USING COMMUNITY CONTROL AND OVERSIGHT LAWS TO RESIST AND ABOLISH POLICE SURVEILLANCE TECHNOLOGIES

BY VINCENT M. SOUTHERLAND

The proliferation and use of technology by law enforcement is rooted in the hope that technological tools can improve policing. Improvement, however, is relative. Quantitative data and qualitative experience have proven the criminal legal system to be a site of racial injustice and rank brutality. The police are one of the principal instruments of those harms. For the policed, especially those communities who have been harmed by policing and the other facets of the system, law enforcement technologies only reify and exacerbate injustice. Surveillance technologies are of particular concern, as they are disproportionately wielded against economically disadvantaged communities of color, infringe on privacy, and tend to operate under a veil of secrecy.

In 2016, advocates armed with these concerns, launched a campaign to impose regulatory guardrails on law enforcement surveillance tools. Embedded within those regulatory guardrails were provisions aimed at infusing community control over those technologies. To date, those laws—modeled on what are known as Community Control Over Police Surveillance ("CCOPS") laws—have been enacted in more than 20 jurisdictions nationwide. They are premised on the notion that an informed and engaged community can serve as a check on intrusive surveillance technologies and the abuses that flow from them. The laws empower city councils or their local equivalents with oversight over law enforcement acquisition and deployment of surveillance technologies.

There is a natural tension between laws like CCOPS, which risk legitimizing surveillance technologies in police hands, and efforts that look to an abolitionist horizon by seeking to relieve police of their surveillance tools. I grapple with that tension in this article by evaluating the efficacy of CCOPS and its community control mechanisms, and theorizing ways that the law might be deployed to achieve abolitionist ends. I do so by focusing on the handful of jurisdictions that have enacted a version of the law that looks to an independent community advisory body to serve as an agent for the community, purportedly to exercise some authority over police surveillance technology. Drawing from media reports, publicly available records, conversations with those tasked with the law's implementation, and other sources, I engage in a qualitative analysis of the law and its community control mechanisms, surfacing their benefits and shortcomings.

Engaging the potential that CCOPS holds as a ratchet for more transformative interventions, the article then suggests ways forward, both for jurisdictions that have adopted the CCOPS model and for those advocates who are pushing jurisdictions to do so. It culminates in a vision that looks to an abolitionist horizon. Such a vision requires shifting power to communities through criminal legal system actors whose interests are aligned with those most often targeted and harmed by the use of police surveillance technologies, amending the law where needed to address its

shortcomings, and leveraging the benefits of the law where possible to create the conditions necessary for transformative change. Ultimately, I contend that while CCOPS laws and their community control mechanisms are far from ideal, they should be considered among the suite of tools that advocates can use to end the raced, classed, violent status quo that characterizes the deployment of police surveillance technologies in particular and the criminal legal system in general.

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"People think that either you're interested in reform or you're an abolitionist—that you have to choose to be in one camp or the other. I don't think that way. For some people, reform is the main focus and end goal and for some people, abolition is the horizon. But I don't know anybody who is an abolitionist who doesn't support some reforms. Mainly those reforms are . . . non-reformist reforms. Which reforms don't make it harder for us to dismantle the systems we are trying to abolish?"
--Mariam Kaba[1]

Introduction

In August 2020, the New York Police Department acquired Digidog,[2] a 70 pound robot dog[3] "outfitted with lights, cameras and . . . artificial intelligence."[4] Digidog was hailed as a leap forward in service of law enforcement, given its capacity to engage in surveillance and conduct reconnaissance in hostage situations and police investigations. The head of the NYPD's technical Assistance Response Unit explained at the time that "[t]his dog is going to save lives. It's going to protect people. It's going to protect officers."[5]

People across New York City saw things differently. The NYPD's acquisition of Digidog, and its unlimited potential for abuse, sparked outrage. The robot dog was viewed as a harbinger of a dystopian future.[6] The reaction of the public—a mix of fear buoyed by curiosity—was swift. After video of Digidog walking alongside police handlers went viral, social media captured the public response: "I never seen nothing like this before in my life. Do you see this?"[7] "Nah they really got these robot police dogs in NYC. This is wild."[8] U.S. Representative Alexandria Ocasio-Cortez of Queens tweeted: "Now robotic surveillance ground drones are being deployed for testing on low-income communities of color with under-resourced schools."[9] Representative

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[1] MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST PAPERS, 96 (2020).
[2] Mihir Zaveri, *N.Y.P.D. Robot Dog's Run Is Cut Short After Fierce Backlash*, N.Y. TIMES (May 11, 2021), https://www.nytimes.com/2021/04/28/nyregion/nypd-robot-dog-backlash.html.
[3] Samia Sultana, *Digidog: The Future of Surveillance?*, THE SCIENCE SURVEY (Apr. 22, 2021), https://thesciencesurvey.com/news/2021/04/22/digidog-the-future-of-surveillance/.
[4] Mihir Zaveri, *N.Y.P.D.'s Robot Dog Returns to Work, Touching Off a Backlash*, N.Y. TIMES (Apr. 19, 2021), https://www.nytimes.com/2021/04/14/nyregion/robot-dog-nypd.html.
[5] Emma Bowman, *'Creepy' Robot Dog Loses Job With New York Police Department*, N.P.R. (Apr. 30, 2021), https://www.npr.org/2021/04/30/992551579/creepy-robot-dog-loses-job-with-new-york-police-department.
[6] James Vincent, *The NYPD is sending its controversial robot dog back to the pound*, THE VERGE (Apr. 29, 2021), https://www.theverge.com/2021/4/29/22409559/nypd-robot-dog-digidog-boston-dynamics-contract-terminated.
[7] Rebecca Flood, *Robot Police Dog Patrolling NYC in Video Sparks 'Black Mirror,' 'Robocop' Comparisons*, NEWSWEEK (Apr. 13, 2021), https://www.newsweek.com/robot-police-dog-patrolling-new-york-video-black-mirror-robocop-1583202.
[8] *Id.*
[9] @AOC, TWITTER (Feb. 25, 2021, 2:31 p.m.), https://twitter.com/aoc/status/1365021717144420354?lang=en.

Jamaal Bowman of the Bronx took to social media: "They got ROBOT police dogs in the streets of New York. This is ridiculous y'all."[10]

The backlash was immediate, loud, and widespread. The outcry forced the NYPD to put Digidog down,[11] but not before it had been deployed half a dozen times, including during a barricade and hostage situation,[12] and to a public housing building.[13]

The Digidog episode might not have ended as it did absent the nationwide uprisings against police violence and racism that unfolded in the summer of 2020.[14] Well-founded concerns about the technologically enhanced reach of the police were heightened by a short-lived reckoning with race and policing.[15] For many, the uprisings were a reminder of the urgent need to reign in and ultimately end the carceral state,[16] and the central role that communities can and should play in that effort.

They also reinvigorated a long-running debate about the best path to wholesale change and the methods advocates and their allies should use to advance racial justice in the face of a criminal legal system where justice is anathema and brown skin is a proxy for suspicion. Do we reform the police or defund them? Do we re-imagine public safety or abolish the system and actors—law enforcement in particular—who claim to keep us safe? Is there a middle path, one that moves us forward without compromising our commitment to transformational change? What policy mechanisms actually can do the work of curtailing or limiting abusive police power over communities?

The battle over police surveillance technologies bring these questions into sharp relief. While policing is the heart of the problem, police technologies make the policing problem worse, given the exponential growth in power and reach that they afford law enforcement. In response, recent years have seen a proliferation of laws designed to foster transparency, oversight, and community control of common police technologies like predictive policing, facial recognition systems, automated license

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[10] @JamaalBowmanNYC, TWITTER (Apr. 13, 2021, 8:20 p.m.), https://twitter.com/JamaalBowmanNY/status/1382126695147266052.

[11] Sophie Bushwick, *The NYPD's Robot Dog Was a Really Bad Idea: Here's What Went Wrong*, SCIENTIFIC AMERICAN (May 7, 2021), https://www.scientificamerican.com/article/the-nypds-robot-dog-was-a-really-bad-idea-heres-what-went-wrong/.

[12] Zaveri, *supra* note 2.

[13] Zaveri, *supra* note 4.

[14] *See* Vincent M. Southerland, *Toward a Just Future: Anticipating and Overcoming a Sustained Resistance to Reparations*, 45 N.Y.U. REV. L. & SOC. CHANGE 427, 432-37 (2021) (describing scale and scope of racial justice uprisings against police violence).

[15] *Id.*

[16] Amna Akbar, *An Abolitionist Horizon for (Police) Reform*, CALIF. L. REV. 1781, 1789-90 (2020) ("Police violence is (1) authorized by law, (2) takes various, interconnected forms, (3) that occur in routine and common place ways, that are (4) targeted along the dimensions of race, class, and gender, and (5) constitute and produce our political, economic, and social order.").

plate readers, audible gunshot detectors, surveillance cameras, and other police surveillance tools.

Those laws, enacted in cities across the country, aim to impose procedural hurdles on police departments seeking to obtain or deploy surveillance technologies. In a handful of instances, they also create independent advisory bodies ostensibly drawn from communities grappling with surveillance technologies to raise civil rights and civil liberties concerns about the technologies and to impose oversight on law enforcement procurement and use of the tools. The charge of those bodies amounts to advising local governing authorities like city councils about the potential harms the tools carry with them as those entities consider whether or not to bless the adoption of police surveillance technologies, prevent their acquisition, or otherwise limit their use.

These laws have been met with critique, especially from those who look toward an abolitionist horizon on policing and the carceral state. The critique is grounded in a worthwhile and invaluable caution: that such laws and the institutions that implement them, even if well-intentioned, do little more than embed the technologies further in the criminal system, cementing them in the hands of the police. Rather than imposing community control or independent oversight, the law gives police a series of steps to walk through before acquiring or using technology. It accommodates technology, rather than reigning it in and stopping it. That accommodation amounts to acquiescence to a more powerful, more invasive police state. It creates a ready-made response to any outrage or opposition that flows from the deployment of police surveillance technologies: no need for concern—the police technology you want to complain about was vetted through a community engaged bureaucratic process and was ultimately approved. Nothing to see here—no harm, no foul.

That view is shared by groups like the Stop LAPD Spying Coalition and Free Radicals, who are comprised of, and work in partnership with, communities who are concerned with the growth of police surveillance technology and have experienced the violence of policing first hand.[17] They have advanced an abolitionist ethos to deal with algorithmic tools.[18] They argue that many proposed reforms to the algorithmic system, including transparency, training, and oversight, do not "meaningfully alter the [algorithmic] ecology as a whole."[19] Rather than invest time, effort, and resources in creating a surveillance bureaucracy, dismantling and abolishing forms of police surveillance is the best path forward.[20] Surveillance bureaucracy will never be up to the task.

The concern over the ineptitude of the law reflects what the poet and activist Audre Lorde once wrote: the "master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will

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[17] Stop LAPD Spying Coalition and Free Radicals, *The Algorithmic Ecology: An Abolitionist Tool for Organizing Against Algorithms,* MEDIUM (Mar. 2, 2020), https://stoplapdspying.medium.com/the-algorithmic-ecology-an-abolitionist-tool-for-organizing-against-algorithms-14fcbd0e64d0; @sh4keer, Twitter (Feb. 10, 2021 8:02 p.m.), https://mobile.twitter.com/sh4keer/status/1359669101430407171.

[18] *Id.*

[19] Stop LAPD Spying, *supra* note 17.

[20] *Id.* ("The only way to dismantle harm is to abolish these systems of dominance and oppression.").

never enable us to bring about genuine change."[21] In the context of the fight against police surveillance technologies, law is one of the master's tools. That tool is viewed by many as legitimating a bankrupt status quo.

This article is my attempt to grapple with, and harmonize, the tension between reform and abolition through policy and engagement with government systems. I think the critique leveled by carceral abolitionists bears truth, and accept it. As those who wielded the equal protection clause to end *de jure* segregation in America can attest, it is incredibly difficult to dismantle an unjust system using the very tools that system provides. Process and transparency can add a patina of legitimacy. But the critique cannot allow us to overlook the value of a surveillance bureaucracy that fosters transparency and oversight over police and their technologies. I believe that we can and must be critical of the law, but also use it as a jumping off point for fruitful advocacy against police surveillance technologies. I think there are ways that we might even turn the law into a weapon in the fight to halt police surveillance tools. Engaging the critique by evaluating the efficacy of the law and suggesting ways that we might repurpose in an informed manner is the work that I attempt to do here.

In engaging the critique, I take as a given that abolition is an essential strategic intervention in the face of a brutal criminal legal system. My view is rooted in an understanding that the stark racial disproportionality of those enmeshed in the modern carceral state is a descendant of the racial caste system established with the birth of American enslavement.[22] "[P]olicing and incarceration are contingent, rather than necessary, forms of violence, constitutive of the terrain of inequality and maldistribution."[23] Policing and caging people is the knee jerk response to all manner of social problems, perpetuating inequality and "shap[ing] the material infrastructure of our political, social, and economic relationships."[24] Critically, despite the fact that historically, the majority of those incarcerated have been white, "it is impossible to disentangle institutional racism in America—past and present—from the simultaneous development of the nation's criminal legal system."[25] Indeed, one cannot understand "the intersecting and distinctive racial, ethnic, gendered, and socioeconomic dimensions of policing and punishment in the American criminal legal system" without a firm grasp on the America's "antiblack punitive tradition."[26]

At the core of that tradition is an ideology of white supremacy and a presumption of dangerousness and criminality that has become inextricably linked

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[21] Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House, in* SISTER OUTSIDER: ESSAYS AND SPEECHES 110, 111 (Crossing Press rev. ed. 2007) (1984).
[22] Dorothy Roberts, *Abolition Constitutionalism,* 133 HARV. L. REV. 1, 42-43 (2020).
[23] Akbar, *supra* note 16 at 1816.
[24] *Id.*
[25] Elizabeth Hinton and DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANNU. REV. CRIMINOL. 261, 265 (2021); Radley Balko, *There's Overwhelming Evidence that the criminal justice system is racist. Here's the proof,* WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/.
[26] Hinton, *supra* note 25 at 262.

to Black people and other people of color.[27] "[T]he habitual surveillance and incapacitation of racialized individuals and communities" have rendered that tradition enduring.[28] At their inception, law enforcement and the carceral state were deployed, at least in part, to uphold the regimes of enslavement and Jim Crow segregation.[29] Those forces evolved and expanded in response to uprisings against racial inequality, "the threat of large-scale urban disorder," and a federal War on Crime waged by President Lyndon Johnson in the mid-1960s and his successor, Richard Nixon, setting the stage for our current era of mass incarceration.[30] Bringing that era to a close should be our collective North Star.

Abolition is rightfully aimed at ending racialized, "punitive systems of social control" and replacing those systems with alternatives that center investments in the health, well-being, safety, dignity, and human welfare of communities.[31] In this way, abolition is a steady project of decarceration,[32] informed by a willingness to "displace conventional criminal law administration as a primary mechanism for social order maintenance."[33]

But how do we get from here to there? If law, policy, and institutions are the master's tools, being used to legitimate a bankrupt status quo, what happens when communities of resistance wield them? What results when we rethink the ways they are used, the institutions that leverage them, or the values that inform their deployment? Abolitionist scholar Ruth Wilson Gilmore has suggested that "the most important thing in print when you read the master's tools is the apostrophe between the r and the s. The tools that belong to the master."[34] Ownership and effective control, Gilmore tells us, makes all the difference.[35]

As currently implemented, laws aimed at imposing community control and oversight of police surveillance technologies may not be quite up to the task of ending the use and proliferation of those technologies. That is unsurprising, because those laws were not really designed for that purpose. Outside of bans enacted to address specific technologies, there is scant evidence that they have been central in stopping police surveillance technologies. But that should not be the end of the story. As advocates, we should work to fill the gaps in laws and institutions where they fall short so that they can be deployed alongside the type of extralegal collective resistance that will satisfy abolitionist ends.

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[27] Bryan Stevenson, *A Presumption of Guilt*, New York Review of Books (Jul. 13, 2017).
[28] Hinton, *supra* note 25 at 263.
[29] *Id.* at 267.
[30] *Id.* at 271.
[31] Amna Akbar, *Toward a Radical Imagination of Law*, 93 NYU LAW REV. 405, 460-61 (2018).
[32] Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1161 (2015).
[33]Allegra McCleod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives,* 8 UNBOUND: HARV. J. LEGAL LEFT 109 (2013).
[34] The Graduate Center, City University of New York, *Change: A World Without Prisons—Ruth Wilson Gilmore in Conversation with Mariame Kaba*, YOUTUBE (Sept. 23, 2020), https://www.youtube.com/watch?v=oeQmVpnRMYE.
[35] *Id.*

Doing so requires viewing the law as a potential ratchet for transformative change. That is consistent with the way legal interventions and reform efforts can advance racial justice, even if they hold the potential to "undermine the larger radical project of transformation."[36] In some sense, we have no choice but to use the law and institutions at hand. That's because

> popular struggles are a reflection of institutionally determined logic and a challenge to that logic. People can only demand change in ways that reflect the logic of the institutions that they are challenging. Demands for change that do not reflect the institutional logic—that is, demands that do not engage and subsequently reinforce the dominant ideology—will probably be ineffective. The possibility for ideological change is created through the very process of legitimation, which is triggered by crisis. Powerless people can sometimes trigger such a crisis by challenging an institution internally, that is, by using its own logic against it.[37]

Legitimation is necessary to yield change, because one must engage with a system or institution in order to change it. Abolitionists cannot make the progress they seek without engaging the systems they are battling against.

The challenge comes in marrying an abolitionist vision with the available methods for engaging a system or institution. While we may prefer that all harmful systems and institutions fall at once, the path to transformative change in the criminal legal system must contend with the notion that alternatives to the status quo must "*contradict* at least certain premises of the old system and at the same time *compete* with the system to be replaced."[38] That reality naturally limits the pace and scale of change, because any change sought must be "recognizable and conceivable to someone embedded in the existing state of affairs"[39] In other words, the path to transformative change is necessarily piecemeal. But the pace of change does not render it valueless.

Navigating those challenges is central to this article. It builds on my own work at the intersection of race, the criminal legal system, and technology. In a previous piece,[40] I applied a racial justice lens rooted in critical race theory to the design and use of algorithmic tools in the criminal legal system—tools that rely on historical data to produce a forecast or prediction about an event of interest. My argument there was that our use of predictive technologies—if they are going to be used at all—must be informed by knowledge that they, and the data they rely on, operate in a world steeped in racism, and that they produce forecasts that are used in ways that reflect

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[36] Paul Butler, *The System is Working the Way it is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1446, 1457 (2016).

[37] Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1368 (1988).

[38] McLeod, *Confronting, supra* note 33 at 120.

[39] *Id.*

[40] Vincent Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487 (2021).

as much.[41] Among the solutions to those problems, I suggested flipping the gaze of algorithmic tools on the criminal system itself, using the tools to hold the system to account for its harms.[42] A condition of that shift in gaze is that the tools themselves must be deployed by those who are most likely to bear the disproportionate share of the burdens imposed by harmful forecasts produced by algorithmic tools.[43]

I suggested flipping the gaze of technological tools as a step toward abolition.[44] Here I aim to take that notion—flipping the gaze with tools like law and policy—to do the same. I do so by examining one of the tools at play—laws imposing transparency, oversight, and community control—and imagining how they can be transformed so they can be deployed to meet abolitionist ends.

In doing so, the article makes several contributions to existing scholarship, while exploring avenues for change that have received less attention. It is among the first to undertake a comprehensive evaluation of the community control dynamic at play in existing legislation aimed at regulating law enforcement surveillance technologies.[45] In Part I, I examine the role that law enforcement technologies play in advancing the racial control ends of the criminal legal system. I identify the significant harms that such technologies can produce, speaking specifically to the racial justice, privacy, and secrecy concerns that have informed and justified much of the resistance to an ever-expanding suite of police surveillance technologies. Those harms are grounds for reigning in and ending the use of police surveillance tools.

In Part II, I describe the legislative campaign to impose community control over police surveillance tools. It is a well-intended legal reform effort aimed at striking a balance in the face of police surveillance technologies through levers of community control and democratic, bureaucratic decision-making. I detail the basic components of the model bill and the law as enacted in four jurisdictions that have created, or purport to create, some independent community comprised oversight body. In Part III, I evaluate the law in those four cities and its substantive impact. It is a descriptive and qualitative assessment, drawing from news reports, interviews, and a review of materials produced and public meetings held in accordance with the surveillance oversight laws of each jurisdiction. That exercise provides clarity and context: the law is not all good or all bad, but instead, it carries costs and benefits that are worth weighing and shape the way it may be leveraged.

Taking the law's benefits and shortcomings, in Part IV I posit solutions that may allow advocates to use the law as an abolitionist tool. This part applies an abolitionist lens to the law and its community control provision, leading to

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[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Others have examined the regulatory regime at issue, but they have focused on other aspects of the law, or given limited attention to the community control facet of these laws. *See, e.g.,* Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CAL. L. REV. 917, 974-78 (2021); ARI CHIVUKULA & TYLER TAKEMOTO, SURVEILLANCE OVERSIGHT ORDINANCES (Feb. 2021); Mailyn Fidler, *Local Police Surveillance and the Administrative Fourth Amendment*, 36 SANTA CLARA HIGH TECH L.J. 481 (2020).

recommendations to policymakers and advocates seeking to leverage the abolitionist potential of ordinances that foster community control. With the right tweaks, amendments, and changes, the law can serve as a site of resistance, a venue for public education, a catalyst for crisis, and a tool to build power. Indeed, every effort to tweak, change, amend, or deploy the law can serve as an opportunity to create crisis, foster resistance, and build power. That is among the law's most valuable uses. This part also involves examining the role that other institutions can and must play in fostering community control. I explore public defender offices as one such institution that can drive community control over police surveillance technologies. I conclude with suggestions for further exploration.

I. Policing and Surveillance Technologies

Conventional wisdom suggests that when government officials adopt technologies,[46] they do so to improve the functioning and operation of the

[46] This article focuses on those law enforcement surveillance technologies that guide decisions about who to police, where to police, how to police, and when to police. I am specifically speaking to technologies that surveil indiscriminately, and which are rarely governed by a warrant requirement or any of the traditional legal oversight mechanisms. That necessarily encompasses technologies that "use algorithmic tools to process large amounts of data in order to focus law enforcement activity, be it where they patrol, who they patrol or who they find suspect." NACDL TASK FORCE ON PREDICTIVE POLICING, GARBAGE IN, GOSPEL OUT 16 (2021). Surveillance can be understood as "oversight," with the use of data collection as a driver of surveillance as a means of "a way of managing or governing a certain population" through the aggregation of their data. SIMONE BROWNE, DARK MATTERS 18 (2015). "The combination of new data sources, better algorithms, expanding systems of shared networks, and the possibility of proactively finding hidden insights and clues about crime has led to a new age of potential surveillance." *See* ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT 1-19 (2017) [hereinafter "BIG DATA POLICING"]. The model legislation that is the focus of this article defines surveillance technologies as "electronic surveillance device, hardware, or software that is capable of collecting, capturing, recording, retaining, processing, intercepting, analyzing, monitoring, or sharing audio, visual, digital, location, thermal, biometric, behavioral, or similar information or communications specifically associated with, or capable of being associated with, any specific individual or group; or any system, device, or vehicle that is equipped with an electronic surveillance device, hardware, or software." *Community Control Over Police Surveillance (CCOPS) Model Bill*, ACLU, §12(F) (Apr. 2021), https://www.aclu.org/legal-document/community-control-over-police-surveillance-ccops-model-bill [hereinafter "Model CCOPS Bill"]. That definition includes surveillance and predictive technologies that are routinely deployed by law enforcement, such as face recognition, predictive policing tools, aerial drones, pole cameras, cellphone tracking devices, social media monitoring programs, gang databases, biometric scanners and databases, gunshot detection systems, automated license plate readers, and neighborhood surveillance applications. See Katelyn Ringrose and Divya Ramjee, *Watch Where You Walk: Law Enforcement Surveillance and Protestor Privacy*, 11 CAL. L. REV. ONLINE 349 (2020); Electronic Frontier Foundation, *Street-Level Surveillance,* https://www.eff.org/issues/street-level-surveillance (last visited Jan. 20, 2022). While I necessarily focus on a limited range of technological tools in this article, in a very real sense, all technologies are police technologies, given law enforcement's ability to access a range of data sources and municipal tools. Grappling with that concern, while important, is beyond the scope of this article.

government.[47] With criminal legal system tools, improvement is relative. The surveillance technologies that police adopt, access, and leverage expand their investigative reach and capacity. Police technologies allow them to keep more tabs on more people and more places with fewer human resources.[48] They can more efficiently allocate limited resources to address crime.[49] They can potentially solve more crimes, advancing public safety when that term is defined as more arrests, prosecutions, and convictions. Bennett Capers has argued, convincingly, that surveillance technology can address one of the critiques leveled at law enforcement by those communities "hardest hit by crime": that criminal law is underenforced within those communities, with too few crimes addressed and solved.[50] In that view, surveillance technologies can challenge the underenforcement critique head on.[51] That said, whether viewed as benign or malignant, technology in the hands of law enforcement is a force multiplier. It increases the power of the police exponentially.[52]

For many of those who are policed or who bear an unwarranted, disproportionate burden of law enforcement attention, more power is the last thing that police need. Indeed, the police already have "super powers" countenanced by

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[47] Sarah Valentine, *Impoverished Algorithms: Misguided Governments, Flawed Technologies, and Social Control*, 46 FORDHAM URB. L.J. 364, 370 (2019) ("Governments have always relied on the surveillance technology of the day."); Dru Stevenson, *Effect of the National Security Paradigm on Criminal Law*, 22 STAN. L. & POL'Y REV. 129, 165-66 (2011); Brayne, PREDICT AND SURVEIL (2021) 6 (describing big data as a purported panacea that is intended to make police practices more effective, fair, accountable, and objective).

[48] Ringrose and Ramjee, *supra* note 46 at 366; Ferguson, BIG DATA POLICING, *supra* note 46 at 35-40 (detailing the use and efficacy of data-driven focused deterrence in Kansas City, Missouri and heat listing or strategic suspects listing in Chicago).

[49] *See* Ferguson, BIG DATA POLICING, *supra* note 46 at 19-21 (describing how the need for cost-efficient means of policing was precipitated in part by cuts to local law enforcement budgets following the 2008 economic recession); *Id.* at 19 ("Law enforcement can identify drug dealers from patterns of supplies (purchasing tiny ziplock bags, rubber bands, digital scales), suspicious transactions (depositing cash, highend all- cash purchases), and travel patterns (to and from a source city for drugs)….[B]etter information allows police to prioritize and target the higher risks to a community."); *see also* Brayne, *supra* note 47 at 53 (noting that law enforcement follows "a mandate to collect as much data as possible, in part by securing routine access to a wide range of data on everyday activities from nonpolice databases.").

[50] I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959, 988-89 (2013); I Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1280 (2017).

[51] Capers, *Crime*, *supra* note 50 at 988-89; *see also* Brayne, *supra* note 47, at 6 (noting that in theory, big data could reduce persistent inequalities in policing by, among other things, "replacing unparticularized suspicion of racial minorities and human exaggerations of patterns with less biased predictions of risk"); *see also* Ferguson, BIG DATA POLICING, *supra* note 46, at 19 (suggesting that the tilt towards data-driven policing emerged partly in response to community demands to reform policing away from social control practices such as stop-and-frisk).

[52] Technology as a force multiplier not only expands the net of surveillance that law enforcement can cast, but also shifts discretionary decisions further into the unregulated shadows of the law. *See* Brayne, *supra* note 47, at 6 (noting that big data "displaces discretionary power to earlier, less visible (and less accountable) parts of the policing process," and that the surveillance tools themselves are "far outpacing the laws that regulate them.").

law.[53] Technology amplifies that power, deepening the problem. It is too easily transformed into a tool of racial and social control. It rightfully fosters resistance.[54] That resistance should not be confused for acquiescence to disorder driven by crime. As Lawrence Grandpre of Baltimore's Leaders of a Beautiful Struggle has explained, opposition to increased police surveillance "is not about being anti-police," nor "about ignoring the impact of violent crime."[55] Rather "[i]t is about challenging the racially imbued ideology of police-ism: the belief that all urban problems must be addressed primarily or exclusively through the lens of policing. . . . [We] believe that safety is not simply the absence of violence, but the creation of conditions for human flourishing. Thus, we refuse the false . . . choice between community instability created by violent crime, [and] the community instability caused by mass incarceration [and] unaccountable policing . . . ."[56] In other words, if policing is not the answer to complex social problems, enhancing police power with technology is certainly not.

Surveillance poses other problems. It can intrude on one's privacy and chill First Amendment activities. And it is often done in secret, lawlessly, and with cooperation of private actors and public institutions who work with police. In the next section, I discuss some of the most pressing concerns that flow from police use of surveillance technologies. I do so to provide some context for the efforts to impose community control over the tools through a surveillance bureaucracy.

A. Tools of Racial Control

To the communities who have been targeted and harmed by their interactions with police, technological innovations serve nefarious ends.[57] Those communities

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[53] Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016); see also Ekow Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1573-97 (2019).

[54] Ruha Benjamin, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 80-96 (2020) (detailing how algorithmic tools are designed to reproduce the biases that persist in the social world because they are tasked with learning and replicating human behavior); *see also* Brayne, *supra* note 47, at 5-6 (describing algorithmic tools as a Trojan Horse—as "a gift to society [that] actually smuggle[s] in all sorts of biases, assumptions, and drivers of inequality").

[55] Lawrence Grandpre, *Who Speaks for Community? Rejecting a False Choice Between Liberty and Security*, Leaders of a Beautiful Struggle Blog (June 5, 2020), https://www.lbsbaltimore.com/who-speaks-for-community-rejecting-a-false-choice-between-liberty-and-security.

[56] *Id.*

[57] *See* Jamelia Morgan, *Policing Under Disability Law*, 73 STANFORD L. R. 1401, 1401-02 (2021) (stating that disabled people are overrepresented in police killings and use-of-force incidents, and tend to experience ordinary forms of policing at disproportionate rates); Jamelia Morgan, *Policing Marginality in Public Spaces*, 81 OHIO ST. L. J. 1045, 1047-1055 (2021) (detailing the history of how quality-of-life offenses emerged to disproportionately target and exclude unsheltered communities and Black youth from public spaces); I. Bennett Capers, *Race, Policing, and Technology*, *supra* note 50 at 1255-57 (describing how racial minorities are disproportionately stopped by police across all major urban jurisdictions); Loic Wacquant, *'The Prison is an Outlaw Institution'*, 51 HOW. J. CRIM. J. 1, 3-6 (2012) (describing the various modalities by which the penal state expanded to serve as the "surrogate social policy towards the poor," including, but not limited to, the proliferation of criminal databases

experience police technologies as tools that extend one of the longstanding and principle functions of the criminal legal system: racial control.[58] One need look no further than the history of American policing to confirm as much.[59] Although the criminal law was not created to perpetuate enslavement, it evolved over time and served as a handmaiden to racial caste, preserving a social, political, and economic order informed by the ideology of white supremacy.[60] American policing was, at least in part, born to serve that purpose.[61] Police have repeatedly deployed surveillance technology in service of the same ends.

"Surveillance is nothing new to [B]lack folks"[62] precisely because the connection between "policing and racialized surveillance" stretches back to the "first

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and genetic fingerprinting and 'broken-windows' policing that resulted in "the constant harassment of poor young black and immigrant men on the street").

[58] *See* Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 156 (2001) ("The interactive relationship between race, space and policing has been of social and political significance since the earliest days of American history. Monitoring the movement of slaves was a central concern for plantation masters and slave patrollers.").

[59] Slave patrols represent the first form of modern American policing, created by enslavers to quell resistance and capture people escaping enslavement. *See* Brayne, *supra* note 47 at 28 (describing how "since its inception, local law enforcement has been called upon to enforce racial suppression," by operating slave patrols, enforcing color lines and racially discriminatory laws, while simultaneously failing to stop lynchings and other forms of racial violence); Eleanor Lumsden, *How Much is Police Brutality Costing America?* 40 U. HAW. L. REV. 141, 146 (2017) ("It can be argued that from the beginning, law enforcement existed to control, not protect, blacks. Further, as African-Americans were literal property, policing that returned runaway slaves to their masters directly served the purpose of maintaining white property interests."); *see also* W.E.B. DUBOIS BLACK RECONSTRUCTION 12 (1935) ("The system of slavery demanded a special police force and such a force was made possible and unusually effective by the presence of the poor whites."); Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, POLICING PERSPECTIVES, AN ANTHOLOGY (EDS. LARRY K. GAINES AND GARY W. CORDNER) 79 (1999) (citing Samuel Walker, "slave patrols were precursors to the police ... [and] . . . the slave patrols operated solely for the enforcement of colonial and state laws").

[60] *See* Lumsden, *supra* note 59 at 146 ("Official control over black bodies continued even after the end of slavery. Contained within the 13th Amendment was a[] [convict-labor] exception that allowed for the continued enslavement of those under government control"); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 5 (2019) (describing how institutions of criminal system have roots in the era of enslavement); Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 11 (2011) (asserting that given "how enormous and deeply entrenched" the penal state has become, "our criminal justice system functions more like a caste system than a system of crime control").

[61] *See* Brandon Hasbrouk, *Abolish Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1113-1119 (2020) (explaining that "[w]hite supremacy birthed and nurtured modern-day policing" and describing the racialized origins of modern policing); HUBERT WILLIAMS & PATRICK V. MURPHY, UNITED STATES DEP'T. OF JUSTICE, THE EVOLVING STRATEGY OF POLICE: A MINORITY VIEW 2 (1990) ("The fact that the legal order not only countenanced but sustained slavery, segregation, and discrimination for most of our Nation's history—and the fact that the police were bound to uphold that order—set a pattern for police behavior and attitudes toward minority communities that has persisted until the present day. That pattern includes the idea that minorities have fewer civil rights, that the task of the police is to keep them under control, and that the police have little responsibility for protecting them from crime within their communities.").

[62] Browne, *supra* note 46, at 10.

iterations of policing through slave patrols."[63] Black people, free and enslaved alike, lived under a constant state of police surveillance throughout the eras of enslavement, emancipation, and Reconstruction.[64] The surveillance of Blackness, whether through tools like lantern laws or other methods, has been etched into the American ethos.[65] Over time, despite attempts to reform and professionalize policing, the institution continued to serve the same racial control goals. Police updated their methods and technologies accordingly.[66] During the Civil Rights era, the FBI notoriously targeted Black communities and civil rights protestors as threats to social order, using novel tools of surveillance.[67] Notable civil rights leaders like Martin Luther King, Jr. and Cesar Chavez were watched and their phones bugged.[68]

Our sordid history of racial control informs law enforcement's use of surveillance technologies against Black people, and other communities of color today.[69] Police continue to weaponize surveillance against communities of color and their allies, producing racial harm.[70] Real, lived, experiences fill the gap between the potential of a future built on a data-driven, technology-enhanced surveillance state

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[63] Chaz Arnett, *Race, Surveillance, Resistance* 81 OHIO ST. L.J. 1103, 1111 (2020). Indeed, during the era of enslavement, those who were enslaved were outfitted with collars filled with bells to ensure that their enslavers would hear any attempts made to escape. Jenny Friedland, *How the Legacy of Slavery Informs Law Enforcement*, WBEZ CHICAGO (Aug. 7, 2019).

[64] Arnett, *supra* note 63, at 1111-1114.

[65] Lantern laws put in place in the early 1700s in New York, required that people of color—Black people in particular—carry a lantern with them after dark, so that they could be readily identified for purposes of enforcing racist curfews enacted for purposes of control. BROWNE, *supra* note 46 at 76-83; SEE DUBBER, THE POLICE POWER: PATRIARCH AND THE FOUNDATIONS OF AMERICAN GOVERNMENT (2005).

[66] *See* Southerland, *supra* note 40 at 498-504 (describing the development of predictive policing technologies).

[67] Alvaro M. Bedoya, *The Color of Surveillance*, SLATE (Jan. 18, 2016), https://slate.com/technology/2016/01/what-the-fbis-surveillance-of-martin-luther-king-says-about-modern-spying.html; News and Notes, *Cointelpro and the History of Domestic Spying*, NATIONAL PUBLIC RADIO (Jan. 18, 2006), https://www.npr.org/templates/story/story.php?storyId=5161811.

[68] Bedoya, *supra* note 67.

[69] Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 441-43 (2017) (describing the historical arc of the surveillance of Black people); Adrienne LaFrance, *Same Surveillance State, Different War*, THE ATLANTIC (Apr. 8 2015), https://www.theatlantic.com/technology/archive/2015/04/same-surveillance-state-different-war/389988/ (describing how government justification for mass surveillance during the war on drugs turned into rationalization for spying on citizens in the war on terror); see also *Surveillance in the Era of Pandemic and Protest*, THE INTERCEPT (Sept. 11, 2021), https://theintercept.com/2020/09/11/coronavirus-black-lives-matter-surveillance/.

[70] My focus here is on the ways police technologies exacerbate racial harms and inequity by "amplify[ying] the power of or harm perpetrated by police agencies that may wield it. When that tool is then adopted by agencies that themselves are biased, the tool exacerbates inequitable harms flowing from the underlying police bias." Laura Moy, *A Taxonomy of Police Technology's Racial Inequity Problems*, 2021 U. ILL. L. REV. 139, 166 (2021). Moy helpfully explains that "[p]olice technology aggravates racial inequity by (1) replicating existing inequity of a police system, (2) masking the inequity of a police system, (3) transferring inequity from elsewhere into a police system, (4) exacerbating inequitable harms flowing from the practices of a police system, and/or (5) compromising oversight of inequity in police systems." *Id.* at 154.

and reality.[71] Far too often, surveillance technologies have been used to monitor and control populations, led to unjustified law enforcement attention,[72] or produced a wrongful arrest or conviction. Examples abound.

For years following September 11, 2001, the NYPD monitored public places in Muslim neighborhoods and placed informants, known as "mosque crawlers," in places of worship, where they reported on sermons and recorded the license plates of innocent congregants.[73] Facial recognition technology, which is demonstrably corrupted by racial bias,[74] has in at least three known cases led to the wrongful arrest of Black men.[75] Autonomous drones were deployed by state and federal law enforcement authorities throughout the summer of 2020 to surveil Black Lives Matter protests in the wake of George Floyd's murder at the hands of police.[76] The city of Baltimore, nearly 60% Black, likewise deployed a drone surveillance program in 2016 and 2020.[77] The most recent version consisted of planes flying "at least 40 hours a week, obtaining an estimated twelve hours of coverage of around 90% of the city each day" outfitted with cameras that could "capture roughly 32 square miles per image per second."[78] In that same city, cell phone surveillance devices were used by law enforcement almost exclusively along racial lines.[79]

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[71] Indeed, police surveillance technologies work in service of an "expanded regime of control, containment, and policing of particular profiled beings (bodies, spaces, communities) . . . implemented through weaponized, high-efficiency state surveillance and the ramping up of ostensibly *extracarceral* state violence, resonating histories of border rangers, frontier war, slave patrols, and punitive industrial-and agricultural-labor dispute." Dylan Rodriguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1597 (2020).

[72] Consider the story of Chicago's Robert McDaniel, who was placed on a list of people likely to be a party to gun violence by an alogorithm produced by the Chicago Police Department. Matt Stroud, *Heat Listed*, THE VERGE (May 24, 2021), https://www.theverge.com/c/22444020/chicago-pd-predictive-policing-heat-list. Mr. McDaniel was told as much by Chicago police, though they could not say if he would be the victim or perpetrator of crime. *Id.* He soon became a target of extensive surveillance by police, who were a constant visible presence in his life. *Id.* That presence led him to become a shooting victim, stemming from the misimpression that he was cooperating with police. *Id.*

[73] Rodriguez, *supra* note 71, at 1597.

[74] *See* PERPETUAL LINEUP, https://www.perpetuallineup.org/ (last accessed Jan. 3, 2022); *see also* Inioluwa Deborah Raji, et. al., *Saving Face: Investigating the Ethical Concerns of Facial Recognition Auditing*, AIES '20: Proceedings of the AAAI/ACM Conference on AI, Ethics, and Society, February 2020 145-151, http://doi.org/10.1145/3375627.3375820.

[75] Kashmir Hill, *Another Arrest, and Jail Time, Due to Bad Facial Recognition Match*, N.Y. TIMES (Dec. 29, 2020), https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html.

[76] Zolan Kanno-Youngs, *U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance*, N.Y. TIMES (June 19, 2020), https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html.

[77] Leaders of Beautiful Struggle v. Baltimore Police Department, Docket No. 20-01495 (4th Cir. Apr 28, 2020), Court Docket.

[78] *Id.*

[79] *See* Arnett, *supra* note 63, at 1118 (noting that 90% of stingray incidents in Baltimore occurred in majority non-white Census block groups, where residents are overwhelmingly Black) (citing George Joseph, *Racial Disparities in Police 'Stingray' Surveillance, Mapped*, BLOOMBERG CITYLAB (Oct. 18, 2016)).

Immigration and Customs Enforcement is known to track and target immigrants through an automatic license plate reader database built on local law enforcement data.[80] That data is comprised of "hundreds of millions of license plate scans from across the country, including from law enforcement agencies, to help them investigate and track people wanted for deportation. . . ."[81] Audible gunshot detection systems, which have been plagued by inaccuracies in detecting the sound of gunfire, predominate Black neighborhoods.[82] In cities like Chicago, Kansas City, Cleveland, and Atlanta they are "placed almost exclusively in Black and brown neighborhoods."[83] They invite police interactions with the people who live in those communities, leading to harms that range from police violence[84] to wrongful incarceration.[85]

A 2021 effort by Amnesty International deploying over 6,000 volunteers to document surveillance cameras in New York City revealed that the New York Police

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[80]Zach Whittaker, *ICE has a huge license plate database targeting immigrants, documents reveal*, TECHCRUNCH (March 13, 2019), https://techcrunch.com/2019/03/13/ice-license-plates-immigrants/; *see also* JUST FUTURES LAW, STATE DRIVER'S LICENSE DATA: BREAKING DOWN DATA SHARING AND RECOMMENDATIONS FOR DATA PRIVACY (Apr. 2020), https://justfutureslaw.org/wp-content/uploads/2020/04/2020-3-5-State-DMV-Data-Sharing-Just-Futures-Law.pdf.

[81] Adolfo Flores & Hamed Aleaziz, *ICE Can Access Hundreds Of Millions of License Plate Scans To Follow Immigrants, These Documents Show*, BUZZFEED NEWS (March 13, 2019), https://www.buzzfeednews.com/article/adolfoflores/ice-access-license-plate-scans.

[82] Todd Feathers, *Gunshot-Detecting Tech is Summoning Armed Police to Black Neighborhoods*, VICE NEWS (July 19, 2021), https://www.vice.com/en/article/88nd3z/gunshot-detecting-tech-is-summoning-armed-police-to-black neighborhoods?fbclid=IwAR3W9CjNa1QVLHk8JrutFG85RKIwHYcBAfuqTRVv5iSziwkh-uyC4sa43qg.

[83] *Id.*

[84] Jamie Kalven, *Chicago Awaits Video of Police Killing of 13-Year-Old Boy*, THE INTERCEPT (April 13, 2021) (describing the death of 13-year-oldAdam Toledo resulting from Shotspotter-inducted police engagement and how ShotSpotter generally increases risk of producing "split-second" situations where police respond to perceived threats with deadly force); Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence,* 105 CALIF. L. REV. 125, 128 (2017) (highlighting the "circuits of violence" through which police surveillance and contact results in police violence).

[85]Prince Shakur, *Gunshot detection technology raises concerns of bias and inaccuracy*, CODA (March 3, 2020), https://www.codastory.com/authoritarian-tech/gun-violence-police-shotspotter/; Garance Burke et al., *How AI-powered tech landed man in jail with scant evidence*, (Aug. 19, 2021) https://apnews.com/article/artificial-intelligence-algorithm-technology-police-crime-7e3345485aa668c97606d4b54f9b6220; *see also* U.S. Dep't of Justice, Nat'l Institute of Justice, Using Gunshot Detection Technology in High-Crime Areas 2 (June 1998), https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/fs000201.pdf (summarizing a study of ShotSpotter that showed that ShotSpotter "did not change in any substantial way" the speed with which the police responded to reports of gunfire and in fact increased police workload by generating false alerts). City of Chicago, Office of Inspector General, The Chicago Police Departments Use of SpotSpotter Technology (Aug. 24, 2011) 3, https://igchicago.org/wp-content/uploads/2021/08/Chicago-Police-Departments-Use-of-ShotSpotter-Technology.pdf (concluding that CPD responses to Shotspotter alerts "rarely produce documented evidence of a gun-related crime, investigatory stop, or recover of a firearm" and identifying evidence that the introduction of Shotspotter technology in Chicago has changed the way some CPD members perceive and interact with individuals present in areas where Shotspotter alerts are frequent.").

Department's (NYPD) facial recognition system is comprised of more than 15,000 cameras, concentrated in Black and Latino neighborhoods.[86] Programs like those in Newark, New Jersey, which deputize the public to monitor a livestream feed produced by a network of government installed surveillance cameras, widen the net cast by law enforcement and invites suspicion tainted by biases.[87] Predictive policing tools are used to allocate police resources by analyzing historical data to forecast where crime might take place and who might be the victim or perpetrator of a crime. They have been infused with data tainted by racial inequality, resulting in racially biased policing.[88]

Digital surveillance technologies provide law enforcement with unprecedented access to social media activity, which can be weaponized against Black and brown communities to chill constitutionally protected activities and associations.[89] In 2015, the federal government collected and monitored data, including location data, from social media accounts to track Black Lives Matter and anti-police brutality activists.[90] Washington D.C.'s Metropolitan Police Department surveilled Black Lives Matter and other antiracist groups for the better part of the last decade.[91] The Los

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[86] Todd Feathers, *NYPD's Sprawling Facial Recognition System Now Has More Than 15,000 Cameras*, VICE NEWS (June 3, 2021), https://www.vice.com/en/article/epnv8z/nypds-sprawling-facial-recognition-system-now-has-more-than-15000-cameras.

[87] Rick Rojas, *In Newark, Police Cameras, and the Internet*, Watch You, N.Y. TIMES (June 9, 2018), https://www.nytimes.com/2018/06/09/nyregion/newark-surveillance-cameras-police.html. It is worth noting that some Newark residents have called for more cameras, based on the belief that they can be used to watch the police just as effectively as they can be used to watch for crime. *Id.* The concerns raised by Newark's program are akin to the problems that flow from the access that law enforcement has to private surveillance cameras. See David Priest, *Ring's police problem never went away. Here's what you still need to know,* CNET (Sept. 27, 2021), https://www.cnet.com/home/security/rings-police-problem-didnt-go-away-it-just-got-more-transparent/; see also Alfred Ng, *Ring's work with police lacks solid evidence of reducing crime*, CNET (March 19, 2020), https://www.cnet.com/features/rings-work-with-police-lacks-solid-evidence-of-reducing-crime/.

[88] *See* Rashida Richardson, Jason M. Schultz, and Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE 15, 18-20 (2019) (discussing how predictive policing tools that utilize "dirty data" derived from "corrupt, biased, or unlawful processes" are shaped by prior policing patterns and therefore reinforce ingrained biases); Lum & Isaac; https://stoplapdspying.org/wp-content/uploads/2018/05/Before-the-Bullet-Hits-the-Body-May-8-2018.pdf. This is part of what Andrew Guthrie Ferguson describes as the black data problem. Ferguson, BIG DATA POLICING, *supra* note 46 at 131-142 (describing the "black data" problem arising from big-data policing and modern surveillance tools). Black data denotes three overlapping concerns, involving race, transparency, and constitutional law. *Id.* One aspect of the black data problem, as he describes it, is that the data the tools rely on incorporate racial disparities and bias from a racialized society. *Id.*

[89] Michael Kwet, *Shadowdragon: Inside the social media surveillance software that can watch your every move*, THE INTERCEPT (Sept. 21, 2021) https://theintercept.com/2021/09/21/surveillance-social-media-police-microsoft-shadowdragon-kaseware/.

[90] George Joseph, *Exclusive: Feds regularly monitored Black Lives Matter Since Ferguson*, THE INTERCEPT (July 4, 2015), https://theintercept.com/2015/07/24/documents-show-department-homeland-security-monitoring-black-lives-matter-since-ferguson/.

[91] Creede Newton, *D.C. Police Closely Watched Anti-Racist Groups for Years*, Hatewactch (Dec. 23, 2021), https://www.splcenter.org/hatewatch/2021/12/23/dc-police-closely-watched-anti-racist-groups-years.

Angeles Police Department (LAPD) engaged in similar behavior in 2016.[92] Officers were encouraged to collect social media information from those they encountered while on patrol. That information was then "fed into Palantir, a system through which the LAPD aggregates data from a wide array of sources to increase its surveillance and analytical capabilities."[93] Officers could use that technology to target and individual and "obtain a map of their movements and personal relationships, checking DMV records, license plate reader data, employment data, arrest records, field interview card data, and other sources. When an officer seeks information about a particular location, the system can use a similar process to identify those who are routinely in the area by virtue of their work, residence, or documented encounters with police."[94] That type of power in the hands of a police department with a history of racist policing and technology enhanced surveillance of Black and brown communities[95] is nothing short of frightening.

In each of these instances, police surveillance technology has deepened the trough of racial injustice, because Black people and other people of color were unfairly subjected to harm. We also have ready examples of how police and government surveillance technologies can be used to control populations. That is the case with surveillance technologies like facial recognition, cell phone spyware, drones and other tools used by the Chinese government against Uyghurs and Turkic Muslims, or by the Israeli military against Palestinians in the West Bank.[96] At best, "[p]olice technology aggravates racial inequity. . . ."[97] Historically, technology "expanded rather than contracted, police power—and reproduced, rather than eliminated, racism and bias."[98]

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[92] Mary Pat Dwyer, *LAPD Documents Reveal Use of Social Media Monitoring Tools*, BRENNAN CENTER (Sept. 8, 2021), https://www.brennancenter.org/our-work/analysis-opinion/lapd-documents-reveal-use-social-media-monitoring-tools.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Omar Shakir & Maya Wang, *Mass Surveillance Fuels Oppression of Uyghurs and Palestinians*, HUMAN RIGHTS WATCH (Nov. 24 2021), https://www.hrw.org/news/2021/11/24/mass-surveillance-fuels-oppression-uyghurs-and-palestinians#; Sigal Samuel, *China Is Going To Outrageous Lengths to Surveil Its Own Citizens*, THE ATLANTIC, https://www.theatlantic.com/international/archive/2018/08/china-surveillance-technology-muslims/567443/; Nadim Nashif, *How Israel turned Palestine into a surveillance tech dystopia*, MIDDLE EASTE EYE (Dec. 10, 2021), https://www.middleeasteye.net/opinion/israel-palestine-surveillance-tech-dystopia. As scholar Khaled Beydoun has pointed out, we are not all that far from either of these scenarios in the United States. Khaled Beydoun, *The Islamophobia nobody talks or knows about*, TRT WORLD (Oct. 12, 2018), https://www.trtworld.com/opinion/the-islamophobia-nobody-talks-or-knows-about-20840.

[97] Moy, *supra* note 70, at 154.

[98] Akbar, *supra* note 16, at 1812. Akbar details the efforts to reform policing by turning to technology, highlighting how the drive to equip police with more technology "reflect the belief that police would do the job right or better with more gadgets or information." *Id.* at 1809. That belief ignores the immense technological arsenal already in the hands of police and the ways that data and technology replicate racial bias and inequality. *Id.* at 1810.

A cursory examination of one of the racialized harms that stretch beyond the direct racial control function of technology-driven police surveillance helps to highlight the lurking danger. Living under a constant state of undue and unwarranted police surveillance contributes to a collective sense of procedural injustice, the feeling that one is being treated unfairly by the police, without dignity, respect, an awareness of one's rights, or recognition of one's personal status or identity.[99] Knowledge of the reach, breadth, and depth of police surveillance technologies exemplifies the ways in which the police can and do target entire communities, contributing to a sense of "vicarious marginalization" rooted in "shared narratives about how the police treat African Americans and people who live in poor communities. . . ."[100] And the advent of police technology, insofar as it replaces officers walking a beat with technological responses to service calls, is in keeping with the type of structural exclusion that leaves Black and brown communities to experience isolation and abandonment vis-à-vis policing.[101] The technologies erect digital borders around communities of color, fortifying the colony-in-a-nation status that defines those communities.[102] At bottom, police surveillance technologies visit deep and abiding harms on Black communities and other communities of color. That is what makes technological tools, when used by the police against the traditional targets of undue law enforcement attention, objects to be resisted and abolished, rather than embraced.[103]

B. Privacy and Other Concerns

Policing enhanced by surveillance technologies also poses a "stark privacy problem."[104] Surveillance technologies are far reaching, able to explore the corners and crevices of one's life that are hiding in plain sight or shielded from public view. They can track a person's movements, locations, associations, and activities, providing law enforcement with unfettered access to a wealth of information about

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[99] This amounts to what Monica Bell has described as legal estrangement, which is "a theory of detachment and eventual alienation from the law's enforcers, [that] reflects the intuition among many people in poor communities of color that the law operates to exclude them from society." Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L. J. 2054, 2056, 2100 (2017).

[100] *Id.* at 2114.

[101] *Id.* at 2117-18.

[102] CHRISTOPHER HAYES, A COLONY IN A NATION 32-35 (2017).

[103] There is a material difference in the desirability of surveillance technologies that turns on who is holding the tools and where those tools are aimed. In the hands of the public, surveillance technologies have been lauded as tools that can be harnessed to "deracialize policing" and, in turn, address the harms that flow from "police violence, underenforcement, and racial profiling" I. Bennett Capers, *Race, Policing, and Technology supra* note 50, at 1268; I. Bennett Capers, *Crime, Surveillance, and Communities supra* note 50 at 988-89. I contend that while the harms of surveillance technologies are not inevitable, the criticism leveled at the tools, along with the regular function of the criminal system, makes harm the most likely outcome. *See* Arnett, *supra* note 63 at 1116-1119.

[104] Ferguson, BIG DATA POLICING, *supra* note 46, at 98 ("The digitization and ability to search and recall particular data points changes the traditional physical limitations of policing. In doing so, it also distorts the constitutional protections of citizens.").

individuals and groups.[105] Although privacy is a core value central to American democracy, protected by the Constitution, those protections have limits.[106] The Fourth Amendment "regulates government surveillance and prevents arbitrary privacy intrusions."[107] It guards against unreasonable searches, seizures, and other forms of government overreach that surveillance technologies can allow. Scholars have explained that those safeguards are largely inapplicable in the context of mass surveillance techniques that have been identified as "panvasive"—both invasive and pervasive efforts by government to "keep[] tabs on the citizenry routinely and randomly reach across huge numbers of people, most of whom are innocent of any wrongdoing."[108]

New surveillance technologies have also fundamentally altered our conception of what we can expect to remain private. Although the Supreme Court has been reluctant to find a privacy interest in activities that occur in public,[109] the Court in recent years has been asked to consider how modern surveillance technology might alter that bedrock understanding.[110] In response, the Court has focused on the dramatically expansive information gathering[111] power of surveillance technologies,[112] with an eye toward the Fourth Amendment's animating principles

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[105] *Id.* at 140 ("With a Domain Awareness System recording your movements 24/7 or [automatic license plate readers] tagging your car everywhere you drive or facial-recognition technologies marking your location, how can one claim any expectation of privacy in public?"); Ira Rubenstein, *Privacy Localism*, 93 WASH. L. REV. 1961, 1964-66; 1968-70 (2018) (detailing the privacy concerns raised by data collection and surveillance activities); Anita L. Allen, *Protecting One's Own Privacy in a Big Data Economy*, 130 Harv. L. Rev. F. 71 (2016)(describing privacy concerns that flow from big data).

[106] Karl Manheim and Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J. L. & TECH. 106, 108, 117-19 (describing the dimensions of privacy) (2021); Anita L. Allen, *What is Privacy?* 37 GPSOLO 9, 10 (2020) ("Deeply rooted in American life, the expectation of privacy anticipates that homes, conversations, social groups, political affiliations, medical care, sexuality, marriages, and families will go largely unmonitored and uncontrolled."); Olmstead v. U.S., 48 S.Ct. 564, 572, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting) (describing application of the Fourth and Fifth amendments to preserve a "right to be let alone").

[107] Matthew Tokson, *The Emerging Principles of Fourth Amendment Privacy*, 88 GEO. WASH. L. REV. 1, 2 (2020).

[108]Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1723 (2014); Rubenstein *supra* note 105, at 1975.

[109] Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1287 (2014).

[110] *See Carpenter v. United States*, 138 S.Ct. 2206 (2018)(considering privacy concerns of historical cell site data); *Riley v. California*, 573 U.S. 373 (2014) (search of cellphone incident to arrest); *United States v. Jones*, 565 U.S. 400 (U.S. 2012) (GPS tracking attached to car for 28 days).

[111] *Carpenter*, 138 S.Ct. at 2217 ("Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts."); *Riley*, 573 U.S. at 375 (recognizing the "immense storage capacity" of modern cell phones that "collects in one place many distinct types of information that reveal more in combination than any isolated record"); *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring in judgment) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

[112] Paul Ohm, *The Many Revolutions of Carpenter*, 32 Harv. J.L. & Tech. 357, 399 (2019) ("The beating heart of the *Carpenter* majority opinion is its deep and abiding belief in the exceptional nature of the modern technological era.").

and privacy harms.[113] Among those harms are the potential for law enforcement abuse and the limitations on the freedom of association and expression that government surveillance imposes.[114] Recent precedent suggests that "when surveillance is all-encompassing, it may violate society's reasonable expectations of privacy, even in cases where the surveillance occurs in public places."[115]

Despite the Court's acknowledgment that pervasive surveillance of public activities implicates Fourth Amendment values, the piecemeal application of the Constitution to evolving surveillance technologies has undermined the force of the Court's recent jurisprudence aimed at safeguarding privacy.[116] Instead, government deployed technologies continue apace to upend privacy.

These harms are compounded by the ways the technology operates: in secret[117] and largely without regulation.[118] Surveillance technologies are often acquired by

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[113] *Carpenter*, 138 S.Ct. at 2214 ("We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools."); *Riley*, 573 U.S. at 403 ("The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."); *Jones*, 565 U.S. at 400-01 ("At bottom, the Court must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.") (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)); Andrew Ferguson, *Facial Recognition and the Fourth Amendment*, 105 Minn. L. Rev. 1105, 1129 (2021) ("These privacy-protective cases help frame the analysis because they recognize the privacy and liberty threat from technology enhanced police surveillance as distinct from traditional police surveillance. Importantly, these cases also appear to be addressing more than just the particular defendant's case at issue, raising concerns with how new technologies impact everyone's privacy interests.").

[114] *Carpenter v. U.S.*, 138 S.Ct. 2206, 2214-19, 2218 (2018) ("Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance."); *U.S. v. Jones*, 132 S.Ct. 945, 956, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) ("Awareness that the government may be watching chills associational and expressive freedoms. And the government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse.").

[115] Rubenstein, *supra* note 105, at 1975-78 (reviewing the line of precedents in *Katz, Riley, Jones,* and *Carpenter*). *United States v. Jones* began a line of precedent that continued under *California v. Riley* and *Carpenter v. United States*, that granted more protection against public surveillance than traditionally recognized. *Id.* at 1977. While promising, it is not clear how this line of precedent will influence the Court's jurisprudence on existing or emergent surveillance technologies. *Id.* at 1978.

[116] Indeed, some courts have abdicated their protective role entirely. *See* David Sklansky, *Two More Ways Not to Think About Privacy and the Fourth Amendment*, 82 U. CHI. L. REV. 223, 227-33 (2015). Alan Z. Rozenshtein, 128 YALE L. J. F. 943, 950 (2018-2019) ("[C]ourts are selective in where they apply the Fourth Amendment because they perceive any broad-scope position as incompatible with the realities of modern policing"). Other courts have read *Carpenter* so narrowly as to undermine its force. *Id.* at 951 (citing cases).

[117] *Id.*

[118]Rubenstein, supra note 105, at 1974-1982 (addressing the judicial and regulatory gaps in surveillance privacy regulation); BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION (2017); Barry Friedman, *Lawless Surveillance* (forthcoming); Brayne *supra*, note 47 at 6.

local police departments through the federal government and private vendors,[119] both of whom have intervened to keep their acquisition and use shielded from the public.[120] Police are loathe to reveal the tools they use to do their work. That culture of secrecy permeates the acquisition and deployment of surveillance technologies.

Ending each of these harms requires dismantling the technologically-enhanced surveillance capability of the police. Laws imposing oversight have been crafted as an avenue for doing so. What follows is an examination of those laws.

II. Efforts to Impose Democratic Guardrails on Police Surveillance Technologies

The concerns that flow from the pervasive and harmful use of law enforcement surveillance technologies have driven interventions that range from outright resistance to the regulation and management of police tools.[121] One such effort began in late 2016.[122] That year, the American Civil Liberties Union (ACLU) launched its Community Control Over Police Surveillance ("CCOPS") campaign to address the prevalence of police technologies being deployed in departments nationwide.[123]

Motivated by an understanding that police surveillance technologies have been disproportionately—and often secretly—deployed against low-income Black and brown communities, the ACLU, along with a diverse coalition of civil society organizations, began legislative advocacy in eleven cities focused on "increasing transparency, ensuring communities have significant influence over the decision-making process, and empowering the public by providing them with full and accurate information about [surveillance technologies.]"[124] Those efforts rested on the premise

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[119] Catherine Crump, *Surveillance Policy Making By Procurement*, 91 WASH. L. REV. 1595, 1601-04 (detailing how federal funding has facilitated the widespread procurement of surveillance technology by local police departments).

[120] See, e.g., Justin Fenton, *Baltimore Police used secret technology to track cellphones in thousands of cases*, THE BALTIMORE SUN (Apr. 9, 2015), https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-stingray-case-20150408-story.html (noting that nondisclosure agreements between the federal government and the Baltimore Police Department prevented police officers from disclosing details about the department's use of Stingray, even in court); Joel Kruth, *Michigan State Police using cell snooping devices*, THE DETROIT NEWS (Oct. 22, 2015) (alarmingly reporting that Michigan State Police had been using Stingray and Hailstorm-type tools initially designed and acquired for counter-terrorism for over a decade without any public disclosure).

[121] These efforts are akin to what Barry Friedman and Maria Ponomarenko termed democratic policing, governing "policing policies and practices . . . through transparent democratic processes such as legislative authorization and public rulemaking" to ensure accountability and support oversight. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1832 (2015). Democratic policing overlaps with another sphere of criminal law that advances local control of police administration, called democratic localism. Trevor Gardner, YALE L. J. FORUM 798, 804 (2021).

[122] Chivukula, *supra* note 45, at 3.

[123] Chad Marlow, *Let There Be Light: Cities Across America Are Pushing Back Against Secret Surveillance by Police,* ACLU (Sept. 21, 2016 1:00PM), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/let-there-be-light-cities-across-america-are?redirect=blog/speak-freely/let-there-be-light-cities-across-america-are-pushing-back-against-secret.

[123] *Id.*

[124] *Id.*

that greater accountability and transparency would best safeguard the rights of communities facing law enforcement technologies. One of the principal architects of the campaign asserted that law enforcement use of surveillance technologies will be "far more protective of [democracy, freedom, privacy, and equality] when decisions regarding their use are made 'transparently by the public and their democratically elected representatives.'"[125] At a basic level, CCOPS ordinances "tell local government departments what they need to do before acquiring surveillance technology."[126]

For some, that basic description of CCOPS captures the problem. One of the most significant critiques leveled at the law is that rather than serving as a disruptive force to the proliferation of police surveillance technologies, the law creates a bureaucratic checklist that, once cleared by a police department, allows the police to acquire whatever technology they want to use it however they want.[127] It is a procedural rubber stamp for "current and new surveillance technologies."[128] The law thus treats police surveillance as "an acceptable project that sometimes tips into excess."[129]

I take as a given that those who crafted and adopted CCOPS legislation in its various iterations seek to curtail and limit the harmful use of police surveillance technologies. My conversations with those at the forefront of the CCOPS campaign, as well as advocates engaged in efforts to implement local versions of CCOPS laws confirm as much.[130] I also view the effort to embed community control through law as laudable. The framework presumes that communities can be empowered by transparency to check the proliferation of harmful police technologies.

Despite seeing the best of intentions in those who support the CCOPS model, I am under no illusions about the efficacy of efforts like these to institute substantive checks on the excesses of the criminal legal system and police. Law tends to operate in service of the status quo, maintaining an imbalance of power that keeps those on the bottom at the bottom and those at the top on the top. Beyond that, police seem impervious to control mechanisms. Three examples make the point.

The Foreign Intelligence Surveillance Act (FISA) was passed by Congress in 1978 and established a court ("FISA Court") to evaluate government applications to obtain foreign intelligence surveillance.[131] While the FISA Court was created to safeguard the American public against illegal government surveillance, the FISA

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[125] *Id.*

[126] Chivikula, *supra* note 45, at 4.

[127] STOP LAPD SPYING COALITION, F__ THE POLICE, TRUST THE PEOPLE: SURVEILLANCE BUREAUCRACY EXPANDS THE STALKER STATE (2020).

[128] Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 682 (2019).

[129] Hamid Khan & Pete White, *Police Surveillance Can't Be Reformed. It Must Be Abolished*, VICE NEWS (Mar. 10, 2021 10:36AM), https://www.vice.com/en/article/xgzj7n/police-surveillance-cant-be-reformed-it-must-be-abolished.

[130] Interview with Chad Marlow (Apr. 28, 2021) on file with author.

[131] ELIZABETH GOITEIN & FAIZA PATEL, BRENNAN CENTER FOR JUSTICE, WHAT WENT WRONG WITH THE FISA COURT 3 (2015).

Court is widely viewed as a rubber stamp for government surveillance applications.[132] The Court conducts hearings in secret; only hears arguments from government representatives; shields records of the government's application and the Court's decision from public scrutiny by sealing them; and does not review executed warrants to ensure they were conducted per the warrant terms.[133] From 1979 to 2012, 99.97% of FISA applications were approved by the FISA Court.[134]

The Supreme Court has narrowed the protections envisaged by the Fourth Amendment's warrant requirement dramatically.[135] Most "governmental intrusions" are made without warrants."[136] To the extent there are exceptions, they have taken most searches outside of homes and offices outside the protective cover of the warrant requirement.[137] In those instances when the warrant requirement does apply, especially in searches using surveillance technology, it has not been a bulwark against potential intrusions on privacy. The experience of the 1968 Wiretap Act (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, known as "Title III") is instructive. The law was enacted after a public, political, and legal backlash against wiretapping that nearly saw the practice outlawed altogether.[138] The law imposed narrow limits on the use of wiretapping.[139] Among those limits were: a warrant requirement; a showing that all other investigative methods were unsuccessful or too dangerous; efforts taken to avoid recording or retaining the conversations of the innocent; authorization for wiretaps in investigations regarding an enumerated list of offenses; notice to the subject of the wiretap; and remedies for violation of the law including suppression and civil damages.[140]

The limits have not narrowed the use of wiretaps. In fact, in the decades since the enactment of Title III the opposite has happened, as wiretapping has increased significantly, Congress has expanded the list of predicate offenses eligible for wiretaps expanded, and the privacy protections put in place have steadily eroded.[141] Rather than narrowing the use of law enforcement surveillance, the law laid the

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[132] *Id.*

[133] Electronic Privacy Information Center, *Foreign Intelligence Surveillance Act* (last visited Dec. 5, 2021), https://archive.epic.org/privacy/surveillance/fisa/#Overview.

[134] Conor Clarke, *Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp?*, 66 STAN. L. REV. ONLINE 125 (2014).

[135] William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 882 (1991); s*ee also, e.g.*, Lewis R. Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557, 560 (1982) ("Too frequently the exceptions are permitted to outrun the exigent circumstances which gave rise to their status, extending them far beyond the limits required to accommodate the legitimate needs which they originally served.").

[136] Katz, *supra* note 135, at 560.

[137] Stuntz, *supra* note 135, at 882 n2.

[138] Jennifer Granick, *Mission Creep and Wiretap Act 'Super Warrants': A Cautionary Tale*, 52 LOY. L.A. L. REV. 431, 437-39 (2019).

[139] *Id.* at 440.

[140] *Id.*

[141] *Id.* at 444-59.

groundwork for "expand[ing] the use of an invasive investigative technique by legitimizing it."[142]

Other mechanisms to control law enforcement conduct have likewise fallen short. Efforts to foster community oversight of police and accountability for their misconduct have produced little in the way of either. The principle example are Civilian Complaint Review Board (CCRBs), which consist of "an agency or procedure that involves participation by persons who are not sworn officers (citizens) in the review of citizen complaints against police and/or other allegations of misconduct by police officers."[143] Widespread use of CCRBs grew out of the Civil Rights Movement's call to end police violence and empower civilians to hold police accountable.[144] Many believed, rightfully, that police do not effectively or fairly discipline their own officers when they violate department policy or the law.[145] CCRBs are meant to give civilians power to investigate police behavior and discipline police officers.[146] Proponents claim that "oversight ensures more thorough and fair investigations, that more complaints are sustained, or that they result in more disciplinary actions, and as a result, more police misconduct is deterred."[147]

The lack of power and independence of CCRBs has undermined their effectiveness. Some have been coopted by law enforcement, or are too tepid in their approach.[148] A 2014 study of the fifty largest police departments revealed that the majority of those with CCRBs had a "review board that [was] majority nominated and majority appointed by the mayor (or in some combination with the head of the police), thus minimizing the independence of such boards."[149] Only six CCRBs had "disciplinary authority;" all others lacked "final decision-making on discipline" and were thus limited to providing advice and recommendations.[150] Ultimately, a chief law enforcement officer or city official determined whether discipline would follow a CCRB recommendation. Further undermining their power, the "vast majority" of

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[142] *Id.* at 459.
[143] Samuel Walker, *The History of the Citizen Oversight*, *in* CITIZEN OVERSIGHT OF LAW ENFORCEMENT AGENCIES 1, 2 (Justina Cintron Perino ed., 2006).
[144] Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1040-41 (2016).
[145] *Id.* at 1034 (A 2014 poll found that 65% of Americans believed that "police departments nationwide do a poor or fair job of holding police officers accountable when misconduct occurs.").
[146] *Id.* at 1039.
[147] Joel Miller, *Civilian Oversight of Policing: Lessons Learned from Literature*, VERA INSTITUTE OF JUSTICE 2 (May 2002).
[148] Joanna Schwartz, *Who Can Police the Police*, 2016 U. CHI. LEGAL F. 437, 466 (2016).
[149] Ofer, *supra* note 144, at 1042.
[150] *Id.* at 1043.

review boards "are not even equipped to independently investigate complaints."[151] The resources available to them—money and staff—also vary by virtue of what the government officials who created them decide is necessary and appropriate.[152] These significant constraints on power and independence has rendered CCRBs largely ineffective.

These examples serve as a ready reminder of the challenges that such entities face, including the institutional, political, and practical counters that work to undermine their effectiveness. With that context, an appropriate evaluation of CCOPS, and the extent to which the law can be used to curtail and upend the use of police surveillance technologies, requires considering how the law's community control means can satisfy a set of abolitionist ends. In the following section I begin that work by detailing the model CCOPS law upon which jurisdictional variations are based. I go on to describe the implementation of the law in four jurisdictions that have created independent community bodies as part of their version of the law. I then assess the law's success by cataloguing its ability to leverage community control to curb the adoption of new police surveillance technologies and to limit the scope and deployment of police surveillance technologies that are already in use.

A. Basic Components of CCOPS Ordinances

At its core, CCOPS seeks to foster transparency, public deliberation, and local democratic oversight over police surveillance technologies. Communities are afforded an advisory seat at the table to inform city council's (or their equivalent's) decisions about police acquisition and deployment of surveillance technology. These core provisions are set forth in a model bill that can be tailored to the needs and circumstances of a locality.[153] An exploration of the model legislation grounds the discussion.[154]

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[151] *Id.* at 1037. *See also* Ross Jones, *Many Civilian Review Groups Have Limited Power to Resolve Allegations of Police Misconduct*, SCRIPPS NEWS (Nov. 16, 2015), https://www.wptv.com/news/national/many-civilian-review-groups-lack-the-power-to-resolve-allegations-of-police-misconduct ("[O]versight groups that work with an independent investigator and have more than advisory power are hard to find. Scripps News reached out to the more than 200 civilian oversight organizations across the nation, and found that nearly two-thirds of those that responded don't have their own investigators. They rely on police department internal affairs officers to determine if a fellow officer went too far."); *see, e.g.*, New York, N.Y. Title 38-A, §1-45(a) (The Civilian Complaint Review Board provides findings and recommendations to the Police Commissioner who "retain[s] in all respects the authority and discretion to make final disciplinary determinations.").

[152] Schwartz, *supra* note 148, at 467.

[153] Model CCOPS Bill, *supra* note 46.

[154] In some ways, the CCOPS model applies administrative law principles to police. Slobogin, *supra* note 108, at 1725 (explaining that under such a regime, "Legislatures should have to specify the principles governing law enforcement decision making and ensure sufficient oversight of those decisions, and law enforcement entities should have to provide reasonable explanations of why they have adopted the rules and practices they have through a transparent procedure that ensures input from the public or surrogates for the public.").

Several key principles undergird the model law.[155] Chief among them is the notion that surveillance technologies should not be approved without "knowledge of the public and the approval of their elected representatives on the city council."[156] "Local communities should play a significant and meaningful role in determining if and whether surveillance technologies should be funded, acquired, or used."[157] Thus, instead of "allowing the police to unilaterally decide if and how surveillance technologies may be acquired and used . . . local communities and their elected officials should be empowered to make those determinations."[158] The process for doing so must be transparent, shaped by public debate that is informed by law enforcement's public disclosure of "the technology to be acquired, its capabilities, how precisely it would be used, how its data would be preserved and protected, its acquisition and operational costs, and how potential adverse impacts on civil rights and civil liberties will be prevented."[159]

Law enforcement seeking to acquire or use a surveillance technology "must identify the technology and its proposed uses with specificity, so they can be debated with specificity."[160] CCOPS provides for ongoing annual public reporting by law enforcement to monitor compliance with any legal or institutional restrictions imposed on the deployment of approved technologies.[161]

The model bill contemplates City Council employing a cost-benefit analysis to its decision about the funding, acquisition, or use of surveillance technology. Accordingly,

> [t]he City Council shall only approve a request to fund, acquire, or use a surveillance technology if it determines the benefits of the surveillance technology outweigh its costs, that the proposal will safeguard civil liberties and civil rights, and that the uses and deployments of the surveillance technology will not be based upon discriminatory or viewpoint-based factors or have a disparate impact on any community or group.[162]

The approval process requires a municipal entity—as relevant here, a law enforcement agency—to submit and make publicly available a "Surveillance Impact Report" and "Surveillance Use Policy."[163] The Impact Report is supposed to describe how the technology works, how it will be used, what impact it will have on the populations it is deployed against from a civil rights and civil liberties perspective,

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[155] Community Control Over Police Surveillance -- Guiding Principles, ACLU, https://drive.google.com/file/d/16g0CEAAjagikGDoaZvRdQdj5H-Pdjbjh/view?usp=sharing (hereinafter "Guiding Principles").
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* § 5.
[163] *Id.* § 2.

and how the law enforcement agency intends to mitigate those impacts.[164] The Use Policy creates a public, binding set of guidelines regarding the approved and proper uses of the technology.[165] That policy details the purpose of the technology, its potential uses, "the legal and procedural rules that will govern" its use, the circumstances under which surveillance data is collected, analyzed, and used, and policies that circumscribe the protection, retention, sharing, and access to surveillance data.[166] The Use Policy's focus is on data collection, data protection, data retention, data sharing, and data access by government entities and third parties. Law enforcement must also explain how it will ensure that the Use Policy will be followed, and how members of the public can voice complaints, raise concerns, or simply inquire about the use of surveillance technologies.[167]

The model CCOPS bill subjects technologies already in use upon the effective date of the legislation to the same approval process as new technologies.[168] If City Council has not approved the continuing use of those technologies within 180 days of submitting an Impact Report and Use Policy, the use of those technologies, and any data obtained from them, must stop until the city council acts.[169] It also requires law enforcement agencies to provide an Annual Surveillance Report for each technology approved by city council and used by law enforcement.[170] That report includes "a summary of how the technology was used," how the data generated by the technology was shared, the location(s) where the technology was deployed, how many people were affected by the surveillance, a summary of the complaints that arose from its use, the results of any audits of the technology, an analysis of the total costs of the technology, and an analysis of any discriminatory or adverse civil rights or civil liberties impacts.[171]

The model bill requires a public hearing following the release of the Annual Report to afford the public an opportunity to discuss and inquire about the report and the agency's use of surveillance technologies.[172] If the information in the Annual Surveillance Report does not meet the standard for city council approval, the council can end use of the technology or require modification of the Surveillance Use Policy to address the shortcomings.[173] The law further imposes an annual reporting requirement on City Council regarding the number of requests submitted, approved, rejected, and modified, along with all Annual Surveillance Reports.[174]

The model legislation provides for a "Community Advisory Committee on Surveillance" to "provide the City Council with broad principles to help guide

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[164] *Id.* §2(B).
[165] *Id.* § 2(C).
[166] *Id.*
[167] *Id.*
[168] *Id.* § 3.
[169] *Id.*
[170] *Id.* § 6.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.* § 7.

decisions about if and how surveillance technologies should be used by the City and its municipal agencies."[175] The membership of the committee is supposed to reflect the diversity of the locality, with a particular emphasis on including those who "have historically been disproportionately subjected to government surveillance."[176] The Community Advisory Committee is tasked with providing an annual "Surveillance Technology Community Equity Impact Assessment and Policy Guidance," which details the disproportionate impact, disparities, and adverse civil rights and civil liberties impacts of surveillance technologies on communities and groups in the city; the remedial efforts needed to address and correct for those impacts; the resources necessary for implementation of those remedial efforts; and a description of new approaches to be taken in the approval process in light of those concerns. [177]

The model law creates a private right of action that can lead to injunctive relief, declaratory relief, evidence suppression, and mandamus relief for violations, along with making violations a crime.[178] It bars the use of any data or information collected or created in violation of the law, requiring such data be deleted and destroyed, except in instances where it can be used in defense against a criminal prosecution, in which case it is provided to the defense before being destroyed.[179]

Additional provisions bar localities and municipal entities from entering into contracts that contravene the law, and prevents the receipt of privately created and owned surveillance data or provision of government generated and owned surveillance data to any non-governmental agency in exchange for payment.[180] These provisions address the host of concerns that flow from private-public partnerships that can be used to evade oversight.

The model CCOPS law closes by defining its most significant terms: "[d]iscriminatory",[181] "[d]isparate impact",[182] "[m]unicipal entity",[183] "[n]ew

[175] *Id.* § 8.
[176] *Id.*
[177] *Id.*
[178] *Id.* § 9.
[179] *Id.*
[180] *Id.* §§ 10 and 11.
[181] Defined as "disparate treatment of any individual(s) because of any real or perceived traits, characteristics, or status as to which discrimination is prohibited under the Constitution or any law of the United States, the constitution or any law" of the state or municipality. *Id.* §12(A).
[182] Defined as "an adverse effect that is disproportionately experienced by individual(s) having any traits, characteristics, or status as to which discrimination is prohibited . . ." *Id.* §12(B).
[183] "any municipal government, agency, department, bureau, division, or unit of this City." *Id.* §12(C).

surveillance technology",[184] "[s]urveillance data",[185] "[s]urveillance technology",[186] and "[v]iewpoint-based."[187] It leaves the terms "community" and "control" undefined.

The CCOPS framework originated as an effort to impose transparency, accountability, and oversight of law enforcement surveillance technologies through a democratic process that fosters community engagement, input, and control. The framework presumes that communities can be empowered to check the proliferation of harmful police technologies, and places a number of requirements on law enforcement, city government, and the public to do so.

B. The Story of CCOPS in Four Cities

In the following section, I review CCOPS laws in four jurisdictions to examine their effect on the acquisition and proliferation of law enforcement surveillance technologies. In the absence of pointed data, I look for answers by focusing on the enactment and implementation of the law in four jurisdictions: Seattle, Washington; Berkeley, Oakland, and San Francisco, California. I focus on those four jurisdictions because they enacted a law that is most closely aligned with the model CCOPS legislation, leveraging channels of public participation in the political process and an independent community body to serve as mechanisms for community control.

That means that of the nearly two dozen jurisdictions that have implemented some version of CCOPS, only those four have created or rely on a body that parallels what the model legislation terms a Community Advisory Committee on Surveillance.[188] San Diego, where the legislative process is still unfolding, would be

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[184] Defined as "any type of surveillance technology, the acquisition of which was not previously approved by the City Council. A surveillance technology is not considered a new surveillance technology where its capabilities and functionality do not differ in any significant way from a previously approved version of an equivalent surveillance technology." *Id.* §12(D).

[185] Defined as "any electronic data collected, captured, recorded, retained, processed, intercepted, analyzed, or shared by surveillance technology." *Id.* §12(E).

[186] Defined as "any electronic surveillance device, hardware, or software that is capable of collecting, capturing, recording, retaining, processing, intercepting, analyzing, monitoring, or sharing audio, visual, digital, location, thermal, biometric, behavioral, or similar information or communications specifically associated with, or capable of being associated with, any specific individual or group; or any system, device, or vehicle that is equipped with an electronic surveillance device, hardware, or software." *Id.* §12(F). Excluded from the definition are routine office equipment and hardware not used for surveillance purposes, non-wearable, handheld, manually operated audio and video recorders, and municipal technologies not designed for surreptitious data collection and surveillance. *Id.* §12(F)(2).

[187] Defined as "targeted at any community or group or its members because of their exercise of rights protected under the First Amendment of the United States Constitution." *Id.* §12(G).

[188] *See* Community Control Over Police Surveillance (CCOPS), ACLU, https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance#map (last visited Jan. 26, 2022); Chivukula, *supra* note 45, at App.; Rebecca Williams, *Everything Local Surveillance Laws Are Missing in One Post*, HARVARD KENNEDY SCHOOL: PERSPECTIVES ON PUBLIC PURPOSE (Apr. 26, 2021), https://www.belfercenter.org/index.php/publication/everything-local-surveillance-laws-are-missing-one-post; STEVIE DEGROFF & ALBERT FOX CAHN, NEW CCOPS ON THE BEAT: AN EARLY ASSESSMENT OF COMMUNITY CONTROL OF POLICE SURVEILLANCE LAWS (2021),

the fifth city to do so, as its law establishes a separate privacy commission to implement the surveillance ordinance.[189] Procedural hurdles and local politics have stalled enactment of the legislation there.

The absence of a community advisory committee or its equivalent does not spell the end of public engagement and participation in the oversight process. New York City provides a ready example. Following months of advocacy by concerned community members and a coalition of tech privacy, civil rights, and racial justice organizations, the city passed the Public Oversight of Surveillance Technology Act in 2020, which adopts, in large part, CCOPS' transparency measures.[190] In the absence of a community-based advisory committee in New York City, members of the coalition that pushed for the law's passage have actively enforced the law's transparency and reporting requirements. Those entities have played the role of advocating before City Council to effectuate the law's transparency provisions. This model—community-based organizations and civil society groups as principal drafters and enforcers of the law's transparency and oversight provisions—is the model advanced in several jurisdictions with varying levels of success.[191] That vision echoes the work being done

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https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/602430a5ef89df2ce6894ce1/1612984485653/New+CCOPS+On+The+Beat.pdf.

[189] Lilly Irani & Khalid Alexander, *The Oversight Bloc*, LOGIC MAG. (Dec. 25, 2021), https://logicmag.io/beacons/the-oversight-bloc/; San Diego Privacy, *How San Diego's Privacy Law Stacks Up Against 16 Others* (Mar. 23, 2021), https://sandiegoprivacy.org/berkley-review-of-surveillance-oversight.html.

[190] *See* New York City, N.Y., Int. 0487-2018 (2020)(requiring annual reporting about surveillance technology use; efforts to restrict access to acquired data; data retention periods; data sharing policies; training required to use the technology; "internal audit and oversight mechanisms"; health and safety impacts of the technology; and disparate impacts of the technology use.).

[191] For example, in Dayton, Ohio, a coalition of advocates that included the Dayton NAACP, the Dayton Anti-Racist Network, Latinos Unidos, Black Lives Matter Dayton and Advocates for Basic Legal Equality drafted an ordinance that adopted the city council oversight provisions of the model CCOPS bill in May 2021. Mawa Iqbal, *City of Dayton Passes Police Surveillance Tech Ordinance*, WYSO PUBLIC RADIO (May 18, 2021), https://www.wyso.org/local-and-statewide-news/2021-05-18/city-of-dayton-passes-police-surveillance-tech-ordinance; Mawa Iqbal, *City of Dayton Working With Activists on Police Surveillance Tech Ordinance*, WYSO PUBLIC RADIO (Mar. 22, 2021), https://www.wyso.org/news/2021-03-22/group-works-with-city-of-dayton-on-police-surveillance-tech-ordinance. The law requires the police to prepare a surveillance impact report on surveillance technologies and present it in a public hearing before the city council decides whether or not to approve the technology. Nashville's version of CCOPS requires that the city council approve the use of certain surveillance technologies. Nashville, Tenn., Ordinance BL2017-646 (June 7, 2017), https://legisarchive.nashville.gov/mc/ordinances/term_2015_2019/bl2017_646.htm. That requirement has served as an entry point for a coalition of local advocates, including immigrant's rights groups, racial justice advocates, and the local police oversight board, to engage in a months-long public debate over a proposal, sponsored by a councilmember and supported by local law enforcement, to deploy license plate readers in the city. Samantha Max, *Surveillance Or Safety Tool? Nashville Starts to Consider Whether Police Should Use License Plate Readers*, WPLN NEWS (Jan. 5, 2021), https://wpln.org/post/surveillance-or-safety-tool-nashville-starts-to-consider-whether-police-should-use-license-plate-readers/; Anita Wadhwani, *Debate Over Licensee Plate Readers Returns to Metro Council Tuesday*, TENNESSEE LOOKOUT (Apr. 20, 2021), https://tennesseelookout.com/2021/04/20/debate-over-license-plate-readers-returns-to-metro-council-tuesday/; Yihyun Jeong, *License Plate Reader Bill Shelved in Nashville After Fierce Debate Over Use*

by a host of grassroots, community based, and civil society organizations who have pushed back against technological tools in the criminal system through other avenues.[192] But the absence of an independent community-comprised committee means that as an initial matter, there is no dedicated channel for community input, potentially frustrating a core animating purpose of the model legislation.

Turning to the four jurisdictions that have adopted some form of an independent community advisory committee, I start with the jurisdiction where the law has been in place for the longest: Seattle, Washington. In each look at the law, I conduct a qualitative assessment of the law's effectiveness in curtailing surveillance technologies and fostering community empowerment.

1. Seattle

The city of Seattle adopted the Seattle Surveillance Ordinance, which governs the "[a]cquisition and [u]se of [s]urveillance [t]echnologies" in July 2017.[193] At the

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as Policing Tool, TENNESSEAN (Apr. 22, 2021), https://www.tennessean.com/story/news/politics/2021/04/22/nashville-license-plate-readers-shelved-metro-council-debate-use-policing-tool/7319166002/; Morgan Nicole Veysey, *Nashville Police Pitch for License Plate Readers*, THE TENNESSEE STAR (Oct. 31, 2021), https://tennesseestar.com/2021/10/31/nashville-police-agencies-pitch-for-license-plate-readers/; *Oversight Board Votes to Oppose License Plate Readers in Nashville, Cites Privacy Concerns*, FOX 17 NEWS (Dec. 21, 2021), https://fox17.com/news/local/oversight-board-votes-to-oppose-license-plate-readers-in-nashville-cites-privcy-concerns-tennessee-metro-council-mnpd-da-glenn-funk; *Metro Nashville Council Defers Vote on License Plate Readers*, TENNESSEE LOOKOUT (Sept. 8, 2021), https://tennesseelookout.com/2021/09/08/metro-nashville-council-defers-vote-on-license-plate-readers/. In Grand Rapids, Michigan, in December 2021, the NAACP demanded changes to the city's version of CCOPS, which included enhancing the reporting requirements imposed on city departments seeking to acquire and use surveillance technologies, and the creation of a surveillance oversight committee comprised of the city commission's public safety committee. City of Grand Rapids Agenda Action Request, Briefing on the Surveillance Policy and Revisions to Administrative Policy 15-03, Dec. 7, 2021, http://grandrapidscitymi.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=4766&Inline=True; Marisa Oberle, *UPDATE: City of Grand Rapids Approves Proposed Surveillance Changes*, FOX 17 WEST MICHIGAN (Dec. 14, 2021), https://www.fox17online.com/news/local-news/grand-rapids/grand-rapids-looks-to-make-needed-change-to-citys-surveillance-policy.

[192] There are a host of organizations engaged in this work, including, but not limited to Our Data Bodies; Data for Black Lives; Media Justice; Upturn; Algorithmic Justice League; Blacks in AI; Leadership Conference on Civil and Human Rights; STOP LAPD Spying Coalition; Surveillance Technology Oversight Project; Silicon Valley Debug; Essie Justice Group; NACDL; Leaders of a Beautiful Struggle; Mi Gente; THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE USE OF PRETRIAL "RISK ASSESSMENT" INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS (2018), http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf (describing civil rights concerns raised by algorithmic risk assessments).

[193] SEATTLE, WASH., MUN. CODE § 14.18 (2017), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.18ACUSSUTE.

time, the law was hailed by the ACLU as "the strongest measure adopted by an American city to regulate the acquisition of surveillance technology."[194]

Crisis motivated the law. In 2012, local activists learned of the Seattle Police Department's acquisition of surveillance technologies without oversight, public notice, or policy guidance.[195] Among the technologies were two aerial drone aircraft outfitted with cameras, a 30 camera closed circuit television network along the city waterfront, and a wireless mesh network in downtown Seattle with the capacity to track WiFi enabled devices and cell phone data.[196] Public outcry led the police department to end the use of the two drones, while the department deactivated the mesh network after media reports exposed it.[197] The concerns raised by the proliferation of those technologies led Seattle City Council to adopt an ordinance in 2013 that required their approval prior to the purchase or acquisition of surveillance technologies.[198]

The 2013 ordinance failed to provide full transparency and law enforcement accountability. That failure ultimately set the stage for the 2017 enactment of the Seattle Surveillance Ordinance.[199] Several months after the 2013 law went into effect, a local activist learned that no law enforcement technologies had been submitted for City Council review.[200] Three years later, in 2016, media reports exposed the Seattle Police Department's secret acquisition and use of software called Geofeedia, which allowed law enforcement to monitor social media posts and track the location of social media users.[201] The software also had the capacity to display social media posts from users in the same vicinity, and store the disparate pieces of information in a database, presumably for law enforcement use.[202] Geofeedia offered the tool to the Seattle Police Department in 2014, positing that it would allow for "perpetual monitoring" of social media.[203] A Geofeedia executive explained that the

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[194] Press Release, ACLU Washington, Seattle Adopts Nation's Strongest Regulations for Surveillance Technology (Aug. 8, 2017); Council Approves Strongest-in-Nation Surveillance Technology Transparency Ordinance, Council Connection (July 31, 2017), https://council.seattle.gov/2017/07/31/council-approves-strongest-in-nation-surveillance-technology-transparency-ordinance/.

[195] Meg Young et. al., *Municipal surveillance regulation and algorithmic accountability*, BIG DATA & SOCIETY 3-4 (2019).

[196] *Id.*; Ansel Herz, *How the Seattle Police Secretly—and Illegally—Purchased a Tool for Tracking Your Social Media Posts*, THE STRANGER (Sept. 28, 2016), https://www.thestranger.com/news/2016/09/28/24585899/how-the-seattle-police-secretlyand-illegallypurchased-a-tool-for-tracking-your-social-media-posts.

[197] Herz, *supra* note 196.

[198] Young, *supra* note 195, at 4; SEATTLE, WASH., ORDINANCE 124142 (2013), http://www.clerk.seattle.gov/~archives/Ordinances/Ord_124142.pdf; Gemma Alexander, *Seattle keeps surveillance in check*, AVVOSTORIES (Dec. 4 2017), https://stories.avvo.com/rights/privacy/seattle-keeps-city-surveillance-check.html.

[199] See *supra* note 194.

[200] Young, *supra* note 195, at 4.

[201] Alexander, *supra* note 198; Herz, *supra* note 196.

[202] Herz, *supra* note 196.

[203] *Id.*

software could—by monitoring and analyzing social media posts—forecast the likelihood of violence at a protest.[204] The Seattle Police Department, according to one media report, admitted that the secret use of the software was potentially a violation of the 2013 ordinance.[205] That view was shared by the city's chief technology officer.[206] Despite the illegal acquisition and deployment of surveillance technology, a spokesperson for the Seattle Police Department asserted that Geofeedia was used to support ongoing criminal investigations and denied that it was used to surveil protected First Amendment activities.[207]

The Geofeedia fiasco exploded against the backdrop of protests against police violence led by the Black Lives Matter movement and other advocates working to advance racial justice.[208] That fact undoubtedly fueled public concern about law enforcement's use of high tech surveillance tools.[209] It also drove efforts to strengthen the 2013 law by broadening the range of technologies under its purview, adding a focus on the intersection of surveillance, race, and social justice, and enhancing public engagement and community input in the vetting of tools sought by the police.[210] The new law emerged in the wake of several city council hearings and eight months of engagement with stakeholders ranging from the ACLU of Washington to law enforcement and the mayor's office.[211]

2. Oakland, Berkeley, and San Francisco

The other cities relevant here are clustered in the Bay Area, in Northern California.[212] Like Seattle, shock and outrage about the unfettered expansion of law enforcement surveillance produced a wave of surveillance oversight ordinances. Much

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[204] *Id.*; Lee Fang, *The CIA is Investing in Firms that Mine Your Tweets and Instagram Photos*, THE INTERCEPT, Apr. 14, 2016, https://theintercept.com/2016/04/14/in-undisclosed-cia-investments-social-media-mining-looms-large/.

[205] Herz, *supra* note 196; SEATTLE, WASH., ORDINANCE 124142 (2013), http://www.clerk.seattle.gov/~archives/Ordinances/Ord_124142.pdf.

[206] Herz, *supra* note 196.

[207] *Id.*

[208] Southerland, *Toward a Just Future, supra* note 14, at 461 n.123.

[209] Herz, *supra* note 196.

[210] Young, *supra* note 195, at 4.

[211] Alexander, *supra* note 181; Fidler, *supra* note 45, at 556-57 (2020); Rubenstein *supra* note 105, at 1989 (detailing the historical origins of the Seattle Ordinance).

[212] Although other northern California cities enacted surveillance oversight ordinances, since the focus of this article is on those cities with surveillance ordinances that include an independent community-compromised body to guide decisions on surveillance technologies, I have focused on only a subset of those cities. The remaining jurisdictions include Santa Clara County, which was the first jurisdiction in the country to pass such an ordinance, Davis, Palo Alto, and the Bay Area transit system. See generally Nicole Ozer, *Santa Clara County Passes Landmark Law to Shut Down Secret Surveillance*, ACLU N. CAL. (June 8, 2016), https://www.aclunc.org/blog/santa-clara-county-passes-landmark-law-shut-down-secret-surveillance; Community Control Over Police Surveillance (CCOPS), ACLU (last visited Jan. 18, 2022), https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance#map.

of the credit is due to the outsized role played by advocates in Oakland, whose work in coalition with local grassroots advocates and community-based organizations throughout the Bay Area led a CCOPS style surveillance ordinance in April 2018.

The advocacy was driven by a wellspring of concern over Oakland's surveillance expansion plan, which came to light in 2013.[213] The plan would have dramatically expanded the reach and presence of surveillance technologies in Oakland.[214] At the time, the city was in the midst of building a $10.9 million Domain Awareness Center ("DAC") "to link more than 700 surveillance cameras throughout the city, license plate readers [LPRs], shot spotters and other surveillance equipment into a system where law enforcement could have consistent and real-time access to the data."[215] That system was to include three hundred terabytes of storage for the data the city anticipated collecting from Oakland residents.[216] The project would have created a massive surveillance dragnet that could incorporate new technologies and be used to surveil political protestors and large demonstrations.[217]

The proposed system provided a textbook example of the litany of concerns raised by police surveillance. The Oakland Police Department, which has been under federal oversight since 2003 to address allegations of brutality and civil rights violations,[218] was tasked with designing the DAC and the policies that would govern

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[213] Halima Kazem, *Watching the Watchers: Oakland Seeks Control of Law Enforcement Surveillance*, THE GUARDIAN (July 13, 2015), https://www.theguardian.com/usnews/2015/jul/13/oakland-law-enforcement-surveillance; Ali Winston, *Oakland Surveillance Center Raises Concerns*, SFGATE (July 17, 2013), http://www.sfgate.com/crime/article/Oakland-surveillance-center-raises-concerns-4671708.php; Somini Sengupta, *Privacy Fears Grow as Cities Increase Surveillance*, N.Y. TIMES (Oct. 13, 2013) https://www.nytimes.com/2013/10/14/technology/privacy-fears-as-surveillance-grows-in-cities.html.

[214] Alan Greenblatt, *What Cities can Learn from the Nation's Only Privacy Commission*, GOVERNING (Feb. 21, 2020), https://www.governing.com/next/what-cities-can-learn-from-the-nations-only-privacy-commission.html.

[215] Kazem, supra note 213. The DAC was developed using a 2008 federal infrastructure grant received by the Port of Oakland to fortify it against acts of terrorism. The DAC was originally billed as limited to the Port itself, including Oakland International Airport. However it soon after expanded to encompass the whole city. Devin Katayama, *Oakland's Privacy Commission Could Lead Nation on Surveillance Oversight*, KQED (Jan. 22, 2016) https://www.kqed.org/news/10824952/oaklands-privacy-commission-could-be-one-of-most-active-in-country.

[216] Brian Hofer, *How the Fight to Stop Oakland's Domain Awareness Center Laid the Groundwork for the Oakland Privacy Commission*, ACLU N. CAL. (Sept. 1, 2016), https://www.aclunc.org/blog/how-fight-stop-oaklands-domain-awareness-center-laid-groundwork-oakland-privacy-commission. To put that number in perspective, in 2009 the Library of Congress estimated nearly 15.3 million digital items freely available to the public in its catalog, which translates to approximately 74 terabytes of data. Contel Bradford, *Big Data Storage and Preservation at the Library of Congress*, STORAGECRAFT BLOG (last visited Jan. 18, 2022), https://blog.storagecraft.com/big-data-storage-library-congress/.

[217] Darwin BondGraham & Ali Winston, *The Real Purpose of Oakland's Surveillance Center*, EAST BAY EXPRESS (Dec. 18, 203), https://eastbayexpress.com/the-real-purpose-of-oaklands-surveillance-center-1/.

[218] David Debolt, *Federal Oversight of the Oakland Police Department May be Nearing its End, Attorneys Say*, THE OAKLANDSIDE (Aug. 25, 2021), https://oaklandside.org/2021/08/25/federal-oversight-oakland-police-department-nearing-end-negotiated-settlement-agreement/.

its use.[219] Internal city communications revealed that city staffers were more interested in using the system to monitor political protests than curbing the city's crime rate or solving violent crimes.[220] The head of the DAC project described it as a system that could be used to control labor strikes and community protests that could lead to political unrest and disrupt operations at the port of Oakland.[221] Surveillance of that nature was in line with a lengthy history of local law enforcement surveillance and infiltration of protest movements in Oakland.[222] And the system was slated to link public and private cameras from businesses, streets, roads, and highways, schools, public housing, and transit, providing an all-encompassing, constant, real-time surveillance system.[223] The city planned to incorporate facial recognition technology, high powered surveillance cameras, social media monitoring, and features that allow for the automated tracking of vehicles and pedestrians to widen the scope of its surveillance capabilities.[224]

A confluence of national and local events added fuel to the fire. News of the DAC plan broke just as the largest intelligence leak in the NSA's history revealed the inner workings of a mass data collection program conducted by US intelligence agencies.[225] At the time, Oakland was still grappling with the fallout from the murder of Oscar Grant, a Black man, by a white transit officer, in 2009.[226] That killing sparked protests against police brutality and law enforcement violence under the banner of Occupy Oakland, which was also a protest movement against income inequality.[227] In 2011, Oakland Police reacted to those protests, and the movement led occupation of the lawn outside of City Hall, with unrelenting and shocking violence, including tear gas, lead filled bean bags, flashbangs, and physical violence.[228] Upwards of 1,200 internal affairs complaints were filed against the police.[229] An independent monitor was imposed on the department to address police misconduct and brutality.[230] Ultimately, the Oakland Police Department's crackdown

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[219] BondGraham & Winston, *supra* note 217.
[220] *Id.*
[221] *Id.*
[222] Hofer, *supra* note 216 ("[I]t is no secret that the FBI worked with the Oakland Police Department to surveil and infiltrate both the Panthers -- and more recently, Occupy Oakland -- to great and harmful effect.").
[223] BondGraham & Winston, supra note 217.
[224] *Id.*
[225] Glenn Greenwald, Ewen MacAskill & Laura Poitras, *Edward Snowden: the Whistleblower Behind the NSA Surveillance Revelations*, THE GUARDIAN (June 11, 2013), https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance.
[226] Ali Winston, *10 Years Ago, OPD Forcefully Dismantled the Occupy Oakland Camp*, THE OAKLANDSIDE (Oct. 25, 2021), https://oaklandside.org/2021/10/25/10-years-ago-opd-violently-dismantled-the-occupy-oakland-camp/.
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*

rendered it the exemplar of excessive force and police violence nationwide, long before protests that erupted in Ferguson, Missouri.[231]

It was within that context, at the height of a long-standing concern with abusive policing,[232] that the plan to expand Oakland's surveillance technology capacity emerged into public view. Concerned city residents and local advocacy organizations spent months educating the public and City Council about the dangers of the surveillance dragnet being built by city officials.[233] They formed a coalition, called the Occupy Oakland Privacy Working Group, and later renamed Oakland Privacy,[234] which spearheaded the fight against the DAC.[235] Among the demands made by advocates was "a voice in how law enforcement uses surveillance technology in our community."[236]

The advocacy paid off. By 2014, the City Council voted to reign in the scope of the DAC, restricting it to the port of Oakland and Oakland International Airport instead of the entire city.[237] They prohibited DAC's use of facial recognition software, automated license plate readers, and limited data retention.[238] The Council also created a citizens committee to craft a privacy policy for the DAC.[239] Two years later the City Council approved the creation of a formal body,[240] the Oakland Privacy

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[231] Gavin Aronsen, *Oakland Police Under a Cloud for Violent Occupy Crackdown*, MOTHER JONES (Oct. 28, 2011), https://www.motherjones.com/politics/2011/10/opd-crowd-control-policy-force/.

[232] At the time of the Occupy Oakland incident, the police department was in the midst of a consent decree to address abusive policing practices. Sarah Moughty, *The Oakland Police Department's Troubled History*, FRONTLINE (Oct. 27, 2011), https://www.pbs.org/wgbh/frontline/article/the-oakland-police-departments-troubled-history/. Over the ten year period from 2001 through 2011, the City of Oakland paid close to $60 million for claims involving misconduct and abuse by the Oakland Police Department. Scott C. Johnson, *How a Dirty Police Department Gets Clean*, POLITICO MAG. (Mar./Apr. 2015), https://www.politico.com/magazine/story/2015/03/oakland-police-reform-115552/. From 2000 to 2012, there were 87 officer involved shootings; 39 were fatal. *Id.* Those abuses were the latest in a long history of police killings by Oakland officers, often provoking protests against police violence by groups like the Black Panther Party. Liam O'Donoghue, *'How You Organize that Rage': A Podcast on Policing and Protest from The Oaklandside and East Bay Yesterday*, THE OAKLANDSIDE (July 24, 2020), https://oaklandside.org/2020/07/24/oaklandside-east-bay-yesterday-police-violence-oakland/; Paul Harris, *Oakland Police: Controversial History Sets Tone for City's Discord*, THE GUARDIAN (Oct. 26, 2011), https://www.theguardian.com/world/blog/2011/oct/26/oakland-police-department-black-community.

[233] *See, e.g.*, Hofer, *supra* note 216; Ali Winston, *Oakland City Council Rolls Back the Domain Awareness Center*, EAST BAY EXPRESS (Mar. 5, 2014), https://eastbayexpress.com/oakland-city-council-rolls-back-the-domain-awareness-center-1/.

[234] Oakland Privacy, https://oaklandprivacy.org (last visited Jan. 20, 2022).

[235] *Timeline*, Oakland Privacy (last visited Jan. 20, 2022), https://oaklandprivacy.org/timeline/.

[236] Hofer, *supra* note 216.

[237] Winston, *supra* note 226.

[238] Hofer, *supra* note 216.

[239] *Id.*

[240] *Oakland Public Safety Committee Adopts Privacy Ordinance*, RIGHTS & DISSENT (last visited Jan. 20, 2022), https://rightsanddissent.org/news/oakland-public-safety-committee-adopts-privacy-ordinance/.

Advisory Commission (PAC).[241] The ordinance that established the PAC assigned it several duties, including providing guidance to the city on privacy protections, engaged the public and obtain public input, and to draft a surveillance oversight ordinance.[242] Today, the PAC serves as the community advisory body contemplated by the model CCOPS bill, while grappling with the privacy concerns raised by surveillance tools.[243]

The current chair and executive director of the PAC, Brian Hofer, was central in the fight against the expansion of surveillance in Oakland, advocated for the creation of the PAC, and helped author Oakland's version of the CCOPS ordinance.[244] Hofer was also a member of Oakland Privacy, who alongside the Council on American-Islamic Relations, the ACLU of Northern California,[245] and a host of grassroots organizations continued their advocacy in the neighboring cities of Berkeley and San Francisco. That work led to the passage of similar surveillance oversight ordinances in those cities.[246]

Like the fight over the expansion of surveillance in Oakland, each city had to contend with its own history of police surveillance technologies. In Berkeley, passage of the ordinance followed the city's 2015 one year moratorium on the use of drones by

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[241] Katayama, *supra* note 215.

[242] OAKLAND, CAL. ORDINANCE 13349 C.M.S. § 2 (Dec. 17, 2015). https://cao94612.s3.amazonaws.com/documents/Privacy-Advisory-Commission-final-Ordinance-13349-CMS.pdf.

[243] *Privacy Advisory Commission*, City of Oakland (last visited Jan. 20, 2022), https://www.oaklandca.gov/boards-commissions/privacy-advisory-board. See also Brian Hofer, *Why You Should Care About Our Lawsuit Against the City of Oakland* (Sept. 2, 2021) https://secure-justice.org/blog/why-should-you-care-about-our-lawsuit-against-the-city-of-oakland ("[T]he Privacy Advisory Commission ('PAC'), [] advise[s] the City Council about how best to balance the potentially harmful effects of surveillance technology and data mining practices and public safety."); Greenblatt, *supra* note 214; OAKLAND, CAL. ORDINANCE 13349 C.M.S. § 2 (Dec. 17, 2015).

[244] Hofer was an untrained, unattached casual observer who walked into Oakland City Hall in 2013 to oppose the Domain Awareness Project that year. Zoom Interview with Brian Hofer (May 5, 2021) (on file with author). The need for a privacy policy to address surveillance technologies was readily apparent, leading to the creation of the PAC. *Id.* Hofer co-authored five of the Bay Area ordinances, with the belief that it was the most politically viable means to achieve any oversight over surveillance technologies. *Id.*; David Debault, *Lauded as a National Model, Some Question Whether Oakland's Privacy Commission is Working*, THE OAKLANDSIDE (Nov. 2, 2021), https://oaklandside.org/2021/11/02/lauded-as-a-national-model-some-question-whether-oaklands-privacy-commission-is-working/. For a detailed history of the DAC fight, *see* Domain Awareness Center, Oakland Wiki (last visited Jan. 20, 2022), https://localwiki.org/oakland/Domain_Awareness_Center#Timeline.

[245] Emily Raguso, *Officials Approve New Rules on City Surveillance; May be First in the Nation*, BERKELEYSIDE (Mar. 15, 2018), https://www.berkeleyside.org/2018/03/15/berkeley-officials-approve-new-rules-city-surveillance-may-first-nation.

[246] Notably, Hofer played a role in those ordinances as well. *See* Kate Conger, *The Man Behind San Francisco's Facial Recognition Ban is Working on More. Way More.*, N.Y. TIMES (May 15, 2019), https://www.nytimes.com/2019/05/15/technology/facial-recognition-san-francisco-ban.html; Interview with Ethan Gregory Dodge, (April 23, 2021) on file with author.

the Berkeley Police Department.[247] Privacy advocacy by concerned citizens and advocates in Oakland helped to spur the legislation.[248]

San Francisco's law, enacted in 2019, was driven by a concern with law enforcement's use of surveillance technologies to target communities of color, and in particular Black, brown, Muslim, and immigrant communities.[249] A coalition of more than two dozen organizations[250] supported the legislation, which was authored and sponsored by a member of the city's Board of Supervisors.[251] That coalition pointed out that by passing the law, the city "gave the community a seat at the table and acted decisively to protect its people from the growing danger of face recognition, a highly invasive technology that would have radically and massively expanded the

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[247] Tim Lochner, *Berkeley Council Passes One-Year Moratorium on Police Drones*, THE TIMES-HERALD (Feb. 25, 2015), https://www.timesheraldonline.com/2015/02/25/berkeley-council-passes-one-year-moratorium-on-police-drones/; Suhuana Hussain, *City Council Passes Moratorium on Police Drones, Sends Police Policy Recommendations to City Manager*, THE DAILY CALIFORNIAN (Feb. 25, 2015), https://www.dailycal.org/2015/02/25/berkeley-city-council-passes-one-year-moratorium-police-use-drones-sends-community-police-relations-recommendations-city-manager-study/. Berkeley's Peace and Justice Commission called for an outright ban on drones three years earlier, in 2012. *Id.* The Peace and Justice Commission, established in 1986, "advises the [Berkeley City] Council and the School Board on issues of peace and social justice" and "[c]reates citizen awareness and develops educational programs." Peace and Justice Commission, City of Berkeley (last visited Jan. 20, 2022), https://www.cityofberkeley.info/Clerk/Commissions/Commissions__Peace___Justice_Commission.aspx.

[248] DJ Pangburn, *Berkeley Mayor: We Passed the "Strongest" Police Surveillance Law*, FAST COMPANY (Apr. 24, 2018), https://www.fastcompany.com/40558647/berkeley-mayor-we-passed-the-strongest-police-surveillance-law.

[249] Sarah Emerson, *San Francisco Bans Facial Recognition Use by Police and the Government*, VICE (Mar. 14, 2019), https://www.vice.com/en/article/wjvxxb/san-francisco-bans-facial-recognition-use-by-police-and-the-government; Letter from the Coalition in Support of the Stop Secret Surveillance Ordinance to San Francisco Board of Supervisors (Apr. 9, 2019), https://www.aclunc.org/docs/Coalition_SUPPORT_Stop_Secret_Surveillance_Ordinance.pdf.

[250] The coalition in support of the Stop Secret Surveillance ordinance includes the ACLU of Northern California, Asian Americans Advancing Justice, Asian Law Alliance, CAIR California, the Center for Media Justice, Centro Legal De La Raza, the Coalition on Homelessness San Francisco, Color of Change, Data for Black Lives, DSA San Francisco, the Electronic Frontier Foundation, Faith in Action Bay Area, Fight for the Future, Freedom of the Press Foundation, the Greenlining Institute, the Harvey Milk LGBTQ Democratic Club, Indivisible San Francisco, Justice for Mario Woods, the Lawyers' Committee for Civil Right SF, Media Alliance, National Center for Lesbian Rights, Oakland Privacy, the San Francisco Public Defender Racial Justice Committee, San Francisco Latino Democratic Club, Secure Justice, the Tenth Amendment Center, and the Transgender Law Center. Coalition letter, *supra* note 249 at 6.

[251] Sidney Fussell, *San Francisco Wants to Ban Government Face Recognition*, THE ATLANTIC (Feb. 5, 2019), https://www.theatlantic.com/technology/archive/2019/02/san-francisco-proposes-ban-government-face-recognition/581923/; Matt Cagle & Brian Hofer, *New Surveillance Oversight Law Keeps Communities Safe and Redefines Tech Leadership*, S.F. EXAMINER (May 8, 2019), https://www.sfexaminer.com/opinion/new-surveillance-oversight-law-keeps-communities-safe-and-redefines-tech-leadership/.

government's power to track and control people going about their daily lives."[252] Notably, San Francisco's ordinance included an outright ban on the use of all face recognition technology or any information obtained through such technology.[253] The city became the first in America to do so.[254]

3. Local Variations on CCOPS

As relevant for the analysis here, in most respects, the ordinances in Seattle,[255] Oakland,[256] Berkeley,[257] and San Francisco[258] are consistent with the Model Bill. They all require City Council (or the local equivalent) approval of surveillance technologies,[259] create a version of an independent community advisory committee,[260] and require the government proponent of technology to create the local equivalent of

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[252] San Francisco Board of Supervisors Approves Historic Face Surveillance Ban and Oversight Law, ACLU N. Cal. (May 14, 2019), https://www.aclunc.org/news/san-francisco-board-supervisors-approves-historic-face-surveillance-ban-and-oversight-law.

[253] S.F. Admin. Code, Ch. 19B.2(d) (2019), https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-61746#JD_19B.2.; Kate Conger, Richard Fausset, & Serge F. Kovaleski, *San Francisco Bans Facial Recognition Technology*, N.Y. TIMES (May 14, 2019), https://www.nytimes.com/2019/05/14/us/facial-recognition-ban-san-francisco.html.

[254] Emerson, *supra* note 249.

[255] Seattle, Wash., Mun. Code § 14.18 (2017),

[256] Oakland's Surveillance and Community Safety ordinance went into effect in April 2018. Cyrus Farivar, *Oakland May Become Rare American City with Strict Rules for Spy Gear Use*, ARSTECHNICA (Jan. 6, 2017), https://arstechnica.com/tech-policy/2017/01/oakland-may-become-the-rare-american-city-with-strict-rules-for-spy-gear-use/; PAC Surveillance Technology Ordinance Approved by City Council, City of Oakland (last updated Jan. 20, 2021), https://www.oaklandca.gov/resources/pac-surveillance-technoloy-ordinance-approved-by-city-council; Sidney Fussell, *It's Not Easy to Control Police Use of Tech—Even With a Law*, WIRED (Sept. 24, 2021), https://www.wired.com/story/hard-control-police-tech-law/#:~:text=In%202018%2C%20Oakland%20enacted%20an,cities%20have%20adopted%20similar%20laws.

[257] Berkeley Mun. Code § 2.99; *See also* DJ Pangburn, *Berkeley Mayor: We Passed the Strongest Police Surveillance Law*, FAST COMPANY (Apr. 24 2018), https://www.fastcompany.com/40558647/berkeley-mayor-we-passed-the-strongest-police-surveillance-law; Emilie Raguso, *Officials approve new rules on city surveillance; may be first in nation*, BERKELEYSIDE (Mar. 15 2018), https://www.berkeleyside.org/2018/03/15/berkeley-officials-approve-new-rules-city-surveillance-may-first-nation; Darwin BondGraham, *Berkeley Council Approves Surveillance Technology Oversight Ordinance*, EAST BAY EXPRESS (Mar. 14, 2018), https://eastbayexpress.com/berkeley-council-approves-surveillance-technology-oversight-ordinance-2-1/.

[258] S.F. Admin. Code, Ch. 19B (2019), https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-61746#JD_19B.
San Francisco's version of CCOPS was adopted in May 2019, nearly a year after neighboring cities of Oakland and Berkeley. See, *supra* note 249.

[259] Model Bill, ACLU (April 2021), *supra* note 45, § 1.A; Oakland Mun. Code § 9.64.030(2)(B) (2021);; Berkeley, Cal., Mun. Code § 2.99.030 (2018); S.F., Cal., Admin. Code § 19B.2 (2019); Seattle, Wash., Mun. Code § 14.18.020.A(2017).

[260] Oakland, Cal., Mun. Code § 9.64.020(1); S.F., Cal., Admin. Code § 19B.2(b); Berkeley, Cal., Mun. Code § 2.99.030(2); Seattle, Wash., Mun. Code § 14.18.080(A).

a use policy and impact report governing the deployment of the technologies and data sharing, retention, and access.[261] Each law also requires submission of a publicly available annual report to City Council on the use of surveillance technologies that fall under the statute's purview.[262]

Seattle's Ordinance departs from the model bill in two significant ways. First, it makes explicit reference to racial equity concerns, framing surveillance technologies as raising racial equity concerns and requiring an assessment of the law taking such concerns into consideration.[263] Second, unlike the law in the other three jurisdictions, it fails to set forth any standards to guide the City Council's decision to approve surveillance technologies.[264]

The law in each city provides for a private right of action to enforce its provisions.[265] None criminalize a breach of the law or create a suppression remedy in light of a breach. All four allow departments to bypass the statutory process and approval requirements in exigent circumstance.

4. Community Advisory Committees

There is some variation in the composition and function of the independent community advisory committees in each city, but they all generally bear the same responsibilities. All are advisory, and none possess binding authority. City Council or its equivalent is free to ignore their recommendations and police are not required to abide by their requests. There are differences that emerge upon closer consideration. In Seattle, the ordinance creates a Community Surveillance Working Group which is tasked with "advis[ing]" the City Council "from a community perspective."[266] The Working Group must draft a privacy and civil liberties impact assessment for every technology with Seattle's version of a surveillance use policy submission and impact report.[267] The impact assessment must detail "the impact of the surveillance technology on the civil rights and liberties and potential disparate impacts on communities of color and other marginalized communities."[268] Second, it must "provide assistance as resources permit to the Executive and Council in ensuring

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[261] Oakland, Cal., Mun. Code §§ 9.64.020, 9.64.030; Berkeley, Cal., Mun. Code § 2.99.030(2); Seattle, Wash., Mun. Code § 14.18.040; S.F., Cal., Admin. Code § 19B.2(a). The process varies slightly in San Francisco, where the community body is responsible for drafting the surveillance use policy. S.F., Cal., Admin. Code § 19B.2(b)(2).

[262] S.F., Cal., Admin. Code § 19B.6; Berkeley, Cal., Mun. Code § 2.99.020(2); Seattle, Wash., Mun. Code §§ 14.18.050, 14.18.060; Oakland, Cal., Mun. Code § 9.64.040(1).

[263] Seattle, Wash., Mun. Code § 14.18.10.

[264] Model Bill, ACLU (April 2021), *supra* note 46, § 5. The model bill includes specific standards for approving a technology: (1) the benefits outweigh the costs; (2) civil rights are protected; and (3) use of the technology will not be discriminatory or have a disparate impact on any groups. *Id.*

[265] Berkeley, Cal., Mun. Code § 2.99.090; Oakland, Cal., Mun. Code § 9.64.050; S.F., Cal., Admin. Code § 19B.8(b); Seattle, Wash., Mun. Code § 14.18.070(B).

[266] Seattle, Wash., Mun. Code § 14.18.080.A.

[267] *Id. § 14.18.080.B.1.* Seattle's version of the Surveillance Impact Report and Surveillance Use Policy is a Surveillance Impact Report (SIR). § 14.18.040.A.

[268] *Id.*

members of vulnerable communities have the opportunity to provide input and feedback" on surveillance technologies.[269] In other words, Seattle's Working Group is specifically tasked with ensuring that voices from vulnerable communities are heard in the statutory process.

Seattle's law also sets forth qualifications for the Working Group. "At least five members of the Working Group shall represent equity-focused organizations serving or protecting the rights of communities and groups historically subject to disproportionate surveillance."[270] The Working Group, when at full capacity, is to be made up of four members appointed by the Mayor and three members appointed by the City Council.[271] They are to serve terms of between five and six years.[272] Seattle's Working Group is currently comprised of four people,[273] three short of what is contemplated by the ordinance due to attrition.[274] Working Group members are unpaid volunteers, and receive no compensation for their work. Two work at nonprofits concerned with civil liberties and racial justice, one is a law firm investigator and law student, and one is an expansion strategy manager at Amazon.[275]

Oakland's version of a community advisory committee is the Privacy Advisory Commission (PAC). The PAC is tasked with providing review of new and existing surveillance technologies and recommendations to City Council about whether to adopt, amend, or reject proposals related to the acquisition and use of those technologies.[276] It is also responsible for ongoing oversight after a technology is approved by City Council through its review of annual surveillance reports.

The composition of the PAC is set forth by its bylaws, which provides for nine members, six of whom must be residents of Oakland.[277] Members are appointed by the mayor and confirmed by a majority of City Council.[278] They serve in three year, staggered terms and are volunteers, uncompensated for their work.[279] Members "shall be persons who have an interest in privacy rights as demonstrated by work

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[269] *Id.* § 14.18.080.B.3.
[270] *Id.* § 14.18.080.A.3.
[271] *Id.* § 14.18.080.A.1.
[272] *Id.* § 14.18.080.A.4.
[273] *Surveillance Advisory Working Group, Seattle.gov: Seattle Information Technology,* https://www.seattle.gov/tech/initiatives/privacy/surveillance-technologies/community-surveillance-working-group.
[274] Seattle, Wash., Mun. Code § 14.18, supra note 176, § 14.18.080.A.1; see also Seattle Information Technology, Surveillance Technology Community Equity Impact Assessment and Policy Guidance Report 5 (2021), http://www.seattle.gov/Documents/Departments/Tech/Privacy/2021%20CTO%20Equity%20Report.pdf.
[275] Surveillance Advisory Working Group, supra note 273. Kayleigh: Kayleigh McNiel, LINKEDIN, https://www.linkedin.com/in/kayleigh-mcniel-67594067/ (last visited Jan. 20, 2022); Joe: Joe Woolley, LINKEDIN, https://www.linkedin.com/in/josephrwoolley/ (last visited Jan. 20, 2022).
[276] Oakland Mun. Code § 9.64.020.
[277] Oakland Priv. Advisory Comm. Bylaws art. III § 2(a).
[278] *Id.*
[279] *Id.* §2(c).

experience, civic participation, and/or political advocacy."[280] They cannot be elected officials.[281] At least one, but no more than two members can be individuals with legal expertise in privacy and civil rights, someone in law enforcement with experience working with surveillance equipment, someone from an organization focused on government transparency, an accountant, and a hardware, software, or data security professional.[282]

Early reporting on the PAC noted its composition, which included a "white law professor at the University of California, Berkeley; an African-American former [Oakland Police Department] officer; a 25-year-old Muslim activist; an 85-year-old founder of a famed user group for the Unix operating system; a young Latino attorney; and an Iranian-American businessman and former mayoral candidate."[283] That composition remains largely the same.[284]

Berkeley's law situates its citizen's police oversight body, the Police Review Commission (PRC) as the community advisory committee.[285] The PRC was replaced with a Police Accountability Board (PAB) in July 2021.[286] That body is tasked with

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[280] *Id.* §2(d),(f).

[281] *Id.* §2(g).

[282] *Id.* §2(h).

[283] Cyrus Farivar, *Why Privacy Needs All of Us*, SAN FRAN. PUBLIC PRESS (Dec. 17, 2018), https://www.sfpublicpress.org/why-privacy-needs-all-of-us/.

[284] The current PAC has nine commissioners. Oakland Priv. Advisory Comm. Bylaws art. III §2(a); Privacy Advisory Board – Team, City of Oakland (last visited Jan. 21, 2022), https://www.oaklandca.gov/teams/privacy-advisory-board. Among them are Hofer, who is Chair and Executive Director of Secure Justice, a "non-profit organization advocating against state abuse of power, and for reduction in government and corporate over-reach"; a researcher and the program manager in the Technology and Work program at the UC Berkeley Labor Center, About Reem, U.C. Berkeley Labor Center (last visited Jan. 21, 2022), https://laborcenter.berkeley.edu/people/reem-suleiman/; co-owner of a computer software company, Metron Computerware Ltd., Cal. Bus. Database (last updated July 12, 2017), https://www.cabusinessdb.com/company?utm_source=1088390; a Staff Attorney at Centro Legal de la Raza, which provides civil legal services to low income people and immigrant communities, Omar de la Cruz – Staff Attorney, Centro Legal de la Raza (last visited Jan. 21, 2022) https://www.centrolegal.org/omar-de-la-cruz/; a former police officer, Bay Area News Group, *My Word: Evidence is Clear that Oversight of OPD Actions Must Change*, EAST BAY TIMES (June 23, 2014), https://www.eastbaytimes.com/2014/06/23/my-word-evidence-is-clear-that-oversight-of-opd-actions-must-change/; an attorney "specializing in police oversight and public safety policy" and member of the Oakland Police Commission, "a civilian-run police oversight agency with both disciplinary and policymaking authority." Henry Gage III, LinkedIn (last visited Jan. 21, 2022), https://www.linkedin.com/in/henrygage/?trk=pub-pbmap; Head of IT - Americas for Yondr Group; member on the Google U.S. Government Innovation Advisory Board; Board Member with the TechEquity Collaborative Housing Committee, and the SafeHavn Homes Advisory Board); and the Project Manager Lead for Elections and Civic Process at Facebook, formerly at the US Gov't Accountability Office.

[285] Berkeley Mun. Code § 2.99.030.

[286] The Police Review Commission (PRC) was established by a citizen initiative in 1973 as one of the first police oversight agencies in the country. Emily Raguso, *New police oversight board now has broader power for misconduct inquests,* Berkeleyside (Oct. 10, 2021), https://www.berkeleyside.org/2021/10/10/berkeley-police-accountability-broader-powers-misconduct-complaints The PRC was replaced by the Police Accountability Board (PAB) in November 2020, through an amendment to the city charter. *Id.* The PAB became operational as of July 1, 2021. *Id.*

reviewing the proposal and approving, objecting, recommending modifications, or taking no action.[287] That work falls within the PAB's general duties of advising and making recommendations to the public, City Council, and the City Manager regarding police department operations, including written polices, practices, and procedures.[288] At full strength, the PAB is comprised of nine members, appointed by the Mayor and City Council.[289] The law imposes residency and role requirements for members.[290] It also places an affirmative obligation on the City Council to establish a board that is reflective of the range of dimensions of diversity that comprise the city, including, for example, along lines of race, gender, age, economic status.[291] There are currently seven members of the PAB: a trial lawyer whose firm specializes in white collar and general criminal defense; a practicing government civil rights attorney who has previously taught at law schools as a teaching fellow; a principal production coordinator at a publisher; a former Police Services Manager and Police Communications Supervisor in the Oakland Police Department who currently manages an entertainment company; a criminology professor at University of California, Irvine; an attorney and social justice advocate; a senior program officer for a public health school's health-tech program; and the Chair of the Berkeley Reimagining Public Safety Task Force, currently a third-year Legal Studies major at University of California, Berkeley.[292]

San Francisco's version of an independent community advisory committee is the outlier among the four jurisdictions. There, it is a subcommittee of another body called the Committee on Information Technology (COIT). The COIT is comprised 17 members, 15 of whom are city government officials, and serves as the main

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Members of the PAB must be: residents of the city; at least 18 years of age; not be an employee, or contractor with the City, a *current* sworn police officer from any agency, or a *current* employee, official, or representative of an employee association representing sworn police officers; Be fair minded and objective with a demonstrated commitment to community service.

[287] Berkeley Mun. Code § 2.99.030(2).

[288] Charter of the City of Berkeley, art. XVIII, § 125(3)(a)(1).

[289] Charter of the City of Berkeley, art. XVIII, § 125(5). Each PAB member serves for four years, or at the end of the nominating councilmembers term, whichever is earlier. PAB members are limited to serving 8 consecutive years, but may be reappointed with a two year break. *Id.* § 125(7).

[290] Members of the PAB must be: residents of the city; at least 18 years of age; not be an employee, or contractor with the City, a *current* sworn police officer from any agency, or a *current* employee, official, or representative of an employee association representing sworn police officers; Be fair minded and objective with a demonstrated commitment to community service. Charter of the City of Berkeley, art. XVIII, § 125(5)(a)-(c).

[291] The law provides that "The City Council shall endeavor to establish a Board that is broadly inclusive and reflective of race, ethnicity, age, gender identity, sexual orientation, economic status, neighborhoods, and various communities of interest in the City. Toward that end, in soliciting applications for the position of Board member, the Director of Police Accountability shall reach out to civic, community, and civil rights organizations, among others." Charter of the City of Berkeley, art. XVIII, § 125(6)(b).

[292] Kira Rao-Poolla, *Berkeley Police Accountability Board holds its 1st meeting*, THE DAILY CALIFORNIAN (Jul. 8, 2021), https://www.dailycal.org/2021/07/08/berkeley-police-accountability-board-holds-its-1st-meeting/.

governance body over city technology.[293] The composition of that body is determined by statute, rather than mayoral appointment, and is comprised of a host of city officials and city department heads.[294] Those officials elect a chair, who in turn is responsible for appointing the members of COIT's subcommittees.[295] Those subcommittee members are chosen based on "technical, financial, management, and policy-making capabilities and responsibilities" and must "represent major service areas of the City."[296] The relevant subcommittee for purposes of San Francisco's surveillance ordinance is the Privacy and Surveillance Advisory Board (PSAB), which supports the implementation of the law by "provid[ing] recommendations to COIT on appropriate action on surveillance technology policies and other ordinance required documents."[297] The PSAB made up of eight members, nearly all of whom are city officials, including the deputy city administrator, the chief information security officer, the director of research and planning at the department of juvenile probation. Of the eight member board, the sole public member is a privacy attorney with experience as a community organizer who now works with startups.[298]

III. Assessing the Efficacy of CCOPS Laws in Practice

The most straightforward way to assess the efficacy of the community control provision of CCOPS laws could be drawn from the stated aims of the law itself: to empower community engagement, input, and oversight in connection with law enforcement surveillance technologies.[299] In other words, has the law empowered those communities who have traditionally been the target of police surveillance technology to have a voice in the surveillance technology conversation in their jurisdiction?[300] Does it have the capacity to do so? Has it helped to stop or slow the growth of law enforcement surveillance technologies? Can it? Or has it served as a

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[293] The COIT describes itself as "the main governance body that makes decisions regarding the future of the San Francisco's technology. The Committee is composed of 13 department heads that represent each of the major service areas." SF.GOV, Committee on Information Technology, About Us, https://sf.gov/public-body/committee-information-technology-coit/about.

[294] San Francisco Admin. Code § 22A.3(a).

[295] *Id.* § 22A.3(b).

[296] *Id.*

[297] SF.GOV, Privacy and Surveillance Board (PSAB), https://sf.gov/public-body/privacy-and-surveillance-advisory-board-psab (last visited Feb. 5, 2022).

[298] Venture Gained Legal, Nnena Ukuku, https://venturegainedlegal.com/nnena-ukuku (last visited Feb. 5, 2022).

[299] *See* Model CCOPS Bill, *supra* note 46, at Preamble.

[300] Community is one of those terms that far too often invoked without precision. That lack of precision is dangerous, because absent a clear definition, the term "carries with it serious dangers of vagueness, cooptation, and exclusion." Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 817 (2021). At worst, it "means very little, or nothing very coherent, and sometimes means so many things as to become useless in legal or social discourse." Robert Weisberg, *Restorative Justice and the Danger of "Community",* 2003 UTAH L. REV. 343 (2003). While defining the contours of community is beyond the scope of this paper, I operate under the premise that the community the law seeks to imbue with control are those who have historically been the disproportionate targets of police surveillance technologies.

rubber stamp, check-the-box exercise that supplants substantive opposition with procedural compliance?

These sorts of questions are informed by the forces that drive calls for community control, which have grown louder in the wake of 2020's protests against police violence following George Floyd's murder by Minneapolis police officer Derek Chauvin.[301] Such calls are grounded in a desire to shift power over police practice and policy to those who have felt the most significant harms of police violence, and by extension, the violence of the criminal legal system.[302] Indeed, the organizing vision of the Movement for Black Lives, which has advanced justifications for community control over policing, provides a capacious definition of community control: "We demand a world where those most impacted in our communities control the laws, institutions, and policies that are meant to serve us – from our schools to our local budgets, economies, police departments, and our land . . . ."[303] Those demands flow from a dissatisfaction with the status quo, and a desire to place control over law enforcement in the hands of those who come into contact with the police on a daily basis.[304] What that control means for the relationship with policing—"whether it is less policing . . . better policing. . . or both, demands for popular control over policing is a broader and separate demand for power and democratic rule."[305]

Community control over policing—and in turn the technological tools available to the police—is justified on three grounds: as reparation, as antisubordination, and as necessary for contestatory democracy.[306] It can be reparative by shifting power to those most harmed by police and surveillance technologies to remedy those harms.[307] Its role as a mechanism for antisubordination derives from the principle that the state should put an end to the subordination of historically oppressed groups.[308] Although antisubordination as theory typically is discussed in constitutional law contexts,[309] in the context of community control, the concept drives consideration of

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[301] *See, e.g.*, Jazmine Salas, *To Transform Policing, We Need Community Control*, IN THESE TIMES (Aug. 25, 2020), https://inthesetimes.com/article/jazmine-salas-community-control-police-cpac; Wayne Nealis, *Commnity Control of Police – An Idea Whose Time has Come*, MINNPOST (June 3, 2020), https://www.minnpost.com/community-voices/2020/06/community-control-of-police-an-idea-whose-time-has-come/.

[302] Arnett, Decarceration *supra* note 128, at 681; Simonson, *supra* note 300, at 815 ("A demand for community control is a demand for power.").

[303] *Community Control*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/community-control (last visited Apr. 12, 2021).

[304] Simonson, *supra* note 300, at 815-16.

[305] *Id.* at 824.

[306] *Id.* at 787.

[307] *Id.*

[308] *Id.*

[309] The applicability of the equal protection clause is understood along two conceptions: anticlassification and antisubordination. Anticlassification provides that government may not classify on the basis of race. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassfiication Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1472 (2004). Antisubordination insists that government cannot "engage in practices that enforce the inferior social status of historically oppressed groups." *Id.* at 1472-73.

mechanisms that account for, and minimize the group harms of police technologies.[310] When the state has an obligation to promote antisubordination, it might consider ways that participation in democratic institutions is "muted for marginalized groups."[311] Shifting power to those whose views and participation and rights are subordinated "promotes equality and democracy."[312]

Finally, community control can serve as a form of contestatory democracy which "facilitat[es] . . . countervailing power for those subject to the domination of the state."[313] This notion of countervailing power is rooted in agonism, the political theory that values conflict within current political structures.[314] In the case of community control, the criminal legal system's power to produce "domination and violence"[315] necessitates the creation of structures and institutions that can resist that power.[316]

That means that community control must truly shift power, giving rise to more than mere procedural oversight without substantive authority.[317] It must foster contestation, defined as "political action that involves direct opposition to reigning laws, policies, or state practices."[318] Ideally, contestatory participation . . . shifts and builds countervailing political power" that can be wielded to shape policy and practice in ways that are aligned with the ends sought by communities.[319]

Professors Jocelyn Simonson and K. Sabeel Rahmeen have proposed measuring the effectiveness of mechanisms that purport to foster community control by analyzing "the nature of the authority, the composition of the governing body, and the moment of authority."[320] The nature of authority focuses on whether the community control provisions and the bodies that implement them "possesses power over, or merely input into, its domain of authority." It also requires examining whether those entities have power over the larger institutions that drive inequality.[321] In other words, is the authority possessed by a governance institution—in this instance, a community body—merely symbolic or instead substantive? The composition of the governing body examines whether there are means that ensure representation on the governing body of populations that are traditionally

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[310] Simonson, *supra* note 300, at 839.
[311] *Id.* at 839.
[312] *Id.* at 839.
[313] *Id.* at 787.
[314] *See generally* Mark Wenman, AGONISTIC DEMOCRACY: CONSTITUENT POWER IN THE ERA OF GLOBALISATION 5 (2013); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612 (2017) (describing antagonism as a withdrawal from political structures.).
[315] Simonson, *supra* note 300, at 787.
[316] *Id.* at 843.
[317] K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 680 (2020) (emphasis added).
[318] *Id.* at 690.
[319] *Id.* at 691.
[320] *Id.* at 683.
[321] *Id.*

disenfranchised, and to ensure the independence of the governing body.[322] The moment of authority forces looks to when authority is deployed—"upstream" at a moment of significant consequence with widespread impact or "downstream" with more incremental, piecemeal impact.[323]

In the sections that follow, I endeavor to analyze and evaluate CCOPS laws with an eye toward the spirit and substance of this analytical frame and the questions that opened this section. I also do so while keeping in mind the ways that the law might be used in service of an abolitionist vision. A few caveats are necessary. First, these questions do not lend themselves to a neat, precise quantitative analysis or even clear answers. In part, that's because much of the implementation story is constructed by public hearings, meeting minutes, reports made by the independent community bodies, law enforcement and other sources that do not always produce straightforward answers. It is also because the law is just beginning to take hold in some jurisdictions, so more time is needed to fully understand the breadth of its impact. In many instances we may never know whether police have decided to forego a tool or take a different course because of the law, the recommendation of a community body, or for some other reason.

That said, we can still draw some lessons from the implementation story thus far. The law yields two clear benefits: transparency and an avenue for limiting and banning the use of surveillance tools. Those benefits, however, must be balanced against the power and capacity deficit, the challenges of representation in the oversight process, and the timing of the oversight. I begin with the benefits of the law, while analyzing the challenges the law and community bodies face in light of the nature of the authority, the composition of the governing body, and the moment of authority.

A. Substantive Benefits

1. Transparency, When Police Comply

[322] *Id.*
[323] *Id.*

When the law works as designed, and law enforcement agencies comply with its reporting requirements,[324] it offers a measure of transparency.[325] In all four jurisdictions, police and city officials have been forced to reveal—with varying levels of accuracy and success—the surveillance technologies at their disposal and detail the dynamics of their use and deployment. Seattle provides an instructive example of that benefit, while the experience in Oakland illustrates how law enforcement can frustrate it.

In Seattle, the ordinance has shed a light on all of the surveillance technologies being used by the city, including the police department.[326] One Seattle Working Group member described how they learned about at least one technology that they did not know existed or that was in use by city agencies.[327] That technology, used by the Seattle Department of Transportation (SDOT), constantly monitored locations of cars and people by capturing WiFi signals and WiFi enabled devices. Though the tool was used for traffic management, the extent of the city's surveillance capacity was, prior to the retroactive audit imposed by the ordinance, completely unknown to the public.[328]

The reporting requirements have also had the effect of heightening public sensitivity to the acquisition and use of surveillance technologies by law enforcement. That awareness can mobilize constituencies in support of efforts to reign in technologies. Three incidents that have unfolded in the years since the law's enactment help to make the point. Each became a flashpoint precisely because there was a surveillance ordinance in place and an independent body tasked with enforcing the provisions of the law. One, raised by the ACLU of Washington, related to the SDOT's use of closed circuit television cameras to monitor protest activities.[329] The concern was ultimately resolved following a review by the City Auditor which concluded that the SDOT deployment of the technology was in compliance with its Surveillance Impact Report.[330] The second concern related to the use infrared

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[324] Neal McNamara, *Seattle Surveillance Reports Show How City Watches Public*, Patch, Oct. 9, 2018, https://patch.com/washington/seattle/seattle-surveillance-reports-show-how-city-watches-public.

[325] I do not mean to suggest that transparency alone is enough, or that it should be the ceiling of what the law offers. *See* David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L. J. 100 (2018) (describing the transformation of transparency from a demand of progressives to a neoliberal or libertarian value that can stifle substantive reform).

[326] Zoom interview with Michelle Merriweather, President and CEO, Urban League of Metropolitan Seattle (Dec. 3, 2021).

[327] Zoom interview with Jennifer Lee, Technology & Liberty Project Manager, ACLU Washington (Dec. 8, 2021).

[328] *Id.*

[329] 2021 Surveillance Technology Community Equity Impact Assessment and Policy Guidance Report *supra* note 274, at 7 (2021), http://www.seattle.gov/Documents/Departments/Tech/Privacy/2021%20CTO%20Equity%20Report.pdf.

[330] *Id.*; Megumi Sumitani & David G. Jones, Seattle Office of City Auditor, Surveillance Usage Review: Seattle Department of Transportation Closed Circuit Television (CCTV) Traffic Cameras 37-38 (2021).

cameras on county helicopters during protest activities.[331] Review of that use revealed "no improper use" by the police department.[332]

The third issue arose from records obtained through a concerned citizen's June 2020 public records request, which revealed that Seattle Police Department detectives had acquired and possibly used face recognition technology developed by the corporation Clearview AI since at least September 2019.[333] The detectives did so without abiding by any of the Surveillance Ordinance's requirements, in direct violation of the law.[334] An investigation by the Inspector General and the Office of Police Accountability found that an individual officer had acquired and used the technology on their own.[335] The detective was reprimanded, and as a result of the incident, City Council identified facial recognition technologies as surveillance technology subject to the ordinance's oversight provisions.[336] In the months that followed, advocates citing the racial justice concerns endemic to facial recognition technology,[337] successfully pressed City Council to enact a county-wide ban on government use of such technologies.[338]

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[331] jseattle, *Remember that f#!cking plane flying over Capitol Hill during last summer's protest? Here's what it was up to*, Capitol Hill Seattle Blog (Apr. 6, 2021, 2:44 PM), https://www.capitolhillseattle.com/2021/04/remember-that-fcking-plane-flying-over-capitol-hill-during-last-summers-protest-heres-what-it-was-up-to/.

[332] Surveillance Technology Community Equity Impact Assessment and Policy Guidance Report (2021), supra note 274 at 7.

[333] *Seattle officials deny use of facial recognition technology after ACLU allegations*, KING 5 News, Dec. 3, 2020, https://www.king5.com/article/news/local/seattle/seattle-facial-recognition-technology/281-bedd520e-fcf5-4672-abc8-86da9db2c4bf; *ACLU-WA Letter on SPD Use of Clearview AI*, ACLU Washington (Dec. 2, 2020), https://www.aclu-wa.org/docs/aclu-wa-letter-spd-use-clearview-ai.

[334] *Id.*

[335] Seattle Office of Police Accountability, Closed Case Summary (2021), http://www.seattle.gov/Documents/Departments/OPA/ClosedCaseSummaries/2020OPA-0731ccs042721.pdf; Surveillance Technology Community Equity Impact Assessment and Policy Guidance Report (2021), supra note 274, at 7.

[336] Surveillance Technology Community Equity Impact Assessment and Policy Guidance Report (2021), supra note 274, at 7.

[337] Matt Markovich, *Seattle, King County mull ban on facial recognition technology amid racial bias concerns*, KOMO News, May 5, 2021, https://komonews.com/news/local/seattle-king-county-mull-ban-on-facial-recognition-technology-citing-racial-bias-concerns; Drew Harwell, *Federal study finds racial bias of many facial-recognition systems,* THE SEATTLE TIMES, Dec. 19, 2019, https://www.seattletimes.com/nation-world/federal-study-finds-racial-bias-in-many-facial-recognition-systems/.

[338] Nathalie Graham, *ACLU Asks Durkan to Ban Use of Facial Recognition Software at SPD*, THE STRANGER, Dec. 2, 2020, https://www.thestranger.com/slog/2020/12/02/52765786/aclu-asks-durkan-to-ban-use-of-facial-recognition-software-at-spd; Melissa Hellmann, *King County Council delays vote on facial recognition ban*, THE SEATTLE TIMES, May 5, 2021, https://www.seattletimes.com/seattle-news/king-county-council-delays-vote-on-facial-recognition-ban/; Julia Marnin, *Washington State County Becomes First in U.S. to Ban Facial Recognition Software Over Racism Concerns*, NEWSWEEK, June 2, 2021, https://www.newsweek.com/washington-state-county-becomes-first-us-ban-facial-recognition-software-over-concerns-racism-1596894; King County, Wash., Ordinance 19296 (2021),

While it is impossible to know what would have happened in the absence of a surveillance ordinance, the fact that government entities were using surveillance technologies, and that a law existed requiring some procedural mechanism for oversight and use of those tools, undoubtedly served as fodder for a deeper investigation of those uses. In each instance, the surveillance ordinance, and the policies produced under the ordinance's purview, served as clear guidelines about what was or was not legitimate. And in at least one instance, ongoing advocacy that flowed from the controversy surrounding a potential violation of the ordinance led to an outright, county-wide ban of a police surveillance technology. Those facts, at least in part, vindicate the existence of the law.

Oakland's experience underscores the challenges and frustrations that can flow from law enforcement recalcitrance in the face of a legal mandate that demands transparency and compliance. Simply put, policies and reports are of little value if law enforcement can simply refuse to abide by them or actively work to undermine the functioning of the statute without fear of retribution. The Oakland PAC's experiences with automated license plate readers (ALPRs) exemplifies this problem.[339]

The PAC began to review these tools under the authority of the Surveillance Ordinance in March 2019.[340] By early 2021, that review was still underway, with concerns raised by the public regarding the retention of data, the sharing of data with other law enforcement agencies such as immigration authorities, and privacy safeguards put in place to guard against unauthorized access to the data.[341] Applying

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https://mkcclegisearch.kingcounty.gov/LegislationDetail.aspx?ID=4793336&GUID=260D1D8E-6553-4583-B75B-92FB4C5886C8&Options=&Search=&FullText=1.

[339] Automated License Plate Readers are "high-speed, computer-controlled camera systems that are typically mounted on street poles, streetlights, highway overpasses, mobile trailers, or attached to police squad cars. ALPRs automatically capture all license plate numbers that come into view, along with the location, date, and time. The data, which includes photographs of the vehicle and sometimes its driver and passengers, is then uploaded to a central server." *Street Level Surveillance: Automated License Plate Readers*, Electronic Frontier Foundation, https://www.eff.org/pages/automated-license-plate-readers-alpr#:~:text=Automated%20license%20plate%20readers%20(ALPRs)%20are%20high%2Dspeed%2C,attached%20to%20police%20squad%20cars (last visited Jan. 26, 2022). ALPRs can be attached to a fixed location, like a traffic light or telephone pole, or attached to a police patrol car. *Id.* In both instances, they capture images of cars and license plates, producing data that can be used to identify travel patterns, locate stolen vehicles, determine whether a vehicle has been in the vicinity of a crime, or find associations between vehicles. *Id.* Law enforcement agencies can store the data they capture, and can access that data from other agencies or private companies that maintain databases that store the information. *Id.* ALPRs can be programmed by police to search for license plates of particular interest to assist real time and historical investigations. *Id.* Despite those investigative uses, ALPRs raise a host of concerns. They include high error rates, data sharing, data security, privacy, and the potential to impose a racially disparate impact on communities of color. ÁNGEL DÍAZ & RACHEL LEVINSON-WALDMAN, BRENNAN CENTER FOR JUSTICE, AUTOMATIC LICENSE PLATE READERS: LEGAL STATUS AND POLICY RECOMMENDATIONS FOR LAW ENFORCEMENT USE (2020).

[340] *Privacy Advisory Commission Meeting Minutes* 2 (Mar. 7, 2019), https://cao-94612.s3.amazonaws.com/documents/Meeting-Minutes-030719.pdf.

[341] *Privacy Advisory Commission Meeting Minutes* 3-5 (Jan. 7, 2021), https://cao-94612.s3.amazonaws.com/documents/Privacy-Advisory-Commission-Meeting-Minutes-010721.pdf.

the cost-benefit analysis demanded by the surveillance ordinance, the Oakland PAC recommended that City Council prohibit the police department from using ALPR technology for two years.[342] That recommendation was based, in large part, on the fact that the police department had not complied with the statute. Police failed to perform regular audits of ALPRs, document requests for data sharing, or present annual reports to the City Council regarding their deployment.

For months, Oakland's PAC continued to raise concerns about police use of ALPRs.[343] One was with the police department's two-year retention period for data collected from ALPRs. The PAC analyzed emails from the police department that police claimed justified the use of ALPRs and a lengthy data retention period. That analysis found that when an ALPR was used, most of the searches occurred within the first 48 hours of its collection.[344] The PAC also examined each instance where ALPRs were used and found only one instance in which the technology was instrumental in solving a crime.[345] The PAC's frustrations culminated in a lawsuit, filed by Hofer against the city, for its failure to fully comply with the Surveillance Ordinance.[346]

Hofer, who filed the suit, situated Oakland's version of CCOPS against a national backdrop.[347] He described Oakland as "the most robust and transparent" of the jurisdictions that have enacted a CCOPS law, and highlighted the fact that Oakland "stands alone in having the sole privacy commission integrated into the oversight regime."[348] At the same time, Hofer contended, the legislation is "failing to work in Oakland and the other jurisdictions primarily because the culture of policing

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[342] *Privacy Advisory Commission Meeting Minutes* 1 (Feb. 4, 2021), https://cao-94612.s3.amazonaws.com/documents/Privacy-Advisory-Commission-Meeting-Minutes-020421.pdf; https://oaklandprivacy.org/wp-content/uploads/2021/02/ALPR-Motion-and-Findings.pdf The PAC continued to raise concerns regarding ALPRs throughout 2021. *Privacy Advisory Commission Special Meeting 2 Minutes* 1-4 (Oct. 7, 2021), https://cao-94612.s3.amazonaws.com/documents/Privacy-Advisory-Commission-Special-Meeting-2-Minutes-100721.pdf.

[343] *Privacy Advisory Commission Meeting Minutes* 2-3 (Nov. 4, 2021), https://cao-94612.s3.amazonaws.com/documents/Privacy-Advisory-Commission-Meeting-Minutes-110421.pdf.

[344] *Privacy Advisory Commission Meeting Minutes* 2 (Oct. 7, 2021) https://cao-94612.s3.amazonaws.com/documents/Privacy-Advisory-Commission-Special-Meeting-2-Minutes-100721.pdf; *Privacy Advisory Commission Meeting Recording* at 36:20 https://www.oaklandca.gov/meetings/pac-regular-meeting-october-7-2021 (Oct. 7, 2021).

[345] *Privacy Advisory Commission Meeting Recording* at 37:01 https://www.oaklandca.gov/meetings/pac-regular-meeting-october-7-2021 (Oct. 7, 2021).

[346] Brian Hofer, Why You Should Care About Our Lawsuit Against the City of Oakland, Secure Justice (Sept. 2, 2021) ("By withholding information legally required to be disclosed to the public, OPD and the city attorney are prohibiting the PAC from performing its oversight role, and the public and city council are unable to determine whether use of these surveillance technologies is effective and being used according to the approved use policies in a lawful manner[.]"), https://secure-justice.org/blog/why-should-you-care-about-our-lawsuit-against-the-city-of-oakland; Fussell, supra note 256.

[347] Hofer, *supra* note 346. Notably, Hofer was able to file suit pursuant to a provision in the law that provides for a private right of action for violations. Oakland Mun. Code § 9.64.050(1)(A).

[348] Hofer, *supra* note 346.

hasn't changed, there is a lack of trust in the data being presented, and because the civilian volunteer commissioners cannot confirm the veracity of what the police are claiming, having no access to the raw, confidential underlying data."[349]

Hofer described the police department's repeated failure to comply with the law and multiple efforts to obstruct oversight by the PAC.[350] The suit reads like a playbook of police non-compliance, from police failures to perform audits of ALPR use since the PAC was formed in 2016, to multiple failures to provide information to the PAC regarding surveillance technology use.[351] The suit accused the police department of violating the surveillance ordinance on several other fronts, including: by using a drone on a pair of occasions in the absent of any exigency and without reporting it to the PAC and City Council;[352] for failing to disclose all police surveillance technologies used by the Oakland Police Department;[353] and for the unauthorized sharing of surveillance technology data with federal law enforcement authorities in violation of the technology's use policy.[354] Police non-compliance with the law prevented the PAC and the City of Oakland from "fulfilling the purpose of the Surveillance Ordinance."[355] Meanwhile, police are able to continue using ALPRs—tools that are demonstrably ineffective, raise privacy concerns, and can be deployed to serve nefarious ends. And they are able to do so as litigation aimed at enforcing the law unfolds.

As these implementation stories make clear, transparency is a value add, when law enforcement complies. Compliance, however, is far from a given.

2. Avenues to Curtail or Stop the Use of Police Surveillance Technologies

The law and the oversight process also provides an avenue to limit the deployment of police surveillance technologies, and in some instances stop those technologies altogether. All four jurisdictions have enacted bans to specific law enforcement surveillance technologies. The Seattle experience recounted above is a ready example of that. The discovery of facial recognition technology in use by Seattle police eventually led to a City Council amendment to the ordinance banning that technology. A ban on facial recognition technology was also enacted by a unanimous City Council vote as part of an amendment to the law in Berkeley.[356] The law bars

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[349] *Id.*

[350] *Id.*

[351] Petition for Writ of Mandate or Prohibition, Secure Justice et al. v. Oakland Police Dep't et al., (Super. Ct. of Alameda 2021) ¶¶ 22-26, 39-49.

[352] *Id.* ¶¶ 53-59.

[353] *Id.* ¶¶ 57-59.

[354] *Id.* ¶¶ 60-69.

[355] Id. ¶ 8.

[356] Matthew Guarglia, *Victory! Berkeley City Council Unanimously Votes to Ban Face Recognition*, Electronic Frontier Foundation (Oct. 16, 2019) https://www.eff.org/deeplinks/2019/10/victory-berkeley-city-council-unanimously-votes-ban-face-recognition. While city officials claimed that they never sought or used facial recognition technology, documents obtained through a public records request revealed that prior to the ban the city had

government acquisition, use, and access to face recognition technology.[357] The preemptive ban was enacted nearly 18 months after the ordinance was passed.[358] In San Francisco, a ban on face recognition was enacted as part of the surveillance ordinance.[359] And in Oakland, the PAC engagement with the oversight process led to bans on two police surveillance technologies. The PAC proposed amendments to the Surveillance Ordinance banning predictive policing technology and biometric surveillance technology.[360] Those amendments were proposed after, in the course of reviewing a crime analysis report tool, the PAC uncovered a predictive policing function in the technology.[361] The amendments were adopted in January 2021, barring the city's acquisition or use of biometric surveillance technology and predictive policing technology.[362] And if City Council accepts and follows the recommendation made by Oakland's PAC imposing a two year moratorium on ALPRs, that will serve as another example of the law working to halt a surveillance tool.

The law has also helped stifle the expansion of police surveillance technologies. For example, in Oakland at a PAC Meeting in March of 2020, PAC members "raised significant concerns" concerning Oakland Chamber of Commerce's proposed $75,000 grant to install cameras on private property in Chinatown and to share that information with the Oakland Police Department. The PAC members stated that "this program [was] anathema to the goals of transparency and public oversight of surveillance technology."[363] Eventually, after the PAC indicated that it could not

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acquired it. Brandon Yung, *Before ban, city of Berkeley acquired facial recognition technology*, The Daily Californian (Oct. 21, 2019), https://www.dailycal.org/2019/10/21/before-ban-city-of-berkeley-acquired-facial-recognition-technology/.

[357] Berkeley Ordinance at 2.99.0.30(2).

[358] *See* Berkeley Police Department, Special Order 2020-0005; *See also* Haley Samsel, *Berkeley Becomes Fourth City to Ban Police Use of Facial Recognition*, Security Today (Oct. 18, 2019), https://securitytoday.com/articles/2019/10/18/berkeley-becomes-fourth-city-to-ban-police-use-of-facial-recognition.aspx.

[359] Shirin Ghaffary, *San Francisco's facial recognition technology ban explained*, VOX (May 14, 2019), https://www.vox.com/recode/2019/5/14/18623897/san-francisco-facial-recognition-ban-explained

[360] *Privacy Advisory Commission Meeting Minutes* 4-5 (July 2, 2020), https://cao-94612.s3.amazonaws.com/documents/PAC-AUG-6-MEETING-PACKET.pdf.

[361] *Privacy Advisory Commission Meeting Minutes* 4-5 (June 4, 2020), https://cao-94612.s3.amazonaws.com/documents/PAC-JULY-2-SPECIAL-MEETING-PACKET.pdf.

[362] Oakland, Cal. Ordinance Amending Oakland Municipal Code Chapter 9.64 (Jan. 12, 2021), https://www.eff.org/document/oakland-ordinance-amending-oakland-municipal-code-chapter-964-which-regulates-citys; Nathan Sheard, *Oakland's Progressive Fight to Protect Residents from Government Surveillance*, Electronic Frontier Foundation (Jan. 20, 2021), https://www.eff.org/deeplinks/2021/01/oaklands-progressive-fight-protect-residents-government-surveillance.

[363] *Privacy Advisory Commission Meeting Minutes* 2 (Mar. 5, 2020) https://cao-94612.s3.amazonaws.com/documents/Meeting-Minutes-030520.pdf.

recommend that City Council approve the grant, the proposal was withdrawn and the funds were instead allocated to enhance street lighting.[364]

In other instances, policies narrowed the parameters for the use of technologies, even as they did not halt them altogether.[365] When agreement could not be reached, or issues persisted, the matter would be referred to an ad hoc committee for further discussion and review.[366] During a February 2020 Oakland PAC meeting, one member of the public pointed to the effectiveness of the law as measured by the fact that in 2007, when no oversight or use policies were in place, law enforcement used cell site simulators—technologies used to mimic and track cell phone signals—"dozens of times, and since the ordinance was adopted it has only done so three times."[367] He credited the dramatic reduction in the number of deployments as "an example of how oversight creates a level of restraint in the department that inherently protects people's civil liberties."[368]

Bans on specific technologies are a good thing; they are in keeping with the type of abolitionist ethos that works to shrink the footprint and limit the power of

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[364] The debate over the Chinatown grant spanned over several meetings. *See Privacy Advisory Commission Meeting Minutes* (May 6, 2021) https://cao-94612.s3.amazonaws.com/documents/Privacy-Advisory-Commission-Meeting-Minutes-050621.pdf (indicating that the PAC will vote against the grant); *Privacy Advisory Commission Meeting Minutes* (June 4, 2021) (https://cao-94612.s3.amazonaws.com/documents/Privacy-Advisory-Commission-Meeting-Minutes-060421.pdf) (detailing the announcement that the grant proposal was withdrawn, and that "The funding that was earmarked by City Council will instead be used to enhance street lighting.").

[365] *See, e.g., Privacy Advisory Commission Meeting Minutes* 2-3 (Mar. 5, 2020) https://cao-94612.s3.amazonaws.com/documents/Meeting-Minutes-030520.pdf (editing Oakland Police Department's Live Stream Camera Use Policy to require "a written notification any time the department activates the cameras and uses them to observe Protected Activity," and approving the policy with those edits); *Privacy Advisory Commission Meeting Minutes* 2-3 (Sept. 2, 2021) https://cao-94612.s3.amazonaws.com/documents/Privacy-Advisory-Commission-Meeting-Minutes-090221.pdf (imposing several conditions on OPD's Body Worn Camera Use Policy – including an instant activation feature, a lengthier buffering time, and more training for officers regarding uploading Body Worn Camera data – before voting to approve it); *Privacy Advisory Commission Special Meeting Minutes* 5 (June 4, 2020) https://cao-94612.s3.amazonaws.com/documents/PAC-JUNE-4-2020-SPECIAL-MEETING-PACKET.pdf (approving OPD's Drone Use Policy with two stipulations: "first, that the City only acquire a drone with the capabilities allowed in the Use Policy. . . . Second, due to the economic fragility of the City during the downturn, that the City only use grant funds to purchase a drone and not general fund revenue."); *Privacy Advisory Commission Meeting Minutes* 1-2 (Dec. 5, 2019), https://cao-94612.s3.amazonaws.com/documents/Privacy-Advisory-Commission-Meeting-Minutes-120519.pdf (approving the Wildfire District and Fire Safety Inspection's Data Collection Impact Statement and proposed Use Policy, subject to several edits, including clarifying language regarding third party data sharing and a clause requiring consent for photography inside of a property).

[366] For example, in its May 2020 meeting, the PAC formed an ad hoc group to workshop Oakland Police Department's Forensic Logic Technology Impact Report and Proposed Use Policy. *Privacy Advisory Commission Meeting Minutes* 2 (May 14, 2020), https://cao-94612.s3.amazonaws.com/documents/May-14-2020-Special-Meeting-Minutes.pdf. The group then presented its revised report and policy to the PAC in September of that year, where it was adopted. *Privacy Advisory Commission Meeting Minutes* 2 (Sept. 3, 2020), https://cao-94612.s3.amazonaws.com/documents/Meeting-Minutes-090320.pdf.

[367] *Privacy Advisory Commission Meeting Minutes* 2 (Feb. 6, 2020), https://cao-94612.s3.amazonaws.com/documents/Privacy-Advisory-Commission-Meeting-Minutes-020620.pdf.

[368] *Id.*

criminal legal system actors. Placing greater limits on the instances when a surveillance technology can be used is of value as well. But limiting or banning police surveillance technologies on a case-by-case and tool-by-tool basis is akin to a game of whack-a-mole. It amounts to a set of retail, rather than wholesale interventions. The law's shortcomings make it difficult to replicate these types of successes on a broad scale, or to dramatically upend police surveillance technologies. Nor is there any guarantee that a ban will be permanent. Against the backdrop of these concerns, I turn now to the law's limits, examining its community control mechanisms.

B. Challenges

1. Power and Capacity Deficits

All of the community bodies that serve as mechanisms for community control are plagued by a significant power deficit. On the continuum of power versus input, the bodies examined here and as envisaged by the model law are firmly on the side of input. First, in each jurisdiction, City Council or its equivalent is free to disagree with the community body's suggestions, or ignore its recommendations altogether. City Council is not required to provide any reason for its departure from a recommendation, or take any steps to incorporate any of the community body's views into its decision to accept or reject a technological tool or the policies that will govern it. Second, they have little to no substantive tools to hold police or other government entities that share surveillance tools with the police accountable. Police are free to ignore or flout the policies that City Council approves, and face next to no repercussions when they do so. While the model CCOPS bill contains stopgap measures that bar the use of technologies absent city council approval, no such similar provisions exist in any of the jurisdictions examined here.[369] Finally, as discussed below, the capacity challenges contribute to the power deficit in significant ways.

My conversations with members of Seattle's Community Surveillance Working Group crystallized the challenges that flow from a power deficit. Following the path of ALPRs through the process there provides clarity. In April 2019, Seattle's Working Group raised concerns to City Council about the use of ALPRs, which the Working Group argued "chills constitutional protected activities."[370] Their concerns were well founded, as the ALPR systems at issue collected 37,000 license plates in a 24-hour period—equating to 13.5 million scans over a full year.[371] In response, the Seattle Working Group detailed instances of abusive use of ALPRs by police to surveil Muslim communities in New York and the United Kingdom, and the disproportionate

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[369] Model Bill, ACLU (April 2021) *supra* note 46, at §§3 & 6(C).

[370] Seattle Community Surveillance Working Group, Privacy and Civil Liberties Impact Assessment (April 23, 2019), https://www.seattle.gov/documents/Departments/Tech/Privacy/CSWG%20Comments%20on%20Group%201%20LPR%20Technologies%20Final%20.pdf.

[371] Automated License Place Recognition (Patrol), 2018 Surveillance Impact Report at 45.

placement of ALPRs in low income communities of color in Oakland.[372] The police pointed to six undated instances in Seattle when arrests were made in serious crimes as examples of the benefits of ALPRs.[373] Notably, none of those examples detailed whether the suspect arrested was convicted of the crime charged.

The Seattle Working Group suggested, among other things limiting use of ALPRs to criminal investigations and halving the retention period for data collected by ALPRs from 90 days to 45 days. While the ultimate policy did limit access to ALPR data to specific criminal investigations, the data retention limits were unchanged. The city's chief technology officer responded by stating that "We believe that policy, training, and technology limitations enacted by SDOT provide adequate mitigation for the potential privacy and civil liberties concerns raised by the Working Group about the use of this important operational technology."[374] The Council rejected the Working Group recommendation and adopted a 90-day retention period.[375] ALPRs were ultimately approved in early 2021, with little in the way of additional substantive changes to the policies governing their use.

One Seattle Working Group member, the ACLU of Washington's Jennifer Lee, noted that in her experience, that course of conduct was the norm: the City Council often did not accept the recommendations of the Working Group.[376] And since the law does not require City Council to explain the reasoning behind its decisions, Ms. Lee was understandably unable to say how much weight City Council gave to the Working Group's input, if any at all. While the Working Group could theoretically advocate on its own to have their recommendations accepted, launching and conducting such a campaign would be so time consuming as to impede their work entirely.[377] Although City Council considers whether to approve or reject technology at public hearings, those hearings were generally led by the agency proponent of the technology or the

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[372] *Id.*

[373] *Id.* at 14-15. For ALPRs used for Parking Enforcement, police noted that in 2017, 3613 motor vehicles were reported stolen, and 318 were confirmed stolen, and that during the first nine months of 2018, 2600 motor vehicles were stolen with 349 confirmed stolen. Parking Enforcement Systems (Including ALPR), 2018 Surveillance Impact Report at 14. They also detailed nearly $40 million in revenue collected from parking citations for 2016 and 2017, though it is unclear how much of that resulted from ALPRs. *Id.*

[374] Meeting Minutes, Community Surveillance Working Group, May 17, 2019, http://www.seattle.gov/tech/initiatives/privacy/surveillance-technologies/community-surveillance-working-group.

[375] Seattle Police Department, 2018 Surveillance Impact Report: Automated License Plate Readers (ALPR)(Patrol) 17 (2019), http://www.seattle.gov/Documents/Departments/Tech/FINAL_English_ALPR_Patrol.pdf.

[376] Interview with Jennifer Lee, *supra* note 327; Seattle City Council Insight, *Surveillance technology ordinance collapsing under its own bureaucratic weight* (May 21, 2019), https://sccinsight.com/2019/05/21/surveillance-technology-ordinance-collapsing-under-its-own-bureaucratic-weight/#:~:text=Surveillance%20technology%20ordinance%20collapsing%20under%20its%20own%20bureaucratic%20weight,-On%2005%2F21&text=In%20July%20of%202017%2C%20the,be%20used%20for%20surveillance%20purposes.

[377] Interview with Jennifer Lee, *supra* note 327.

city's chief technology officer.[378] The fact that those officials—aligned with city government and law enforcement—were tasked with leading these meetings provides some sense of the voices that the Council actually considers and credits.

Another dimension of the power problem is the lack of tools to hold law enforcement accountable when they frustrate the oversight process. The experience in Oakland—where law enforcement simply defied the statute's reporting requirements without fear of any consequences—is one manifestation of the power deficit. While the Oakland experience demonstrates how one can leverage a private right of action to sue the police for violation of the ordinance, nothing prevents City Council from approving surveillance technologies over the objection of these independent bodies. And if the history of litigation deployed against police to stop misconduct in other spaces is any indicator, a lawsuit will be of limited utility.[379]

The other significant challenge faced by the Working Group is the sheer capacity it requires to engage in the type of rigorous oversight envisioned by the surveillance ordinance.[380] Those capacity challenges contribute to the power deficit of the CCOPS community control mechanism. It has taken years for the oversight process to unfold in Seattle.[381] There, the city initially compiled a master list of technologies 28 surveillance technologies, 19 of which were used by the Seattle Police Department, in November 2017.[382] That list was revised two years later, in December 2019, and includes 26 technologies, 17 of which were used by law enforcement.[383] The revised list categorized the technologies in four groups, and set forth a schedule for the completion of Surveillance Impact Reports (SIRs) and approval by City Council for each group of technologies. A September 2021 report on the status of the law notes that 8 police technologies have been approved by City Council, with another set of technologies scheduled for approval in December 2021.[384] None of the technologies that have been reviewed so far have been rejected.[385]

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[378] *Id.*

[379] It is unclear how the power dynamics in one of the cities will unfold, but is worth noting. Berkeley's body is responsible for oversight of police, and was recently empowered with the ability to access records, compel attendance of police department employees, and exercise subpoena power. Berkeley City Charter, *supra* note 288, at §125(3)(a)(5).

[380] Seattle City Council Insight, *supra* note 376.

[381] *Id.* A set of bylaws, enacted in the summer of 2021, were designed to enhance the operation of the Working Group. It is too early to say whether the bylaws will have the intended effect. Surveillance Technology Community Equity Impact Assessment and Policy Guidance Report (2021), *supra* note 274, at 11-16 app. A.

[382] City of Seattle, Master List of Surveillance Technologies 1 (2017), http://www.seattle.gov/Documents/Departments/SeattleIT/Master-List-Surveillance-Technologies.pdf.

[383] City of Seattle, Master List of Surveillance Technologies 2 (2019), http://www.seattle.gov/Documents/Departments/Tech/Privacy/12-2019%20Revised%20Master%20List%20of%20Surveillance%20Technologies.pdf.

[384] Surveillance Technology Community Equity Impact Assessment and Policy Guidance Report (2021), *supra* note 274, at 3-4.

[385] Those technologies include automated license plate readers, a 911 logging recorder, infrared cameras, video recording systems, situational awareness cameras, and a dispatch system. *Id.*

The policy documents created by law enforcement and other government entities contain a wealth of information, and are subjected to a public comment period before they are reviewed and assessed by Seattle's Working Group, which then provides its own privacy and civil liberties equity impact assessment.[386] That assessment by the Working Group serves as a set of recommendations to City Council.[387] In the case of ALPRs used for parking enforcement, the final approved policy spanned 327 pages. The policy document for ALPRs used for patrol by police spanned 353 pages. Those pages included comments from the public, along with use policies, impact reports, and documents offered by the police to demonstrate the effectiveness of the tools.

Ms. Lee noted that in many instances, the use and impact policy reports are riddled with inaccuracies, contradictions, and blatant omissions.[388] Setting aside whether such errors are the result of benign mistakes or intentional obfuscation, review of the reports for accuracy requires a significant investment of time, resources, and expertise.[389] Despite efforts by Ms. Lee and other members of the Working Group to garner more input from non-technologists, including those with lived experience grappling with law enforcement surveillance, the sheer volume of the work and the expertise required to execute it makes such efforts at inclusion difficult.[390] At the same time, advocacy organizations who have a seat on the Working Group are not compensated for their participation, which effectively means that only those who have the resources and time to participate can do so.[391]

Working Group member Michelle Merriweather, President and CEO of the Urban League of Seattle, echoed Ms. Lee's sentiments regarding both the power dynamics at play and the capacity challenges faced by the Working Group.[392] Like Ms. Lee, Ms. Merriweather made clear that while the Working Group conducts its own review and assessment, and makes recommendations to City Council, ultimately the Council makes its own decision about how to proceed.[393] Ms. Merriweather was unable to say how much weight Council gave to their recommendations, though she noted that most centered on retention periods for the data collected by surveillance technologies.[394] She highlighted the outsized role that Ms. Lee and the ACLU of Washington must play in the review process, given the complexity of the use and impact reports and the depth of experience and expertise that Ms. Lee can bring to bear.[395] Ms. Merriweather explained that the information contained in the reports must be interpreted for those who do not understand the intricacies of the technology

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[386] Interview with Jennifer Lee, *supra* note 327.
[387] *Id.*
[388] *Id.*
[389] *Id.*
[390] *Id.*; Seattle City Council Insight, *supra* note 376.
[391] Interview with Jennifer Lee, *supra* note 327; Seattle City Council Insight, *supra* note 376.
[392] Interview with Michelle Merriweather, *supra* note 326.
[393] *Id.*
[394] *Id.*
[395] *Id.*

at issue.[396] In the absence of such expertise, the entire process would serve as little more than a "rubber stamp."[397]

2. Community Representation and Public Engagement

Examining this dimension of the law and the structure it creates from the standpoint of composition and representation reveals a bit of a mixed bag. The law in each city was enacted with the spirit of engaging local communities in the debate over surveillance technologies. The preambles of the law in Seattle and Oakland speak to the importance of public and community input,[398] and the model legislation is grounded in the notion that decisions about surveillance technologies should not be made "until meaningful public input has been solicited and given significant weight."[399] The community advisory committees or their functional equivalents are supposed to provide a channel for community voices. And in three of the four cities at issue here, the law requires they do so while reflecting in their membership those aligned with or subjected to the harms of police surveillance technologies. In Seattle, Oakland, and Berkeley, the law that creates the community body aims to ensure that they at least, in part, ensure "representation of traditionally powerless groups affected by the policies in question."[400] The bodies themselves seem to reflect that commitment.[401]

Notwithstanding the composition of the independent community bodies, public engagement with those closest to the harms of police surveillance tools has proven challenging. Seattle's experience is instructive. Pursuant to the law there, the city's chief technology officer undertook an annual review to assess the functioning of the surveillance statute. That review revealed limited public engagement with those most likely subject to over-use of surveillance technologies.[402] During the Seattle

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396 *Id.*

397 *Id.*

398 Seattle's preamble suggests that the city and its entities can promote carefully considered, judicious deployments of surveillance technologies when informed by public input and mechanisms to address civil rights and civil liberties concerns. Seattle, Wash., Ordinance 125376, Preamble (2017), https://seattle.legistar.com/ViewReport.ashx?M=R&N=Text&GID=393&ID=2849012&GUID=5B7D2F80-A918-4931-9E2E-88E27478A89E&Title=Legislation+Text. Oakland's preamble highlights the importance of public debate and input over the acquisition and use of surveillance technology, given the history of the use of such technologies to threaten privacy and harass and oppress disfavored and marginalized groups Oakland, Cal. Ordinance Adding Chapter 9.64 to the Oakland Municipal Code Establishing Rules for the City's Acquisition and Use of Surveillance Equipment Preamble (Apr. 26, 2018) http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/standard/oak070617.pdf.

399 Model Bill, ACLU (April 2021) *supra* note 46, at Preamble.

400 Rahman & Simonson, *supra* note 317 at 723; *see* Part II.C.2.

401 *See supra* Part II.C.2.

402 Surveillance Technology Community Equity Impact Assessment and Policy Guidance Report (2021), *supra* note 274, at 7. A version of this concern was raised in the 2020 Equity Impact Assessment. Seattle Information Technology, Surveillance Technology Community Equity Impact Assessment and Policy Guidance Report 5 (2020),

Working Group's review of ALPRs, a total of 129 comments were submitted over the course of 2 focus groups, 5 meetings, and through an online survey.[403] Some unknown number of individuals submitted more than one comment.[404] More than half were submitted by people who identified as White, while 10% were submitted by Black people.[405] Nine percent identified as Asian or Asian American, 4% as multiple races, and 2% American Indian.[406]

These levels of engagement are consistent with the Seattle experience overall: in the course of their review of 17 surveillance technologies used by government and police, an average of 9 members of the public commented on those technologies.[407] On average, 11% of respondents were Black, 12% were Asian, 1% were Hispanic or Latino, and 48% were white.[408]

On one hand, overall public comments submitted during the approval process revealed ongoing concerns about government overreach and unnecessary surveillance; data and information sharing between government agencies and city departments; data use, management, and security; and the potential that data collected for one purpose could be used for law enforcement purposes.[409] The public also made some requests for additional cameras to "enforce bike lane regulations and to provide neighborhood and park safety."[410]

However, to the extent those public comments are supposed to comprise the views of those most impacted by surveillance technologies, outreach efforts have fallen short, rendering those voices largely silent.[411] While Seattle has made efforts to engage the public and reach as many communities as possible, "those efforts have not been effective."[412] In fact, review of the comments revealed that "primary

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http://www.seattle.gov/Documents/Departments/Tech/Privacy/2020%20CTO%20Equity%20Report.pdf. .

[403] Automated License Place Recognition (Patrol), 2018 Surveillance Impact Report at 55.

[404] *Id.*

[405] *Id.*

[406] *Id.*

[407] SEATTLE POLICE DEP'T, 2018 SURVEILLANCE IMPACT REPORT: AUTOMATED LICENSE PLATE RECOGNITION (ALPR) (PATROL) app. B (2019); SEATTLE POLICE DEP'T, 2019 SURVEILLANCE IMPACT REPORT: 911 LOGGING RECORDER app. E (2019); SEATTLE POLICE DEP'T, 2020 SURVEILLANCE IMPACT REPORT: FORWARD LOOKING INFRARED REAL-TIME VIDEO (FLIR) (KCSO HELICOPTERS) app. C (2020).

[408] SEATTLE POLICE DEP'T, 2018 SURVEILLANCE IMPACT REPORT: AUTOMATED LICENSE PLATE RECOGNITION (ALPR) (PATROL) app. B (2019); SEATTLE POLICE DEP'T, 2019 SURVEILLANCE IMPACT REPORT: 911 LOGGING RECORDER 35 (2019); SEATTLE POLICE DEP'T, 2020 SURVEILLANCE IMPACT REPORT: FORWARD LOOKING INFRARED REAL-TIME VIDEO (FLIR) (KCSO HELICOPTERS) 26 (2020). As a point of reference, 2021 Census data for Seattle estimates that 7% of the population is Black, 15% is Asian, 7% were Hispanic or Latino, and 64% is white. United States Census Bureau, *QuickFacts Seattle city, Washington*, https://www.census.gov/quickfacts/seattlecitywashington (last visited Feb. 8, 2022).

[409] Surveillance Technology Community Equity Impact Assessment and Policy Guidance Report (2021), supra note 247, at 6.

[410] *Id.*

[411] *Id.* at 8.

[412] *Id.*

engagement is not amongst communities potentially disproportionately affected by use of surveillance technologies" but instead, "the primary group identified in engaging in this process is white and in a subset of specific neighborhoods not identified as communities of concern for over-use of surveillance."[413] Those who are engaged are a select few, whose primary concerns are focused on technical working or security, "rather than the larger policy discussion relating to civil liberties or disproportionate community impact resulting from a technology's use."[414] Efforts to make materials more accessible to those members of the public who might feel the disproportionate burden of surveillance technology have not succeeded.[415] Even if the community bodies are reflective of those who are either harmed by surveillance technology, or targeted by it, the challenges of public and community engagement are glaring.

3. Form Over Substance and the Rubber Stamp Problem

This article began by arguing that surveillance oversight bureaucracy approval can further entrench police surveillance tools in the ecosystem of a jurisdiction. In part, that concern is animated by the point at which a local governing body exercises its authority. All of the laws require that decisions about police technologies go through city council for approval—with the input of a community body--prior to the acquisition and deployment of surveillance technologies. That is the strongest point at which a community body can exercise its authority—advisory or not. The challenge, however, is that we are at an early point in the law's implementation. Cities have not had to confront new police surveillance technologies en masse, but are instead examining those already in use by police. In those circumstances, they are doing work that is shaped more by what already exists than the possibilities of what might be.[416] It may be easier to bless a tool that the police are already using than it is to stop the police from acquiring a new tool. That dynamic can turn the statutory process into a rubber stamp. Berkeley's implementation of its surveillance ordinance exemplifies, in part, how that can be true. A review of the annual surveillance reports and the public reporting reveals a dearth of publicly available information detailing objections, if any, raised by Berkeley's Police Review Commission (PRC) about the surveillance technologies that have come before it for review.

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[413] *Id.*

[414] *Id.* The Chief Technology Officer's report does note that its analysis of public comments also revealed concerns about technologies that were exempted by the statute, fell outside the City's purview, or focused on broader concerns about oversight of police, with concerns about surveillance as one dimension of that conversation. *Id.*

[415] *Id.*

[416] The distinction is between participation that happens "upstream, early in a policy-making discussion when many possibilities are live" as compared to "downstream, where there are still possible changes, but prior decisions have already locked much more in place." Rahman & Simonson, *supra* note 317 at 725.

All of the technologies subject to review—four in total—have been approved by Berkeley's PRC. Those technologies are: body worn cameras, automated license plate readers, GPS tracking devices, and a street level imagery camera that is mounted on a vehicle to collect digital images of the City's infrastructure. While that fact alone—approval of technologies—is common to the experiences in other jurisdictions, the relative lack of rigor in the review and approval process is at odds with the spirit of the law. In each instance, the guardrails placed on surveillance technologies allow for significant abuses and misuses of those technologies by law enforcement. And to the extent objections were raised, the perspective of law enforcement about the value of the tools anchors the contours of the debate.

In the case of body worn cameras, the police department's surveillance use policy mandates their use in several circumstances, while granting broad discretion to officers outside of those circumstances to use their cameras as they see fit. The circumstances under which body worn cameras must be activated are confined to specific law enforcement activities, such as investigative contacts, custodial interviews, traffic stops, searches, contacts with "adversarial part[ies]," and during the transport of a detained or arrested person. Outside of that, "officers should record any incident they feel would be appropriate or valuable to document."[417] Berkeley officers can also surreptitiously record any conversation in which they "reasonably believe[] that such a recording will be lawful and beneficial to their investigation."[418] Similarly, Berkeley police personnel can mute their BWC when conducting a search for evidence once a location has been secured and they are no longer interacting directly with a member of the public, or when recording "would interfere with their ability to conduct an investigation" in their judgment.[419]

While the financial costs are detailed, [420] there is no further analytical account describing the substantive benefits of body worn cameras beyond citation to a 2013 Justice Department study highlighting a decrease in use of force and citizen complaints as a result of cameras being deployed.[421] The police attempted to justify the massive collection of data conducted by body worn cameras by pointing to general categorical uses of camera footage.[422] That justification falls short, however, in the absence of a more detailed delineation of how much footage is useful in each category. Concerns related to civil rights and civil liberties are framed by the police department

[417] Berkeley City Manager, 2019 Surveillance Technology Report at 18.
[418] *Id.* at 26.
[419] *Id.*
[420] *Id.* at 20.
[421] The lone report from the U.S. Bureau of Justice Administration that referenced a 2013 Rialto, California study showing that the use of BWCs led to a 59% decrease in use of force and an 87.5% decrease in citizen complaints. *Id.* at 21.
[422] In its November 2020 report, the Berkeley Police Department asserted that body worn cameras have proven effective in supporting criminal prosecutions, training purposes, and Internal Affairs investigations and Use of Force Reviews. Berkeley City Manager, 2020 Surveillance Technology Report at 5-6.

narrowly to center on data protection, rather than the infringement on privacy that body worn cameras carry with them.[423]

The use of ALPRs is restricted to supporting law enforcement operations, such as parking enforcement, and searching for stolen vehicles.[424] The data obtained by the tools is retained for a year and can be shared with other law enforcement agencies.[425] The cost-benefit analysis is again framed in financial terms, and the efforts to safeguard civil rights and civil liberties are, as with body worn cameras, rooted in data retention and protection.

GPS trackers, used for criminal investigations pursuant to a warrant or the consent of the owner of the object to which the tracker is attached, were likewise approved without much difficulty. A 2020 Surveillance Technology Report shows they were justified—without any metrics—for their effectiveness in "apprehending bike thieves."[426] And safeguards to civil rights and civil liberties were again focused on data protection. In addition to the boilerplate language found in the reports regarding body worn cameras and automated license plate readers, the City Manager's report stressed the need to maintain ownership and control over shared information to protect against unauthorized use of GPS tracker data. It maintained that such procedures would ensure that the data is "not used in a way that would violate or infringe upon anyone's civil rights and/or liberties, including but not limited to potentially disparate or adverse impacts on any community or group."[427]

Berkeley's PRC did not provide substantial public comments regarding these tools, noting simply that it had reviewed the acquisition and use policies "with the balancing test in mind and submitted its input to the [City] Council."[428] In the limited instances where the PRC's policy recommendations are available, those recommendations do not fundamentally upend the use of the technology.[429]

The implementation of San Francisco's surveillance technology ordinance echoes the Berkeley experience. It also highlights a structural flaw in the ordinance: delays in the bureaucratic process afford the police unfettered access to existing surveillance technologies.

A review of the publicly available materials reveals that the San Francisco Police Department has provided an inventory of the surveillance technologies currently in their hands and in use to the Committee on Information Technology (COIT), the body from which a subcommittee, the Privacy and Surveillance Advisory

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[423] 2019 Surveillance Technology Report at 12.
[424] *Id.* at 46.
[425] *Id.* at 47-49.
[426] 2020 Surveillance Technology Report at 8.
[427] *Id.*
[428] Berkeley Police Review Commission 2019 Annual Report at 26.
[429] One local media outlet reported, for instance, that the PRC passed a motion recommending that the body worn camera use policy make clear that they must be used to record unless exigent circumstances exist, such as if the BWC fails to function. Sabrina Dong, *Police Review Commission recommends changes to body-worn cameras at meeting*, THE DAILY CALIFORNIAN (Oct. 26, 2018), https://www.dailycal.org/police-review-commission-recommends-changes-to-policy-on-body-worn-cameras-at-meeting/. Notably, that recommendation actually expands the use of a surveillance technology, rather than narrowing it.

Board, is drawn.[430] The department lists 44 technologies on its website, providing the name of each piece of surveillance technology without further detail.[431] The City of San Francisco likewise lists these police surveillance technologies, in some instances providing a sentence or two description of their function.[432] Of the 44 technologies listed, only two—Automated License Plate Readers and Shotspotter—have a technology policy in place.[433] In both instances, the policies were approved unanimously by the Board of Supervisors on the recommendation of the San Francisco's COIT, following public hearings.[434] The policies and impact reports for both technologies were produced in 2021, nearly two years after the date the ordinance was enacted.[435] Notwithstanding the fact that delays to the audit and review process may have been caused by the COVID-19 pandemic, a comprehensive audit and review of the remaining technologies will not happen overnight. The fact that the police department is able to use more than three dozen additional technologies in the absence of a policy and without a rigorous assessment of the impact of those technologies is problematic. Since the law allows for the continued law enforcement use of existing surveillance technologies as the audit and review process unfolds, theoretically the police could delay in order to continue using all the surveillance technologies at their disposal.[436] Delays in the audit and review process inure to the benefit of law enforcement and proponents of surveillance technologies, leaving the status quo in place.

IV. Using Community Control as a Ratchet

The stories of the surveillance ordinances in Seattle, Oakland, Berkeley, and San Francisco provide some valuable lessons. The law is neither all bad or all good, and as such, yields benefits and challenges. The community committees in each city have, at times, lived up to their potential to play a pivotal role in the implementation of the surveillance oversight ordinances. That is critical in those instances when the law has served as a conduit to foster transparency and helped to surface the racial justice, civil rights, and privacy concerns that make surveillance technologies in

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[430] San Francisco Police Department, *19B Surveillance Technology Policies*, https://www.sanfranciscopolice.org/your-sfpd/policies/19b-surveillance-technology-policies.

[431] *Id.*

[432] SF.GOV, *Surveillance Technology Inventory*, https://sf.gov/resource/2020/surveillance-technology-inventory.

[433] *Id.*

[434] Ordinance Approving Surveillance Technology Policies, https://sfbos.org/sites/default/files/o0116-21.pdf; Surveillance Technology Policy and Impact Report, Automated License Plate Reader, https://sf.gov/sites/default/files/2021-02/SFPD_Surveillance%20Technology%20Ordinance_ALPR_%20COIT%20Review_9.17.2020_Policy.pdf; https://www.sanfranciscopolice.org/sites/default/files/2021-09/SFPDALPRPolicy20210903.pdf; Surveillance Technology Policy and Impact Report, Shotspotter, https://www.sanfranciscopolice.org/sites/default/files/2021-09/SFPDApprovedGunshotDetectionTechnology20210910.pdf.

[435] *Id.*

[436] S.F., Cal., Admin. Code § 19B.5(d).

police hands harmful. Those concerns, in turn, have been used to limit the deployment of police surveillance tools or halt some tools altogether.

At the same time, the law's benefits have been limited by key challenges. The community committees are advisory; local governing bodies can and do ignore their recommendations. They likewise have little power to force the target of oversight, the police, into compliance. Police can and do flout or evade the oversight and approval process, and do so without many repercussions. It takes substantial time to review police technologies, especially among the host of surveillance tools that reside across city agencies. Limited enforcement mechanisms instill little confidence about how closely the police will abide by the rules. Nor has community engagement been as robust as the spirit underlying the motivation for the law would suggest. And the experiences in some cities reflect the concern that the statutory process can be transformed into a rubber stamp that legitimizes and entrenches police surveillance technologies—the legitimating forces being review by a community committee and ratification by local government entities. Police continue to deploy most of the same surveillance technologies they did before the law was enacted, only now they can do so with the sanction of local municipal government, and in most instances, the general approval of a community body.

These are significant shortcomings that undermine the ability of community control to end the use of police surveillance technologies. But the challenges need not be insurmountable.[437] Nor must every shortcoming of the law be addressed to make productive use of it. They are already on the books; those opposing police surveillance technologies would do well to take advantage of their benefits, while addressing their shortcomings where possible and as appropriate. I contend that we can use an imperfect tool and tie that to an abolitionist commitment to end the use of police surveillance technologies. In the following sections I explore the contours of doing so.

A. Overcoming the Shortcomings and Leveraging the Benefits

Although CCOPS is solidly grounded in the logics of reform, layering an abolitionist ethos onto the law and its implementation opens up new opportunities to use it to meet abolitionist ends. What I am suggesting is an application of abolitionist theory to the text and implementation of the law.[438]

What might that mean? Abolition is "a political vision, a structural analysis of oppression, and a practical organizing strategy."[439] As an analytical tool to attack the criminal system, "[a]n abolitionist ethic highlights the way race and social control animate our approach to criminal legal systems in the United States."[440] It anchors a critique of police and the prison industrial complex in America's historical context,

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[437] LaTonya Goldsby, *A Safer Cleveland*, INQUEST (Dec. 18, 2021), https://inquest.org/a-safer-cleveland/.

[438] *See* Dorothy Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV.L. REV. 1, 105 (2019) (applying abolitionist theory to the Constitution).

[439] Kaba, *supra* note 1, at 2.

[440] Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 168 (2021).

mirroring the views I described in Part IA. Those institutions work in service of perpetuating racial caste system and an unjust economic order.[441] Abolitionist thinking challenges and rejects the notion that police keep us safe. Instead, "police detract from the social provision of human needs. They sustain large-scale suffering and inequality through their violence and the broader structural violence that their violence enables."[442]

Anchoring a theory of change in a narrative about the racialized history of policing and the criminal punishment system, and demystifying and delegitimizing those institutions and systems requires influencing attitudes, engaging in political education, and changing consciousness.[443]

Abolition requires "divesting, dismantling, and delegitimizing the infrastructure of criminalization."[444] That said, abolition is as much about destroying harmful systems and institutions as it is about creating the conditions that leave us without a need for those very structures.[445] "Central to abolitionist praxis is the decoupling of social responses to harm and conflict from the criminal legal system and toward non-punitive and non-carceral systems of accountability and care. Abolitionists aim to dismantle and resist punitive and carceral institutions and the logics that identify them in order to prevent these systems from operating as tools of racial, gender, disability, and class-based subordination."[446] Creating the conditions for a world free from police[447] means divestment from those entities is followed by investment in "social provision and collective care: for example, housing, health care,

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[441] Defined as "the intersecting interests of government of government and industry that employ surveillance, policing, the judiciary, and imprisonment as solutions to what the state identifies as social problems (i.e., poverty, homelessness, 'social deviance,' political dissent)." Rachel Herzing and Isaac Ontiveros, *Building an International Movement to Abolish the Prison Industrial Complex*, CRIM. JUST. MATTERS, June 2011, at 42.

[442] Akbar, *supra* note 16 at 1823. In legal practice, abolition requires: *"Demystifying*: Explaining what a legal system or apparatus actually does (as opposed to what it says it does); *Delegitimizing*: Explaining why it does what it does (as opposed to why it says it does what it does); *Disempowering/Dismantling*: Collectively implementing interventions that move us closer to the elimination of the system or apparatus--interventions that ideally diminish suffering while weakening the system or apparatus; *Dreaming*: Imagining (not reimagining) ways of collective existence." Brendan Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 Harv. L. Rev. 213, 215 (2021).

[443] Smith Futrell, *supra* note 440 at 168.

[444] Akbar, *supra* note 16 at 1827.

[445] Abolition is as much "a negative process of dismantling and decarcerating and a positive process of creating new institutions for addressing the economic, social, and political conditions that had been dealt with through prisons. This highlights the necessity of emphasizing abolition as a project of building as much as, if not more than, it is one of tearing down. Working to create alternatives that render existing oppressive systems obsolete is in itself a way of resisting those impossibly large structural evils." Marina Bell, *Abolition: A New Paradigm for Reform* 46 LAW & SOC. INQUIRY 32, 46 (2021)

[446] Jamelia Morgan, *Lawyering for Abolitionist Movements*, 53 CONN. L. REV. 605, 608 (2021).

[447] Mariame Kaba, *Yes, we literally mean abolish the police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html.

and education."[448] The "combination of divestment and reinvestment" is a strategic intervention aimed at "help[ing] prevent future harm."[449]

Reform is necessarily part of the abolitionist ethos, though the parameters of reform are tightly defined, even if they are clouded in practice. Abolitionists look to advance non-reformist reforms, that "aim to undermine the prevailing order in service of building a new one."[450] Such non-reformist reforms work to "unravel rather than widen the net of social control through criminalization."[451] The goal is not to reform the status quo, but instead to draw on radical critiques of the status quo in service of efforts to transform it.[452] Non-reformist reforms shift and build power, in the tradition of contestatory democracy, to "build[] the power of people to wage a long-term struggle of transformation."[453] Does the reform "'expand[] the reach of policing'" or "[w]ill the proposal reduce funding, tools, tactics, technology, the scale of the police, or 'challenge the notion that police increase safety?'"[454] "Whereas reformist reforms aim to improve, ameliorate, legitimate, and even advance the underlying system, non-reformist reforms aim for political, economic, social transformation. They seek to delegitimate the underlying system in service of building new forms of social organization. Rather than relegitimate, they seek to sustain ideological crisis as a way to provoke action and develop public consciousness about the possibilities of alternatives and our collective capacity to build them together."[455] Enacting non-reformist reforms necessitates shifting power over institutions that produce harm to those who have historically been the targets of those institutions.[456] Relatedly, non-reformist reforms must shape pathways for transformation by "expand[ing] organized collective power."[457]

The line dividing the two is not always neat or clear, but knowing that there is a difference and sorting through it is essential.[458] As it relates to surveillance

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[448] Akbar, *supra* note 16 at 1830.

[449] Alexis Hoag, *Abolition as the Solution: Redress for Victims of Excessive Police Force*, 48 FORDHAM URB. L. J. 721, 741 (2021). As Mariam Kaba explains, "[w]e should redirect the billions that now go to police departments toward providing health care, housing, education, and good jobs. If we did this, there would be less need for the police in the first place."
KABA, *supra* note 1 at 16.

[450] Amna Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 103 (2021)

[451] *Id.* at 101; Simonson, *Democratizing Criminal Justice, supra* note 314 at 1623 (characterizing non-reformist reforms as "changes that, at the end of the day, unravel rather than widen the net of social control through criminalization" (quoting RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007))).

[452] *Id.* at 104.

[453] *Id.* at 105.

[454] Akbar, *supra* note 16 at 1826 (quoting CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS IN POLICING, https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf [https://perma.cc/B8UL-7PFP].).

[455] Akbar, *Demands for a Democratic Political Economy*, *supra* note 450 at 104.

[456] Simonson, *supra* note 300, at 786.

[457] Akbar, *Demands for a Democratic Political Economy*, *supra* note 450 at 106.

[458] *Id.* at 100-06. Mariam Kaba describes the inquiry we must undertake: "People think that either you're interested in reform or you're an abolitionist—that you have to choose to be in one camp or the

oversight laws, "reform rooted in an abolitionist horizon aims to contest and then to shrink the role of police, ultimately seeking to transform our political, economic, and social order to achieve broader social provision for human needs."[459]

An abolitionist ethos also requires deploying imagination and experimentation.[460] Shifts in thinking that move away from the current state of affairs and challenge the logics that sustain white supremacy and dominate the criminal system requires experimentation and a radical reimagining of not just what is possible, but what should be.[461] The same type of imaginative exercise is necessary in considering what alternative systems, institutions, and structures might look like and how they might operate. Experimentation and iteration are expected; abolition does not demand a particular model or a singular tactic.

CCOPS is decidedly not an abolitionist piece of legislation. Nor does it impose a robust form of community control. As described earlier, the versions of CCOPS in nearly all of the jurisdictions detailed here, as well as the model legislation, set out a clear purpose for the law. That purpose rests on the idea that communities should have a say in the surveillance technologies that their local law enforcement agencies are using or want to obtain. Hashing out the terms of use for those tools will better respond to concerns that travel with surveillance technologies: government overreach, police abuse, and racial control.

The law's relatively modest foundations should not stop advocates from leveraging its elements in service of abolitionist ends. That requires infusing our implementation of the law with an abolitionist ethos. Doing so allows advocates to make use of the things the law provides—like transparency and an avenue for narrowing or stopping technologies—in conjunction with broader efforts outside the law to shrink the role of police technologies and law enforcement's access to them.

The application of an abolitionist ethos to community control has several practical implications. First, there are ways that we might work to leverage existing institutions to contest the law enforcement acquisition and use of surveillance technologies. Second, there are ways that we might amend the statute to advance

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other. I don't think that way. For some people, reform is the main focus and end goal and for some people, abolition is the horizon. But I don't know anybody who is an abolitionist who doesn't support some reforms. Mainly those reforms are . . . non-reformist reforms. Which reforms don't make it harder for us to dismantle the systems we are trying to abolish?" KABA, *supra* note 1, AT 96; *see also id.* at 70-71 (providing a guide for evaluating police reforms through an abolitionist framework).

[459] Akbar, *supra* note 16 at 1787.

[460] KABA, *supra* note 1, at 4 (2020).

[461] Morgan, *supra* note 446 at 613. Allegra McLeod has described this need for experimentation and imagination while explaining the value of unfinished efforts at reform that may ultimately supplant current systems and institutions in the spirit of an abolitionist ethos: "[T]he unfinished alternative presents the possibility of sustained competition and contradiction within the existing system because although it is truly alternative in the sense of promising something different, it is decidedly not fully formed, and so can be envisioned as coming into being incrementally within the bounds of the existing system, even as, at some later point, the alternative itself may usher in a new state of affairs that will displace the existing state of affairs." McLeod, *supra* note 33, at 121.

abolitionist ends. Finally, there are ways that advocates might use the statute to do so. I take each in turn.

B. Solutions

1. Enlist Institutions to Implement an Abolitionist Vision of Community Control

Employing an abolitionist ethos to community control forces us to consider institutional actors who might be best positioned to implement the CCOPS model. Public defender offices are one example of such an institution. At their most ideal, public defender offices serve populations who have felt the harms of surveillance technologies. They are therefore well-positioned to work alongside and on behalf of those who seek to curtail and ultimately end the use of police surveillance tools. Their experiences representing clients facing police tools means that they have been forced to develop the technological expertise that is necessary to provide rigorous oversight of the reporting done by law enforcement agencies regarding their surveillance technologies. And as an institutional actor that is naturally at odds with law enforcement and works in opposition to the police, they are well suited to serve as a check on proponents of surveillance technologies and advance an abolitionist ethos.

Looking to a public defender's office to fulfill this role requires accepting a few substantial caveats and addressing some significant challenges. First, I do not mean to suggest that public defenders have not played a role in the enforcement of surveillance oversight laws, or that they have not been engaged in these fights—they have.[462] Just this year, New York City's largest public defender office, the Legal Aid Society, used a Freedom of Information Act request to obtain NYPD surveillance technology contracts worth $15 million over the last eight years, revealing a previously unknown expanse of surveillance tools in police hands.[463] My suggestion here is that they be supported and empowered in ways that allow them to play an even more significant role. That demands that we acknowledge the overwhelming suite of challenges that those offices face in carrying out their current constitutional mandate of providing zealous representation to the indigent. Public defenders are notoriously overworked and under-resourced; they face capacity challenges in fulfilling one of the core components of their mission at present. They are also burdened by a narrow frame of reference for doing their work. Traditionally they have tended to focus on individual representation rather than systemic change. And as between police, prosecutors, and city government officials, they are not, by design, the most powerful actors in the criminal system. But those shortcomings should not be dispositive, nor should they prevent us from looking to entities like them to serve as a conduit for infusing community control with abolitionist sensibilities.

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[462] Rocco Parascandola, *NYPD flouts law requiring disclosure of surveillance technology: advocates*, N.Y. DAILY NEWS (Aug. 10, 2021), https://www.nydailynews.com/new-york/nyc-crime/ny-post-act-nypd-surveillance-20210810-3yut5kbndrf5dgy5kefaesayfe-story.html.
[463] *Id.*

The notion that a public defender office could play an expanded role is not new or novel.[464] Over the last two decades, scholars and advocates have pushed defender offices to expand their role. Professor Kim Taylor-Thompson, who headed up Washington D.C.'s Public Defender Service long ago identified a community-oriented, institutional vision of public defense.[465] An institutional vision involves defenders developing and pursuing "consistent approaches to recurring issues" that affect many clients.[466] Community-oriented PD offices "mov[e] beyond reactive roles and forg[e] partnerships that are at once community-oriented and problem-solving.[467] Such an approach could involve coordinating strategy across the office to address particular issues.[468] Another requires that the office engage in legislative advocacy or community activism.[469] Yet another demands defender offices, and especially chief defenders, engaging in systemic advocacy as institutional stakeholders about funding for PD offices.[470] Professor Anthony Thompson has likewise situated the role of the 21st Century public defender office as one that is intimately engaged with the communities the office serves, and deeply enmeshed in the broader policy fights that spur reform.[471]

Robin Steinberg, founder of The Bronx Defenders, has advanced a holistic defense ethos, which she views as "distinct from . . . community-oriented defense,"[472]

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[464] Joshua Michtom, Opinion, *When a Police Officer Kills, Let Public Defenders Investigate*, N.Y. TIMES (July 29, 2019), https://www.nytimes.com/2019/07/29/opinion/politics/police-misconduct-investigation-buttigieg.html.

[465] Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996).

[466] *Id.* at 2420, 2431.

[467] Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153 (2004).

[468] *Id.* at 159.

[469] *Id.* at 160.

[470] Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. FOR STUDY LEGAL ETHICS 199, 210 (1999).

[471] Anthony Thompson, *The Promise of Gideoon: Providing High Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 732–33 (2013) ("[i]n addition to engaging in zealous individualized representation, defenders need to recognize that they must play a broader, community-based and political role. Public defenders have other responsibilities aside from standing next to a client in court. Because few other groups, agencies or legislative bodies do it, public defenders must also be active within the communities where they practice. Defenders should be aware of legislative initiatives that will adversely affect clients, and must be armed with the social justice as well as the fiscal arguments that spur policy reform in today's legislative world.").

[472] Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 964 (2013). Steinberg notes that community-oriented defenders are "often physically located in the community, and have partnerships with schools, churches, and nonprofit organizations in the community." *Id.* at 981. They "often engage in advocacy and policy initiatives that focus on fighting discriminatory policies and practices in the communities they serve." *Id.* at 982. Community defenders also "partner with community members . . . to create long-term change . . . through community education programs, policy, and organizing." *Id.* at 983. Steinberg states that community-oriented approaches are "integrat[ed]" into holistic defense. *Id.* at 984. Holistic defense, however, is an "institutional model." *Id.* Holistic defense is defined by four pillars: (1) access to legal and nonlegal services that meet client needs; (2) interdisciplinary communication and information sharing among attorneys, social workers, etc.; (3) advocates with

includes local organizing, policy advocacy, coalition-building, and legal action to advocate for systemic change.[473] That ethos has resulted in attorneys at BxD "pursu[ing] policy change through everyday practice[,]" including by collecting and publicizing data.[474] Others have pushed for an "expanded conception of what it means to provide counsel to the criminally accused."[475] In addition to holistic advocacy, this expanded conception of the defender's role also includes "consensus-building with other criminal justice stakeholders" and "community engagement."[476] Consensus-building involves "[e]ngaging legislators and other criminal justice policy makers" and communicating reform messages that benefit clients.[477] Community engagement involves service activities and education programs to connect with the broader community.[478] These suggestions have been taken up by public defender offices in cities like New York, Washington D.C., Portland, and Atlanta.[479]

What these models suggest is that a public defender office can engage in extensive advocacy that falls outside the confines of individual representation but that inures to the benefit of broader communities of clients. That work is being done right now, and includes everything from impact litigation,[480] to legislative and policy

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interdisciplinary skill sets; and (4) an understanding and connection to the community served. *Id.* at 984–1002. Only the final pillar is relevant here.

[473] *Id.* at 997–98.

[474] *Id.* at 998.

[475] Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 404 (2001).

[476] *Id.* at 408.

[477] *Id.* at 439.

[478] *Id.* at 443; Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 460 (2015).

[479] Natapoff, *supra* note 478, at 460-62.

[480] For example, The Bronx Defenders co-litigated a class action suit with the New York Civil Liberties Union which sought to end discriminatory stop-and-frisk practices inside New York City apartment buildings. Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 1001 (2013); Katherin E. Kinsey, Note, *It Takes a Class: An Alternative Model of Public Defense*, 93 TEX. L. REV. 219 (2014). Washington D.C.'s Public Defender Service PDS has a Special Litigation Division, which "handles a wide variety of litigation that seeks to vindicate the constitutional and statutory rights of PDS clients and to challenge pervasive unfair criminal justice practices." *Special Litigation Division*, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, https://www.pdsdc.org/about-us/legal-services/special-litigation-division (last visited May 12, 2021). PDS's Special Litigation group has litigated cases about *Brady* violations, civil forfeiture, and discredited forensic "science," among others. *Id.* The group also challenged the D.C. jail's policies during the COVID-19 pandemic. *Class-Action Lawsuit Alleges Detainees at Mortal Risk; Seeks Immediate Relief*, ACLU D.C. (Mar. 30, 2020), https://www.acludc.org/en/press-releases/public-defender-service-aclu-dc-challenge-dc-jails-failure-protect-incarcerated. New York City's Legal Aid Society also has a "Law Reform and Special Litigation Unit" in its Criminal Defense practice. *Criminal Defense Law Reform and Special Litigation Unit*, LEGAL AID SOC'Y, https://legalaidnyc.org/programs-projects-units/criminal-defense-practice-special-litigation-unit (last visited May 14, 2021). The unit litigated a case in the 1990s that established the right to have a judge review a criminal charge within twenty-four hours of arrest. *Id.* Especially relevant here, the unit has challenged NYPD's "digital stop and frisk" program, in which they note NYPD officers illegally detain people, demand identification, and run warrant checks and records searches in their extensive databases without individualized suspicion. By using surveillance

advocacy,[481] to data collection and monitoring of police misconduct.[482] The fact that offices have the capacity to engage in this work bolsters the notion that they can serve a community control function, at least as outlined above. Additional training, research, and other resources focused on police surveillance technologies would only enhance their ability to do so.

There are ready frames that invite such work. Movement lawyering, for example, is "the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define."[483] Movement lawyers view law as a "form of politics" to advance social movement objectives, like "catalyzing direct action, imposing pressure on policy makers to change and enforce law, and equipping individuals with the power to assert rights in their day-to-day lives."[484] There are also ways that we might imagine using technology in service of expanding institutional capacity and power to serve as an instrument of community control. What if we were to outfit public defender offices with the technological or legal tools they needed to ensure that law enforcement was working in compliance with the law? That could mean everything from creating technological tools that could survey reports produced by government agencies, and law enforcement, to those that could aid in the investigation of police compliance with

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technology, the NYPD has supplemented traditional—and discredited—police practices such as stop and frisk with new digital searches that rely on surveillance systems to provide a detailed snapshot of people's lives, from daily movements to financial footprints." *Id.*

[481] The Bronx Defenders worked in coalition with other advocacy organizations to achieve reform of New York's Rockefeller Drug Law and played a role in ending prison gerrymandering. Steinberg at 1001. The Minnesota Board of Public Defense hired a former ten-year legislator as a Government Relations Manager, whose job is to "monitor lawmaking and lobby his former colleagues." Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 439 (2001).

[482] The San Francisco Public Defender launched a "CopWatch SF" database in November 2020. *San Francisco Public Defender Launches "CopWatch SF" Database to Ensure Public Access to Available Police Records*, S.F. PUB. DEF. (Nov. 18, 2020), https://sfpublicdefender.org/news/2020/11/sf-public-defender-launches-copwatch-sf-database-to-ensure-public-access-to-available-police-records [hereinafter *"CopWatchSF" Database*] . The database is now called CopMonitor. *CopMonitor*, S.F. PUB. DEF., https://sfpublicdefender.org/copmonitor (last visited May 14, 2021). This project makes publicly available "hundreds of public records about police and sheriffs." *Id.* It lists officers with records that have been released under a new California officer transparency law, as well as other "publicly available documents like civil lawsuits, news articles, and known findings of complaints filed with the Department of Police Accountability." *Id.* The Legal Aid Society established a Cop Accountability Project (CAP), which tracks police misconduct in New York City so that defenders and civil and human rights lawyers can "better advocate for transparency and accountability." *The Cop Accountability Project*, LEGAL AID SOC'Y, https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project (last visited May 13, 2021). CAP is a private database, but the group also launched CAPstat.nyc, which is publicly accessible and compiles thousands of federal civil rights lawsuits filed against NYPD officers and other public information. CAPSTAT, https://www.capstat.nyc (last visited May 13, 2021).

[483] Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1689–716 (emphasis omitted).

[484] *Id.* at 1690–91.

reporting and transparency requirements. What if we empowered them with authority over the approval process, or placed them in the position of a third-party check on decisions to approve police surveillance technologies? Reimagining the capacity and power of these institutional actors is a worthwhile endeavor.

Two other features of a public defender's office help situate them as a worthwhile site for an abolitionist vision of community control: their proximity to communities and their adversarial institutional role. Both have significant challenges to overcome, but are worthy of consideration.

First, public defender offices are, or should be connected to, and ideologically aligned with communities most harmed by surveillance technologies. That is because their day-to-day work of defending the indigent renders them proximate to those most affected by technology, surveillance, and policing. Defenders are uniquely oriented to the specifics of a particular community and the relationship between the criminal legal system and individuals in that community.[485] That potentially positions them to serve as robust advocates working in partnership with impacted communities, more so than other institutional actors, perhaps even those appointed to community control bodies by local politicians.[486] Indeed, by virtue of the work a public defender's office does, the communities to whom public defenders are connected are more likely to be a collection of individuals and allies bound together by their common concerns about, and experiences with, the racial inequities and harms fostered by police technology, and opposition to the acquisition and use of that technology.[487]

That connection to community and client populations grappling with surveillance technologies carries with it several benefits. Public defenders can bring to bear client stories and experiences that center the most pernicious harms of surveillance technologies, but also the daily burdens of living under the thumb of a surveillance regime. Those narratives and examples can be used to build public pressure, enhance public education, and lend credibility to arguments in support of abolishing surveillance technologies.[488]

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[485] As Robin Steinberg argues, "[h]olistic defenders know firsthand about the struggles, deficits, and vibrancy of the community and can place the client's life, experience, and even criminal charges in broader context." Steinberg at 1001. Cait Clarke notes that "defenders understand [client] communities and have special links to the problems facing individuals and families." Clarke at 439. And Brandon Buskey writes that "public defenders are uniquely situated to connect with the neglected voices of a community." Brandon Buskey, *When Public Defenders Strike: Exploring How Public Defenders Can Utilize Lessons of Public Choice Theory to become Effective Political Actors*, 1 HARV. L. & POL'Y REV. 533, 540 (2007).

[486] One consequence of an institutional vision is the relationship defenders can build with the community in which an office operates and in which its clients reside. Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996).

[487] Southerland, *supra* note 40 at 547-48 (defining community as "the network of individuals who are advocating for equity in the criminal legal system and are bound together by their common concerns about the inequities fostered by the use of algorithmic tools and the criminal legal system").

[488] Defenders have a "unique vantage point" that "allows them to testify as experts in state and local legislatures, work with elected officials to craft legislation, and help communities construct and demand better policies from lawmakers, police and prosecutors." MELANCA CLARK & EMILY SAVNER, BRENNAN CTR. JUST., COMMUNITY ORIENTED DEFENSE: STRONGER PUBLIC DEFENDERS 31 (2010).

Second, public defender offices are positioned, by virtue of their institutional role, as adversaries of state power, law enforcement, and police use of surveillance technologies. They are, by design, tools of conflict within the criminal legal system, an outgrowth of the state's responsibility to create institutions that can resist power. Their independence can, of course, be compromised by the structures that govern their work or other considerations.[489] Those concerns aside, however, they are naturally agonistic toward the very actors most likely to support the expansion and deployment of surveillance technologies, and therefore well-positioned to counter it.

I offer public defender offices not as a panacea, but as an imaginative way of thinking about what is necessary to effectuate community control with abolitionist goals. Public defender offices are plagued by a host of challenges that could completely undermine their ability to serve a site of implementation for an abolitionist community control vision. They suffer from similar power deficits as the community bodies at issue here. They can be at odds with the communities they serve, complicit in the harms of the criminal system, and far too overburdened. Sorting through those challenges is a far more expansive project than can be undertaken here. And overcoming them would require investments that our society may be far from ready to make. But that should not blind us to what is needed: an independent actor with connection to community, technical expertise, an oppositional ethos, and authority. Such institutions are in short supply, largely because the government rarely creates institutions that challenge power dynamics or that work to upend the status quo. But looking to and supporting existing institutions to play that role is one path forward.

2. Amend the Law

The most straightforward answer would be to amend the law to deal with its practical shortcomings, addressing the power deficit, representativeness, and authority of the community control bodies.[490] As an initial matter, that would mean empowering the community bodies with substantive, rather than advisory, authority. That could mean everything from the ability to subpoena police records to ensure compliance with the disclosure provisions of the ordinance to the power to levy fines or the like for non-compliance, to binding recommendations regarding technologies, veto power over the city council's decisions about surveillance technologies, or the unilateral power to take a police technological tool offline for law enforcement noncompliance or in response to community demands.

It would also mean strengthening the capacity of the community bodies to do their work, by outfitting them with dedicated staff with technical and policy expertise, compensating members, and providing them with the organizing and

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[489] Katherine Kinsey, Note, *It Takes a Class: An Alternative Model of Public Defense*, 93 TEX. L. REV. 219, 251 (2014) (noting that public defender offices may not be able to "bite the hand that feeds them").
[490] Rebecca Williams, *Everything Local Surveillance Laws Are Missing In One Post*, TAPP Project (Apr. 26, 2021), https://rebeccawilliams.us/blog/everything-local-surveillance-laws-are-missing/.

communications tools that they need to engage members of communities most harmed by surveillance technologies. Providing professional support staff with funding and technological expertise would go a long way toward dealing with the overwhelming burden of auditing police surveillance technologies (along with all of the other government surveillance technologies that fall under the umbrella of the law), the need for constant vigilance to ensure compliance, and the ability to serve as a representative voice for the community through public engagement.

Another change to the law might include updating the standard that city council must use to weigh approval of surveillance technologies, replacing it with a presumption against surveillance technologies. In three of the four cities, the heart of the current inquiry is whether the benefits of surveillance technology outweigh its costs. Such an amorphous standard invites approval. In part, that is because the popular narrative about policing is that law enforcement fosters safety and security, and that technology works in service of that function. The racial justice and privacy concerns that come with surveillance technologies are a second order consideration when weighed against fears about crime and the veneer of security that police surveillance technologies can provide.

The dramatic expansion of the surveillance state following 9/11, and the near universal acceptance of the new state of affairs is a helpful reminder of how quickly we are willing to ignore racial justice and forego privacy in the name of what we are told will keep us safe. At the time, significant bipartisan support existed at the federal level for legislation aimed at ending racial profiling by law enforcement. After 9/11, that support cratered, as government policy shifted to target religious and ethnic identities as increasing the likelihood that a person would engage in terrorism.[491] Rather than attempting to balance the costs against the benefits, a presumption against the acquisition and use of surveillance technologies, rebuttable only by a metric determined by communities most at risk of police surveillance could prove to be more of a backstop against police surveillance technologies than the costs-benefits standard in place.[492]

There are myriad changes to the law that could strengthen its ability to curtail surveillance technologies. Ultimately those changes work to increase the institutional friction of the process envisioned by the ordinance. Whether or not the political will exists to make those changes is another question entirely.

3. Leverage the Law to Create Crisis, Build Power, and Foster Resistance

Crisis, power, and resistance are consistent keys to advancing along an abolitionist horizon. Whether advocates choose to press other institutions into service, amend the law, or some combination of both, they should take advantage of

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[491] Sameera Hafiz, *It's time to pass a law to end racial profiling*, THE HILL (Dec. 14, 2011), https://thehill.com/blogs/congress-blog/civil-rights/199451-its-time-to-pass-a-law-to-end-racial-profiling.

[492] Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, Yale L. J. Forum 798, 820 (2021).

the law and its abolitionist elements. Doing so means leveraging it as a site for power building, deploying it as a vehicle to narrow the space within which surveillance technologies operate, or using it to advance bans on specific technologies, broader categories of tools, or particular uses of data. In other words, without buying into the CCOPS model as the only, or even preferred path going forward, advocates could still make use of the statute. That demands no more than a clear-eyed vision of what the law can accomplish, and its limited utility as a tool to serve abolitionist ends.[493] It is a ratchet worth employing.[494]

Advocates can use the law and the various decision-making bodies that review surveillance technologies as institutional footholds that allow for advocacy and engagement focused on resisting surveillance technologies.[495] That work is akin to resistance lawyering: "employ[ing] every means at [one's] disposal to frustrate, delay, and dismantle" the system within which they are working.[496] Just as abolitionist lawyers used the Fugitive Slave Law of 1850 to resist enslavement, advocates can engage with CCOPS to resist police surveillance technologies. Advocates can operate in the same way that resistance lawyers did, by "engag[ing] in regular, direct service practice within a procedural and substantive legal regime that she considers unjust and illegitimate" to "mitigate the worst practices of that system and to resist, obstruct, and dismantle the system . . . ."[497]

In the context of CCOPS laws, that work can take several forms. Advocates could use the community advisory committees and the surveillance oversight process as a "site of resistance" and a "venue for a vigorous rhetorical proxy battle" against surveillance technology.[498] Independent community bodies can serve as "a clearly visible and consolidated institutional target with meaningful authority" that can focus organizing efforts.[499] The process provided for by the law—requiring reporting by law enforcement of surveillance technologies and ongoing oversight—are the sorts of "hooks and levers" that can be used by advocates deploying an abolitionist ethos.[500] The model CCOPS bill and some of its jurisdiction specific analogues provide legal hooks to address potential violations of the statute. While litigation can be uncertain and costly, it is a useful avenue to press for other benefits, whether that be greater transparency, a prohibition on the use of a technology, or other forms of relief.

The framework's focus on the data collected by surveillance technologies is also useful. It requires use policies that include reporting by law enforcement entities on how much data is collected, who it is collected from, how long it is stored, who it is shared with, when it is collected, and how it is used. Each of those questions provide grounds from which advocates can fight. Of course, the abolitionist view might be

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[493] Paul Butler, *The System is Working the Way it is Supposed To: The Limits of Criminal Justice Reform*, 104 Geo. L. J. 1419, 1471 (2016).
[494] *Id.* at 1466.
[495] K. Sabeel Rahman, *Policymakng as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 369–70 (2018).
[496] Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1880-81.
[497] *Id.* at 1880.
[498] *Id.* at 1882.
[499] Rahman, *supra* note 495 at 364.
[500] *Id.*

that the police should not be collecting any data from anyone at all. That view does not prevent advocates from steadily chipping away at the bond between surveillance technologies and the data they collect over time, narrowing each parameter to work toward abolitionist ends. The same can be said of the other features relevant to surveillance technologies—policies governing when tools can be used, by what law enforcement agencies, and for what purposes.

Advocates can also use those fights to push for bans to particular technologies. In all the jurisdictions detailed here, the law was either amended or designed to bar a specific technology. Those bans followed robust public debates about surveillance technologies, engagement with the public, the deployment of public education and research regarding the tools, and the building of political will and power to propose and enact bans. Advocates could use the law to engage in similar battles against other tools. While banning technologies on a case-by-case basis will not dampen the enthusiasm or pursuit of similar tools,[501] each campaign brings with it an opportunity to engage the public, build power, expand coalitions, and demonstrate through experience that police can do without surveillance technologies. To the extent that bans are not politically feasible, one might use the provisions in the laws that require annual review and ongoing approval of police surveillance technologies premised on a demonstration that they continue to meet the standard that led to their approval in the first place. Using those annual reviews as sites of resistance, advocates might mount campaigns to phase out the use of a particular technology.

The transparency provisions in the statute can be used to the advantage of those working toward abolition of surveillance technologies. The information revealed to the public about a particular police surveillance technology can be used to create crisis, which is an essential element to drive change.[502] The transparency demands of the statute can shed light on abusive uses of surveillance technologies or potentially dangerous technologies on the horizon, providing a lever to raise public consciousness, highlight a crisis, and pressure to reign in technologies. The Digidog episode that opened this article, Seattle's experience discovering the use of facial recognition technology by rogue officers which led to a ban on that technology, and Oakland's experience banning predictive police and biometric surveillance technologies are noteworthy examples of how movements can leverage crises to halt technologies altogether.

The law's cataloguing of the material costs of surveillance technologies provide another site for abolitionist advocacy. Detailing the fiscal costs of surveillance tools provides substance to arguments that cities should divest from law enforcement tools and invest those resources in ways that might better serve communities. Those engaged with the law can make demands about how funds ordinarily spent on

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[501] Arnett *supra* note 63, at 1141.

[502] Southerland, *Toward a Just Future*, *supra* note 14, at 438; Lauren Edelman et. al., *On Law, Organizations, and Social Movements*, 6 ANN. REV. L. & SOC. SCI. 653, 670–71 (2010) ("According to most social movement and organizational theory, significant institutional innovation and change most often result from exogenous shocks to the field, which produce crises--or ruptures--that destabilize dominant practices in that field."); MILTON FRIEDMAN, CAPITALISM AND FREEDOM, at viii-ix (1982) ("Only a crisis--actual or perceived-- produces real change.").

surveillance can be better allocated elsewhere to produce community safety and stability.

The law can also be used to foster public education, raise consciousness and expand coalitions that can pressure democratically accountable officials to act in the interests of those seeking to upend surveillance technologies. The absence of grant of practical power to community committees need not be the end of the story. The power of the people, working in coalition can advance us closer to an abolitionist horizon.

The story of San Diego provides a blueprint.[503] There, advocates spent two years organizing against the ongoing use of the city's smart streetlights program.[504] That program would have affixed surveillance cameras to thousands of LED streetlights, making that footage accessible to law enforcement seeking to expand their surveillance tools and city and business officials motivated to use surveillance as a means of displacing Black and Brown communities.[505] Their organizing efforts stopped the streetlight project and led to the passage of a CCOPS style surveillance oversight ordinance and the creation of an independent body to implement the law.[506] Organizers wrote the law to appeal to a broad coalition in service of what can be seen as abolitionist ends:

> Fiscal conservatives liked it because they wanted to reduce government spending. (The streetlight program, budgeted at $30 million over a decade, was already seeing cost overruns.) Liberals who believed in deliberative process appreciated that the ordinance created an independent body to advise the city council and included civil rights oversight. More radical organizing communities recognized that they needed the ordinance in order to find out about new technologies if they were to have any chance of organizing against them.[507]

The fight over the streetlight system and the law itself served as an organizing tool, allowing the coalition to broaden its ranks and pull in a wide range of people whose ideological opposition to surveillance technologies, rooted in different reasons, fostered more power than they otherwise would have had individually.[508]

The overarching point is that even as the law was not designed with abolition as the goal, there are ways to use its component parts and the benefits that it provides to drive substantive changes that align with abolitionist ends. The law is a "tool[] for struggle and refusal" and should be wielded by organizers and advocates as such.[509] It need not displace or supplant other efforts. Those can be just as, if not more

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[503] Irani *supra*, note 189.
[504] *Id.*
[505] *Id.*
[506] *Id.*
[507] *Id.*
[508] *Id.*
[509] As the organizers of the effort in San Diego explained, "ordinances like these are not a panacea. They are tools for struggle and refusal, but do not guarantee resistance to surveillance. Without vigilant organizing, including alliances with technologists and elected officials, even community advisory boards may rubber stamp policies and legitimize surveillance technologies." *Id.*

valuable. The fight against police surveillance, however, demands that we use any and all tools at our disposal.

Conclusion

I have made the case that the racial injustice and other harms caused by police surveillance technologies require that we look to an abolitionist horizon. Laws imposing transparency, oversight, and community control of police surveillance tools were not enacted with abolition as the goal. They are far from perfect, and ripe for critique. But we should not disregard their potential to help us get to a better place. Leveraging other institutions, amending the law, and fighting on the grounds the law provides are ways to do so. Ultimately, we should deploy the law as a ratchet to move us closer to a world without technological tools of racial control.