup> 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 §1983 suits more than 99% of the time).

<sup>109</sup> See Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1121-22 (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.”).

<sup>110</sup> Cf. 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 disciplining effect of government-controlled surveillance of the police); I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 FORD. 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).

<sup>111</sup> See, e.g., Mir Adnan Ali et al., *Measuring the Effect of Sousveillance in Increasing Socially Desirable Behavior*, 2103 IEEE INTERNATIONAL SYMPOSIUM ON TECHNOLOGY AND SOCIETY 266-67 (2013); Melissa Bateson et. al., *Cues of being watched enhance cooperation in a real-world setting*, 2006:2 BIOLOGY LETTERS 412-14 (2006).

surveillance cameras<sup>112</sup> or are in the presence of spectators.<sup>113</sup> Not only do copwatching organizations film police officers, they also engage them in dialogue about their behaviors and constitutional rules.<sup>114</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>115</sup> By speaking with the officers on camera, then, 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>116</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

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<sup>112</sup> See, e.g., Benjamin J. Goold, *Public Area Surveillance and Police Work: the Impact of CCTV on Police Behavior and Autonomy*, 1 SURVEILLANCE & SOCIETY 191, 194 (2003) (finding that two-thirds of British police officers interviewed reported that they were more careful when under surveillance of CCTV cameras).

<sup>113</sup> 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*, THE GUARDIAN (Nov. 4, 2013), <http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto>; OFFICE OF CMTY. ORIENTED POLICING SERVICES., THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING: RESEARCH AND BEST PRACTICES (2004), <http://www.cops.usdoj.gov/ric/ResourceDetail.aspx?RID=404>.

<sup>114</sup> See *infra* notes 170-171 and accompanying text.

<sup>115</sup> See Bar-Gill & Friedman, *supra* note 34 at 30-39, 36 (collecting studies and arguing that “[t]he debiasing and accountability literatures suggest that police decisionmaking 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”).

<sup>116</sup> Police-worn body cameras are a reform for which a number of scholars have advocated in recent years. See Ron Bacigal, *Watching the Watchers*, 82 MISS. L. J. 821, 825 (2013); Bar-Gill & Friedman, *supra* note 34 at 1673-74; David Harris, *Picture This: Body Worn Video Devices ('Head Cams') as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEXAS TECH L. REV. 357 (2010); Christopher Slobogin, *Community Control over Camera Surveillance*, 40 FORDHAM URB. L.J. 993, 997 (2013); Eric Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1169-70 (2000). But see Wasserman, *supra* note 20 at 8 (arguing that “the deterrent effect [of body cameras] may not be as great as many hope”).

courts – but also in the “wild” (i.e., unregulated) public sphere.<sup>117</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 off the cameras when they do not want to be filmed,<sup>118</sup> require complicated discovery requests before the footage is released,<sup>119</sup> or refuse to turn over any footage at all<sup>120</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>121</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

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<sup>117</sup> See Jurgen Habermas, *Political Communication in Media Society*, 16 COMMUNICATION THEORY 415, 420 (2009) (“[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.”); TOCH, *supra* note 113 at 91-130 (describing the effect of social media on police practices in Seattle).

<sup>118</sup> 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>. In Los Angeles, one internal inspection found that about half of the estimated 80 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-care recording equipment, records show*, LOS ANGELES TIMES (April 7, 2014), <http://articles.latimes.com/2014/apr/07/local/la-me-lapd-tamper-20140408>.

<sup>119</sup> See, e.g., Sara Libby, *Even When Police Wear Body Cameras, Don’t Count on Seeing the Footage*, CITY LAB (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/>; 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*.

<sup>120</sup> *Id.*

<sup>121</sup> Cf. Tracey L. Meares et. al., *The Two Different Worlds We Live In: Lawfulness and Perceived Police Misconduct* (Yale Law Sch., Pub. Law Working Paper No. 255, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=211664](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=211664) (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) (collecting studies).

termed the turning of surveillance instruments on those in power – watching the watchers – as “sousveillance,” or surveillance from below.<sup>122</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>123</sup> With *sousveillance*, observation becomes a form of resistance.<sup>124</sup> And *sousveillance* is a technique of deterrence, much like Jeremy Bentham’s original panopticon was designed to prevent prison misconduct through a constant threat of surveillance.<sup>125</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 prevents it.”<sup>126</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

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<sup>122</sup> See, e.g., Steve Mann & Joseph Ferenbok, *New Media and the Power Politics of Sousveillance in a Surveillance-Dominated World*, 11 SURVEILLANCE & SOC. 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’ towards a kind of veillance (monitoring) equilibrium.”).

<sup>123</sup> Professor Steven Mann, who coined the term, describes *sousveillance* as a technique “for uncovering the Panopticon and undercutting its primary purpose and privilege.” Steve Mann et. al., *Sousveillance: inventing and using wearable computing devices*, 1 SURVEILLANCE & SOC. 331, 333 (2003); see also Steve Mann & Joseph Ferenbok, *New Media and the Power Politics of Sousveillance in a Surveillance-Dominated World*, 11 SURVEILLANCE & SOC. 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’ towards a kind of veillance (monitoring) equilibrium.”); 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).

<sup>124</sup> Resistance, here, refers to the Foucaultian concept of the diffuse resistance to power that can come in everyday activities. See generally Michael Foucault, “The Subject and Power” 208, 210 in H. DREYFUS AND P. RABINOW, EDs., MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS (1983).

<sup>125</sup> See JEREMY BENTHAM, THE PANOPTICON, OR, THE INSPECTION HOUSE Ch. VI (2008 edition); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 195-231 (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.”).

<sup>126</sup> MXGM interview. Since that time, however, MXGM has caught several instances of police violence on film. *Id.*

has the impact of deescalating the situation or not allowing the situation to escalate. Even if we can deescalate, at minimum, we are witnessing and obtaining evidence of abuse.”<sup>127</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 24-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 with which I spoke have been actively involved in community policing activities or meetings between police departments and community organizations related to federal litigation.<sup>128</sup> Copwatching thus serves as a 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>129</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>130</sup>

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<sup>127</sup> Justice Committee interview.

<sup>128</sup> See, e.g., Telephone interview with People’s Justice (hereinafter People’s Justice interview) (describing their involvement with the *Floyd* litigation and their hope to participate in the stakeholder meetings mandated by the NYPD settlement); Telephone interview with Portland Copwatch (describing their involvement with public hearings relating to the specifics of the police department’s settlement with the Department of Justice); LA CAN interview (describing their attendance at community policing “beat meetings” and their advocacy for more of those meetings).

<sup>129</sup> For calls for better data collection about department-wide practices, see, e.g., Harmon, *supra* note 60 at 29-30; Fan, *supra* note 110 at 102-03; Luna, *supra* note **Error! Bookmark not defined.** 116 at 1167-70.

<sup>130</sup> 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 (describing how videos of police behavior by spectators using mobile technology has “ended a monopoly on the history of public gatherings that was limited to the official narratives”).

Police departments’ control over official narratives of their behavior is well-entrenched.<sup>131</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>132</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>133</sup> fudge the truth,<sup>134</sup> and claim good faith.<sup>135</sup> When combined with the bias inherent in a judicial determination in the face of seized contraband,<sup>136</sup> the result is that defendants lose the vast majority of suppression hearings.<sup>137</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

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<sup>131</sup> See generally Carol Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 852 (1994) (hereinafter Steiker, *Second Thoughts*) (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’”).

<sup>132</sup> 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.

<sup>133</sup> See Ron Bacigal, *A Brave New World of Stop and Frisk*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 83, 87-89 (2011) (describing how police can craft narratives so as to win suppression motions); David N. Dorfman, *Proving the Lie: Litigating Police Credibility* 26 AM. J. CRIM. L. 455, 472-3 (2013) (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).

<sup>134</sup> 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).

<sup>135</sup> 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).

<sup>136</sup> See Anthony Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 778 (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, *Second Thoughts*, *supra* note 131 at 853-5.

<sup>137</sup> Cf. Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1 (2013) (documenting that since 1990, the Supreme Court sided with government interests in approximately eight out of ten criminal procedure cases.).

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>138</sup> More than that, though, the context of videos recorded as part of a copwatching patrol may affect the interpretation of those videos. The fact that there are observers from the neighborhood – observers, moreover, who have seen fit to distribute the video – is a reminder to the viewer that the conduct at issue affects not only the person interacting directly with the police officer, but also their neighbors, friends, and others who interact with those same officers.<sup>139</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>140</sup>

I do not mean to overstate the power of video.<sup>141</sup> Video is not objective, but rather depends on the context, point of view, and cultural experiences of its viewers.<sup>142</sup> Some copwatchers recognize this, adjusting by engaging in dialogue with officer during the taking of video so as to lock them into an explanation<sup>143</sup> or limiting their expectations of the reception of their videos;<sup>144</sup> while some, in contrast, believe that

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<sup>138</sup> 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).

<sup>139</sup> Cf. Simonson, *supra* note 24 at 2202-05 (describing this phenomenon in the context of the audience in the courtroom); TOCH, *supra* note 113 at xvii-5 (describing how when spectators gather near police conduct it gives the police conduct public significance).

<sup>140</sup> See Stuart, *supra* note 93 at 339 (describing importance of video capturing an interaction from start to finish).

<sup>141</sup> For more on this problem, see *infra* Part III(c).

<sup>142</sup> See Dan 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 Kahan et. al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 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 93 at 328-33 (discussing the “social construction of video evidence”).

<sup>143</sup> See, e.g., Stuart, *supra* note 93 at 341-3 (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).

<sup>144</sup> See, e.g., LA CAN interview; People’s Justice interview; MXGM interview.

“video doesn’t lie.”<sup>145</sup> But the point remains that videos recorded by members of the public, and especially organized copwatchers, are different in kind than those from surveillance cameras or police-worn cameras.

Similarly, the fact that copwatching organizations usually retain control over their videos is important not just for its deterrent effect, described above,<sup>146</sup> but also because the videos are in possession of populations that have historically lacked access to data about policing practices.<sup>147</sup> Part of the power of copwatching as sousveillance is this control over the video evidence<sup>148</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>149</sup> An official police effort to frame an event or a policy may quickly be disputed by counter-narratives 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, they flooded Twitter with pictures of police abuse under the “#mynypd” hashtag, making front page news.<sup>150</sup> For example, one photo retweeted more than a thousand times in 24 hours showed a picture of a police officer wielding a baton over the body of an unarmed man, with captioned in part, “#mynypd engages with its community members”.<sup>151</sup> Through social media, then, copwatching organizations have the power

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<sup>145</sup> Virginia Copblock interview.

<sup>146</sup> See *supra* notes 110-128 and accompanying text.

<sup>147</sup> See Gerald P. Lopez, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59, 60 (2004) (describing problem of lack of data and knowledge within low-income communities).

<sup>148</sup> See Mann, *supra* note 123 (describing control over captured footage as a key component of sousveillance).

<sup>149</sup> Berkeley Copwatch Handbook at 3 (describing founding of Berkeley Copwatching in 1990 in response to order maintenance policing initiative) (on file with author).

<sup>150</sup> See Lauren Burke, NYPD Hashtag Blows Up into Embarrassing Social Media Fiasco, (Apr. 2014) <http://politic365.com/2014/04/22/mynypd-nypd-hashtag-blows-up-into-embarrassing-social-media-fiasco/> (“The folks at @copwatch had a particularly energetic time using the #MyNYPD hashtag.”); Thomas Tracy et. al., *#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).

<sup>151</sup> <https://twitter.com/OccupyWallStNYC/status/458684716447973376>.

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 in, they are able to provide real-time updates via social media that often contradict official reports in the popular media.<sup>152</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 have been brought into custody for offenses for which they could also be given a non-custodial ticket – a practice that may not look out of the ordinary on video, but when captured in the aggregate can say a lot about the exercise of police discretion in particular neighborhoods.<sup>153</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>154</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>155</sup> although the information collected by copwatching organizations could certainly be useful to police supervisors and administrators as a form of public feedback.<sup>156</sup> But these information-collecting practices are an important function of copwatching organizations as data collectors on behalf of the public.

#### *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 bumps up against the control that courts and police officers have to determine what is “reasonable” or “suspicious” with regard to the Fourth Amendment. A flip side of this constitutional

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<sup>152</sup> 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).

<sup>153</sup> See People’s Justice Newsletter, May 20, 2014 (on file with author).

<sup>154</sup> See, e.g., Berkeley Copwatch, People’s Investigation: In-custody Death of Kayla Moore (October 2013), available at [http://www.berkeleycopwatch.org/resources/Peoples\\_Investigation\\_Kayla\\_Moore\\_2013.pdf](http://www.berkeleycopwatch.org/resources/Peoples_Investigation_Kayla_Moore_2013.pdf).

<sup>155</sup> Cf. Gerald P. Lopez, *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 (2014) (critiquing the “rule of experts” in seeking evidence-based strategies for reentry).

<sup>156</sup> Cf. Lior Jacob Strahilevitz, “How’s My Driving” For Everyone (and Everything), 81 N.Y.U. L. REV. 1699, 1764 (2006) (proposing “How’s My Policing” program that aggregates citizen feedback on police officers).

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 Fourth Amendment reasonableness 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>157</sup> but in practice do not account for the day-to-day experiences of disempowered populations.<sup>158</sup> The first is the “reasonable suspicion” that an officer must possess to conduct a *Terry* stop, or a “stop and frisk”.<sup>159</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>160</sup> This means that, for example, in determining 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 their neighborhood.<sup>161</sup> Nor can a court consider any harm to

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<sup>157</sup> 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.”).

<sup>158</sup> See Janice Nadler, “Consent, Dignity, and the Failure of Scattershot Policing,” in PARRY & RICHARDSON, EDS., *THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE* 93, 99 (2013) (“[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 doesn’t ask whether the Court’s own perceptions gel with what people actually find fair or just.”); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases*, 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); Devon W. 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.

<sup>159</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>160</sup> *Terry*, 392 U.S. at 9-10; *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

<sup>161</sup> See *Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, *J.*, dissenting) (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 133 at 92 (2011) (“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 158 at 250-

neighborhoods or communities when deciding the reasonableness of an officer's conduct.<sup>162</sup> Instead, courts and officers are the sole judges of whether an officer's suspicion was reasonable.

A similar dynamic plays out in the definition 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>163</sup> or when “a reasonable person would have believed that he was not free to leave.”<sup>164</sup> This test “presupposes an innocent person.”<sup>165</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>166</sup> A court's determination of reasonableness, though, may not map onto the views of society,<sup>167</sup> much less minorities residing in high crime areas who may interact with police officers more frequently.<sup>168</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 who is simultaneously trying to avoid prosecution, but from residents and citizens who have an interest in reducing crime in their neighborhoods. They are “innocent” people,

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52 (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).

<sup>162</sup> See Baradaran, *supra* note 137 at 20-30; cf. Harmon, *supra* note 37 at 778 (“Every arrest harms an individual, and perhaps a community, no matter how lawful.”)

<sup>163</sup> *Terry*, 392 U.S. at 16.

<sup>164</sup> *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); see also *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (holding that a seizure does not occur when “a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter”).

<sup>165</sup> *Bostick*, 501 U.S. at 435.

<sup>166</sup> *Illinois v. Wardlow*, 528 U.S. 119, 133 (2000).

<sup>167</sup> See Bowers & Robinson, *supra* note 40 at 223; Luna, *Katz Jury*, *supra* note 68 at 846 (questioning whether judges should determine society's reasonable expectations of privacy); Slobogin & Schumacher, *supra* note 158 at 730-31 (finding that society's views of reasonable expectation of privacy differ from that of the Supreme Court).

<sup>168</sup> See *Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, *J.*, dissenting) (criticizing the Court majority for overlooking innocent reasons that people, “particularly minorities and those residing in high crime areas”, might be afraid of contact with the police).

but not the “innocent” people who usually make official determinations of what is reasonable.<sup>169</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 she is 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>170</sup> Rather than challenging 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 they 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>171</sup>

This constitutional engagement continues beyond an individual encounter, making its way both into courtrooms and into the public sphere. A majority 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 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

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<sup>169</sup> *Bostick*, 501 U.S. at 435. 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.

<sup>170</sup> Every copwatch organization with which I spoke conducts “Know Your Rights” trainings both with their members and in their communities. *See also* MXGM Cop Watch Program Manual at 4 (on file with author) (describing importance of legal education). Copwatching trainings involve in-depth “Know Your Rights” education with respect to the First and Fourth Amendment. 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, in schools and with community organizations. *See* People’s Justice interview.

<sup>171</sup> *See* David K. Kessler, *Free to Leave – An Empirical Look at the Fourth Amendment’s Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 52-9 (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).

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 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; 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. 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>174</sup> A named plaintiff was an active member of an organization that runs copwatch patrols.<sup>175</sup> Although it is impossible to draw direct inferences from this grassroots pressure to the court’s eventual finding that NYPD’s practices were unconstitutional under the Fourth and Fourteenth Amendments – especially in a case like *Floyd* that relied so heavily on extensive data collection and expert testimony – it is worth noting that the unprecedented opinion cited not only traditional Fourth Amendment doctrine, but also concepts of dignity and race that are rarely seen in such litigation.<sup>176</sup>

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<sup>172</sup> See JUDITH RESNIK AND DENNIS CURTIS, REPRESENTING JUSTICE 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).

<sup>173</sup> 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.”).

<sup>174</sup> See, e.g., Flyer from MXGM, People’s Justice, and the Justice Committee advertising a day of packing the court and a press conference outside the courthouse on April 2, 2014 (on file with author).

<sup>175</sup> See *Floyd v. City of New York*, No. 08 Civ.1034 (S.D.N.Y. 2012), Declaration of Lalit Clarkson (describing himself as a member of MXGM). See also Justice Committee interview (“[Our organization] was a big part of the precursor to the *Floyd* lawsuit.”)

<sup>176</sup> See *Floyd* (remedial opinion at 14) (“[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

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 those videos 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, each of which invoke constitutional rights and use videos to substantiate claims with respect to those rights. Moreover, organized copwatchers have increasingly serve 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

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jurisprudence); Nadler, *supra* note 16 (same). *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.

<sup>177</sup> See generally DAVID GARLAND, *THE CULTURE OF CONTROL* 167-93, 168 (2001) (describing the “political values, cultural sensibilities, and criminological conceptions” in modern crime control); JONATHAN SIMON, *GOVERNING THROUGH CRIME* 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. 123-130 (2012) (discussing the relationship between public conceptions of the convergence of immigration and criminal law to official conceptions of those laws).

<sup>178</sup> See, e.g., Tony, “Falmouth, Maine Traffic Stop” Copblock.org (February 21, 2014), <http://www.copblock.org/47056/flamouth-maine-traffic-stop/> (discussing a video of a conversation with an officer about the Fourth and Sixth Amendments that the writer believes led the officer to decide not to issue a ticket).

<sup>179</sup> See, e.g., Andrea Platten, *Berkeley Copwatch’s ‘Know Your Rights’ event teaches police-observation tactics*, THE DAILY CALIFORNIAN (Jul. 8, 2015), <http://www.dailycal.org/2015/07/08/berkeley-copwatches-know-your-rights-event-teaches-police-observation-tactics/> (discussing Berkeley Copwatch training that “specifically discussed how to approach an event such as the December Black Lives Matter protests”).

<sup>180</sup> See TOCH, *supra* note 113 at 91-145 (documenting effect of social media recordings of police on recent police reforms in Seattle).

<sup>181</sup> See Robert M. Cover, *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).

<sup>182</sup> See, e.g., McMann, *supra* note 70 at 81; Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946 (2006); Guinier & Torres, *supra* note 16 at 2757-64.

interpretation, what is a thinkable legal argument and what is constitutionally ‘off the wall.’”<sup>183</sup> More recently, Professors Lani Guinier and Gerald Torres have introduced the concept of demospudence – 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 currently 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 possible.

By engaging with the legal meaning of the Fourth Amendment, then, copwatching has the potential to expand the reach of the Fourth Amendment itself. 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 that people interacting with the police care about as much as, if not more than, the

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<sup>183</sup> Balkin, *supra* note 70 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.”).

<sup>184</sup> Guinier & Torres, *supra* note 16 at 2757.

<sup>185</sup> *See* Jeremy Perelman & Lucie E. White, “Stones of Hope”, in STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY 149, 154 (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.”).

<sup>186</sup> *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 809 (1996); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *see also* Bowers, *supra* note 39 at 992-95; Harmon, *supra* note 37 at 768-81; Sekhon, *supra* note 39 at 1179-81.

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 that are not covered by its reach.<sup>188</sup> Through their 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 – not a stance from representatives of an entire community, but 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 the practice of 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. First, though, I address 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 residents of neighborhoods they police.

#### A. *Police resistance*

Police officers often display resistance to 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 First Amendment protections clearly protect the

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<sup>187</sup> See Meares, *supra* note 6; Tyler et al., *supra* note 121; Schulhofer et. al., *supra* note 121 at 350-62.

<sup>188</sup> Cf. Wasserman, *supra* note 12 at 648 (“[R]egardless of how policymakers themselves interpret and understand the video, they must consider whether the public or some subcommunity (united by demographics, ideology, political concerns, or some combination) will see unconstitutional behavior.”).

<sup>189</sup> See Part IV, *infra*.

<sup>190</sup> See Kreimer, *supra* note 7 at 357-64 (collecting cases); Barry Friedman, Book Manuscript, Chapter 6 (Draft on file with author) (describing “small torrent of charges being filed against people for filming the police”).

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 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. More commonly, police arrest copwatchers for charges that can include failure to obey an officer, interfering with police conduct, harassment, and disorderly conduct.<sup>193</sup> Some recorders report that their images or videos have been erased after being seized by police officers.<sup>194</sup> Officers have also arrested bystanders for failing to turn over cameras and images of police conduct.<sup>195</sup> This has led to a slew of lawsuits against police departments for arresting individuals

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<sup>191</sup> See, e.g., *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (describing the parameters of the First Amendment right to record the police in public); *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (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.”). It is still an open question, however, whether surreptitious recording of police officers is a protected act. See Lisa A. Skehill, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981 (2013). Moreover, in some jurisdictions the First Amendment right to record is not yet “clearly established” – or established at all. See *infra* note 270 (comparing cases).

<sup>192</sup> See Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguard 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).

<sup>193</sup> See Kreimer, *supra* note 7 at 360 (“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, 302-306 (2013) (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>.

<sup>194</sup> See Larry Krasner, *Cellphone Videography as Spontaneous Protest*, Visual Legal Advocacy Roundtable, University of Pennsylvania Law School, 2013 (available at <https://www.youtube.com/watch?v=ybFkDTUuTp8>), at 6:00 – 12:00 (video showing an officer confiscating cell phones after someone videotaped him beating a suspect), *id.* at 1350 (“[It is] very important to remember that they’re going to go for your videos”); Potere, *supra* note 193 at 302-306 (collecting cases) (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.”).

<sup>195</sup> See, e.g., Sean Gardiner, *Shoot First, Hand Over Film Later*, VILLAGE VOICE (New York), June 11-17, 2008, at 9; see also Kreimer, *supra* note 7 at 363-6 (describing “the ‘crime’ of photographic defiance of authority”).

engaged in recording police conduct from a distance,<sup>196</sup> many with organized copwatchers as named plaintiffs.<sup>197</sup>

Copwatching organizations vary in their experiences with respect to police resistance. The groups report a range of police responses to their conduct, ranging from respect and cooperation to the systematic deployment of groups of officers who block cameras, shine lights into camera lenses, physically intimidate copwatchers, and arrest individuals for filming.<sup>198</sup> 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>199</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>200</sup> The resistance of police officers to copwatching can have a chilling effect on groups who would like to engage in the

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<sup>196</sup> See, e.g., Jacob Sullum, *D.C. Police Officially Declare Photography Is Not a Crime*, Reason.com (July 23, 2012) (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*, ABCNews.com, July 19, 2010, <http://abcnews.go.com/US/TheLaw/videotaping-cops-arrest/story?id=11179076>;

<sup>197</sup> See *infra* notes 199-200 (collecting cases).

<sup>198</sup> See, e.g., LA CAN interview (reporting 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”); Berkeley Copwatch, Report, *The Criminalization of Copwatching* (October 2011),

[http://berkeleycopwatch.org/resources/Criminalization\\_of\\_Copwatching\\_2011.pdf](http://berkeleycopwatch.org/resources/Criminalization_of_Copwatching_2011.pdf). (collecting experiences of copwatching organizations who have experienced resistance from police officers and reporting 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”).

<sup>199</sup> See *Buehler v. City of Austin/Austin Police Dep’t et. al.*, 1:13-cv-01100-ML (W.D. Tex. July 24, 2014) (denying city’s motion for summary judgment for claim that Austin police officers targeted the founder of Peaceful Streets-Austin when he was engaged in a group patrol to record officers at traffic stops); *Cangress v. City of Los Angeles et. al.*, 2:2014-cv-01743 (C.D. Cal. Mar. 10, 2014) (complaint describing retaliatory conduct against LA CAN’s community watch program).

<sup>200</sup> See, e.g., Nathan Diebenow, *Atlanta police agreed to back off citizens who videotape*, THE RAW STORY (Feb. 14, 2011), <http://www.rawstory.com/rs/2011/02/14/atlanta-police-agreed-to-back-off-citizens-who-videotape/> (describing settlement of law suit 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); General Order No. 304-19, Metropolitan Police, District of Columbia, July 19, 2012, available at [http://legaltimes.typepad.com/files/go\\_304\\_19.pdf](http://legaltimes.typepad.com/files/go_304_19.pdf) (police recognizing the right of individuals to film the police, issued as part of a settlement with Jerome Vorus).

practice: one group representative with whom I spoke, for instance, explained that her group engaged in a pilot copwatching practice for a period of sixth months but stopped, in part, out of concerns for the safety of the participants.<sup>201</sup>

Other copwatching organizations, though, report experiencing little resistance from police officers. Indeed, one organization representative reported that he started the organization so as to try to be more respectful towards 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 . . .”<sup>202</sup> In turn, the same representative reported that that some officers have told members “that videoing allows people to trust the police”.<sup>203</sup>

Why might well-meaning officers resist being filmed?<sup>204</sup> Some may be concerned about safety. For example, in the wake of the death of Eric Garner, Police Commissioner William Bratton implied that the filming by bystanders of the 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

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<sup>201</sup> Phone interview with representative of Copwatch Providence Pilot Project, a defunct project that engaged in copwatching for six months in 2010-11; Minutes of Copwatch Providence Pilot Project wrap-up meeting (Aug. 3, 2011) (on file with author).

<sup>202</sup> See Telephone interview with Tuscon AZ Copblock.

<sup>203</sup> *Id.* However, this same representative also reported that “A sergeant . . . says that cops all the time will complain to him (the sergeant) about people recording, and the sergeant tells them that they just have to deal with it. He’s a good guy.” *Id.*

<sup>204</sup> 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 push a suspect to the ground with several onlookers gathered around him, and then turn only to the person with the camera and attempt to confiscate his camera and arrest him. See Carlos Miller, *Pennsylvania Cops Single Out Man With Camera*, PINAC (July 29, 2014), <http://photographyisnotacrime.com/2014/07/29/pennsylvania-cops-single-man-camera-ordering-away-police-abuse-incident/>.

<sup>205</sup> Anthony 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>. 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.*

suspects in a peaceful manner.<sup>206</sup> Similar concerns have been echoed by police leaders across the country.<sup>207</sup> But while concern for officer safety might explain disapproval of filming extremely close to an officer, it 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, then, 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 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 many ways, the adversarial dimension of copwatching invites this type of resistance: because it aims to transfer power from state actors to civilians, it asks that those state

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

<sup>207</sup> See, e.g., *Boston Police Commissioner wants law to push back on camera-toting cop watchers*, BOSTON 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); Alysia Santo, *Why Cops Aren't Ready for Their Close-up*, THE MARSHALL PROJECT (Apr. 24, 2015), <https://www.themarshallproject.org/2015/04/24/why-cops-aren-t-ready-for-their-close-up> (interviewing Dallas Police Association President Ron Pinkston).

<sup>208</sup> Cf. Carroll, *supra* note 113 **Error! Bookmark not defined.** (describing study howing that police behave better when being filmed).

<sup>209</sup> See Smith Letter, *supra* note 259 at 1.

<sup>210</sup> See TOCH, *supra* note 113 at 45-50 (collecting police officers' statements regarding their reactions to perceived disrespect from spectators); Elizabeth Joh, *Privacy Protests: Surveillance Evasion and Fourth Amendment Suspicion*, 55 ARIZ. L. REV. 997, 1021 (2013) (“Sociologists 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”) (collecting studies).

<sup>211</sup> 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>.

<sup>212</sup> 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”).

actors – police officers – relinquish some power and authority to the people whom they serve.

Those who view strong criticisms of police as “anti-cop”<sup>213</sup> are unlikely to applaud the practice of copwatching. This is precisely the dynamic against which organized copwatching presses: 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, then, to the extent that the police resist filming from a respectful distance, it 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,

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<sup>213</sup> Heather Mac Donald, *De-policing New York*, CITY JOURNAL (July 23, 2014), <http://www.city-journal.org/2014/eon0723hm.html> (labelling critics of broken windows policing in New York City as “anti-cop” and engaged in “anti-NYPD agitation”. Mac Donald writes that “the anti-cop brigades have now set their sights on broken-windows policing.”); cf. Alex Vitale, *What does it mean to be anti-police?*, THE NATION (Dec. 23, 2014) (questioning the labelling as “anti-police” of protesters challenging broken windows policing after the death of Eric Garner).

<sup>214</sup> 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 don’t 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 147-151. 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 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); Interview with Communities United Against Police Brutality (describing how some police officers and retired police officers support their efforts). Cf. Black Law Enforcement Organizations Denounce NYPD Commissioner Bratton (Jul. 30, 2014), <https://www.youtube.com/watch?v=0-xsnBF4Tx8> (video of press conference in which Black Law Enforcement Organizations denounce policy of broken windows policing in New York City).

<sup>215</sup> *Houston v. Hill*, 482 U.S. 451, 462-3 (1987).

<sup>216</sup> See DAVID LYON, *SURVEILLANCE STUDIES* 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 125 at x 1945-52 (discussing the dangers of surveillance to “intellectual privacy”).

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> If copwatching groups are expressing disapproval of policing policies while holding cameras, this may discourage people who agree with police actions. 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 a 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. 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>219</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>220</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>221</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, too, that 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, there is a danger that concentrating attention on videos of specific incidents involving individual officers will further a focus on “bad cops” rather than the institutional dynamics that guide police behavior.<sup>222</sup> Conflating the

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<sup>217</sup> See, e.g., Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 199-200 (2008); Richards, *supra* note 125 at 1937-42.

<sup>218</sup> See, e.g., Berkeley Copwatch interview (describing practice of asking for permission before filming and consulting a lawyer before posting any material).

<sup>219</sup> *ACLU v. Alvarez*, 679 F.3d 583, 611 (7th Cir. 2012) (Posner, *J.*, dissenting).

<sup>220</sup> *Id.*

<sup>221</sup> See Capers, *supra* note 110 at 960-65; Joh, *supra* note 210 at 1018-22; Richards, *supra* note 125 at 1937-42.

<sup>222</sup> 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

behavior of individuals with the workings of larger institutions can leave institutional problems in place and larger power dynamics unchanged.<sup>223</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>224</sup> how it is framed,<sup>225</sup> and what biases<sup>226</sup> and experiences<sup>227</sup> the viewer brings to the viewing experience. 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>228</sup> More recently, polls show that a majority of Americans, as well as a majority of New Yorkers, disagree with the decisions of a New York City grand jury to decline to indict Officer Daniel Pantaleo in the death of Eric Garner despite a video of the incident – evidence that interpretations of the video vary greatly.<sup>229</sup> In a series of recent studies, Professor Dan Kahan and his co-authors have

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incidents and misbehaving individuals, and too little on an overly aggressive police culture that facilitates and rewards violent conduct.”).

<sup>223</sup> See Cohen, *supra* note 217 at 199-200 (“As political performance art, sousveillance is brilliant. . . . but sousveillance does not change the architectural conditions of surveillance or the underlying inequalities that they reinforce.”); Torin Monahan, *Counter-Surveillance as Political Intervention*, 16 *SOCIAL SEMIOTICS* 515, 515 (2006) (“Current 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.”).

<sup>224</sup> See Kahan et. al., *Protest*, *supra* note 142 at 884; Kahan et. al., *Whose Eyes*, *supra* note 142 at 879-81.

<sup>225</sup> See Benforado, *supra* note 138 at 1347-60.

<sup>226</sup> See Jerry Kang et. al., *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124, 1160-1161 (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).

<sup>227</sup> See Kahan et. al., *Whose Eyes?*, *supra* note 142 at 881-903

<sup>228</sup> See Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 *DENVER U. L. REV.* 283, 285-6 (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 93 at 330-33 (describing the social construction of video in the Rodney King trial).

<sup>229</sup> 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); *Poll finds most New Yorkers oppose Eric Garner grand jury decision*, *S.I. LIVE* (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).

demonstrated that individuals perceive videos of police conduct differently depending on their backgrounds, experiences, and political beliefs.<sup>230</sup> Similarly, people from different backgrounds, and with different views of policing in their neighborhoods, will have very different reactions to a video showing a copwatching organization 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 towards the homeless on Skid Row in Los Angeles.<sup>231</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, referring to the political tattoo of someone holding the camera.<sup>232</sup> Analyzing this phenomenon, Stuart worries that certain police behaviors in response to being filmed “may . . . actually lead to an increase in police ability to present and defend their own interpretations.”<sup>233</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 – not only through its deterrent effect, but also because video clips bring with them more data points, more perspectives, and less opportunity for police officials to dominate the conversation over what policing can and should be.<sup>234</sup> For copwatching, video is a form of advocacy as much as it is a form of documenting the truth.<sup>235</sup>

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<sup>230</sup> Kahan et. al., *Protest*, *supra* note 142 at 884; Kahan et. al., *Whose Eyes*, *supra* note 142 at 879-81 (2009) (studying perceptions of video of police officers driving a car off the road).

<sup>231</sup> See Stuart, *supra* note 93 at 335-36.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 343.

<sup>234</sup> Cf. DAVID BRIN, *THE TRANSPARENT SOCIETY* 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.”).

<sup>235</sup> See Caldwell, *supra* note 78 at 1-20 (describing contemporaneous recording of human rights violations as a form of advocacy); cf. 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, 847-9 (2006) (describing the concept of “visual legal advocacy” through film).

#### 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 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 about creating the conditions for those disempowered people to engage in their own forms of participation 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>236</sup> there is a danger of losing sight of the value of more adversarial methods of engagement.

Copwatching organizations take a clearly adversarial stance towards 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>237</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 which they are supposed to be accountable.

However, although organized copwatching is adversarial, it need not follow that copwatching is antagonistic. To the contrary, 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 those changes through a combination of official and grassroots channels, through both law and politics. Copwatching in its most productive form is what political theorist Chantal Mouffe would call *agonistic*.<sup>238</sup> Agonism takes an adversarial stance towards practices and ideologies of institutions in power, but it does so through engagement with those institutions rather than withdrawal, by acknowledging intractable differences but respecting the adversary who disagrees.<sup>239</sup> Agonism serves as a contrast to, on one end, *antagonism*,

<sup>236</sup> See *supra* notes 41-69 and accompanying text.

<sup>237</sup> See *supra* notes 131-137 and accompanying text.

<sup>238</sup> See CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 80-108 (2000) (hereinafter MOUFFE, PARADOX); CHANTAL MOUFFE, AGONISTICS 1-19 (2013) (hereinafter MOUFFE, AGONISTICS).

<sup>239</sup> MOUFFE, PARADOX at 100-08.

through which groups withdraw from political institutions altogether,<sup>240</sup> and on the other end, *deliberation*, which emphasizes consensus through rational dialogue.<sup>241</sup> Because no one idea can be representative of a diverse modern population, “[t]oo much emphasis on consensus, together with aversion towards confrontations, leads to apathy and to a disaffection with political participation.”<sup>242</sup> Agonism thus pushes up against the exclusion that can come from trying to do away with conflict through consensus, but maintains that change can come through contestation that engages with formal democratic processes.<sup>243</sup> Although there are other democratic theories that critique the deliberative turn towards consensus through dialogue,<sup>244</sup> the concept of agonism is useful in its ability to discern between 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 between how various copwatching organizations approach legal change. A minority of groups – five of eighteen – with which I spoke are not agonistic, but rather antagonistic: they withdraw from participation in formal institutions, often identifying with anarchist forms of communal governing.<sup>245</sup> In

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<sup>240</sup> *Id.* at 102

<sup>241</sup> *Id.* at 90-98 (citing JURGEN HABERMAS, *BETWEEN FACTS AND NORMS* 127 (1996)).

<sup>242</sup> MOUFFE, *AGONISTICS*, *supra* note 238 at 7.

<sup>243</sup> Legal scholars have used Mouffe’s concept of agonism to argue for the benefits of various forms of contestation in the legal world: for example, adversarial debates around the initial writing of the Constitution, *see* Bernadette Meyler, *Accepting Contested Meanings*, 82 *FORDHAM L. REV.* 803, 826 (2013), contestation of the interpretation of the Constitution by social movements, *see id.* at 826 (“[S]ocial movements’ work to affect constitutional interpretation has brought such agonism to the fore today.”), and an adversarial conception of the First Amendment, *see* Martin H. Redish & Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes*, 103 *N.W. U. L. REV.* 1303, 1361 (2009); *cf.* Robert Post, *Theorizing Disagreement: Reconceiving the Relationship between Law and Politics*, 198 *CALIF. L. REV.* 1319, 336-40 (2010) (discussing Mouffe’s concept of agonism in the context of other theorists who acknowledge the need for disagreement in politics).

<sup>244</sup> *See, e.g.*, JEFFREY GREEN, *THE EYES OF THE PEOPLE* 58-63 (2010) (putting forth “ocular model of popular empowerment” in contrast to model of deliberative democracy); PHILIP PETTIT, *ON THE PEOPLE’S TERMS* 5-26 (2013) (describing contrast between republicanism and deliberative democracy); IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 10-50 (2003) (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 59-106 (laying out the contrast between pluralist conceptions of democracy and those of deliberative democracy and connecting that distinction to similar distinctions in policing policy).

<sup>245</sup> *See, e.g.*, Copwatch LA (mission statement includes “fighting for change without a reformist consciousness”); Peaceful Streets-Austin (describing their deliberate decision to divorce themselves from political activity); Copwatch of East Atlanta (describing

contrast, the majority of groups 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; 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 the work of a copwatching organization, but nevertheless demonstrates the agonistic nature of much of the practice.

When a copwatching group takes an agonistic stance towards 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>246</sup> and civil disobedience, where dissenters purposefully disobey an existing law in an effort to change law or policy.<sup>247</sup> Agonistic copwatching acknowledges and celebrates profound disagreement with current policing practices but works to change those practices through contestation both within and without official channels.

Leading accounts of community participation in policing, however, eschew the adversarial in all forms, whether agonistic or antagonistic, and instead seek to support communities through deliberation and consensus.<sup>248</sup> Copwatching challenges this trend directly. It 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>249</sup> In this way, copwatching also presents a challenge to a local police department's

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roots of organization in the “anarchist tradition”). Mouffe characterizes “withdrawal from” political institutions as the central indication of an antagonistic approach to politics. See MOUFFE, *AGNOSTICS*, *supra* note 238 at 65-84.

<sup>246</sup> Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005).

<sup>247</sup> 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”).

<sup>248</sup> See *supra* notes 41-69 and accompanying text.

<sup>249</sup> See, e.g., Meares & Kahan, *supra* note 15 at 4-5 (arguing that there is a conflict between democratic rule and individual rights with respect to the policing of minority communities).

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 widescale civic disengagement and disenfranchisement of people who live in highly policed neighborhoods should 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 cooptation by government-driven collaborative approaches. Copwatching can work in tandem with the creation of formal mechanisms of engagement such as community policing and its outgrowths. Indeed, 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>250</sup> the convening of juries,<sup>251</sup> or the solicitation of public comments regarding police procedures prior to their implementation.<sup>252</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 – to respect critical observation by neighborhood residents? 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 interested in including “communities” in policing 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

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<sup>250</sup> See, e.g., Garrett, *supra* note 59 at 101-05; Sabel & Simon, *supra* note 59 at 1047; Simmons, *supra* note 59 at 390-419.

<sup>251</sup> See, e.g., Ryan, *supra* note 68 at 891-94; Eric Luna, *supra* note at 840.

<sup>252</sup> See, e.g., BIBAS, *supra* note 32 at 149-50 (proposing the solicitation of online feedback about policing priorities); Bierschbach & Bibas, *supra* note 56 at 139-53 (2012) (proposing notice-and-comment procedures for policing and prosecutorial charging policies).

important part of police accountability – one that can be a complement to 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, 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>253</sup> Consent decrees that emerge from §14141 litigation allow courts to oversee the restructuring of police policies and procedures through ongoing monitoring and data collection.<sup>254</sup> Those consent decrees, however, rarely focus on respecting observation and filming of police as part of their solution – only three of 28 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 and/or record in public.<sup>255</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>256</sup> This begins with changes to written police policies, or “general orders”.<sup>257</sup> A number of police departments have issued explicit orders or policies stating that it is not a crime to film

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<sup>253</sup> 42 U.S.C. §14141 (1994); *see also* Harmon, *supra* note 60 at 11; Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1433 (2015).

<sup>254</sup> *Id.*

<sup>255</sup> These are the settlements between the Department of Justice and the cities of East Haven, Seattle, and New Orleans. *See* United States v. Town of East Haven, no. 2:12-cv-01652-AWT, (D. Conn. Nov. 20, 2012) (settlement agreement and order), [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); United States v. City of New Orleans, No. 2:12-cv- 01924-SM-JCW (E.D. La. July 24, 2013) (consent decree), <http://www.clearinghouse.net/chDocs/public/PN-LA-0001-0001.pdf>; United States v. Seattle, no. 2:12-cv-01282-JLR, (W.D. Wa. July 27, 2012) (settlement agreement and stipulated order of resolution), [http://www.justice.gov/crt/about/spl/documents/spd\\_consentdecree\\_7-27-12.pdf](http://www.justice.gov/crt/about/spl/documents/spd_consentdecree_7-27-12.pdf). *Cf.* Rushin, *supra* note 253 at 1378-88 (detailing content of multiple settlement agreements).

<sup>256</sup> *See* Samuel Walker, *Responding to the NYPD Chokehold Death: a PTSR Framework* (July 2014), <http://samuelwalker.net/wp-content/uploads/2014/07/RESPONDING-TO-THE-NYPD-CHOKEHOLD-DEATH22.pdf>. (describing the PTSR Framework of “Policy, Training, Supervision, and Review”; “Each element needs to be in place in order to achieve genuine officer accountability.”).

<sup>257</sup> *See* Skogan, *supra* note 261 at 147 (“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.”).

police officers in public, many of them following well-publicized incidents of interference with cameras.<sup>258</sup> The Department of Justice has come out in support of these regulations.<sup>259</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>260</sup>

As much as police departments are starting to realize the importance of respecting cameras, then, incidents of bad reactions to filming police continue without substantial training and supervision underscoring those policies.<sup>261</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>262</sup> Police training can

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<sup>258</sup> See, e.g., Seattle Police Manual 5.160, effective June 6, 2008, at [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); Timothy B. Lee, D.C. *Police Chief Announces Shockingly Reasonable Cell Camera Policy*, ARS TECHNICA (July 24, 2012, 2:34 PM), <http://arstechnica.com/tech-policy/2012/07/dc-policechief-announces-shockingly-reasonable-cell-camera-policy/>; Boston Herald Staff, *By the book – what police should – and shouldn’t do*, Boston Herald (Aug. 9, 2015), [http://www.bostonherald.com/news\\_opinion/local\\_coverage/2015/08/by\\_the\\_book\\_what\\_at\\_police\\_should\\_and\\_shouldn\\_t\\_do](http://www.bostonherald.com/news_opinion/local_coverage/2015/08/by_the_book_what_at_police_should_and_shouldn_t_do) (collecting police regulations regarding civilian filming from Cambridge, Chelsea, and Boston, Massachusetts).

<sup>259</sup> See, e.g., 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, Baltimore Police Dep’t (May 14, 2012), available at [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) (stating that the right to record “subject to narrowly-defined restrictions, engender[s] public confidence in our police departments, promotes public access to information necessary to hold our governmental officers accountable, and ensure[s] officer safety.”).

<sup>260</sup> See Carlos Miller, *D.C. Cops Confiscate Phone, Steal Memory Card, Day After New Photo Policy Implemented*, PIXIQ (July 26, 2012), <http://www.pixiq.com/article/dc-cops-confiscate-phone-steal-memory-card>; see also Andrew Rosado Shaw, *Note, Our Duty in Light of the Law’s Irrelevant: Police Brutality and Civilian Recordings*, 20 GEO. POVERTY LAW & POL’Y 161, 166-80 (2013) (“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.”).

<sup>261</sup> Cf. Wesley Skogan, *Why reforms fail*, in MONIQUE MARKS & DAVID SKLANSKY, ED., *POLICE REFORM FROM THE BOTTOM UP* 144, 144-54 (2012).

<sup>262</sup> Armacost, *supra* note 222 at 523-24; see also Samuel Walker, *Institutionalizing Police Accountability Reforms: the Problem of Making Police Reforms Endure*, 57 ST. LOUIS U. PUB. L. REV. 57, 68-71 (2013) (describing the resistance of police subculture to reforms).

make a difference in changing these norms, as can leadership from supervisors and administrators emphasizing the importance of respecting filming.<sup>263</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>264</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 legislators<sup>265</sup> – the Department of Justice has a chance here to lead the way towards 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>266</sup> Although civil liability may not on its own deter officers from interfering with civilian filming,<sup>267</sup> state legislation can send a forceful and important message to local police departments regarding the necessity of respecting observation and filming.<sup>268</sup>

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<sup>263</sup> See David Klinger, *Can Police Training Affect the Use of Force on the Streets?*, in CANDACE MCCOY, ED., *HOLDING POLICE ACCOUNTABLE* 95, 103-06 (2010) (finding that training on use of violence reduces the use of force).

<sup>264</sup> *City of New Orleans*, settlement agreement at V.E.155.

<sup>265</sup> See Walker, *supra* note 262 at 85-91 (describing such efforts in Los Angeles, Denver, and Omaha).

<sup>266</sup> See Colorado State Bill 15-1290 (signed May 20, 2015) [http://www.statebillinfo.com/bills/bills/15/1290\\_enr.pdf](http://www.statebillinfo.com/bills/bills/15/1290_enr.pdf); California Bill SB11 (pending governor’s signature as of Aug. 26, 2015), <http://openstates.org/ca/bills/20152016/SB411/>. In contrast, some states have proposed legislation that would criminalize certain forms of filming the police in public. See, e.g., Daniel Perez, *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>.

<sup>267</sup> Cf. Schwartz, *supra* note 108 (showing that police officers are usually indemnified from damages when they lose civil lawsuits).

<sup>268</sup> Cf. Sam Adler-Bell, *That’s What you Get for Filming the Police*, TRUTHOUT, (May 7, 2015), <http://www.truth-out.org/news/item/30628-that-s-what-you-get-for-filming-the-police> (quoting the policy director of the Colorado ACLU as saying that the

### *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 changes in policing should not give up on constitutional change in efforts to improve police accountability. This 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>269</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” – a standard important for purposes of qualified immunity.<sup>270</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>271</sup> The First Amendment protection for recording cannot extend to all circumstances; there must be limits on physical proximity and allowances for circumstances in which there are

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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.”).

<sup>269</sup> See *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012). Cf. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“[T]he First Amendment protects the right to gather information about what public officials do on public property.”); *Buehler v. City of Austin/Austin Police Dep’t et. al.*, 1:13-cv-01100-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).

<sup>270</sup> Compare, e.g., *Higginbotham v. City of New York*, No. 14-CV-8549 PKC RLE, 2015 WL 2212242, at \*9 (S.D.N.Y. May 12, 2015) (finding right to record clearly established); *Crago v. Leonard*, K No. 0877, No. 2:13-CV-531-TLN-EFB, 2014 WL 3849954, at \*4 (E.D. Cal. Aug. 5, 2014) report and recommendation adopted sub nom. *Crago v. Leonard*, No. 2:13-CV-531-TLN-EFB, 2014 WL 4435954 (E.D. Cal. Sept. 9, 2014) (same), with *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010) (finding no clearly established right to record); *Pluma v. City of New York*, No. 13 CIV. 2017 LAP, 2015 WL 1623828, at \*7 (S.D.N.Y. Mar. 31, 2015) (finding right to record is not clearly established); *Lawson v. Hilderbrand*, No. 3:13-CV-00206 JAM, 2015 WL 753708 (D. Conn. Feb. 23, 2015) (same).

<sup>271</sup> See Taylor Robertson, *Lights, Camera, Arrest*, 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 B.Y.U.L. REV. 183, 189-94 (same).

true safety issues. But Courts adjudicating First Amendment claims should recognize not only the autonomy interests at stake in the right to be free from interference with observation and information gathering, but also the benefits to police accountability and democracy that accrue from the respect accorded to civilian observation and recording.<sup>272</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>273</sup> and better account for the experiences of people of color who live and work in neighborhoods with a high police presence.<sup>274</sup> Surely judges do not 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>275</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 to communities of particular practices, the dignity interests at stake in a particular police action, and the neighborhood sentiment towards a particular practice.<sup>276</sup> While those factors do not solve a Fourth Amendment question on their

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<sup>272</sup> For an extended discussion of the First Amendment right to record police offices *see* Simonson, *supra* note 21.

<sup>273</sup> *See, e.g.*, Baradaran, *supra* note 137 (advocating for “a major shift in Fourth Amendment balancing towards 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 265-67 (suggesting ways in which the Court might consider lay perceptions of police practices in determining the constitutionality of those practices).

<sup>274</sup> *See, e.g.*, Bacigal, *supra* note 133 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 person”); Harris, *supra* note 161 at 660 (arguing that a high crime area should not be an allowable factor to contribute to a stop); Maclin, *supra* note 161 at 1328 (arguing that courts should consider freedom of movement in Fourth Amendment determinations); Thompson, *supra* note 25 at 1004-1014 (arguing that courts should consider the role of race in police officer decisions).

<sup>275</sup> *See* Bowers & Robinson, *supra* note 40 at 223 (describing how when the Court determines “reasonableness” in the context of criminal procedure, “the Court doesn’t ask whether the Court’s own perceptions gel with what people actually find fair or just.”).

<sup>276</sup> *See supra* notes 157-189 and accompanying text.

own, they lend credence to efforts by scholars and courts to bring the concept of the “reasonable person” 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 decide which community residents to consult, when and where to consult them, and what the goals of those consultations should be.<sup>277</sup> At the same time, scholars and policymakers debate and decide the best ways to structure meetings and build partnerships.<sup>278</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 non-elites, by those traditionally outside of the system.<sup>279</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 what we mean when we talk about 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.

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>280</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>281</sup> – a goal that cannot be met with consensus-based solutions

<sup>277</sup> See *supra* notes 52-55 and accompanying text.

<sup>278</sup> See *supra* notes 41-57 and accompanying text.

<sup>279</sup> Cf. BIBAS, *supra* note 32 at 16-24 (contrasting “insiders” and “outsiders” in the criminal justice system).

<sup>280</sup> See, e.g., President’s Task Force on 21st Century Policing, <http://www.cops.usdoj.gov/Default.asp?Item=2761> (last visited Jan. 28, 2015); STL Positive Change, Official Site of the Ferguson Commission, [stlpositivechange.org](http://stlpositivechange.org) (last visited Jan. 28, 2015) (“The charge of the Ferguson Commission is to help 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*, THE NEWS JOURNAL (Jan. 28, 2015), <http://www.delawareonline.com/story/news/local/2015/01/27/wilmington-crime-commission-clears-delaware-house/22435053/>.

<sup>281</sup> President’s Task Force on 21st Century Policing, <http://www.cops.usdoj.gov/Default.asp?Item=2761> (last visited Jan. 28, 2015).

alone. Instead, scholars and policymakers 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. 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.

## 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