2022

Public Undersight

Christina Koningisor
UC Law SF, koningisorc@uclawsf.edu

Article

Public Undersight

Christina Koningisor†

† Associate Professor of Law, S.J. Quinney College of Law, University of Utah Law School. Many thanks to BJ Ard, Jack Balkin, Hannah Bloch-Wehba, Erin Carroll, James Dempsey, Colin Doyle, Eric Freedman, Nikolas Guggenberger, Thomas Haley, RonNell Andersen Jones, Thomas Kadri, Daphne Keller, Sarah Lageson, Karen Levy, Ngozi Okidegbe, Francesca Procaccini, Jocelyn Simonson, Katherine Strandburg, Jacob Victor, and Ari Ezra Waldman, as well as to participants in the 2021 Privacy Law Scholars Conference, the 2021 Freedom of Expression Scholars Conference, and the Junior Law and Technology Scholars Workshop.

INTRODUCTION

For decades, New York law offered broad protections for police disciplinary records. Most significantly, section 50-a of the New York Civil Rights Law extended a robust shield over the personnel records of law enforcement officials,[1] protecting even substantiated complaints against police officers from public view.[2] The statute was ultimately repealed in the summer of 2020, in the wake of George Floyd's murder and the nationwide protests that followed.[3] But until that point, New York's law had been among the most restrictive in the country.[4]

Even public defenders in the state found it difficult to access the disciplinary histories of police officers involved in their clients' cases.[5] Yet these records can be critical to mounting an effective defense. They can demonstrate that an arresting officer has a history of

1. N.Y. CIV. RIGHTS LAW § 50-a (repealed 2020). Portions of the law also shielded the personnel records of corrections officers and firefighters. *Id.*

2. N.Y. Civ. Liberties Union v. N.Y. Police Dep't, 118 N.E.3d 847 (N.Y. 2018).

3. Ashley Southall, *N.Y.P.D. Releases Secret Records After Repeal of Shield Law*, N.Y. TIMES (Oct. 13, 2021), https://www.nytimes.com/2021/03/08/nyregion/nypd-discipline-records.html [https://perma.cc/V5BW-QJFL].

4. Robert Lewis, Xander Landen & Noah Veltman, *New York Leads in Shielding Police Misconduct*, WNYC (Oct. 15, 2015), https://www.wnyc.org/story/new-york-leads-shielding-police-misconduct [https://perma.cc/TR9D-J4RH].

5. Cynthia H. Conti-Cook, *Open Data Policing*, 106 GEO. L.J. ONLINE 1, 17 (2017).

misconduct—for example, that a police officer repeatedly engaged in unlawful searches or that the city previously settled false arrest accusations against an arresting officer.[6] But section 50-a largely prevented defense counsel from obtaining these disciplinary histories.

With these traditional transparency law mechanisms closed off to criminal defendants, a group of public defenders in New York City banded together in 2015 to develop an alternative.[7] Denied access to the official police disciplinary records' archive, these lawyers reverse-engineered their own database, building dossiers on thousands of New York City police officers.[8] In doing so, they relied upon information obtained from a variety of sources, including state and federal lawsuits, the NYPD's Civilian Complaint Review Board hearings, newspaper reports, social media posts, and their clients' own accounts of their experiences interacting with police officers.[9]

They then offered access to other public defenders across the city, and they invited these lawyers to feed their own records into the system.[10] Over time, they built a shadow police disciplinary database, one intended to serve as a stand-in for the official set of police disciplinary records that the law had walled off from public view. Rather than work within the legal system to change the formal access rules, these public defenders circumvented the law altogether to reclaim control of government information from the outside.

This is just one example of a growing set of grassroots efforts to reconstruct government information externally rather than utilize existing legal structures to remedy breakdowns in the transparency law regime. An array of bottom-up movements to challenge the government's monopoly on information have sprung up around the country in recent years. Activists now rely on public sources of in-

---

6. *See, e.g.*, *id.* at 17–18; Jason Tashea, *Databases Create Access to Police Misconduct Cases and Offer a Handy Tool for Defense Lawyers*, ABA J. (Feb. 1, 2016), https://www.abajournal.com/magazine/article/databases_create_access_to_police_misconduct_cases_and_offer_a_handy_tool_f [https://perma.cc/4TDY-HJS9].

7. Robert Lewis, *More Defenders Get Access to 'Bad Cops' Database*, WNYC (Nov. 9, 2017), https://www.wnyc.org/story/more-defenders-get-access-bad-cops-database [https://perma.cc/ND6H-B3EH].

8. *The Cop Accountability Project*, LEGAL AID SOC'Y, https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project [https://perma.cc/533T-8AKZ].

9. *Id.*; Tashea, *supra* note 6.

10. Alice Speri, *Open Data Projects Are Fueling the Fight Against Police Misconduct*, INTERCEPT (Oct. 25, 2016), https://theintercept.com/2016/10/25/open-data-projects-are-fueling-the-fight-against-police-misconduct [https://perma.cc/YKJ8-EVTW].

formation and extralegal monitoring efforts to track where ICE is conducting immigration raids,[11] gather environmental air pollution data,[12] monitor police activity in communities of color,[13] challenge local governments' underreporting of police-caused deaths,[14] and collect comprehensive data on judicial bail decisions.[15]

Not all of these efforts are new: organized copwatching and court-monitoring groups, for example, stretch back decades,[16] arguably even centuries.[17] But other programs have only come into existence in recent years, as technological advances have opened up new possibilities for the systematic collection of government data from the outside.[18] Moreover, even when it comes to older forms of extralegal government monitoring, new technologies have allowed these groups and these efforts to expand their scope and impact.[19] I de-

11. *See, e.g.*, *ICE Watch: ICE Raids Tactics Map*, IMMIGRANT DEF. PROJECT (July 2018), https://www.immigrantdefenseproject.org/wp-content/uploads/ICEwatch-Trends-Report.pdf [https://perma.cc/MN4F-L7EN] (summarizing ICE raids in the New York Metropolitan area between 2013 and 2018).

12. *See, e.g.*, LA. BUCKET BRIGADE, https://labucketbrigade.org [https://perma.cc/VR76-TYGG] (instructing citizens how to gather air pollution samples in their neighborhoods).

13. *See, e.g.*, Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 393 (2016) (describing organized copwatching as "groups of local residents who wear uniforms, carry visible recording devices, patrol neighborhoods, and film police-citizen interactions in an effort to hold police departments accountable to the populations they police").

14. *See, e.g.*, Julie Tate, Jennifer Jenkins & Steven Rich, *Fatal Force*, WASH. POST (Jan. 27, 2021), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/92RL-CUXJ] (logging every fatal encounter between a civilian and on-duty police officer since 2015).

15. *See, e.g.*, *Same Game, Different Rules: Eyes on 2020: Lessons from the First 100 Days of New York's Bail Reform*, CT. WATCH NYC (July 2020), available at https://www.courtwatchnyc.org/eyes-on-2020 [https://perma.cc/79WK-ZRDE] [hereinafter *Same Game, Different Rules*] (detailing the findings from over 360 hours observing 937 criminal court arraignments).

16. *See, e.g.*, Dennis B. Fradin, *Court Watching Project: Is Justice Being Done in Counties of Cook, Champaign, Warren & DuPage?*, ILL. ISSUES (Aug. 1976), https://www.lib.niu.edu/1976/ii760803.html [https://perma.cc/7XT8-KN4Z] (describing a court watch project established in 1974).

17. *See, e.g.*, SIMONE BROWNE, DARK MATTERS 21 (2015) (describing abolitionist pamphlets urging Black communities in Boston to "keep a sharp lookout" for slave catchers).

18. Crowd-sourced maps of police and immigration enforcement activities offer an example. *See ICE Watch: ICE Raids Tactics Map*, *supra* note 11.

19. For example, copwatching groups are now "aggregating, digitizing, logging, metatagging, and analyzing eyewitness video . . . to show[] patterns of discrimination and abuse at the precinct and officer levels." *Planning Workbook: Police Violence Vid-*

scribe these extralegal transparency efforts as examples of "public undersight."[20]

Legal scholars have devoted ample attention to exploring the mechanisms of public oversight, or the more formal legal avenues that allow the public to monitor government officials and hold government actors to account. This body of law includes constitutional and common-law access rights; the federal Freedom of Information Act and various state public records laws; federal and state open meetings statutes; subject-specific transparency provisions embedded within broader federal and state statutes; and a variety of other formal transparency law mechanisms at both the federal and state levels.[21]

Scholars have criticized this body of law on a number of grounds. They have emphasized the financial toll these transparency statutes impose on the government,[22] the chilling effect they have on government deliberations,[23] and the privacy harms they inflict on government employees and private citizens.[24] They have also argued that these laws are ineffective, maintaining that they overexpose the government agencies least in need of monitoring and underexpose those engaged in more dangerous and potentially harmful activities.[25] And they have highlighted the extent to which these transparency statutes have been co-opted by the private sector to serve corporate interests.[26]

These scholarly critiques are persuasive. But these existing criticisms—including my own[27]—focus almost exclusively on ways to

---

eo Database, WITNESS & EL GRITO DE SUNSET PARK, at 3 (Sept. 2018), available at https://elgrito.witness.org/portfolio/project-planning [https://perma.cc/3NWM-9CYX].

20. For a further description of this phrase see discussion *infra* Part II.

21. *See* Hannah Bloch-Wehba, *Exposing Secret Searches: A First Amendment Right of Access to Electronic Surveillance Orders*, 93 WASH. L. REV. 145, 153–58 (2018) (summarizing constitutional and common law access rights); Christina Koningisor, *Transparency Deserts*, 114 Nw. U. L. REV. 1461, 1475–78 (2020) (summarizing state public records laws); David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 123–45 (2018) (summarizing federal transparency statutes).

22. *See, e.g.*, Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1416–22 (2016).

23. *See, e.g.*, Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 225 (2008).

24. *See, e.g.*, Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204, 2215–17 (2018).

25. Pozen, *supra* note 21, at 156.

26. Kwoka, *supra* note 22, at 1414–26.

27. *See* Koningisor, *supra* note 21; Christina Koningisor, *Secrecy Creep*, 169 U. PA. L. REV. 1751, 1751 (2021).

remedy transparency law from within. They propose, for example, amendments to the statutory language,[28] better training for government officials,[29] or judicial expansion of constitutional or common law access rights.[30] Yet with some important exceptions,[31] legal scholars have largely overlooked the rich and varied ways that civil society groups have eschewed traditional avenues of legal reform to seize control of government information from the outside.[32] And by ignoring these increasingly influential extralegal efforts, they have overlooked important developments in the public's ability to hold government actors to account. Fleshing out these extralegal forms of transparency allows for a more nuanced and complex understanding of our democracy's information ecosystem to come to light. This Ar-

28. *See, e.g.*, Koningisor, *supra* note 21, at 1542–43.

29. *See, e.g.*, Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law*, 8 COMM. L. & POL'Y 313, 351–54 (2003).

30. *See, e.g.*, Adam Cohen, *The Media that Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 6 (2011).

31. They include Conti-Cook, *supra* note 5, at 16–21 (describing extralegal policing data); Simonson, *supra* note 13, at 417–20 (describing the data collection functions of copwatching groups); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2179–84 (2014) [hereinafter Simonson, *The Criminal Court Audience*] (describing the data collection functions of court monitors). Separately, many law review articles address the narrower topic of citizen recordings of police. *See, e.g.*, Mary D. Fan, *Democratizing Proof: Pooling Public and Police Body-Camera Videos*, 96 N.C. L. REV. 1639, 1672 (2018); Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1569–74 (2016); Scott Skinner-Thompson, *Recording as Heckling*, 108 GEO. L.J. 125, 133–35 (2019).

32. Relatedly, a coalition of media outlets and activist groups have long sought to reform the formal laws of government access—especially federal and state freedom of information laws—from within. They have looked to expand public understanding of government by securing incremental changes to these statutes through impact litigation. *See* FOIA Project Staff, *FOIA Suits Filed by Nonprofit/Advocacy Groups Have Doubled Under Trump*, FOIA PROJECT (Oct. 18, 2018), http://foiaproject.org/2018/10/18/nonprofit-advocacy-groups-foia-suits-double-under-trump [https://perma.cc/E5VM-9A2X] (describing FOIA litigation by nonprofits); FOIA Project Staff, *When FOIA Goes to Court: 20 Years of Freedom of Information Act Litigation by News Organizations and Reporters*, FOIA PROJECT (Jan. 13, 2021), http://foiaproject.org/2021/01/13/foialitigators2020 [https://perma.cc/VB4M-KTV2] (describing FOIA litigation by media organizations). These efforts are valuable in their own right. Yet meaningful victories are often few and far between. *See, e.g.*, David McCraw, *FOIA Litigation Has Its Own Rules, But We Deserve Better*, JUST SEC. (Mar. 15, 2016), https://www.justsecurity.org/29974/foia-litigation-rules-deserve [https://perma.cc/PEA7-SWAM] ("[M]eaningful victories in national security FOIA cases remain legal unicorns."). The public undersight efforts chronicled in this Article help to illuminate an alternative path forward: they demonstrate that these battles over information access do not have to be fought on the government's terms.

ticle aims to widen the aperture of the transparency law literature to bring the rise and effects of these extralegal movements into view.

In doing so, it makes three central contributions. First, it offers a descriptive account of the public undersight regime.[33] It defines the concept of public undersight and then chronicles the various efforts and movements that fall within its scope. Drawing upon interviews with the individuals who lead these efforts, along with news reports and other public-facing accounts of their work, this Article explores these extralegal efforts across a variety of government arenas, from policing to immigration enforcement to environmental monitoring. It explores both the strengths and limits of exploring these tactics and efforts across different substantive realms.

Second, it offers a normative account of public undersight, exploring the benefits and drawbacks of these bottom-up movements.[34] It highlights the ways that these extralegal efforts address flaws in the formal transparency regime—by concentrating public attention on those government activities most prone to abuse, for example, or by transferring power from the government to the communities most affected by government activity.[35] It also emphasizes the potential these movements have to democratize accountability in government, lowering the barriers of access to government information and bringing new and often underrepresented voices into law and policy debates. Further, it explores the potential costs of these efforts. Information collected extralegally may be inaccurate, for instance, and it can be difficult to replicate public undersight successes and build these movements to scale.[36]

Third, it fills gaps in the transparency law scholarship and practice—which, by overlooking these extralegal movements, has ignored an entire set of potential solutions. It draws upon insights from scholarship exploring extralegal activism and social movements,[37] and it examines how these grassroots government monitor-

33. *See* discussion *infra* Part II.

34. *See* discussion *infra* Part III.

35. *See* discussion *infra* Part III.A.

36. It also examines the limits of public undersight as a useful concept and lens. Many of the examples described here are drawn from the criminal justice context, because that is where the tactics are being used. But these efforts are spreading. And there is little uniformity among these groups and efforts. These organizations are engaging in extralegal monitoring for a wide variety of ends—some are pursuing an abolitionist agenda, some a reformist agenda, and some a more carceral agenda. *See* discussion *infra* Section III.B.2. Although these distinctions are important, they are not the subject of this Article.

37. *See, e.g.*, Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement*

ing efforts can be used to expand our conception of public oversight and "reimagine" the task of government transparency and accountability.[38]

It also looks to recent work exploring the democratic theory of "agonism," or the ways that the public engages in more contentious and adversarial interactions with political institutions, as opposed to cooperative and deliberative processes.[39] This Article both draws from and builds upon this work to explore agonistic engagement with transparency law and government accountability. It examines different types of agonistic engagement in contexts beyond the criminal justice space, such as in the realms of national security, the environment, and public health. And it also looks beyond the constitutional context to study the impact of agonistic engagement in the construction of federal and state transparency statutes.

Further, this Article links the transparency law literature with the field of surveillance studies.[40] While this latter literature is cross-disciplinary, much of it emanates from the sociology scholarship.[41] It explores the ways that technological developments allow marginalized and relatively powerless communities to resist an encroaching government. It also chronicles the rise of "countersurveillance," or

---

Law, 73 STAN. L. REV. 821, 821 (2021) (describing "an approach to legal scholarship grounded in solidarity, accountability, and engagement with grassroots organizing and left social movements"); Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 939–40 (2007) (exploring the limits of social change in the context of both legal reform and extralegal activism); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. 323, 324 (1987) (suggesting that "those who have experienced discrimination speak with a special voice to which we should listen," an approach she describes as "looking to the bottom"). The emerging "movement law" scholarship, in turn, draws from and builds upon a range of legal traditions and movements, including popular constitutionalism, law and society scholarship, labor scholarship, Critical Legal Studies, and more. Akbar et al., *supra*, at 832–36.

38. *See* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 409 (2018); *see also* Akbar et al., *supra* note 37, at 859 (arguing that social change projects "create new pathways for justice and fight for horizons otherwise invisible within legal scholarship").

39. CHANTAL MOUFFE, AGONISTICS: THINKING THE WORLD POLITICALLY 1–19 (2013) (explaining the concept of agonism). Professor Jocelyn Simonson has explored various forms of agonistic public participation in the criminal justice system. Simonson, *supra* note 13, at 435–37; Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1614 (2017).

40. *See* Gary T. Marx, *Preface* to ROUTLEDGE HANDBOOK OF SURVEILLANCE STUDIES xx (Kirstie Ball, Kevin D. Haggerty & David Lyon eds., 2012) [hereinafter ROUTLEDGE HANDBOOK] (describing surveillance studies as an "emerging" field).

41. *See generally id.*

the public's efforts to resist and thwart surveillance efforts, as well as "sousveillance," or attempts to monitor those in power from below.[42] Insights derived from the surveillance literature help to illuminate the ways that public undersight can operate as an instrumental tool for the public to assert control over government actors.[43] This scholarship also highlights the power of these grassroots transparency efforts to serve as a mechanism of resistance, allowing communities long subjected to intrusive forms of government surveillance to co-opt the tools and techniques of the government and stare back.[44]

This Article proceeds in four parts. Part I offers an overview of the public oversight regime, or the formal constitutional, statutory, and common law sources of transparency in government. It describes the different sources of public oversight and then offers an overview of the various critiques of this body of law. Part II then offers a descriptive account of public undersight. It defines the concept and then offers examples of these bottom-up efforts to monitor and track the government extralegally.

Part III explores the benefits and drawbacks of public undersight. It examines the promise of these extralegal efforts to address the flaws of the formal access and transparency regime—to democratize information access, and to shift power to those communities most affected by government action. It then chronicles the down-

---

42. *See* Steve Mann, *Veillance and Reciprocal Transparency: Surveillance Versus Sousveillance, AR Glass, Lifeglogging, and Wearable Computing*, IEEE INT'L SYMP. ON TECH. & SOC'Y (2013); BROWNE, *supra* note 17, at 19.

43. Transparency law scholars have mentioned these extralegal monitoring efforts only in passing. *See, e.g.*, Pozen, *supra* note 21, at 154 (noting that sousveillance efforts "have arisen partly *in response* to the perceived failures of the transparency laws that are the focus of this Article"). While policing scholars have gone further in considering the effects of public undersight activity, their inquiries have been largely limited to the policing context. *See, e.g.*, I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 706 (2018) (describing citizen recordings of police as a form of sousveillance); Simonson, *supra* note 13, at 415–16 (same); Skinner-Thompson, *supra* note 31, at 139 (same); *see also* Fan, *supra* note 31, at 1642 (arguing that our current age is characterized not by sousveillance but by "toutveillance," where police officers and the public both record each other). Conversely, surveillance scholars have explored public undersight activity across a variety of substantive realms, and yet they have largely ignored the ways these sousveillance efforts interact with the formal legal regime governing access to government information. For an exception, see Robert Rothmann, *Video Surveillance and the Right of Access: The Empirical Proof of Panoptical Asymmetries*, 18 SURVEILLANCE & SOC'Y 222, 236–37 (2017), evaluating flaws in the right of access regime embodied in Austria's Data Protection Act. This Article ties these disparate literatures together by linking public sousveillance of government to the formal legal regime governing information access.

44. *See* discussion *infra* Part III.B.4.

sides of circumventing these established legal processes. And it proposes potential remedies, exploring the ways that we might maximize the benefits of public undersight while minimizing its harms. It identifies areas for improvement in the formal law—places where judges and policymakers might patch the holes in the current transparency law regime in order to ease pressure on these grassroots movements. At the same time, it contends that we should support these public undersight efforts and amplify their beneficial effects.

I. PUBLIC OVERSIGHT

Grassroots efforts to monitor the government do not exist in isolation. Rather, they have been influenced and shaped in part by the formal transparency law. In order to better understand and contextualize these extralegal transparency efforts, then, we must first understand the structure and shortcomings of the public oversight regime.

The term "public oversight" is ubiquitous in the law: it appears in countless statutory texts,[45] judicial opinions,[46] and administrative regulations.[47] Yet its meaning is nebulous. The phrase is rarely defined, and its significance tends to shift across contexts. It is sometimes invoked narrowly—to refer, for example, to the specific statutory responsibilities of an agency inspector general.[48] At other times it assumes a broader form, invoked as a catch-all term for improved or effective government.[49]

Yet overall, the phrase tends to assume one of three meanings. First, it is used to describe the various ways that citizens exercise direct power or influence over their government. The classic illustration of this form of public oversight is democratic elections.[50] Second, it is used to describe inter- and intragovernmental checks and balances, such as congressional authority to investigate the executive

45. *See, e.g.*, CAL. GOV'T CODE § 7283(h).

46. *See, e.g.*, Memphis Publ'g Co. v. Cherokee Child. & Fam. Servs., Inc., 87 S.W.3d 67, 76 (Tenn. 2002).

47. *See, e.g.*, 49 C.F.R. § 650.31(b)(6).

48. *See, e.g.*, CAL. PENAL CODE § 6133.

49. The media, for example, often makes vague reference to government actors operating with "little public oversight." *See, e.g.*, Stephen Ceasar, *A Magnifying Glass on Public Authorities*, N.Y. TIMES (July 12, 2010), https://cityroom.blogs.nytimes.com/2010/07/12/putting-a-magnifiying-glass-to-public-authorities [https://perma.cc/FKU3-6SNJ].

50. *See* B. GUY PETERS, AMERICAN PUBLIC POLICY: PROMISE AND PERFORMANCE 3 (9th ed. 2013).

branch or the president's appointment of agency inspectors general.[51] And third, it is used to describe the various legal mechanisms that allow the public to access information about government directly—the set of laws that allow for an informed electorate and facilitate the "voting of wise decisions."[52]

This latter definition is arguably the most common. References in both the law and popular opinion to "public oversight" often refer to these types of compelled government disclosures—through public records statutes, for example, or through constitutional provisions requiring public access to court proceedings.[53] The Freedom of Information Act ("FOIA") and state public records laws are perhaps the best-known example of this type of transparency law.[54] But the legal regime that governs access to government information is vast and complex, encompassing a variety of constitutional, common law, and statutory sources.

I largely utilize this third definition. There are practical benefits to cabining the concept of public oversight to the bounds of these formal mechanisms for accessing government information—this approach helps to render a large and unwieldy universe of laws and norms more manageable. This definition also more closely mirrors the various forms of public undersight chronicled below. These grassroots movements cannot serve as an effective stand-in for periodic elections or intergovernmental checks and balances. But they can and do perform many of the same functions as these constitutional, common law, and statutory information access rights.

A. SOURCES OF PUBLIC OVERSIGHT

In order to explore how these grassroots, extralegal transparency efforts can help to remedy shortcomings in the formal transparency law, it is important to understand the structure of this public oversight regime, as well as the specific ways in which it is flawed.

---

51. *See, e.g.*, 42 R.I. GEN. LAWS ANN. § 42-155-2 (describing the "executive and legislative budgetary review required of state agencies and departments" as forms of "public oversight").

52. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).

53. *See, e.g.*, WIS. STAT. ANN. § 19.31 (describing the purpose of the state public records law as "providing persons with "the greatest possible information regarding the affairs of government").

54. *See, e.g.*, *id.*; Voces De La Frontera, Inc. v. Clarke, 891 N.W.2d 803, 808 (Wisc. 2017) (noting that the state public records law "serves one of the basic tenets of our democratic system by providing an opportunity for public oversight of the workings of government").

This Part provides an overview of this body of law, as well as an exploration of its various critiques.

1. Constitutional and Common Law Sources

The text of the U.S. Constitution contains a handful of explicit disclosure provisions. It requires, for example, that the U.S. House and Senate each publish a journal of their proceedings,[55] that the president periodically brief Congress on the state of the union,[56] and that judges afford criminal defendants the right to a public trial.[57] Yet these textual provisions are limited both in scope and in force. They reach only a small fraction of government information, and they offer the government ample discretion to determine when and how to comply.[58]

The most significant constitutional access requirement instead derives from the text of the First Amendment. In *Richmond Newspapers v. Virginia*, the Supreme Court recognized a qualified First Amendment right of public access to criminal trials, apart from the defendant's independent Sixth Amendment right to a public trial.[59] The Court reasoned that the purpose of the First Amendment is to ensure freedom of communication about matters of government, and that there is arguably no aspect of government more critical than "the manner in which criminal trials are conducted."[60]

The Supreme Court has since extended this constitutional right of access to other contexts, including jury selection in criminal trials and certain pretrial hearings.[61] The lower federal courts have extended it even further, granting access rights to a wide variety of other judicial records and proceedings, including executions,[62] sen-

55. U.S. CONST. art. I, § 5, cl. 3.

56. *Id.* art. II, § 3.

57. *Id.* amend. VI. There are a handful of other relevant constitutional provisions as well. *See, e.g.*, *id.* art. I, § 9, cl. 7 (requiring that Congress publish "Receipts and Expenditures of all public Money").

58. *See, e.g.*, *id.* art. II, § 3 (requiring only that the state of the union be delivered to Congress "from time to time").

59. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575–78 (1980). Separately, the Due Process Clause imposes an obligation upon the government to make the law publicly available under certain circumstances. U.S. CONST. amend. XIV, § 1; Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

60. *Richmond Newspapers*, 448 U.S. at 575.

61. *See, e.g.*, Press-Enter. Co. v. Superior Ct. of Cal., 464 U.S. 501 (1984); Press-Enter. Co. v. Superior Ct. of Cal., 478 U.S. 1 (1986).

62. *See, e.g.*, Cal. First Amend. Coal. v. Woodford, 299 F.3d 868 (9th Cir. 2002).

tencing hearings,[63] search warrant applications,[64] and certain administrative proceedings.[65] Yet again, this right is limited. Not only is it qualified,[66] but it is also largely limited to judicial branch records and proceedings.[67] And even within the judicial branch itself, the right of access covers only a subset of judicial activity.

State constitutions likewise contain few explicit provisions addressing public oversight and information access. While there are variations among the fifty states,[68] these textual distinctions, have not, for the most part, meaningfully affected the public's access rights at the state and local level. Much like the federal Constitution, these state constitutional access requirements reach only a fraction of government information. And even where there are more significant textual distinctions, such as an explicit constitutional right of access,[69] state courts have tended not to interpret this language in ways that significantly expand the public's right to obtain government information.

Apart from these explicit textual requirements, many states also recognize a separate state constitutional right of access, one that derives from state constitutional speech and press protections.[70] In theory, these provisions could give rise to a state constitutional access right that sweeps more broadly than the federal one. Yet in practice, state courts have largely interpreted this language in lockstep with federal court interpretations of the First Amendment right of access, rarely reading state speech and press protections to afford a broader right of access than the one extended by the First Amendment.[71]

The public enjoys a separate common law right of access to public records and government proceedings. This common law right is

---

63. *See, e.g.*, United States v. Thompson, 713 F.3d 388 (8th Cir. 2013).

64. *See, e.g.*, *In re* Search Warrant for Secretarial Area Outside Off. of Gunn, 855 F.2d 569, 573–74 (8th Cir.1988).

65. *See* Whiteland Woods, L.P. v. Twp. of W. Whiteland, 193 F.3d 177, 181 (3d Cir. 1999).

66. *Press-Enter. Co.*, 478 U.S. at 13–14.

67. *See Whiteland Woods, L.P.*, 193 F.3d at 181.

68. *See, e.g.*, FLA. CONST. art. 1, § 24. (providing textual right of access to government records and proceedings); MASS. CONST. art. LXXXIX, § 4 (requiring amendments to municipal charters be made public).

69. *See, e.g.*, FLA. CONST. art. 1, 24.

70. *See, e.g.*, Iowa Freedom of Info. Council v. Wifvat, 328 N.W.2d 920, 923 (Iowa 1983).

71. *See, e.g.*, Des Moines Reg. & Trib. Co. v. Osmundson, 248 N.W.2d 493, 498 (Iowa 1976); State v. Frisbee, 140 A.3d 1230, 1236 (Me. 2016).

broader than the constitutional right of access, extending, at least in theory, to all three branches.[72] Yet in practice, much of the common law right has since been displaced by federal and state public records laws,[73] and the right is largely limited today to the judicial branch.[74] The Supreme Court has largely left it up to the lower courts to determine when and how this right attaches.[75] This has yielded a range of different approaches from the various circuits.[76]

These constitutional and common law rights are generally coextensive: a judicial record or proceeding protected by the First Amendment right is very often protected by the common law right as well.[77] Yet there are also important distinctions. The common law right sweeps more broadly, for example, but it is also more easily overcome.[78] As a consequence, records or proceedings may be covered by one access right but not the other.[79]

2. Statutory and Regulatory Sources

Statutory and regulatory sources of public oversight help fill in the gaps left by these limitations in the common law and constitutional access regimes. There are two broad categories of statutory and regulatory public oversight: general transparency laws, or transsubstantive statutes enacted with the primary goal of enhancing public access to information;[80] and subject-specific statutes and regula-

72. *See* Ctr. for Nat'l Sec. Stud. v. U.S. Dep't of Just., 331 F.3d 918, 936 (D.C. Cir. 2003).

73. *Compare, e.g.*, Breighner v. Mich. High Sch. Athletic Ass'n, 683 N.W.2d 639, 649 (Mich. 2004) (finding that statute codified common law right), *with* Nast v. Michels, 730 P.2d 54, 58 (Wash. 1986) (finding that the two rights are coextensive).

74. A number of federal and state court rules also clarify procedures for determining whether a judicial record or proceeding must be open to the public through court rules. *See, e.g.*, ARK. R. CRIM. P. 38.1 (ensuring news media can report on criminal proceedings); ARIZ. R. CRIM. P. 9.3(b)(1) (providing that judicial proceedings are presumptively open).

75. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 599 (1978).

76. *See, e.g.*, Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1376 (8th Cir. 1990) (departing from most federal circuits' strong presumption in favor of access to defer to the trial court's determination).

77. *See, e.g.*, Ridenour v. Schwartz, 875 P.2d 1306, 1308 (Ariz. 1994) (en banc) (rooting access in both constitutional and common law right); *In re* Application of N.Y. Times Co. for Access to Certain Sealed Ct. Recs., 585 F. Supp. 2d 83, 87 n.3 (D.D.C. 2008) (same).

78. *See, e.g.*, *Nixon*, 435 U.S. at 599; Rapid City J. v. Delaney, 804 N.W.2d 388, 392 (S.D. 2011).

79. *See, e.g.*, *In re* Providence J. Co., 293 F.3d 1, 16 (1st Cir. 2002); Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 6 (Fla. 1982).

80. Note that in some respects, federal and state administrative proceedings

tions, or those that mandate transparency in a specific substantive realm.[81]

a. *General Transparency Statutes*

i. Public Records Laws

The federal and state statutory transparency regime consists of an array of federal and state statutes that address various forms of public oversight. But arguably, the most significant category of general transparency statutes are those that secure access to government records: specifically, FOIA at the federal level, and the fifty separate public records laws enacted by each of the states.[82]

These public records statutes allow the public to access government information directly. Anyone can submit a request for records, and anyone can sue to have this right enforced.[83] Records held by government entities covered by the law are presumptively open, meaning that they can be withheld from public view only if they fall within one of an enumerated set of exemptions.[84] At the federal level, FOIA contains nine such exemptions, including protections for classified documents, law enforcement investigatory records, and records that disclose private information about government employees or private citizens.[85] Each state formulates this list of exemptions differently, with some states enacting dozens or even hundreds of carve-outs to the law.[86]

There are other distinctions between the federal and state public records' regimes. One important difference is in the scope of the laws' coverage. While FOIA reaches only the records of federal agencies—the Office of the President, Congress, and the judiciary are all excluded[87]—these state statutes sweep more broadly, extending to cover legislative records, judicial records, or the records of the office

---

acts could be categorized as a general transparency statute because they impose transsubstantive notice and publication requirements on federal and state agencies. *See generally* 5 U.S.C. §§ 551–59. Yet, because this is not necessarily the primary purpose of these statutes, I have not included them here.

81. *See infra* Part I.A.2.b.

82. *See* Pozen, *supra* note 21, at 124.

83. *See, e.g.*, 5 U.S.C. § 552 *et seq.* Some states do place limited restrictions on who may request records. *See, e.g.*, ARK. REV. STAT. § 25-19-105(a)(1)(B)(i) (2019) (barring incarcerated felons from submitting public records requests).

84. *See* 5 U.S.C. § 552 (a)(2).

85. 5 U.S.C. § 552(b)(1)–(8).

86. *See, e.g.*, NEV. REV. STAT. § 239.010 (listing 431 exemptions).

87. 5 U.S.C. § 552(a).

of the governor.[88] Only one state, Massachusetts, has tailored its public records statute to the same narrow boundaries as FOIA.[89]

ii. Open Meetings Laws

A second group of general transparency statutes requires that certain meetings of government are open to the public. The primary law at the federal level is the Government in the Sunshine Act, which mandates that the meetings of federal agency heads must be accessible to the public unless they fall within one of ten enumerated exemptions.[90] A handful of other, more limited federal statutes contain open meetings requirements as well.[91]

Separately, each state has enacted its own open meetings law or set of laws mandating public access to state, county, and local and municipal government meetings. These state laws broadly resemble the federal open meetings statute: they define which government entities are subject to the law, set forth public notice requirements, and clarify when meetings may be lawfully closed.[92] But again, these state laws tend to cover a broader range of government activity than the federal law. While the Government in Sunshine Act is largely cabined to executive agency meetings,[93] for example, most state versions of this statute reach certain meetings of the legislative and judicial branches as well.[94]

---

88. Christina Koningisor, State Public Records Law Database (unpublished database) (on file with author) (containing public records law information compiled and analyzed by the author for all fifty states).

89. Todd Wallack, *State Lawmakers Fail to Reach Consensus on Whether to Expand Public Record Law*, BOS. GLOBE (Jan. 10, 2019), https://www.bostonglobe.com/metro/2019/01/10/state-lawmakers-fail-reach-consensus-whether-expand-public-record-law/XvwfD04o2TtQ4HWqmxi0BO/story.html [https://perma.cc/75HP-ST7K].

90. Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended in scattered sections of 5 and 39 U.S.C.).

91. *See, e.g.*, Federal Advisory Committee Act, 5 U.S.C. app. §§ 1–16 (2018) (requiring agency advisory committees be made open to the public).

92. *See generally Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/open-government-guide [https://perma.cc/5SCU-94RE].

93. *See, e.g.*, 5 U.S.C. § 552b(a) (limiting GITSA to federal agencies); *see also* Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (1970) (codified as amended in scattered sections of 2 U.S.C.) (requiring certain congressional meetings to be open).

94. *See, e.g.*, *Open Government Guide*, *supra* note 92 (comparing open records' law coverage across states); MD. CODE ANN. GEN. PROV. § 3-101(e)(3), (j)(1) (West 2017); NEB. REV. STAT. § 84-1409.

iii. Open Data Requirements

Open data requirements represent a third category of general transparency statute. There has been a push in recent years for the government to proactively publish data in more digitally accessible formats.[95] This open data movement has culminated at the federal level in a scattering of statutes requiring that covered government entities affirmatively publish certain types of data. For instance, the Digital Accountability and Transparency Act of 2014 requires that the government publish its spending data for free in a standard and accessible format.[96]

The states have largely followed suit, enacting a variety of statutes that impose open data obligations upon state and local governments. For example, nearly two dozen states have enacted open data laws that require the use of open-source data or machine-readable data formats for certain categories of data, the establishment of a chief data officer position, or the preservation of certain types of data.[97] And virtually every state has built an open data portal that serves as a centralized repository for state and local government datasets.[98]

b. Subject-Specific Statutes and Regulations

While these general, trans-substantive transparency statutes form the backbone of the transparency law regime, the federal and sub-federal transparency law ecosystem contains a wealth of more tailored, subject-specific statutes, regulations, and executive orders. These subject-specific laws and regulations generally fall into one of two categories. The first consists of statutes or regulations enacted with the express purpose of enhancing transparency in a specific substantive area. These include laws and regulations addressing campaign finance disclosures,[99] financial disclosures by senior gov-

95. *See generally* Beth Simone Noveck, *Open Data: The Future of Transparency in the Age of Big Data*, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION (David E. Pozen & Michael Schudson eds., 2018) (describing how open government data has the potential to compensate for some of FOIA's worst flaws).

96. Digital Accountability and Transparency Act of 2014, Pub. L. No. 113-101,128 Stat. 1146 (2014).

97. *See State Open Data Laws and Policies*, NAT'L CONF. STATE LEGISLATORS, https://www.ncsl.org/research/telecommunications-and-information-technology/state-open-data-laws-and-policies.aspx [https://perma.cc/6E9V-KXPU].

98. *Id.*

99. *See, e.g.*, Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3.

ernment personnel,[100] transparency in consumer protection,[101] mandatory environmental disclosures,[102] and so on.

The second consists of laws enacted for some other stated purpose but which nonetheless contain some targeted disclosure or transparency measure as part of their broader regulatory regime. These statutes and regulations are too numerous to describe in detail here. Yet these targeted disclosure provisions embedded in broader laws, too, comprise a critical segment of the public oversight regime.[103]

B. CRITIQUES OF PUBLIC OVERSIGHT

The preceding Section explored the text and structure of these transparency laws. But how these laws function in practice is more complex. Transparency statutes break down in myriad ways, from their structure, application, to the costs imposed; constitutional and common law rights of access to information likewise fall short, although in different ways. This Section reviews some common critiques of this oversight regime.

1. Critiques of Constitutional and Common Law Sources

Formally, there are distinctions between the constitutional and common law rights of access: they derive from different sources, and they apply different tests.[104] In practice, however, these two rights tend to converge. They are so similar in their application that courts often either confuse these separate rights, or extend some amalgamation of the two.[105]

Perhaps unsurprisingly, they also suffer from similar limitations. They are fairly narrow in scope: both constitutional and common law rights are largely limited to the judicial branch, and they rarely allow the public to obtain access to legislative or executive branch records

---

100. *See, e.g.*, Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1864 (18 U.S.C. § 207), *amended by* Pub. L. 96-28, 93 Stat. 76 (1979).

101. There are countless laws that fall within this category. *See* Pozen, *supra* note 21, at 136 (describing targeted consumer protection laws as "ubiquitous").

102. *See, e.g.*, Safe Drinking Water Act Amendments of 1996, 42 U.S.C § 300g-(c)(4) (requiring publication of "consumer confidence reports" for source of drinking water).

103. Of course, countless other laws are enacted for some non-transparency purpose but still contain some disclosure or notification provision.

104. *See supra* notes 72–76.

105. *See, e.g.*, Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988) (applying both constitutional and common law doctrine).

or proceedings.[106] Even within the judicial branch itself, the right is often limited. These access rights generally do not reach grand jury records and proceedings,[107] for example, or discovery materials that have not been filed with the court.[108] And some states and circuits have set forth especially cramped interpretations. Colorado, for instance, does not recognize any state constitutional right of access at all.[109]

These rights can also be difficult to vindicate. Remedying a denial of access often requires taking some action in court, usually intervening in a case to file an access motion.[110] These steps are expensive and time consuming, and they require familiarity with the legal system—both in order to recognize that a violation has occurred and to know how to remedy it. As a result, these rights have historically been enforced by institutional actors, very often media organizations.[111] And yet, the institutional press is in a state of crisis today. Local newspapers are closing at an alarming rate, and those that remain often no longer have the resources to fight costly and unpredictable access cases.[112] Some larger national outlets have continued to litigate in this space, but even these organizations tend to file access motions jointly and to intervene only in the highest-profile cases.[113]

The average citizen has even fewer resources at their disposal to enforce a violation of their access rights. This is especially harmful given the broader inequities of the criminal justice system. Criminal court audiences are largely made up of individuals who are poor, noncitizens, people of color, or some combination of all three.[114]

---

106. There are some exceptions. *See, e.g.*, Detroit Free Press v. Ashcroft, 303 F.3d 681, 700 (6th Cir. 2002) (extending the First Amendment right of access to deportation hearings).

107. *See* Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 219 (1979).

108. *See, e.g.*, *In re* Associated Press, 162 F.3d 503, 510 (7th Cir. 1998).

109. People v. Owens, 2018 CO 55, ¶¶ 7–9, 420 P.3d 257, 258–59 (Colo. 2018).

110. *See, e.g.*, *In re* Trib. Co., 784 F.2d 1518, 1521 (11th Cir. 1986); *In re* Storer Commc'ns, Inc., 828 F.2d 330, 335 (6th Cir. 1987).

111. *See, e.g.*, RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 571–80 (2011).

112. *Id.*; *In Defense of the First Amendment*, KNIGHT FOUND. 9, 13 (2016), https://knightfoundation.org/wp-content/uploads/2020/03/KF-editors-survey-final_1.pdf [https://perma.cc/PWC3-9CP2] (highlighting that sixty-five percent of survey respondents reported that the news industry was less able today than it was a decade ago to pursue legal action involving free expression).

113. Jones, *supra* note 111, at 624–27.

114. Simonson, *The Criminal Court Audience*, *supra* note 31, at 2185.

They are the "affected locals," witnessing cases that impact their own lives and the lives of their neighbors.[115] Individuals from these communities are both more likely to be excluded from having a voice in the criminal justice process, and less likely to have the time and resources needed to remedy this violation.[116]

There are practical barriers to securing meaningful access to the courts as well. Only a fraction of criminal cases proceed to trial today,[117] pushing public oversight opportunities into pre- and post-trial forums like arraignments, pleas, and sentencings—proceedings that are often shorter and tend to offer less insight into policing and prosecutorial functions.[118] They can also be difficult for the average citizen to follow: judges and lawyers often employ technical legal jargon and cite arcane criminal procedural rules.[119] Moreover, poor courtroom acoustics and repeated sidebars with judges can interfere with the public's ability to hear these proceedings at all.[120]

2. Critiques of Statutory and Regulatory Sources

The statutory and regulatory regime governing transparency and information access is plagued by its own set of flaws and failures, some of which overlap with the shortcomings of the common law and constitutional access regime, and some of which are distinct.

a. *Corporate Capture*

General transparency statutes like FOIA and open meetings laws were intended to enhance public access to government records and proceedings.[121] Specifically, legislators drafted these laws with the

115. *Id.* at 2186.

116. *Id.* at 2189–95 (describing these different forms of exclusion).

117. *See* Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 101–08 (2018).

118. *Id.* at 158–59 (describing how plea agreements can dampen public oversight of the criminal justice process).

119. *Id.* at 158 ("Usually the first question asked of the lawyer at the end of the sentencing hearing is, 'What happened?'"); Telephone Interview with Joyce Bridge, President, Nat'l Council for Jewish Women (Feb. 2, 2021) (describing how even court monitors can have trouble following a proceeding).

120. Kirk W. Schuler, *In the Vanguard of the American Jury: A Case Study of Jury Innovations in the Northern District of Iowa*, 28 N. ILL. U. L. REV. 453, 461 (2008) (describing problems in courtroom acoustics); Simonson, *The Criminal Court Audience*, *supra* note 31, at 2228–29 (same).

121. *See* S. REP. NO. 88-1219, at 8 (1964) (stating that FOIA's purpose was to "provide a court procedure by which citizens and the press may obtain information wrongfully withheld").

media in mind, reasoning that journalists would obtain records or access to meetings and then relay this information to the public at large.[122] Yet in reality, these statutes have been largely co-opted by corporate interests.[123] The public records dockets of many federal, state, and local agencies are now dominated by commercial requests, which impose high financial, resource, and deliberative costs upon government yet offer limited public benefit in return.[124]

This problem is not limited to public records statutes. Other transparency laws have also been co-opted to serve corporate ends. One of the original goals of open meetings laws was to reduce corporate influence over the legislative process, and yet often the only members of the public in attendance are lobbyists representing the very industries that the convening agency regulates.[125] Further, these laws have pushed the decision-making process into more ad hoc and informal processes, which are generally more difficult for the public to monitor and more prone to outside influence by interested actors.[126] Similarly, open data laws have been criticized for helping to privatize government functions and "marketiz[e]" entire fields of government activity, rather than serve as a meaningful source of transparency and accountability for the public at large.[127]

b. *Over and Underinclusive Coverage*

General transparency statutes have also been criticized for failing to reach broadly enough.[128] FOIA covers only executive branch agencies, excluding judicial, legislative, and presidential records.[129] And while most state public records laws are generally more expan-

122. *See* Kwoka, *supra* note 22, at 1367–71.

123. *See id.* at 1376–77; *id.* at 1381 fig.1.

124. *See id.* at 1379–413 (describing corporate capture of FOIA); Koningisor, *supra* note 21, at 1498–504 (describing corporate capture of state public records laws).

125. *See* Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309, 363–64 (2011).

126. Pozen, *supra* note 21, at 127–29.

127. *Id.* at 141–44.

128. *See, e.g.*, *id.* at 155–56 (criticizing the federal transparency regime for shielding "the state's most violent and least visible components").

129. 5 U.S.C. § 551(1) exempts "Congress" and "the courts of the United States" from FOIA. While 5 U.S.C. § 552(f) includes "the Executive Office of the President" in FOIA's scope, the statute does not cover the President or "the President's immediate personal staff . . . whose sole function is to advise and assist the President" to FOIA. H.R. REP. NO. 93-1380, at 15 (1974) (Conf. Rep.).

sive,[130] a minority of states extend coverage to all three branches.[131] Open meetings laws are likewise circumscribed: the Government in Sunshine Act applies only to certain executive agency meetings,[132] and state public records laws tend to exclude broad categories of actors like law enforcement agencies.[133]

Conversely, scholars have criticized these laws for sweeping too broadly. Some have argued that as the statutory transparency regime has expanded, agencies that are basically competent and operating in good faith have been subjected to too much scrutiny, with too little public benefit in return.[134] And yet at the same time, this regime is rife with exceptions and loopholes for national security and law enforcement agencies—the arms of the state that are engaged in the most violent and dangerous activities and therefore most in need of public oversight.[135]

Sometimes this exclusion is explicit. Colorado, for example, has excluded law enforcement agencies altogether, enacting a separate and substantially weaker law to govern the disclosure of police records.[136] But more often it occurs through the steady judicial broadening of statutory exemptions. FOIA's Exemption 1 has been interpreted to shield virtually all classified materials from public disclosure, for example,[137] and both federal and state courts have interpreted exclusions for certain types of law enforcement records to capture police records almost in their entirety.[138] Targeted disclosure laws and ordinances can help fill the gaps left by these general transparency statutes. But these targeted laws tend to be haphazard and scat-

130. Massachusetts is the only state that limits its public records laws to executive agencies. *See* Wallack, *supra* note 89.

131. Koningisor, *supra* note 88.

132. 5 U.S.C. § 552b(a)(2) (limiting the scope of the Government in Sunshine Act to agency meetings where quorum necessary to conduct agency business is present); *id.* § 522b(c) (exempting disclosure of matters concerning national defense, internal agency practices, law enforcement investigatory records, etc.).

133. *See, e.g.*, Colorado Criminal Justice Records Act, COLO. REV. STAT. §§ 24-72-301 *et seq.*; COLO. REV. STAT. § 24-72-305(5) (authorizing a court to prohibit inspection of "investigatory files compiled for any . . . law enforcement purpose").

134. Pozen, *supra* note 21, at 158–59.

135. *Id.* at 154–56.

136. *See supra* note 133 and accompanying text.

137. *See* Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 139–43 (2017).

138. *See, e.g.*, Jordan v. U.S. Dep't of Just., 668 F.3d 1188, 1192–98 (10th Cir. 2011); Jones v. FBI, 41 F.3d 238, 245–46 (6th Cir. 1994).

tered, and to affect only a narrow slice of policing activity.[139]

Finally, these laws impose obligations only upon existing government records, data, and meetings. Public records laws do not require that the government assemble new records or data in response to requests,[140] open meeting laws do not give the public the right to force a meeting on a particular topic,[141] and open data requirements apply only to datasets that the government has already gathered.[142] This can have a distorting effect on conversations about government policies and actions. Public oversight extends only where the government has already decided to focus its attention, vesting the government with substantial power to shape the public narrative.

c. High Costs of Compliance on the Government

Transparency statutes are also costly for the government. Most obviously, they impose substantial financial costs: the federal government spends roughly half a billion dollars a year on FOIA compliance alone.[143] But there are other, non-monetary costs as well. For example, there are security costs: by releasing information to the public at large, these statutes may allow criminals or foreign enemies to learn sensitive or damaging information about the nation's law enforcement or national security activities.[144] And there are deliberative costs as well. Opening up these government conversations to the public can have a chilling effect on government speech.[145] Advisors may not be as forthcoming, and political negotiations may stall under the scrutiny of public opinion.[146]

These laws not only affect the quality of deliberation; they can also dampen communication and information gathering altogether. Scholars have demonstrated that following the enactment of an open

---

139. *See, e.g.*, CAL. PENAL CODE § 13010(g) (2017) (requiring the publication of certain criminal justice statistics); N.Y.C. ADMIN. CODE § 14-188 (2020) (requiring that the NYPD disclose the surveillance technologies it uses).

140. Kissinger v. Reps. Comm. for Freedom of the Press, 445 U.S. 136, 151–52 (1980).

141. 5 U.S.C. § 552b(a)(2).

142. *See, e.g.*, Open, Public, Electronic, and Necessary Government Data Act, 162 CONG. REC. S7132–35 (daily ed. Dec. 9, 2016).

143. *Summary of Annual FOIA Reports for the Fiscal Year 2019*, OFF. OF INFO. POL'Y, U.S. DEP'T OF JUST. 20 (2020), https://www.justice.gov/oip/page/file/1282001/download [https://perma.cc/SVH5-VBWV].

144. These are the concerns embodied in exemptions 1, 3, and 7 of FOIA. *See* 5 U.S.C. § 552(b)(1), (3), (7).

145. *See* Mulroy, *supra* note 125, at 360–62.

146. *See* Lee, *supra* note 23, at 215–27.

meetings law, for instance, government officials hold fewer meetings and engage in more notation votes without prior discussion.[147] And public records laws can disincentivize certain data collection as government actors seek to avoid the public scrutiny that may follow an unwanted disclosure.[148]

d. High Barriers to Public Access and Enforcement

A further critique of this transparency law regime is that, while these laws are relatively easy for the government to violate or ignore, they are difficult for the public to access and enforce. It is costly for individuals to do so: many state public records laws allow government actors to impose processing fees on requesters, and few have placed restrictions on how much they can charge.[149] As a consequence, these fees can be prohibitive, and some may be imposed in bad faith, utilized by government actors as a way to avoid public scrutiny.[150]

Moreover, when the government fails to comply with these transparency laws, the public's only recourse is to sue.[151] Such lawsuits are expensive and time-consuming. Again, news organizations have historically spearheaded these efforts, assuming the role of the public's enforcer of these laws.[152] But the collapse of small- and medium-sized news outlets around the country has left a gaping hole in public records compliance.[153] In many cities today, the only organizations that historically have had the will, expertise, and funds to sue to enforce public records and open meetings laws have either closed or are in such dire financial straits that they can no longer afford to engage in costly access litigation.[154]

---

147. *See* Mulroy, *supra* note 125, at 362–63.

148. Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1129–32 (2013).

149. Koningisor, *supra* note 88.

150. *See, e.g.*, Chris McDaniel, *How Ferguson Contracted a High-Priced Company to Search Its E-mails*, ST. LOUIS PUB. RADIO (Oct. 9, 2014), https://news.stlpublicradio.org/government-politics-issues/2014-10-09/how-ferguson-contracted-a-high-priced-company-to-search-its-emails [https://perma.cc/5FUE-8XCY] (describing thousand-dollar fees the Ferguson Police Department charged media requesters after the police killing of Michael Brown).

151. While FOIA and some states have an administrative appeals process, many states do not. Koningisor, *supra* note 88.

152. Jones, *supra* note 111, at 571–611.

153. Koningisor, *supra* note 21, at 1522–25.

154. Penelope Muse Abernathy, *News Deserts and Ghost Newspapers: Will Local News Survive?*, UNIV. N.C. 9 (2020), https://www.usnewsdeserts.com/wp-content/

e. Weak Judicial Enforcement

A final critique of this statutory transparency regime is that the judicial branch has failed to properly apply these laws. Government transparency statutes were designed to serve as a check on executive authority, with the courts acting as the laws' enforcers.[155] And yet in reality judges have often done the opposite, weakening the laws' effects and ignoring legislative efforts to restore the public's ability to access government information effectively.[156]

They have done so in a variety of ways. Federal courts have disregarded textual instructions contained in these statutes. For example, federal courts have essentially ignored Congress' instruction that judges engage in de novo review of agency decisions under FOIA, instead deferring to an agency's determination in nearly all cases.[157] They have also designed a series of unique procedural mechanisms that apply exclusively to public records cases—for instance, prohibiting discovery and requiring that cases settle at the summary judgment stage.[158] And they have interpreted exemptions broadly, per-

uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf [https://perma.cc/BJ4S-4TDE].

155. *See* S. REP. NO. 88-1219, at 8 (1964) (stating that FOIA's purpose was to "provide a court procedure by which citizens and the press may obtain information wrongfully withheld").

156. This trend is especially pronounced in the FOIA context. *See, e.g.*, Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 247–49 (2011) (arguing that judges regularly convert questions of law into questions of fact in the FOIA context, in an effort to resolve FOIA cases at summary judgment); David E. McCraw, *The "Freedom from Information" Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J.F. 232, 234 (2016) (arguing that "the courts have crafted a line of precedents that exacerbate" flaws in the drafting of the statute).

157. Congress has insisted on de novo review of agency FOIA determinations twice—once when it enacted the statute, and once when it overrode the Supreme Court's decision to defer to government classification decisions. *See* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 198–200 (2013). Yet federal judges have continued to defer to agency determinations in practice. One study found that district court judges affirm agencies' FOIA determinations at a rate of around ninety percent, even though the statute requires de novo review. In contrast, district court judges affirm Social Security Administration disability determinations by administrative law judges at a rate of only fifty percent, even though these cases are reviewed under the substantial evidence standard. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 719 tbl.2 (2002).

158. *See, e.g.*, Carney v. U.S. Dep't of Just., 19 F.3d 807, 812–13 (2d Cir. 1994); Fraternal Ord. of Police v. District of Columbia, 79 A.3d 347, 355–56, 356 n.29 (D.C. 2013).

mitting the government ample latitude to withhold information from public view.[159]

***

The formal transparency law regime is deeply flawed. After decades of amendments, statutory reforms have had only limited success in improving the public's ability to successfully monitor the government.[160] And courts have likewise shown little appetite to enforce these transparency statutes.[161] Government solutions to the problem of government secrecy have fallen short. As the next Part explores, activists, academics, journalists, and others have increasingly responded to these deficiencies by sidestepping these government mechanisms altogether, looking instead to extralegal means to hold the government to account.

II. PUBLIC UNDERSIGHT

Confronted with these flaws in the public oversight regime, some advocacy groups, community organizers, and cause-driven coalitions have eschewed formal legal avenues in favor of extralegal mechanisms for reclaiming control of government information.[162] I have described these efforts as forms of "public undersight."[163] But a clearer definition may be helpful. As I use it here, the term refers to efforts by non-government actors to systematically monitor the government or obtain access to government information without utilizing formal legal mechanisms that vest government actors with final decision-making authority.

A few examples may help. Unauthorized information leaks, for instance, would not qualify as a form of public undersight under my definition because the government official who leaks the material is

159. *See* Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

160. *See, e.g.*, Kwoka, *supra* note 22, at 1347.

161. *See, e.g.*, McCraw, *supra* note 156, at 240.

162. *See* discussion *infra* Part II.A (regarding copwatching organizations), Part II.B (regarding groups that conduct public undersight of immigration, national security, environmental, and public health agencies); Part II.C (regarding court monitoring efforts).

163. This concept is close, although not identical, to what sociologist Steve Mann has described as "sousveillance," or "watching from below." Steve Mann, Jason Nolan & Barry Wellman, *Sousveillance: Inventing and Using Wearable Computing Devices for Data Collection in Surveillance Environments*, 1 SURVEILLANCE & SOC'Y 331, 332 (2003). For a discussion of how public undersight is distinct, see *infra* notes 365–366 and accompanying text.

still exercising final decision-making authority, even if he or she circumvents formal channels of authorization to do so. Similarly, information secured via a public records request or open meeting provision would not meet this definition because it was acquired via formal transparency mechanisms that require the government's consent—in this case, federal and state statutes that vest government actors with decision-making authority over whether or not a meeting is opened or a record released.[164]

These two definitional categories are not always mutually exclusive. Certain actions will straddle the line between public oversight and undersight. Some definitional confusion arises, for example, with the application of constitutional and common law access protections. On the one hand, access to court proceedings seems like a straightforward example of public oversight: courtroom audiences are taking advantage of access protections enshrined in federal and state constitutions and extended by judicial precedent.[165] Yet some uses of this access right—for example, certain kinds of court monitoring efforts—also seem to qualify as a form of public undersight. Specifically, many court monitoring programs gather data about the criminal justice process that the government itself has either declined to track or refused to release.[166] In this sense, these organizations circumvent the formal public oversight regime by gathering government information without the government's consent.

In an effort to reconcile these two readings of court monitoring programs, I have split the difference, categorizing court monitoring

---

164. I have categorized efforts that rely, in part, on records or information obtained through legal transparency channels as an example of public undersight, so long as they are combined with records or materials obtained through extralegal methods. However, I have excluded extragovernmental databases that consist exclusively of materials obtained through public records requests—for example, those that make these records accessible in a more user-friendly format. *See, e.g.*, *Citizens Police Data Project*, INVISIBLE INST., https://invisible.institute/police-data [https://perma.cc/FMT3-MKKG]. I have also excluded crowdsourced data efforts that are not primarily intended as a tool for monitoring government, such as general crime reporting apps. *See, e.g.*, CITIZEN, https://citizen.com [https://perma.cc/K89S-FTVP]. And I have excluded crowdsourced efforts that are primarily intended to evade government enforcement rather than to monitor government activity. *See, e.g.*, WAZE, https://www.waze.com [https://perma.cc/SAL6-L9PW] (crowdsourcing police speed traps).

165. *See, e.g.*, U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (establishing a First Amendment right of public access to certain criminal proceedings).

166. *See* discussion *infra* Part III.A.1.

efforts devoted to data collection about the justice system as a form of public undersight, and excluding court monitoring programs devoted solely to observing judicial proceedings as a form of public oversight.[167] Even so, it is important to acknowledge upfront that certain types of public activity will inevitably blur the lines between these two categories.[168]

A. PUBLIC UNDERSIGHT OF POLICING

Public undersight activity at the state and local levels encompasses a range of efforts, from highlighting racial disparities in sentencing decisions[169] to identifying which city streets have been plowed after a snowstorm.[170] Yet the realm of policing draws the most concentrated and persistent attention.[171] As a result, many of the examples of public undersight explored in this Article are pulled from the policing and criminal justice context.

1. Copwatching

Copwatching groups are activist organizations that monitor and observe police activity.[172] Observers are usually trained and organized, and many of them reside in the community being policed.[173] Participants often wear uniforms and carry visible recording devices to alert the police that they are being monitored.[174] These groups

167. *See* discussion *infra* Part II.C.

168. The examples highlighted in this Part are intended to be illustrative, not exhaustive. I selected three parts of government—policing, federal agencies, and courts—that have seen some of the most sustained, persistent, and concentrated public undersight attention. But this is not to suggest that undersight activity is limited to the specific examples that I have presented here.

169. See discussion *infra* Part II.C for examples of organizations monitoring for disparities in criminal charges, bail, and sentences.

170. Jim Colgan, *Mapping the Storm Clean-up*, WNYC (Dec. 29, 2010), https://www.wnyc.org/story/105548-2-mapping-storm-clean- [https://perma.cc/H3GC-KLD8].

171. *See, e.g.*, Tate et al., *supra* note 14 (tracking fatal shootings by on-duty police officers).

172. Simonson, *supra* note 13, at 410.

173. *See* Telephone Interview with Andrea Prichett, Co-Founder, Berkeley Copwatch (Feb. 3, 2021) (explaining that the group sends out weekly patrols, often to high-police areas like homeless encampments); Simonson, *supra* note 13, at 410 (describing activities of copwatching groups). These groups may engage in a range of other activities as well. *See, e.g.*, E-mail from Dan Handelman, Portland Copwatch, to author (Feb. 3, 2021) (on file with author) (estimating that only five percent of the group's activities involve "actual on the street copwatching").

174. Simonson, *supra* note 13, at 393, 410.

pursue a range of goals, but many of them organize in order to record citizens' interactions with police officers, to let the police know that they are being watched, and to help to deter acts of police violence.[175]

Such efforts are not new. They first gained prominence in the 1960s, when the Black Panthers organized armed patrols to monitor police activity in Oakland and other cities around the country.[176] But copwatching groups have grown substantially in recent years, both in number and in scope, in the wake of the protests in Ferguson and the rise of the Black Lives Matter movement.[177] These groups have also expanded into new regions. While many of the oldest and most prominent copwatching organizations are located in larger, coastal cities,[178] new groups have sprung up in cities and towns in the Midwest and South as well.[179]

Professor Jocelyn Simonson has written the definitive legal account of these groups.[180] In her law review article *Copwatching*, she chronicles the many benefits of these efforts, noting that these groups help to prevent police violence, allow communities to reclaim power and control over their neighborhoods, educate residents about their legal rights, contest police officers' monopoly on the scope and meaning of Fourth Amendment protections, and provide an avenue for expressive resistance to police violence and surveillance in poor communities of color.[181]

She also notes that copwatching serves an important data collection function.[182] In this sense, these groups are engaged in public undersight. Video evidence collected by these organizations can be used to contradict the police's version of events—to cast doubt on a police officer's stated reason for engaging in a stop or search, for ex-

175. *Id.* at 409–10.

176. *Id.* at 408.

177. *Id.* at 393–94, 409.

178. *See, e.g.*, *History*, BERKELEY COPWATCH, https://www.berkeleycopwatch.org/history [https://perma.cc/JS8M-J8Q3] (founded 1990); *About*, PORTLAND COPWATCH, https://www.portlandcopwatch.org/whois.html [https://perma.cc/9CBH-84ES] (founded 1992).

179. Simonson, *supra* note 13, at 445.

180. *See generally id.* (providing an overview of copwatching). For a discussion of copwatching in the sociological literature, see, for example, Laura Huey, Kevin Walby & Aaron Doyle, *Cop Watching in the Downtown Eastside: Exploring the Use of (Counter) Surveillance as a Tool of Resistance*, *in* SURVEILLANCE AND SECURITY: TECHNOLOGICAL POLITICS AND POWER IN EVERYDAY LIFE 149, 152–65 (Torin Monahan ed., 2006).

181. Simonson, *supra* note 13, at 411–13.

182. *Id.* at 417–20.

ample, or to demonstrate a pattern of abuse.[183] And evidence gathered by copwatching groups can undergird community-driven investigations into reports of police brutality. For example, some groups utilize these monitoring efforts to write their own incident reports—ones that are expressly intended to challenge the police department's official narrative of events.[184]

These groups also generate their own policing data. One copwatching group in New York, for example, has tracked individuals brought into custody for noncustodial ticket offenses.[185] And a group in Berkeley has catalogued its videos in a database that can be searched by incident narrative or by the individual police officer involved. The group then links these incidents to any connected legal cases or relevant outside documentation.[186] This allows them to identify officers involved in a pattern of abusive behavior—functioning, in effect, as an extralegal alternative to official police disciplinary databases.[187]

This catalogue serves as an "early warning system," allowing copwatchers to flag police officers who pose an outsized threat to the community.[188] And it allows the group to support their policy efforts with objective, replicable data. In their own words, it permits them to "mov[e] away from the idea that we could shame or change a police department by finding one high profile, outrageous incident" and instead emphasize "the less dramatic, but still impactful daily abuses such as illegal searches, punitive destruction of property, [and] racial

183. *See, e.g.*, *Q+A*, BERKELEY COPWATCH, https://www.berkeleycopwatch.org/people-s-database [https://perma.cc/KH6L-39CR] (using aggregated footage to show a specific officer had repeatedly harassed homeless men and women).

184. *See, e.g.*, Berkeley Copwatch, Community Meeting, Feb. 3, 2021 (describing the steps the group took to investigate five incidents of police violence by Berkeley Police against Black men, including interviewing survivors and witnesses, filing public records requests, and reviewing dispatch recordings); *People's Investigation: In-Custody Death of Kayla Moore*, BERKELEY COPWATCH (Oct. 2013), https://justiceforkaylamoore.files.wordpress.com/2016/07/peoples_investigation_kayla_moore_2013.pdf [https://perma.cc/5ZEY-79UM] [hereinafter *People's Investigation*] (arguing that copwatching investigations "provid[e] narratives to counter official reports and mainstream media portrayals that criminalize and dehumanize people targeted by law enforcement").

185. Simonson, *supra* note 13, at 420.

186. *Our Process*, WITNESS MEDIA LAB: BERKELEY COPWATCH DATABASE https://lab.witness.org/berkeley-copwatch-database/#process [https://perma.cc/5YFS-WZ2T].

187. *See Q+A*, *supra* note 183.

188. *Video: Walkthrough of the People's Database for Community-Based Police Accountability*, BERKELEY COPWATCH, https://www.berkeleycopwatch.org/people-s-database [https://perma.cc/KH6L-39CR].

profiling."[189] By aggregating and then converting video footage into searchable data, the organization is able to provide empirical evidence of lower-profile patterns of abuse.[190]

Further, the videos collected by copwatching groups—either filmed directly by members of their organizations or provided to these groups by citizen bystanders—offer the community a way to challenge police departments' monopoly on video evidence. While police-worn body cameras were initially touted as a powerful new form of police oversight, they have in practice often served to amplify and entrench existing police power instead.[191] Departments have fought to keep these recordings out of the hands of the public,[192] and many public records laws now contain express exemptions for body camera footage.[193] Even in states where such footage is ostensibly public, police routinely deny requests as a matter of course, forcing the public to sue to obtain access.[194] This allows police departments to publicize footage selectively—to use it as evidence against a defendant in a criminal case but to shield it from public view when it depicts an act of police violence.[195]

These copwatcher and bystander recordings, in contrast, offer a

189. *Q+A*, *supra* note 183.

190. *Id.*

191. *See* Fan, *supra* note 31, at 1659–62 (describing the frequency with which police turn off body cameras); Laurent Sacharoff & Sarah Lustbader, *Who Should Own Police Body Camera Videos?*, 95 WASH. U. L. REV. 269, 288 (2017) (describing how police control body camera footage and policy). Of course, there are many instances in which high-profile body camera footage is released. *See, e.g.*, Michael Gold, *What We Know About Daniel Prude's Life and Death*, N.Y. TIMES (Dec. 4, 2020), https://www.nytimes.com/article/what-happened-daniel-prude.html [https://perma.cc/SH5B-94ZS].

192. *See* Keith L. Alexander, *D.C. Police Union Seeks Court Injunction to Stop Release of Body-worn Camera Footage, Officers' Identity Following Fatal Interactions*, WASH. POST (Aug. 10, 2020), https://www.washingtonpost.com/local/public-safety/dc-police-union-seeks-court-injunction-to-stop-release-of-body-worn-camera-footage-officers-identity-following-fatal-interactions/2020/08/10/deb8785a-db28-11ea-8051-d5f887d73381_story.html [https://perma.cc/YH6J-F693]; Ashley Southall, *New York Police Union Sues to Stop Release of Body Camera Videos*, N.Y. TIMES (Jan. 9, 2018), https://www.nytimes.com/2018/01/09/nyregion/new-york-police-union-body-camera-lawsuit.html [https://perma.cc/MD9V-TY7D].

193. *See, e.g.*, S.C. CODE ANN. § 23-1-240(G)(1) (2015); *see also Body-Worn Camera Laws Database*, NAT'L CONF. STATE LEGISLATURES (Feb. 28, 2018), https://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx [https://perma.cc/M5TZ-KDZG].

194. Ryan J. Foley, *Police Regularly Denied Access to Police Officer Videos*, ASSOCIATED PRESS (Mar. 13, 2019), https://apnews.com/article/67f22d5857f14413a4a9b34642c49ae3 [https://perma.cc/B8H7-Q88R].

195. *See* Akbar, *supra* note 38, at 466.

way to circumvent these breakdowns in the formal public oversight regime. These videos do not serve as the perfect vehicle for police accountability. Video footage can be interpreted in different ways, and pre-existing biases inevitably influence what the viewer sees.[196] Yet they nonetheless offer a way to contest the police's monopoly on both the facts and narratives of their interactions with the public—allowing citizens "to insist on dialogue rather than monologue" with law enforcement agencies.[197] They help to expose outright lies by police,[198] and they force the public at large to witness the violence experienced by many—especially men and women of color—at the hands of the police.

These efforts can be characterized as a form of extralegal information gathering—a kind of "transparency agonism."[199] Those communities that are most affected by harsh or intrusive policing are also denied access to information about these agencies. Gaping holes in public records laws, in conjunction with other failings in the formal public oversight regime, make it difficult for members of poor communities of color, in particular, to access information about policing.[200] They are kept in the dark about both specific acts of police violence and the broader police policies that disproportionately affect their neighborhoods.[201] And they also suffer from law enforcement

196. *See, e.g.*, Fan, *supra* note 31, at 1632–64; Timothy Williams, James Thomas, Samuel Jacoby & Damien Cave, *Police Body Cameras: What Do You See?*, N.Y. TIMES (Apr. 1, 2016), https://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html [https://perma.cc/C2TK-G3BG] .

197. Capers, *supra* note 43, at 706.

198. These citizen recordings have exposed police lies on countless occasions. *See, e.g.*, Robert Lewis & Noah Veltman, *The Hard Truth About Cops Who Lie*, WNYC (Oct. 13, 2015), https://www.wnyc.org/story/hard-truth-about-cops-who-lie [https://perma.cc/S2WJ-AKCW]; Press Release, Minnesota Police Department, Investigative Update on Critical Incident (May 26, 2020), https://web.archive.org/web/20200526183652/https://www.insidempd.com/2020/05/26/man-dies-after-medical-incident-during-police-interaction (falsely claiming that George Floyd had resisted arrest).

199. *See* Simonson, *supra* note 13, at 394–95 (applying the theory of agonism to public participation in the criminal justice process).

200. *See* discussion *supra* Part I.B.2.ii.

201. The failings of constitutional rights of access and transparency statutes are compounded by other flaws in the public's ability to oversee police departments. For example, the doctrine of qualified immunity makes it less likely that records and information about policing will come to light in the course of civil litigation against the police. *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 351 (2020) (describing how eliminating qualified immunity would likely lead to an increase in civil rights cases).

agencies' refusal to collect certain categories of information in the first place.[202]

Copwatching, in contrast, permits members of these communities to sidestep this broken transparency law regime and observe and monitor police activity firsthand.[203] For this reason, copwatching efforts should be brought into conversation with a growing body of legal scholarship critiquing the transparency law regime writ large.[204] These efforts not only remedy deficiencies in constitutional mechanisms for regulating police, as Professor Simonson has argued,[205] but they also remedy the statutory failings of the formal public oversight regime.

2. Police Disciplinary Records

Police disciplinary records are shielded from public view under many state freedom of information laws.[206] This has begun to shift in recent years, as state legislatures across the country have amended their public records statutes to enhance public access to police

202. Many police departments do not require police officers to report stop and frisk data, for example. Harmon, *supra* note 148, at 1129. And even when departments are required to gather this information, they often resist. *See, e.g.*, Al Baker, *City Police Officers Are Still Not Reporting All Street Stops, Monitor Says*, N.Y. TIMES (Dec. 13, 2017), https://www.nytimes.com/2017/12/13/nyregion/nypd-stop-and-frisk-monitor.html [https://perma.cc/839J-ZS5K].

203. It is important to stress that copwatching groups and individual copwatchers do not necessarily represent the interests, needs, or desires of the community as a whole. As Professor Simonson has emphasized, "organized copwatching groups do not 'represent' anyone larger than themselves." Simonson, *supra* note 13, at 396; *see also* Huey et al., *supra* note 180, at 164–72 (describing community resistance to copwatching efforts in Vancouver).

204. *See People's Investigation*, *supra* note 184, at 19 (explaining that the copwatch group conducts its own "community based independent inquiries into incidents of police violence and misconduct" in response to "a lack of transparency around police conduct, and compromised review boards").

205. *See id.* at 421–26.

206. *See* Robert Lewis, Noah Veltman & Xander Landen, *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), https://www.wnyc.org/story/police-misconduct-records [https://perma.cc/8GEY-GR4G]. These records are often critical to individual criminal defendants, as well as to the public's ability to oversee the police. *See, e.g.*, Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 746 (2015) (describing how applying *Brady* to police disciplinary files can act as a control on abusive police); Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 844 (2016) (describing the failures of internal police review systems). *But see* Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 873 (2019) (chronicling some of the downsides of making police disciplinary records public).

files.[207] Even so, the obstacles to public access remain substantial. Some states explicitly still exclude police disciplinary materials from public records coverage,[208] while others have construed privacy exemptions broadly to encompass almost all disciplinary materials.[209] More than a dozen states have enacted law enforcement officers' bill of rights, which offer strong statutory protections for police disciplinary information.[210] And powerful police unions have inserted confidentiality provisions directly into the text of many police contracts.[211] Even in states where disciplinary records are ostensibly public, there are often substantial practical barriers to access, such as police departments' coordinated efforts to purge databases or to resist statutory disclosure requirements altogether.[212]

Confronted with these impediments, some citizen groups have looked to reconstruct these databases extralegally, building shadow police disciplinary databases out of newspaper reports, records obtained through lawsuits or public records requests, and notes from their clients' experiences interacting with police.[213] The New York public defenders' database, described above, offers one example.[214] The nonprofit organization Open Justice offers another. It has constructed a database of police officers in Baltimore, relying on a combination of official sources like public records requests, unofficial sources like news reports, and unofficial methods like scraping the Baltimore Police Department's public-facing websites and social media accounts for photographs of police officers.[215]

---

207. For a list of proposed state laws relating to data and transparency in policing, see *Legislative Responses for Policing-State Bill Tracking Database*, NAT'L CONFERENCE STATE LEGISLATURES (Oct. 8, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx [https://perma.cc/V8H3-QZBZ].

208. *See, e.g.*, IOWA CODE § 22-7-11; KAN. REV. STATUTE 45-221.

209. *See, e.g.*, Fraternal Ord. of Police, Metro. Police Lab. Comm. v. District of Columbia, 124 A.3d 69, 71–72 (D.C. 2015).

210. Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 718 (2017).

211. *Id.* at 749.

212. *See, e.g.*, Darwin BondGraham, *California Cities Have Shredded Decades of Misconduct Records*, APPEAL (Apr. 17, 2019), https://theappeal.org/california-cities-have-shredded-decades-of-police-misconduct-records [https://perma.cc/4FYB-8QHC].

213. *See, e.g.*, *The Cop Accountability Project*, *supra* note 8; *Copmonitor San Francisco Public Defender*, S.F. PUB. DEF., https://sfpublicdefender.org/copmonitor [https://perma.cc/56LG-JL3L].

214. *See supra* notes 7–10 and accompanying text.

215. *See* Telephone Interview with Dan Staples, Lead Technologist, Open Justice

Each entry in the database includes the officer's name, photograph, length of employment, salary, overtime payment, and involvement in any uses of force against civilians. The website also allows members of the public to input the rank, gender, or race of a police officer in order to learn the name of a police officer with whom they had an encounter.[216] The group is part of a broader coalition of similar efforts to track police departments around the country, including in smaller cities like Montpelier, Vermont, and Rochester, New York.[217]

Other organizations have taken a different approach, focusing not on recreating complaint databases ex post but instead on making complaints public from the outset. Citizens usually submit complaints against police officers through the department itself,[218] and the complaint is then kept confidential until it is investigated and substantiated. In some cases, these complaints are even kept permanently sealed.[219] A handful of organizations have attempted to circumvent these privacy protections by allowing members of the public to make their complaints public at the time they are filed. The website OpenPolice.org, for example, has built a portal for citizens to submit complaints to police departments. Through this website, members of the public have the option to keep all or portions of the complaint confidential, upload photographic or video evidence, and cross-reference certain features of their complaint with others filed through the site.[220]

These bottom-up efforts to construct shadow police disciplinary databases operate directly in response to breakdowns in the formal public oversight regime. Denied access to the official set of police disciplinary records, these public defenders, copwatching groups,

---

Baltimore (Feb. 5, 2021); BPDWATCH, https://bpdwatch.com [https://perma.cc/BSD2-EGJ3].

216. *Id.* (explaining that police officers in Baltimore do not always wear name tags—for example, they may not wear visible nametags when engaging in crowd control or wearing SWAT uniforms).

217. *See Browse a Department*, OPEN OVERSIGHT, https://openoversight.com/browse [https://perma.cc/P6UL-GEKU].

218. *See, e.g.*, *Report Police Misconduct*, CITY OF OAKLAND, https://www.oaklandca.gov/services/report-police-misconduct [https://perma.cc/DUM8-NL6J].

219. For example, this was the case in New York until Section 50-a was repealed. *See* N.Y. Civ. Liberties Union v. N.Y. Police Dep't, 118 N.E.3d 847 (N.Y. 2018).

220. *File Your Police Complaint*, OPEN POLICE, https://openpolice.org/file-your-police-complaint [https://perma.cc/7VVN-A85P]. Other open complaint efforts are more targeted. *See*, *e.g.*, *Copmonitor San Francisco Public Defender*, *supra* note 213 (making its own complaints against individual police officers available to the public).

and other community activists have declined to challenge the law directly, working instead to circumvent the formal access regime altogether.

3. Police Use of Force Data

In contrast to police disciplinary databases, which the government often withholds from public view, government data on police shootings or police-caused deaths is generally made available to the public. A number of federal agencies—including the FBI and Department of Justice—collect, aggregate, and publish information about police-caused deaths submitted from state and local law enforcement agencies across the country.[221] Yet these federal agencies rely on state and local police to voluntarily inform the federal government about the number of incidents per year. And these state and local law enforcement agencies routinely underreport or fail to report the number of police-caused deaths in their jurisdiction.[222] In other words, the barrier to meaningful public accountability for this category of police data is not that it is inaccessible; it is that it is wrong.

Media and activist organizations have worked to fill these gaps. *The Washington Post* launched an initiative in 2015 to track every fatal police shooting by police in the country, gathering information from law enforcement websites and social media accounts, local news reports, documents obtained from public records requests, and independent police monitoring websites like Killed by Police and Fatal Encounters.[223] The gaps this project revealed in the government's official crime statistics were startling. In the first year of the project, the *Post* uncovered twice as many fatal shootings by police as the FBI had recorded that year.[224] Equally as significant, it collected different types of information, such as the race of the victim, whether the victim was armed, whether the victim was experiencing a mental health

221. Tom McCarthy, *The Uncounted: Why the US Can't Keep Track of People Killed by Police*, GUARDIAN (U.K.) (Mar. 18, 2015), https://www.theguardian.com/us-news/2015/mar/18/police-killings-government-data-count [https://perma.cc/S3N5-PRS3].

222. *Id.*

223. Julie Tate, Jennifer Jenkins, Steven Rich, John Muyskens, Kennedy Elliott, Ted Mellnik & Aaron Williams, *How the Washington Post Is Examining Police Shootings in the United States*, WASH. POST (July 7, 2016), https://www.washingtonpost.com/national/how-the-washington-post-is-examining-police-shootings-in-the-united-states/2016/07/07/d9c52238-43ad-11e6-8856-f26de2537a9d_story.html [https://perma.cc/9TE5-J2R6].

224. *Id.*

crisis, and whether there was any police body camera footage of the incident.[225]

Similar efforts have sprung up elsewhere, targeting other categories of police data. Mapping Police Violence, for example, is a police use-of-force database created by Black Lives Matter activist DeRay Mckesson.[226] It draws upon similar information sources as the *Post* database—social media, newspaper reports, and other publicly available materials—but it tracks a wider range of information. It tallies police-caused deaths by means other than shooting, such as by use of a taser, and it also counts the number of deaths caused by off-duty police officers.[227] Other organizations track more targeted data: Portland Copwatch, for example, has been cataloguing police shootings in the city of Portland since 1992.[228]

The success of these unofficial data sources has prompted a public reckoning for government officials. In 2015, James Comey, then-Director of the FBI, acknowledged that nongovernmental organizations had become "the lead source of information about violent encounters between police and civilians," a situation he described as both "embarrassing" and "unacceptable."[229] These efforts prompted changes in the government's own data collection practices. In 2016, for example, the Department of Justice began supplementing the information voluntarily reported by state and local law enforcement agencies with accounts drawn from news reports and other publicly available sources.[230] And in 2018, the FBI announced the creation of a new database designed to be more effective in tracking police use of force incidents nationwide.[231]

---

225. *See* William S. Parkin & Jeff Gruenwald, *Open-Source Data and the Study of Homicide*, 32 J. INTERPERSONAL VIOLENCE 2693, 2693 (2017).

226. *See Planning Team*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/planning-team [https://perma.cc/F3MY-HBDV].

227. *About the Data*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/aboutthedata [https://perma.cc/F7FJ-8NB5].

228. *About Portland Copwatch*, PORTLAND COPWATCH, https://www.portlandcopwatch.org/whois.html [https://perma.cc/QYD5-5TWG].

229. Aaron C. Davis & Wesley Lowery, *FBI Director Calls Lack of Data on Police Shootings 'Ridiculous,' 'Embarrassing*,' WASH. POST (Oct. 7, 2015), https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28_story.html [https://perma.cc/LY5D-PN42].

230. Duren Banks, Paul Ruddle, Erin Kennedy & Michael G. Planty, *Arrest-Related Deaths Program Redesign Study, 2015–16: Preliminary Findings* 2, BUREAU JUST. STATS., U.S. DEP'T OF JUST., https://bjs.ojp.gov/content/pub/pdf/ardprs1516pf.pdf [https://perma.cc/7BA9-PZT6].

231. Press Release, Fed. Bureau of Investigation, FBI Announces the Official

B. PUBLIC UNDERSIGHT OF FEDERAL AGENCIES

The work of many federal agencies is difficult to monitor externally. Local agencies tend to be more visible and accessible to the public: it is easier to attend a local school board meeting, for example, than a meeting of the federal Department of Education. Despite these limitations, the public still engages in undersight of federal agencies across a range of substantive realms. This Section explores some examples.

1. Immigration Enforcement Agencies

There are two central strands of public undersight of federal immigration enforcement efforts. One strand recreates ICE enforcement information extralegally. A number of advocacy groups have built detailed maps of ICE raids in a specific city or region, for example, and used them to identify broader patterns and trends in immigration enforcement efforts.[232] Human rights and immigration rights groups have also organized court monitoring efforts in immigration courts.[233] Data collected from both types of efforts is then used to inform undocumented communities about ICE's evolving tactics and priorities.[234]

A separate strand of public undersight of immigration enforcement activity more closely resembles copwatching. These efforts are often multifaceted. Some immigration advocacy groups staff an immigration hotline that allows members of the community to report

---

Launch of the National Use-Of-Force Data Collection (Nov. 20, 2018), https://www.fbi.gov/news/pressrel/press-releases/fbi-announces-the-official-launch-of-the-national-use-of-force-data-collection/layout_view [https://perma.cc/V67A-XNKL]. This new system remains highly flawed. *See* Tom Jackman, *For a Second Year, Most U.S. Police Departments Decline to Share Information on Their Use of Force*, WASH. POST (June 9, 2021), https://www.washingtonpost.com/nation/2021/06/09/police-use-of-force-data [https://perma.cc/E455-NU2J] (reporting that only twenty-seven percent of police departments shared data in 2020).

232. *See, e.g.*, *ICEwatch: ICE Raid Tactics Map*, IMMIGRANT DEF. PROJECT 1 (July 2018), https://www.immigrantdefenseproject.org/wp-content/uploads/ICEwatch-Trends-Report.pdf [https://perma.cc/RE7M-7CMH]; *Map of ICE Enforcement Actions (Jan. 2017-Present)*, AM. IMMIGR. LAWS. ASS'N, https://www.aila.org/infonet/map-ice-enforcement-actions-january-2017-current [https://perma.cc/R26W-BL3R].

233. *Immigration Court Observation Project*, ADVOCS. FOR HUM. RTS., https://www.theadvocatesforhumanrights.org/Immigration_Court [https://perma.cc/9877-GRNS].

234. *See, e.g.*, *Interactive Map Details ICE Raids in New York*, METRO (July 24, 2018), https://www.metro.us/interactive-map-details-ice-raids-in-new-york [https://perma.cc/9688-FZJZ] (noting that the ICE Watch map is used to identify the most common arrest tactics used by immigration enforcement officials).

an immigration raid while it is underway.[235] When a call comes in, the group makes lawyers or trained legal observers available to offer legal advice in real time, and many also dispatch rapid response teams to observe, record, and collect information about the raid as it is being carried out.[236] They often assign observers to gather different types of information: one will watch the ICE official, another will take notes, a third will record whether there are any other federal, state, or local agencies involved, and so on.[237] These videos and notes are then utilized if the subjects of the enforcement action decide to fight their removal in court.[238] The groups also analyze this data to identify larger patterns in enforcement activity, which can then be used to inform both the broader undocumented community and the group's advocacy efforts.[239]

2. National Security Agencies

The work of the national security agencies is notoriously difficult to penetrate: countless statutes criminalize the unauthorized disclosure of classified materials, and public records laws contain sweeping exemptions for national security-related information.[240] As a consequence, human rights organizations have increasingly looked to monitor national security agencies using extralegal methods—for

235. *See Immigration Hotlines*, NAT'L NETWORK FOR IMMIGRANTS & REFUGEES RTS., https://nnirr.org/education-resources/community-resources-legal-assistance-recursos-comunitarios-asistencia-legal/immigration-hotlines-lineas-directas-de-inmigracion [https://perma.cc/BBH6-YY9N] (listing immigration hotlines in sixteen states, including Georgia, Florida, New Mexico, Texas, Utah, and Wisconsin).

236. *See, e.g.*, *ICE Rapid Response Training*, ST. LOUIS INTERFAITH COMM. ON LATIN AM., https://stl-ifcla.org/event-calendar/2019/10/7/ice-rapid-response-training [https://perma.cc/L8JJ-AFF6] (dispatching observers in St. Louis); Jeff Victor, *Network, ACLU Train Volunteers to Respond During ICE Raids*, WYO. PUB. RADIO (June 28, 2019), https://www.wyomingpublicmedia.org/news/2019-06-28/network-aclu-train-volunteers-to-respond-during-ice-raids [https://perma.cc/D3KJ-Z9AW] (dispatching observers in Wyoming); Telephone Interview with Susan Shaw, Exec. Dir., N. Bay Org. Project (Feb. 8, 2021) (operating in California).

237. *See, e.g.*, Telephone Interview with Susan Shaw, *supra* note 236.

238. *See, e.g.*, *About*, TUCSON CMTY. RAPID RESPONSE, https://www.rapidresponsetucson.com [https://perma.cc/RG9X-LHBM] ("This community effort to document such data is intended to first and foremost provide any information that may be helpful for an individual's legal process.").

239. *See, e.g.*, *id.*; Telephone Interview with Susan Shaw, *supra* note 236; Telephone Interview with Cynthia Garcia, Nat'l Campaign Manager for Cmty. Prot., United We Dream (Feb. 9, 2021) (noting that these efforts "guide[] our organizing strategy at the local and state level[,] ensuring that said findings are reflected in our state campaigns and community members[']s needs").

240. *See* Pozen, *supra* note 21, at 154–56.

example, tracking the location and number of casualties of U.S.-led drone strikes by monitoring foreign language media,[241] or identifying the paths of CIA rendition flights around the globe by using publicly-available flight plan data.[242]

In doing so, these organizations have drawn upon a variety of sources, including press releases, airport landing logs, interviews with civilians injured in drone attacks, interviews with individuals detained in CIA black sites, records obtained through public records requests, foreign and domestic news reports, and terrorist propaganda videos and publications.[243] One human rights organization, for example, has constructed an interactive map of all suspected rendition flights, searchable by the name of the detainee, the date of the flight, the countries where the flight landed or flew through, and the type of aircraft involved.[244] Another has tracked U.S. drone attacks in Pakistan, Yemen, Afghanistan, and Somalia over the past decade, issuing narrative reports describing each attack and providing an estimate of how many civilians and militants were killed or injured.[245]

With traditional public oversight mechanisms largely closed off to the public in the national security context, these organizations have not tried to expand the reach of the formal law—they have not, for example, worked to narrow the scope of FOIA's national security exemptions.[246] Rather, they have decided to circumvent the government's information controls altogether, focusing their efforts instead

---

241. *See, e.g.*, *Drone Warfare*, BUREAU OF INVESTIGATIVE JOURNALISM, https://www.thebureauinvestigates.com/projects/drone-war [https://perma.cc/6C24-WYT7]; Peter Bergen, David Sterman & Melissa Salyk-Virk, *America's Counterterrorism Wars*: *Tracking the United States' Drone Strikes and Other Operations in Pakistan, Yemen, Somalia, and Libya*, NEW AM. (Mar. 30, 2020), https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars [https://perma.cc/HL3G-JF8U].

242. *See, e.g.*, *Flight Database*, RENDITION PROJECT, https://www.therenditionproject.org.uk/flights/flight-database.html [https://perma.cc/G3DT-2UMW] (describing methodological sources); *Counting Drone Strike Deaths*, COLUM. L. SCH.: HUM. RTS. CLINIC 14–20 (Oct. 2012), https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIA CountingDronesFinal.pdf [https://perma.cc/897B-KT8H] (describing methodological sources of three leading drone strike counting efforts).

243. *See Flight Database Methodology*, RENDITION PROJECT, https://www.therenditionproject.org.uk/flights/methodology.html [https://perma.cc/WX3Q-JH9D]; *Our Methodology*, BUREAU OF INVESTIGATIVE JOURNALISM, https://www.thebureauinvestigates.com/explainers/our-methodology [https://perma.cc/5EJX-8ESB].

244. *Flight Database, supra* note 242.

245. *Drone Warfare*, *supra* note 241.

246. *See* 5 U.S.C. § 552(b)(1), (3).

on recreating national security information from outside the government.[247]

3. Environmental Agencies

Grassroots environmental efforts have also sprung up around the country in recent years to independently monitor air quality around industrial sites. Frustrated by the limits of federal and state environmental agencies' monitoring of emissions near these centers, these environmental nonprofits have worked with residents in the surrounding communities to install their own air monitors to independently measure concentrations of toxic chemicals in the air.[248]

These efforts are often referred to as "bucket brigades," because participants use inexpensive air quality monitors constructed out of plastic buckets to gather their environmental data.[249] The residents of these communities are then able to document an expanded set of pollutants, beyond those that federal and state environmental agencies regularly track.[250] They also capture visual evidence of pollution, using video or cell footage to record the date and time of smoke or flares from nearby facilities.[251] And in some instances, they have developed their own, competing sets of environmental air quality standards, ones intended to challenge the government's monopoly on environmental regulation and highlight gaps in the range of pollutants that federal and state environmental agencies monitor.[252]

These tactics have proven effective, in some instances prompting state environmental regulators to step up their own air quality monitoring efforts.[253] In Louisiana, for example, the state environmental agency installed three new government air quality monitor-

247. *See, e.g.*, *Drone Warfare* , *supra* note 241 (utilizing independent journalists to track U.S. drone strikes and other covert actions in Pakistan, Afghanistan, Yemen, and Somalia).

248. *See, e.g.*, *History and Accomplishments*, LA. BUCKET BRIGADE, https://labucketbrigade.org/about-us/history/ [https://perma.cc/T584-YYLN]; *Who We Are*, GLOB. CMTY. MONITOR, https://gcmonitor.org/about-us [https://perma.cc/ZNT7-4WPH].

249. *See History of the Bucket*, LA. BUCKET BRIGADE, https://labucketbrigad.org/pollution-tools-resources/the-bucket [https://perma.cc/HR7U-PCAA].

250. *See* Gwen Ottinger, *Constructing Empowerment Through Interpretations of Environmental Surveillance Data*, 8 SURVEILLANCE & SOC'Y 221, 224, 227 (2010).

251. *Id.* at 226.

252. *See* Denny Larson, *Crime Scene Investigation: Tools You Can Use to Catch and Expose Pollution*, *in* GOOD NEIGHBOR CAMPAIGN HANDBOOK: HOW TO WIN 62, 73 (Paul Ryder ed., 2006).

253. *See* Ottinger, *supra* note 250, at 226.

ing systems around an ExxonMobil facility in response to evidence of air pollution data presented by the surrounding communities.[254] These grassroots groups have also used the air quality data they collect to petition the private facility itself for changes—to argue for cleaner industrial processes, for example, or to make the case that the company should relocate from the surrounding community altogether.[255]

4. Public Health Agencies

A separate category of public undersight activity focuses not on recreating existing agency information externally, but instead on gathering new forms and types of data. One recent, high-profile example is COVID-19 infection data.[256] At the start of the outbreak, federal agencies like the CDC and Health and Human Services failed to collect accurate information about the number of tests, infections, and deaths from state and local governments, leaving public health experts and other government officials in the dark when it came time to make critical decisions about how best to manage the outbreak.[257]

The media stepped in to fill this information void. *The New York Times* relied on government news conferences, state and local data releases, and reporting by its journalists to build its own virus tracker, which has since been utilized by state and local governments around the country.[258] And *The Atlantic* built a repository of coronavirus testing data so comprehensive that the White House itself looked to the website to inform its pandemic response.[259] These ex-

254. *Id.*

255. *Id.* at 227–28.

256. *See, e.g.*, *We're Sharing Coronavirus Case Data for Every U.S. County*, N.Y. TIMES, https://www.nytimes.com/article/coronavirus-county-data-us.html [https://perma.cc/K76D-NNSZ].

257. *Id.* (explaining that the CDC coronavirus data at the start of the outbreak only tracked state-level data, motivating the Times to start monitoring cases at the county level to "fill the gap").

258. *See, e.g.*, *Coronavirus (Covid-19) Data in the United States*, GITHUB, https://github.com/nytimes/covid-19-data [https://perma.cc/CL2B-HZ3Q] (explaining that the data is being made available for government officials and scientists to access).

259. *See The COVID Tracking Project*, ATLANTIC, https://covidtracking.com [https://perma.cc/9EWL-5NCQ] (*The Atlantic's* COVID-19 tracking database); Robinson Meyer & Alexis C. Madrigal, *Why the Pandemic Experts Failed*, ATLANTIC (Mar. 15, 2021), https://www.theatlantic.com/science/archive/2021/03/Americas-coronavirus-catastrophe-began-with-data/618287 [https://perma.cc/9CMB-M3TM] (describing how the magazine's Covid-19 tracking project had been utilized by the White House and become "a de facto source of pandemic data for the United States").

tralegal data gathering efforts helped to fill in a critical void in the federal government's own data collection efforts during crucial early moments in the pandemic outbreak.[260]

C. PUBLIC UNDERSIGHT OF THE COURTS

Public undersight in the judicial branch primarily finds expression through court monitoring programs. These efforts usually involve groups of trained observers who attend a specific category of judicial proceedings—often those relating to a specific type of crime, like drunk driving, or that occur at a specific stage of the criminal justice process, like bail hearings.[261] As mentioned previously, not all court monitoring activity fits my definition of public undersight.[262] Formal oversight mechanisms preserve the public's ability to view many judicial proceedings and obtain many judicial records, and when court monitoring groups organize solely to observe these proceedings, they rely upon these common law and constitutional rights of access to do so.[263] They are engaged in public oversight.

Yet these constitutional and common law rights are limited to existing proceedings and records. They do not give the public the ability to force the courts to create new records or information. Similarly, public records laws do not permit members of the public to compel law enforcement or corrections agencies to gather new data.[264] This creates a gap in the formal oversight regime. If neither the courts nor law enforcement agencies decide to gather certain categories of information—for example, how often bail is granted—then the formal oversight regime offers little recourse.

Court monitoring groups work to fill this void. A subset of these programs organizes with the explicit aim of gathering new forms and

---

260. Meyer & Madrigal, *supra* note 259, at 2 ("For months, the American government had no idea how many people were sick with COVID-19, how many were lying in hospitals, or how many had died.").

261. *See, e.g.*, RJ Vogt, *Eyes Wide Open Bail Fight Shows Power of Court Watchers*, LAW360 (Jan. 12, 2020), https://www.law360.com/articles/1233148 [https://perma.cc/S7X6-MGKT] (describing how empirical data concerning prosecutorial bail practices gathered by court monitoring group helped spur bail reforms in New York).

262. *See* discussion *supra* Part I.A.

263. *See, e.g.*, Heather Ladd, Atinuke Diver & Ruth Petrea, *Court Watching, Listening, and Learning*, DATAWORKS NC (Mar. 10, 2020), https://dataworks-nc.org/2020/court-watching-listening-and-learning [https://perma.cc/QA93-MHGK] (discussing oversight groups' concerted efforts to maintain a court presence in DHA eviction hearings).

264. *See supra* notes 140–142 and accompanying text.

categories of court data that are unavailable through formal legal channels.[265] Much of this public undersight activity is focused on criminal proceedings. These court monitoring groups aim to shed light on everyday injustices in the criminal justice process, often focusing their attention on overlooked proceedings like bail and sentencing hearings.[266] They gather a wide range of data around the exercise of prosecutorial and judicial discretion—for example, the number of criminal cases resolved through plea bargains,[267] the frequency with which bail is imposed,[268] whether a defendant's ability to pay is assessed before fines or fees are imposed,[269] and whether accused individuals of color are more likely to be denied bail or have higher bail amounts imposed.[270]

Other court monitoring groups focus on specific categories of crimes. Dozens of court monitoring groups gather data on domestic

---

265. *See, e.g.*, Beth Schwartzapfel, *The Prosecutors*, MARSHALL PROJECT 2 (Feb. 26, 2018), https://www.themarshallproject.org/2018/02/26/the-prosecutors [https://perma.cc/TY2R-LXE4] (noting that while bail amount is available online, the only way to capture data like the race of the accused is "to sit there"); RJ Vogt, *Eyes Wide Open: Bail Fight Shows Power of Court Watchers*, LAW360 (Jan. 12, 2020), https://www.law360.com/articles/1233148 [https://perma.cc/S7X6-MGKT] (describing how empirical data about prosecutorial bail practices gathered by court monitoring group helped spur bail reforms in New York).

266. *See, e.g.*, *Broken Promises: A CWNYC Response to Drug Policing and Prosecution in NYC*, CT. WATCH NYC (Oct. 2018), available at https://www.courtwatchnyc.org/reports [https://perma.cc/U8SQ-EQTC] (monitoring arraignments in drug offenses in New York City); Kevin Beaty, *Court Watch Colorado Begins Work Ensuring Justice Reforms are Followed*, DENVERITE (Aug. 12, 2019), https://denverite.com/2019/08/12/court-watch-colorado-begins-work-ensuring-justice-reforms-are-followed [https://perma.cc/JD2S-VYLB] (monitoring bond decisions in Denver).

267. *See, e.g.*, *Spring Newsletter,* CT. WATCH NYC 6 (May 2018), available at https://www.courtwatchnyc.org/reports [https://perma.cc/LR2E-QQPQ].

268. *See, e.g.*, *First 100 Days*, CT. WATCH MA, https://www.courtwatchma.org/first-100-days.html [https://perma.cc/LBY5-AQ3F] (monitoring prosecutorial bail decisions in Suffolk County, Massachusetts); *About*, PHILA. BAIL WATCH, https://www.phillybailfund.org/bailwatch [https://perma.cc/GM4R-DCBT] (monitoring bail decisions in Philadelphia).

269. *See, e.g.*, Hilarie Bass, *Poverty Is Not a Crime: ABA Works to Curb Disproportionate Effect of Excessive Fines and Fees on the Poor*, ABA J. 8 (July 1, 2018), https://www.abajournal.com/magazine/article/poverty_crime_excessive_fines_fees [https://perma.cc/83LD-52KH] (describing efforts to monitor whether defendant's ability to pay is considered in Nashville, New Mexico, Miami, and Tallahassee courts).

270. *See, e.g.*, *Same Game, Different Rules*, *supra* note 15, at 7–8; *Courts in Review: A 2019 Analysis of New Orleans' Courts*, CT. WATCH NOLA 5 (2019), https://www.courtwatchnola.org/wp-content/uploads/CWN-2019-Annual-Report.pdf [https://perma.cc/64VT-F7RD] [hereinafter *Courts in Review*].

violence prosecutions, for example.[271] They track the number and types of convictions secured, the gender and race of the victim and defendant, and whether a restraining order was issued.[272] They also monitor the fairness of the proceedings and the level of respect shown to the parties—recording whether the judges exhibited any negative body language, showed concern for the victim, or commenced the proceeding on time.[273] They then utilize this data to determine whether any judges demonstrate persistent biases.[274]

A separate strand of court monitoring programs focuses on specific categories of courts. These efforts are usually targeted at lower-level courts, which often have an outsized impact on poor communities of color, and which are rarely monitored by the media.[275] These groups look to expose problems or biases in these settings,[276] gathering data on dispositions in family court,[277] arraignment and summons proceedings,[278] drug court,[279] or municipal court.[280] They often

---

271. *Legal Resource Kit: A Guide to Court Watching in Domestic Violence and Sexual Assault Cases*, LEGAL MOMENTUM 13–14, https://www.legalmomentum.org/sites/default/files/kits/courtwatching.pdf [https://perma.cc/S94F-YKZT] (providing a list of court monitoring groups in cities and towns in fifteen states, including Anchorage, AK; South Bend, IN; Louisville, KY; Knoxville, TN; El Paso, TX; and Winosha, WI).

272. *See, e.g.*, *id.* at 11–12.

273. *See* Ellen Sackrison, *Court Monitoring: WATCH's First Look at Ramsey County Criminal Courts*, WATCH 43–44 (Oct. 2017), https://www.theadvocatesforhumanrights.org/res/byid/8288 [https://perma.cc/7PCQ-KE9M].

274. *See* Rebecca Hulse, *Privacy and Domestic Violence in Court*, 16 WM. & MARY J. WOMEN & L. 237, 277 (2010).

275. *See* Gary S. Brown, *Court Monitoring: A Say for Citizens in Their Justice System*, 80 JUDICATURE 219, 220 (1997).

276. *See, e.g.*, *About*, CT. WATCH NYC, https://www.courtwatchnyc.org [https://perma.cc/25LZ-3JNY] ("Court Watch NYC . . . hold[s] court actors accountable to ending the injustices in the criminal legal system that target Black, brown, indigenous, immigrant/migrant, queer and TGNC communities").

277. *See, e.g.*, Telephone Interview with Joyce Bridge, *supra* note 119 (monitoring family court in Kentucky); Telephone Interview with Natalie Andre, President, Families Against Ct. Travesties (Feb. 2, 2021) (monitoring family court in Florida with a nonprofit run by volunteers).

278. *See, e.g.*, *The Court Monitoring Project*, POLICE REFORM ORG. PROJECT, http://www.policereformorganizingproject.org/court-monitoring-project [https://perma.cc/K4RX-EMZF] (monitoring arraignment and summons proceedings in New York City).

279. *See* Nick Chrastil, *State Supreme Court Updates Standards for Drug Courts Throughout the State to Require Confirmation Testing*, LENS (Aug. 6, 2019), https://thelensnola.org/2019/08/06/state-supreme-court-updates-standards-for-drug-courts-throughout-the-state-to-require-confirmation-testing [https://perma.cc/9D7X-VRNX] (describing how court watch groups changed drug testing standards in New Orleans drug court).

focus on racial or gender disparities in these settings,[281] as well as broader problems of judicial administration, such as persistent delays in the start of court,[282] or court appearances that are exceedingly short, sometimes only seconds long.[283] They then use the data gathered to advocate for broader legal and policy changes.[284]

Not all groups organize to help mitigate the punitive effects of the criminal justice system. Some pursue the opposite goal, working to ensure that consistent punishments are imposed for certain types of crimes. Some court monitoring groups, for example, gather data on the disposition of property crimes in their cities, tracking the rate at which those accused of property offenses are charged for the crime or sentenced at or above the federal sentencing guidelines.[285] And the group Mothers Against Drunk Driving has established court monitoring programs throughout the country to gather a wide range of data about dispositions in drunk driving cases.[286] They then utilize this data to pursue broader legislative and judicial reforms around the prosecution and disposition of drunk driving offenses, with the explicit goal of increasing drunk driving conviction rates.[287]

---

280. *See, e.g.*, *Courts in Review*, *supra* note 270, at 27.

281. *See, e.g.*, *id.*; Telephone Interview with Adele Guadalupe, Vice President, Fams. Against Ct. Travesties, Inc. (Feb. 2, 2021) (describing how the group often monitors for bias against mothers in these proceedings); *Family Court Watch Report*, FACTS (on file with author) (asking court reporters to evaluate judges "demeanor and courtesy" to male versus female litigants).

282. *See, e.g.*, Gwen Filosa, *Judges' Work Habits Targeted by Court Watch NOLA Report*, TIMES-PICAYUNE (Sep. 21, 2010), https://www.nola.com/news/crime_police/article_f8e7c033-5934-56d2-996c-679d9e112a94.html [https://perma.cc/DJ8X-JWSE] (reporting the average time that each judge begins court).

283. *Broken Windows Policing: A Tale of Two Cities*, POLICE REFORM ORG. PROJECT (July 2014), https://www.policereformorganizingproject.org/wp-content/uploads/2012/09/Broken-Windows-Policing-A-True-Tale-of-Two-Cities.pdf [https://perma.cc/Y8BE-9EZL] [hereinafter *Broken Windows Policing*].

284. *Id.*

285. *See, e.g.*, *About Us*, STOP CRIME SF, https://stopcrimesf.com/mission [https://perma.cc/8NKG-JMK9].

286. *See, e.g.*, *Court Monitoring Report 2020 Illinois*, MOTHERS AGAINST DRUNK DRIVING, available at https://www.madd.org/the-solution/drunk-driving/court-monitoring [https://perma.cc/RSC8-WUSW] (gathering data on whether any children were endangered in the incident and whether the defendant was assigned to wear an alcohol monitoring bracelet).

287. E-mail from Becky Iannotta, Dir. Commc'ns, Mothers Against Drunk Driving, to author (Feb. 3, 2021) (on file with author).

***

In sum, these extralegal monitoring efforts are rich and diverse. They span a variety of subject-matter areas, and they monitor a range of government entities, from national security agencies operating overseas to local police departments and municipal courts. They also pursue a range of goals, and they deploy the information they collect in different ways.[288] Some seek to replicate existing government data that the government has shielded from public view, while others gather new or missing data that the government has refused to gather for itself.

Yet there are common threads that run throughout these varied efforts and organizations. These public undersight efforts offer similar advantages when it comes to plugging holes in the formal oversight regime and transferring power from government officials to the communities they serve, for example. And they also raise similar questions in terms of the burdens they impose, as well as in their accuracy, efficacy, and long-term viability.

III. THE IMPLICATIONS OF PUBLIC UNDERSIGHT

Legal scholars have explored the effects of discrete forms of public undersight,[289] especially citizen recordings of police.[290] Yet they have generally not grouped these efforts together across a broader range of substantive realms. This Part gathers these disparate forms of extralegal government monitoring together to ask how public undersight activity as a whole can be used to both challenge and complement the formal oversight regime that governs information access, especially among marginalized communities that have long been subjected to government surveillance.[291]

---

288. *See* discussion *infra* Part III.B.2.

289. *See, e.g.*, Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 752–54 (2005) (court watching); Simonson, *supra* note 13 (copwatching).

290. *See supra* note 32 and accompanying text.

291. These public undersight efforts monitor a variety of government entities and pursue a variety of goals. As a consequence, the benefits that they provide are unevenly spread, and to some extent these benefits are even contradictory. Not every group engaged in public undersight will view the same developments as equally beneficial or harmful.

A. THE BENEFITS OF PUBLIC UNDERSIGHT

1. Remedying Flaws in the Formal Transparency Law

Critics of transparency statutes and constitutional and common law access rights have chronicled the many gaps, weaknesses, and flaws in this body of law. Yet the solutions they propose are almost exclusively legal. Expanding the scope of analysis to include the extralegal mechanisms described here opens up new paths and possibilities for improving public access to government information. Public undersight offers a way to remedy what is broken and supplement what is missing in the formal transparency law regime.

First, public undersight activity helps to fill the gaps in public oversight law and practice. While transparency statutes cannot be used to compel the government to collect new information or create new records,[292] these extralegal efforts allow outsiders to gather novel types and categories of data, venturing where the government lacks either the capacity or will to explore—data revealing racial bias in bail hearings, for example, or the level of respect shown to domestic violence victims.[293] In doing so, they challenge the government's monopoly on information.[294]

Further, these efforts expand the narrative possibilities of how this information gets told. Freed from the bureaucratic constraints of government, these groups can pursue more complex and layered forms of data and present richer narrative accounts. Consider the Police Reform Organizing Project, a court monitoring group that observes summons and arraignment proceedings in New York City. In 2014, the group decided to examine whether Mayor Bill de Blasio had followed through on his promise to change the NYPD's stop and frisk policies. The ensuing report contains some of the same empirical data that might appear in a government publication—how many proceedings were observed, for instance, and what percentage of defendants were held in custody after their arraignments.[295]

Yet it also includes surprising new slices of information, such as how much time the court spent on each case—usually only a couple

---

292. *See supra* notes 140–142.

293. *See supra* notes 268, 273.

294. *See, e.g.*, *People's Investigation*, *supra* note 184, at 19 (using copwatching reports to "counter official reports"); Telephone Interview with Adele Guadalupe, *supra* note 281 (describing how court monitoring reports can supplement the official record on appeal).

295. *Broken Windows Policing*, *supra* note 283, at 3–5.

of minutes, but sometimes mere seconds.[296] And it presents information in new and different ways, offering short, narrative summaries of the facts and outcomes of individual cases.[297] Their report weaves together dozens of vignettes to present a powerful account of police and prosecutorial abuses of power.[298]

These groups' efforts to reclaim control—control over what information is collected, and how that information is presented—allows them to reshape the public narrative. Deciding what data to gather is to decide which facts matter.[299] These new informational categories provide the structure and language needed to start a new conversation around government actions and priorities. Gathering statistics on the number of individuals killed by U.S. drone strikes, for example, asserts that the human toll of these policies cannot be ignored; gathering data on whether court starts on time or whether the audience is able to hear the proceedings asserts control over what information is relevant and whose interests—judges, defendants, victims, or audience members—should be served.

These efforts also allow the public to challenge the government's account of an incident or policy. Sometimes this is explicit: certain copwatching groups, for example, conduct their own investigations into an act of police violence and issue a report of their findings.[300] Similarly, grassroots environmental monitoring efforts counter official government pollution datasets—which tend to reflect average annual pollution levels—by documenting shorter, more extreme spikes in air pollution that occur throughout the year.[301] These efforts provide the informational building blocks that allow marginalized communities to weave the same or a competing set of facts into a new narrative with an alternative conclusion.

A related benefit is that these efforts can prompt the government to assume responsibility for collecting the data themselves. Sometimes this involves more formal legal changes in the transparency law. One court watching report demonstrating that judges had failed to comply with new bail reform requirements, for example, prompted state legislators to introduce a bill that would require

296. *See id.* at 3, 7, 9.

297. *Id.* at 16–22.

298. *Id.*

299. *See, e.g.*, *People's Investigation*, *supra* note 184, at 19 (arguing that their investigations into police violence "place the survivor, or in other cases, the victim's family and friends, at the center of an effort to determine what happened").

300. *See id.*; Simonson, *supra* note 13, at 420.

301. Ottinger, *supra* note 250, at 228.

judges to track these categories themselves.[302] And *The Washington Post* police shooting database pressured the FBI to reform its use of force data collection practices and impose new reporting requirements on state and local agencies.[303]

At other times, these public undersight efforts prompt more voluntary shifts in government data collection practices. There is some evidence that extralegal efforts to gather and publish the number of individuals killed in U.S. drone strikes, for example, convinced the Obama Administration to reconsider its previous withholdings and release the information itself.[304] Similarly, grassroots environmental efforts to monitor air quality around industrial facilities have prompted state regulatory agencies to install their own monitoring facilities near these sites.[305]

Public undersight remedies a flaw of the formal oversight regime in a second way: by concentrating public attention where it is needed most. A central critique of the formal oversight regime is that it misallocates attention and resources, overexposing agencies that are mostly well functioning and underexposing those parts of government that are engaged in the most controversial and violent activities—namely, law enforcement and national security agencies.[306]

Public undersight groups, in contrast, concentrate public attention on the segments of government most prone to abuse. Dozens of organizations around the country have formed to monitor national security officials and police and immigration enforcement officers, aiming their gaze at the government officials who exercise the most consequential and lethal forms of state power.

These are also the parts of government that are least visible through traditional oversight mechanisms. FOIA and state public records laws contain gaping exemptions for national security and law enforcement records,[307] and courts have adopted myriad rules

302. *See* Vogt, *supra* note 265 and accompanying text.

303. *See supra* notes 230–231.

304. *See, e.g.*, Miriam Wells, *Ten Years Investigating U.S. Covert Warfare*, BUREAU OF INVESTIGATIVE JOURNALISM (Sept. 4, 2020), https://www.thebureauinvestigates.com/blog/2020-09-04/ten-years-investigating-us-covert-warfare [https://perma.cc/R8RA-Q5BX].

305. Ottinger, *supra* note 250, at 226.

306. Pozen, *supra* note 21, at 154–56.

307. *See 2019 Freedom of Information Act Report*, DEP'T OF HOMELAND SEC. 5, 14, 17 (Feb. 2020), https://www.dhs.gov/sites/default/files/publications/dhs_fy2019_foia_report_final_1.pdf [https://perma.cc/GEK8-49PM] (noting that ICE invoked the law enforcement investigatory exemption in more than three-quarters of the requests it received in 2019); *Freedom of Information Act Annual Report Fiscal Year 2020*, CIA 4,

and procedures to ensure that national security secrets will not be unloosed through the legal process itself.[308] Public undersight efforts bypass these legal impediments, helping to remedy the information imbalances that are embodied in the formal transparency law regime.[309] Further, these efforts not only capture and document evidence of ongoing acts of violence and abuse, but they also help deter them from happening at all.[310]

Public undersight groups correct a separate attention deficit as well, one embodied not in the formal transparency law but in the broader information ecosystems that surround different layers and levels of government. These undersight groups concentrate much of their attention on state and local governments, especially those parts of the state and local judiciary that receive little attention from the institutional media: arraignment and summons proceedings in municipal court, immigration hearings, family court disputes, misdemeanor courts, drug courts, and so on.[311] In doing so, they help to shed light on the parts of government that more powerful and entrenched extralegal actors have too often ignored.[312]

Finally, legislators and scholars often find themselves caught in a self-defeating loop, proposing amendments to the transparency law regime that invariably become subverted by the very government actors that they are supposed to bind.[313] These public undersight movements offer a way out of this box. By looking beyond the bounds of the formal law, these groups expand the possibilities of what meaningful transparency and accountability can look like.[314]

7–8 (2020), https://www.cia.gov/readingroom/docs/CIA_FY2020_FOIA_Annual_Report.pdf [https://perma.cc/N4TA-BTMH] (reporting that the CIA invoked the exemption for classified material in almost half of the FOIA requests it received in 2020).

308. *See, e.g.*, Classified Information Procedures Act, 18 U.S.C. app. §§ 1–16; Chapter 36—Foreign Intelligence Surveillance, 50 U.S.C. §§ 1801–1885c.

309. *People's Investigation*, *supra* note 184, at 19 (describing copwatching group's investigations into incidents of police violence as "responses to a lack of transparency around police conduct").

310. *See* Huey et al., *supra* note 180, at 157–58.

311. *See supra* notes 277–280.

312. *See* Koningisor, *supra* note 21, at 1527–35 (describing lack of public oversight at state and local levels).

313. *See, e.g.*, *FOIA Legislative History*, NAT'L SEC. ARCHIVE, https://nsarchive.gwu.edu/foia/foia-legislative-history [https://perma.cc/Q6JW-E7DU] (describing amendments to FOIA enacted in 1974, 1976, 1986, 1996, 2002, 2007, and 2016).

314. *Cf.* Akbar, *supra* note 38, at 408 (describing how the Movement for Black Lives is "having a far richer and more imaginative conversation about law reforms than lawyers and law faculty").

They permit what Professor Amna Akbar has referred to as a "radical imagination of law," offering an alternative framework for change and "pointing to the different vectors through which ideas are formulated, and the terrain on and means through which they are fought over."[315] These efforts expand the horizons of what public monitoring can mean, widening the scope of possibilities to capture solutions that challenge the government's exclusive control over information, and instead place decision-making power back in the hands of the public.[316]

2. Facilitating Statutory and Constitutional Engagement

Public undersight also endows these communities with the ability to engage with and shape the construction of the law. These groups see themselves as the law's enforcers: they monitor the courts to determine whether judges are fulfilling the requirements imposed by new bail reforms,[317] for example, and they watch the police to ensure that they are complying with the requirements of the Fourth Amendment.[318] They educate themselves on the scope of the law and they bring that knowledge to bear in the courtroom and on the streets. These groups take it upon themselves to independently interpret the law and then publicly call out government officials who fail to comply.[319]

These efforts also allow marginalized communities to alter the underlying law itself, not merely its application. In the Section above, I chronicled the ways that these efforts have elicited shifts in the transparency law. But they have also prompted changes in more substantive, non-transparency realms. The data that court monitor-

315. *Id.* at 414; *see also* Akbar et al., *supra* note 37, at 827 ("Social movements break the molds of political discourse, project new possible futures, and create terrains of engagement.").

316. On the one hand, public undersight efforts share some common ground with other social movements that are pursuing "alternative modes of legal and social organization." Akbar et al., *supra* note 37, at 853; *see, e.g.*, Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 7–10 (2016) (describing how the $15 minimum wage movement has forged a new labor law rooted not in the private ordering of the New Deal era but in a rejection of "the bifurcation between employment law and labor law"). On the other hand, these groups are not, for the most part, organizing with the express intent of reforming or changing transparency law, but instead circumventing the formal boundaries of the law for instrumental purposes in pursuit of other substantive goals.

317. *See* Vogt, *supra* note 265.

318. Simonson, *supra* note 13, at 421–27.

319. *See, e.g.*, Beaty, *supra* note 266; *Same Game, Different Rules*, *supra* note 15, at 4.

ing and copwatching groups have gathered, for example, has led courts and legislators to eliminate cash bail for misdemeanor crimes,[320] restrict how drug tests can be used in drug court,[321] and prohibit the jailing of domestic violence victims for their refusal to testify.[322] These efforts allow the public, especially the marginalized communities that are often left out of policy and legislative debates, to alter the law itself.

Further, they permit members of the public to engage in their own, unmediated forms of constitutional interpretation.[323] Professor Simonson has discussed the ways that copwatching groups allow marginalized communities to engage with and shape the construction of constitutional requirements governing the police, especially the construction of Fourth Amendment protections.[324] Copwatchers challenge police officer's role as "chief interpreter" of Fourth Amendment reasonableness, she explains, injecting their own, competing interpretation of what is reasonable and fair in their interactions with the police.[325]

This insight can be extended further, to other public undersight efforts, and to other constitutional debates. Copwatchers and ICE observers, for example, infuse their own interpretation of what the First Amendment permits into the educational training that they provide to their members. One group instructs copwatchers who are detained by the police "to remind the officer that taking photographs is your right under the First Amendment and does not constitute reasonable suspicion of criminal activity"—encouraging the observer to challenge the police officer's control over both what constitutes protected First Amendment activity and what gives rise to reasonable suspicion.[326] These groups also engage in constitutional interpre-

320. *See, e.g.*, Vogt, *supra* note 265.

321. *See, e.g.*, Chrastil, *supra* note 279.

322. *See, e.g.*, Bryn Stole, *La. Senate Backs Limits on 'Abhorrent Practice' of Jailing Victims Unwilling to Testify*, ADVOC. (May 9, 2019), https://www.dailycomet.com/story/news/state/2019/05/09/la-senate-backs-limits-on-abhorrent-practice-of-jailing-victims-unwilling-to-testify/5205183007 [https://perma.cc/TF9B-9EG4].

323. *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1366–1418 (2006) (using the defeat of the ERA as a case study to explore social movements' ability to change the Constitution's meaning outside of Article V). For a list of works exploring the role of social movements in eliciting constitutional change, see *id.* at 1328 n.13.

324. Simonson, *supra* note 13, at 421–27.

325. *Id.* at 395.

326. *See, e.g.*, *Cop Watch*, NYC SHUT IT DOWN, https://www.nycshutitdown.org/

tation in their public-facing reports and interactions—framing their monitoring of bail hearings as enforcing the Fourteenth Amendment's prohibition against imprisonment for inability to pay fines or fees,[327] for example, or handing out "rights cards" that inform residents of their legal rights when interacting with police.[328]

Further, court monitoring groups help to expand the scope and meaning of the First Amendment right of access through the information they collect. By gathering data on how often a judge engages in a sidebar with lawyers,[329] whether the proceedings can be easily heard,[330] whether the courtroom is in a state of disrepair,[331] or whether victims sitting in the audience are treated with respect,[332] these groups lay claim to a meaningful right of access. They insist that it is not sufficient that the courtroom doors are simply left open, but that the audience must be able to hear and engage with judicial proceedings as well. In this way, public undersight movements work to "enable[] interactions between citizens and officials that produce new constitutional meaning."[333] And these efforts could, over time, shift the boundaries of what is constitutionally plausible—in Professor Jack Balkin's words, moving an "off-the-wall" constitutional interpretation to one that is "on the wall."[334]

Finally, these efforts allow the public to engage directly in the construction of statutory rights. The extra-governmental police disciplinary database built by public defenders, for example, operated as a direct rebuke to section 50-a and the formal statutory regime in New York, which excluded the public from accessing these records through formal law mechanisms.[335] Such efforts allow the public to contest the ways that statutory rights of access are enacted and in-

---

cop-watch [https://perma.cc/9LZH-YPDU].

327. *See, e.g.*, *Courts in Review*, *supra* note 270, at 26, 29.

328. Huey et al., *supra* note 203, at 153.

329. *See, e.g.*, *Orleans Criminal District Court, Magistrate Court & Municipal Court: 2018 Review*, CT. WATCH NOLA 4 (2019), https://www.courtwatchnola.org/wp-content/uploads/2018-Annual-Report.pdf [https://perma.cc/64VT-F7RD].

330. *See* Brown, *supra* note 275, at 221.

331. *Id.*

332. *See, e.g.*, Sackrison, *supra* note 273.

333. Siegel, *supra* note 323, at 1329.

334. *See* Jack M. Balkin, *"Wrong the Day it Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 679 (2005).

335. *See* Tashea, *supra* note 6 ("Cynthia Conti-Cook . . . says the impetus for the database was born out of 'very strict public access laws around police records' and 'bad discovery laws' that make it difficult for criminal defense lawyers in New York state.").

terpreted by government actors, and to ultimately influence and alter the construction of this formal statutory regime.[336]

3. Democratizing Government Transparency

These grassroots, bottom-up efforts can also help to democratize transparency and accountability in government. The formal public oversight regime largely serves wealthy and knowledgeable repeat players: public records laws, open meetings statutes, and open data requirements are disproportionately utilized by corporate entities,[337] and challenging these laws in court is often expensive and time-consuming, and therefore largely out of reach for the average citizen.[338]

Public undersight efforts lower, if not outright remove, these barriers to entry. They allow individuals who lack the financial resources and legal knowledge needed to navigate the public oversight regime to participate in government transparency and accountability efforts.[339] They bring new and underrepresented voices into transparency and accountability debates.[340] And perhaps most critically, they open up a channel for those most affected by government action to acquire knowledge about government activity and express their dissent. The ranks of environmental monitoring, court watching, copwatching, and ICE watching volunteers are filled with individuals who have been directly affected by the state's exertion of policing and immigration power.[341] One court watcher in Delray, Florida, for example, has been monitoring family court proceedings for nearly two decades, ever since her daughter lost custody of her grandson nineteen years ago. "I saw then what goes on in the courts," she ex-

336. *See The Cop Accountability Project*, *supra* note 8 (describing the organization's role in securing the repeal of Section 50-a).

337. *See supra* notes 124–127 and accompanying text.

338. *See supra* notes 151–154 and accompanying text.

339. *See supra* Part I.B.1.

340. One of the benefits of these efforts is that they do not necessarily require formalized interactions with institutions like courts. *See* Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOCIO. REV. 367, 368 (2014) (describing "system avoidance," or "the practice of individuals avoiding institutions that keep formal records (i.e., put them 'in the system') and therefore heighten the risk of surveillance and apprehension by authorities").

341. *See, e.g.*, Telephone Interview with Susan Shaw, *supra* note 236 (explaining that five women from the local immigrant community developed the policies and priorities that would guide the group's ICE watching efforts); Vogt, *supra* note 265 (profiling a woman who started court watching after her son was jailed during a mental health crisis); Ottinger, *supra* note 250, at 227–28 (describing how residents who live near industrial sites spearhead environmental data collection efforts).

plained. Court monitoring offered her a way to facilitate change in the system itself.[342]

This is true both locally and globally. Public undersight efforts like copwatching and court monitoring allow individuals from the communities most affected by policing to exert power over the government actors who exercise control over their and their neighbor's lives. But these extralegal channels also allow foreigners whose lives have been affected by U.S. military and national security-related efforts to obtain information and to tell their stories. On the most literal level, these public undersight efforts have publicly counted and named individuals—those killed or injured in drone attacks or disappeared into CIA black sites—for the first time.[343] Public undersight allows communities that are typically excluded from these law and policy debates to make their views known and their voices heard.

4. Shifting Power to the Public

Finally, public undersight performs a power-shifting function. Under the formal legal regime governing public oversight, legislators determine the structure and scope of transparency law statutes; executive branch officials decide when and how to enforce them; and judges interpret and apply these statutory requirements and constitutional and common law access rights. Any changes to this formal regime, such as statutory amendments, must ultimately flow through these same government channels. Public undersight circumvents these controls, recentering informational power with the public and allowing those individuals and communities most affected by the exertion of state power—undocumented individuals, poor individuals, individuals of color, domestic violence victims, individuals living near polluted industrial sites—to reclaim control over government information and the public narrative.[344]

Further, it allows them to do so not through deliberation and consensus, but through more contestatory, "agonistic" forms of en-

342. Telephone Interview with Adele Guadalupe, *supra* note 281.

343. *See Drone Warfare*, *supra* note 241; *Flight Database*, *supra* note 242.

344. The extent to which police officers are unaccustomed to this power shift can be seen in some of the language used to describe copwatching and citizen filming efforts. Former FBI director James Comey, for example, described officers who are being filmed as feeling "under siege." James B. Comey, Director, Fed. Bureau of Investigation, Law Enforcement and the Communities We Serve: Bending the Lines Toward Safety and Justice, Remarks at the University of Chicago Law School (Oct. 23, 2015), https://www.fbi.gov/news/speeches/law-enforcement-and-the-communities-we-serve-bending-the-lines-toward-safety-and-justice [https://perma.cc/Q88D-ZWPN].

gagement.[345] Armed with the data that they gather, these groups lobby to remove biased or misbehaving judges from the bench,[346] develop policy and advocate for legislation,[347] issue incident reports that challenge the official government account of a citizen's interaction with police,[348] petition government regulators to step up their air quality monitoring efforts,[349] and lobby for broader legislative changes.[350] These extralegal data gathering efforts both undergird and fuel an array of secondary interactions with the formal political and legal system.

These groups shift power to the public in another critical way. Undocumented communities and poor communities of color have long been subjected to persistent and pervasive state surveillance. Majority-Black schools are more likely to have police officers on site and be equipped with intensive surveillance technologies,[351] the vast majority of police stops target Black and Hispanic individuals,[352] and ICE agents routinely surveil neighborhoods with large undocumented communities using undercover agents and advanced surveillance technologies.[353] Individuals from these groups are far more likely to become incarcerated as well, at which point the state's control becomes all encompassing.[354]

---

345. Simonson, *supra* note 13, at 435–46.

346. Telephone Interview with Natalie Andre, *supra* note 277.

347. *See, e.g.*, Jacqui Pitt, *Child Support Court Watching Project*, YOUTUBE, HER JUST. (Dec. 11, 2017), https://www.youtube.com/watch?v=Pu3mYdfkAgs&t=13s (last visited Mar. 22, 2022) (describing how data gathered is used to further reform efforts in child support court).

348. Simonson, *supra* note 13, at 420.

349. Ottinger, *supra* note 250, at 226.

350. Telephone Interview with Natalie Andre, *supra* note 277 (describing lobbying efforts to get a bill passed that would mandate court reporters in family court proceedings); *Court Reform*, HER JUST., https://herjustice.org/about-her-justice/court-reform [https://perma.cc/27Z8-QCSC].

351. *See* Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 804 (2017); Evie Blad, *On-Site Police, Security More Common at Majority-Black Secondary Schools*, EDUC. WEEK (Apr. 26, 2018), https://www.edweek.org/leadership/on-site-police-security-more-common-at-majority-black-secondary-schools/2018/04 [https://perma.cc/U5R6-3WW7].

352. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013) (showing that from January 2004 to June 2012, eighty-three percent of the 4.4 million individuals stopped were Black or Hispanic, and just ten percent were white).

353. *See, e.g.*, Caitlin Dickerson, Zolan Kanno-Youngs & Annie Correal, *'Flood the Streets': ICE Targets Sanctuary Cities with Increased Surveillance*, N.Y. TIMES (Mar. 5, 2020), https://www.nytimes.com/2020/03/05/us/ICE-BORTAC-sanctuary-cities.html [https://perma.cc/E4LL-NJY9].

354. *See* BROWNE, *supra* note 17, at 13.

The lens of public undersight helps make vivid the costs of this surveillance. Criticisms of public undersight efforts—for example, that the data collected by these groups may be inaccurate, violate a government official's privacy, or unfairly single out an individual officer without addressing broader systemic issues in the police force—can be turned around and used to illustrate the harmful effects of pervasive state surveillance on these communities instead. These concerns apply with equal if not greater force when reframed as critiques of government surveillance. After all, this surveillance is conducted with the full power of the state behind it, which immeasurably raises the stakes: faulty facial recognition technology, to give just one example, has already led to the wrongful arrests of Black individuals.[355]

Public undersight not only allows marginalized communities to co-opt the arguments of the government, but it also allows them to co-opt the tools and techniques of the state—to invert this power dynamic and watch the watchers. The transparency law scholarship is filled with references to the chilling effects that transparency laws can have on government deliberations and actions.[356] But these discussions mostly take for granted that those who engage in this actual work of monitoring—who search for responsive records, apply exemptions, and make redactions—will remain government actors. Each step in this process offers a new opportunity to shield unwanted information from public disclosure.[357] The government ultimately retains control.

These bottom-up monitoring efforts strip government actors of this authority, removing the process of information disclosure from the hands of the state entirely. They force the judges, police officers, and immigration enforcement agents accustomed to wielding the tools of surveillance to become its targets, scrutinized over whether they start court on time,[358] treat courtroom audiences with respect,[359] or enforce constitutional requirements.[360] They offer the

355. *See* Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html [https://perma.cc/26L3-KKMM].

356. *See* Lee, *supra* note 146, at 215–27.

357. This can be accomplished, for example, by invoking exemptions that do not apply, delaying responses for months or even years, or conducting an inadequate search.

358. *See, e.g.*, Filosa, *supra* note 282.

359. *See, e.g.*, Sackrison, *supra* note 273.

360. *See, e.g.*, *Cop Watch*, *supra* note 326.

opportunity to "study up," a phrase coined by anthropologist Laura Nader in her landmark essay urging anthropologists to study "the culture of the powerful rather than the powerless."[361] Individuals from marginalized communities are perpetually asked whether they have complied with the law.[362] Public undersight allows them to ask this question back.[363]

The transparency law scholarship, with its focus on formal legal reforms, fails to capture the full extent of the power inversion that occurs with public undersight. It is the surveillance studies literature, in contrast, that offers a more fitting lens. Sociologist Steve Mann has described this power reversal as "sousveillance," or watching from below.[364] He invokes George Holliday's filming of the police beating Rodney King as the "best-known" example of this phenomenon,[365] but he provides other illustrations as well—customers who photograph shopkeepers, or citizens who post photos of occupying troops online.[366] These acts of sousveillance, he explains, "redirect an establishment's mechanisms and technologies of surveillance back on the establishment."[367]

Sociologist Simone Browne has built on Mann's work to explore the racial dimensions of surveillance—the "moments when enactments of surveillance reify boundaries, borders, and bodies along racial lines, and where the outcome is often discriminatory treatment of those who are negatively racialized by such surveillance."[368] She coins the turn "dark sousveillance" to capture these modes and forms of resistance, charting the "possibilities and coordinates and modes of responding to, challenging, and confronting a surveillance

361. Laura Nader, *Up the Anthropologist: Perspectives Gained from Studying Up*, *in* REINVENTING ANTHROPOLOGY 289 (Dell Hymes ed., 1972); *see also* Chelsea Barabas, Colin Doyle, Karthik Dinakar & JB Rubinovitz, *Studying Up: Reorienting the Study of Algorithmic Fairness Around Issues of Power*, ACM CONF. ON FAIRNESS, ACCOUNTABILITY, & TRANSPARENCY (2020) at 171–74 (applying the lens of "studying up" to examine how judges and judicial culture contribute to the problem of overincarceration).

362. *See* Capers, *supra* note 43, at 655 (describing how the Supreme Court's criminal procedure decisions are filled with assumptions about the "good citizen," who "is willing to aid the police and to consent to searches," "willingly waives their right to silence," and "welcomes police surveillance").

363. Steve Mann refers to this as "reflectionism," or "using technology to mirror and confront bureaucratic organizations." Mann et al., *supra* note 163, at 333.

364. Mann, *supra* note 42, at 3.

365. Mann et al., *supra* note 163, at 333. Note that this article was written in 2003, before the widespread use of cell phone cameras to record police interactions.

366. *Id.* at 334.

367. *Id.* at 347.

368. BROWNE, *supra* note 17, at 16.

that was almost all-encompassing."[369]

In this way, the surveillance studies literature—especially the insights provided by Mann and Browne—more fully captures the power dynamics at play with public undersight.[370] Browne is especially attuned to the imbalance between state powers of surveillance and the public's opposing powers of government oversight. She opens her book *Dark Matters* with a discussion of the FOIA request she submitted to the CIA for records relating to Frantz Fanon's trip to the United States in 1961 for medical treatment.[371] She explains that she received a "Glomar" denial, or a refusal from the agency to confirm or deny the existence or nonexistence of sixty-year-old records.[372] She then observes the inequities between the government's powers of surveillance and her own.[373] Federal authorities had long surveilled Black activists, intellectuals, artists, and radicals, she notes, and yet "[m]y own surveillance of the records of the FBI's surveillance of Fanon had apparently been stalled."[374]

Even the concept of sousveillance, however, does not perfectly capture the dynamics at play when it comes to public undersight. Mann, Nolan, and Wellman are largely concerned with technologically-assisted forms of surveillance, for example, while public undersight efforts can also involve low-tech, in-person monitoring of government.[375] And Mann and Browne both focus on these power dynamics writ large, including corporate surveillance and the ways that sousveillance can be used to resist invasive monitoring by private actors.[376] The bottom-up monitoring efforts chronicled here, in

369. *Id.* at 21.

370. For a summary of other sociologists' work on sousveillance in recent years, see Bryce Clayton Newell, *Introduction: The State of Sousveillance*, 18 SURVEILLANCE & SOC'Y 257, 257–61 (2020). For critiques of sousveillance as an effective mechanism to remedy these power imbalances, see, for example, Joseph Brandim Howsin, *The Visuality of Professionalized Sousveillance*, 18 SURVEILLANCE & SOC'Y 276, 277 (2020) (arguing that copwatching groups in Brazil may "unintentionally work[] to preserve the perceptual foundations of the favela's social order"); Glencora Borradaile & Joshua Reeves, *Sousveillance Capitalism*, 18 SURVEILLANCE & SOC'Y 272, 273 (2020) (arguing that sousveillance can feed into existing structures of digital capitalism).

371. BROWNE, *supra* note 17, at 1–12.

372. *Id.* at 1.

373. *Id.* at 3.

374. *Id.* at 3.

375. Mann et al., *supra* note 163, at 336–39 (describing their research focus on "wearable computing devices").

376. *See* BROWNE, *supra* note 17, at 89–129 (exploring racial dimensions of biometric information technology); Mann et al., *supra* note 163, at 338 (exploring sousveillance by customers inside stores); Steve Mann, *Wearables and Sur(over)-*

contrast, focus exclusively on government exercises of power.

The lens of public undersight can help to bridge these two literatures: the surveillance studies scholars' focus on the ways that comparatively powerless groups cast their gaze back at their surveillers, and the transparency law scholars' distinct focus on public scrutiny of government.[377] The concept of public undersight captures a more specific dynamic: one in which those communities most affected by government surveillance are able to invert this power dynamic and stare back.[378]

B. THE DRAWBACKS OF PUBLIC UNDERSIGHT

These grassroots efforts to reclaim control over government information also come with drawbacks, costs, and risks. These techniques can be used for good as well as for ill. Further, decentralizing the flow of government information strips away some of the processes and procedures embedded in the formal oversight regime to minimize the harms of information disclosures.

1. Sustainability and Burden-Shifting Concerns

Public undersight efforts have the potential to remedy breakdowns in the formal transparency law. Yet relying on private actors to perform these functions shifts some of the burdens of these laws from the government onto the public.[379] Public undersight organiz-

---

Veillance, Sous(under)-Veillance, Co(So)-Veillance, and MetaVeillance (Veillance of Veillance) for Health and Well-Being, 18 SURVEILLANCE & SOC'Y 262, 267–68 (2020) (exploring sousveillance in the context of medical data). *See generally* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM (2019) (exploring surveillance by private companies).

377. There is a subset of the surveillance scholarship that does explore sousveillance in the context of policing. *See, e.g.*, Michael McCahill, *Crime, Surveillance and the Media*, *in* ROUTLEDGE HANDBOOK, *supra* note 40, at 244, 247–49; Chris Greer & Eugene McLaughlin, *We Predict a Riot?: Public Order Policing, New Media Environments and the Rise of the Citizen Journalist*, 50 BRIT. J. CRIMINOLOGY 1 (2010); Huey et al., *supra* note 180, at 151–53. But these scholars have not, for the most part, expanded their scope of inquiry to explore the public's sousveillance of the government writ large.

378. There are, of course, limitations on the transformative power of this bottom-up monitoring. As many have noted, most of the police officers captured on camera killing Black men and women have escaped legal consequences. *See, e.g.*, Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. REV. 1313, 1360 (2018); Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html [https://perma.cc/CHR7-WT53].

379. *See* Bryce Covert, *The Court Watch Movement Wants to Expose the 'House of Cards'*, APPEAL (July 16, 2018), https://theappeal.org/court-watch-accountability

ing requires time, energy, and resource investments by private citizens. And calls for enhanced or strengthened civil society activism in this space run the risk of operating as a cloak for the dismantlement of the transparency and accountability obligations of the government, especially those imposed through statutory mechanisms like public records statutes.[380]

To be clear, these public undersight efforts represent a diverse range of interests and goals, and there is little uniformity even within the broad substantive categories provided above.[381] For many of these organizations, transparency and access to government information is, at best, a secondary and instrumental step along the way toward their primary objectives. This is especially true in the context of policing. Copwatching groups, for example, pursue a range of goals—empowering the community, deterring police abuse, documenting law enforcement activity, informing citizens about their constitutional rights, engaging in broader political advocacy efforts, and so on.[382] By examining the work of these and other public undersight efforts through the lens of transparency law, I do not mean to obscure the central goals and aims motivating these efforts, nor do I mean to suggest that the release of government information alone would satisfy these groups' demands or obviate the need for their work.

In at least some contexts, however, the government's failure to gather or release information and records does shift a substantial and unwanted burden onto the public. Consider the example of police disciplinary databases. If the law compelled disclosure, police department officials would be forced to assume the laborious task of combing through police disciplinary records, making redactions, and copying and producing these materials to requesters. Instead, public defenders—a notoriously overworked group[383]—have taken on these burdens themselves, spending their own time and money to build a database, gather relevant records, and feed them into the pri-

-movement [https://perma.cc/2J4T-7ED7].

380. *Cf.* Lobel, *supra* note 37, at 972 (describing how in other legal contexts, such civil rights and labor laws, "the idea of civil society has been embraced by conservative politicians as a means for replacing government-funded programs and steering away from state intervention").

381. *See, e.g.*, Simonson, *supra* note 13, at 411 (describing the range of political orientations that guide copwatching groups).

382. *Id.* at 409–12.

383. *See* Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html [https://perma.cc/Z6AE-469Z].

vate system.[384]

This insight yields a related set of concerns. The time and resource burdens imposed by public undersight efforts are so substantial that some of these organizations are unable to sustain their activities for very long. Although difficult to quantify—there is little press or social media activity around an activist group's decision to shutter its operations—it is reasonable to assume that a number of groups have faltered or ceased operations in recent years at least in part due to the significant time and financial investments that they require. These groups rely heavily on volunteers, and it can be difficult to maintain engagement over a period of months or years when relying on donated time and energy.[385]

It is not an accident, then, that the most impactful and longest-lasting public undersight groups tend to operate in large, urban areas.[386] These cities have a larger concentration of individuals who can be called upon to help sustain these activities. They also have a wealthier base of residents to rely on for financial donations, which can then be used to fund permanent, paid employees. As a consequence, even when individual public undersight efforts are effective and sustainable, it can be difficult to scale these efforts up and replicate their successes across other cities and towns. Put another way, public undersight activities hold great promise for eliciting targeted changes at the local and even statewide level in some places, and yet potentially less so when it comes to securing more systemic nationwide reforms.

The difficulty of sustaining public undersight efforts outside of large, urban areas also means that those government entities that are most in need of additional scrutiny may be least likely to receive it. Police departments in New York, Chicago, and the San Francisco Bay area are monitored by an array of outside observers, including a robust media ecosystem, a large number of criminal defense lawyers, and a diverse and progressive citizen base. Yet they are also scruti-

384. *See supra* notes 7–10 and accompanying text.

385. *See, e.g.*, Telephone Interview with Dan Staples, *supra* note 215 (describing the difficulties of sustaining engagement over time when relying on volunteers); Telephone Interview with Joyce Bridge, *supra* note 119 (same); Telephone Interview with Andrea Prichett, *supra* note 173 (noting that when volunteers' status changes—such as when they get a paid position—they may not be available to volunteer any longer).

386. *See, e.g.*, BERKELEY COPWATCH, *supra* note 178 (founded in 1990); PORTLAND COPWATCH, *supra* note 178 (founded in 1992); *About Us*, CT. WATCH NOLA, https://www.courtwatchnola.org/about-us [https://perma.cc/UAB3-NJS3] (founded in 2007).

nized by some of the oldest and most effective copwatching and court monitoring groups in the country.[387]

In contrast, the collapse of local journalism in the United States has hit rural areas especially hard. Vast swaths of rural America have become news deserts, operating without any local media presence at all.[388] Public undersight efforts could, in theory, help to fill this gap. Yet while public undersight groups do exist in smaller cities and towns across the country, their efforts are sometimes more scattered, haphazard, or short-lived.[389] They have a smaller pool of potential volunteers to draw upon.[390] And they may also confront a more hostile set of government actors, from police officers to judges.[391] As a consequence, the very places where public undersight efforts could have the greatest impact may be the ones least likely to be able to sustain them.

2. Legitimation Concerns

A related concern is that public undersight activity will legitimize government institutions that these groups are seeking to abolish or reform. Many of these examples are drawn from the policing or criminal justice context, because that is where these tactics are largely being deployed. But these tactics are spreading. And this di-

---

387. *See, e.g.*, *History*, *supra* note 178; *Courtwatch*, NAT'L COUNCIL JEWISH WOMEN CHI. NORTH SHORE, https://ncjwcns.org/programs/community-service/court-watch [https://perma.cc/9XEK-BCFY].

388. *See* Abernathy, *supra* note 154, at 8 ("In the 15 years leading up to 2020, more than a quarter of the country's newspapers disappeared, leaving residents in thousands of communities . . . living in vast news deserts.").

389. A number of the organizations I emailed or called told me that they are no longer engaged in court monitoring activities. *See, e.g.*, Email from Leslie Patterson, Dir., Ct. Watch N.C., to author (Feb. 2, 2021) (on file with author); Text Message from Laura Williams, Ct. Watch Fla., to author (Feb. 5, 2021) (on file with author) (stating that the courtwatch program was shut down in 2012 due to lack of funding). It is possible that residents in these smaller cities and towns have less time and fewer resources to devote to these types of activities.

390. *See, e.g.*, Telephone Interview with Natalie Andre, *supra* note 277 (noting that they would like to engage in more empirical analysis of the courts they monitor, but lack the capacity to do so); Telephone Interview with Joyce Bridge, *supra* note 119 ("[T]he volunteer population is dying out."); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 138–39 (2018) (noting that in comparison with national public interest groups, public interest groups in the states are "likely to be comparatively resource poor").

391. *See* Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 456–58 (2011) (describing how certain criminal justice institutions in some southern states are especially hostile towards transparency efforts).

versity—both within the criminal justice space and across different substantive realms—means that these organizations are pursuing a wide range of goals.[392] In the policing and criminal justice context, for example, some organizations pursue an abolitionist agenda, some a more reformist agenda, and some a more carceral agenda.[393] This diversity only increases as we move across different substantive realms, into the areas of national security, environmental monitoring, and public health data.

For some of these groups, extralegal government monitoring is intended to bolster government participation or behavior in a specific arena. For example, groups engaged in extralegal monitoring of environmental data often pursue greater government involvement in preventing environmental degradation and regulating private polluters.[394] But for others, especially those pursuing a more abolitionist agenda, there is the concern that these extralegal monitoring efforts will be coopted to reinforce the existing system rather than overturn it. For groups lobbying for bail abolition, for instance, there is the risk that the data they collect will be used to make the cash bail system work more efficiently, or in ways that are more politically palatable, rather than to end to cash bail altogether.[395]

3. Accuracy and Generalizability Concerns

Another risk of public undersight is that the information gathered and published through these channels will be wrong. These errors could be unintentional, made in a good faith effort to pursue the truth by organizations that lack the resources or capabilities to impose rigorous quality controls over the information that they have gathered. Or they could be intentional, driven by a bad faith effort to

392. *Cf. So You Want to Courtwatch*, CMTY. JUST. EXCH., https://progov21.org/document/so-you-want-to-courtwatch/AXnFPxzCxiRExwXlYttJ/?download [https://perma.cc/88XZ-DJBG] (chronicling different goals pursued by courtwatching groups, including the exploratory research model, the civic engagement model, the individual support model, the accountability campaign model, the advocacy campaign model, and the system monitor model).

393. *Compare, e.g.*, *The End of Cash Bail*, ABOLITIONIST L. CNT. CT. WATCH (Jan. 6, 2021), https://alccourtwatch.org/statement-the-end-of-cash-bail [https://perma.cc/88XZ-DJBG] (pursuing a more abolitionist agenda), *with* CT. WATCH NOLA, *supra* note 386 (pursuing a more reformist agenda) *and* STOP CRIME SF, *supra* note 285 (pursuing a more carceral agenda).

394. *See* LA. BUCKET BRIGADE, *supra* note 12.

395. *Cf.* sources cited *supra* note 393 (describing different avenues for ending or reforming cash bail).

tarnish someone's reputation.[396]

Yet when information published through these public undersight efforts is incorrect, it may be difficult for those harmed by erroneous or defamatory claims to secure a meaningful legal remedy. Defamation law theoretically provides an avenue for redress, and yet these cases can be challenging to pursue in practice. They tend to be costly and difficult to win, and the individuals and organizations engaged in public undersight monitoring may not have sufficient financial resources to justify protracted litigation.[397] Further, at least some of these organizations are likely shielded from liability under section 230 of the Communications Decency Act.[398]

Relatedly, information obtained through public undersight channels may be factually accurate and yet still misleading or incomplete in some way. The evidence or material gathered may be anecdotal and arbitrary, offering an incomplete picture of the government process or activity being scrutinized. Many of these efforts—copwatching, court monitoring, immigration enforcement observing, and so on—are, by their nature, somewhat haphazard and happenstance in terms of what information they capture.[399] Further, public undersight efforts that rely heavily on open-source materials like news reports may reflect distortions or holes in the underlying media coverage.[400] This could yield a misleading portrait of government activity, or produce a set of unrepresentative examples that form the basis for conclusions drawn about the government as a whole.

---

396. Of course, the risk of inaccurate information is not exclusive to extralegal data collection—information collected by the government itself is riddled with errors. *See, e.g.*, Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 559–63 (2016) (describing high rates of error in government databases).

397. *See* Ronen Perry & Tal Z. Zarsky, *Who Should Be Liable for Online Anonymous Defamation?*, 82 U. CHI. L. REV. DIALOGUE 162, 166 (2015).

398. *See, e.g.*, *Frequently Asked Questions*, OPENPOLICE, https://openpolice.org/frequently-asked-questions [https://perma.cc/5RHB-AQ2L] ("[W]e've developed OpenPolice.org in a manner that protects us from defamation claims under Section 230 of the Communications Decency Act.").

399. *See* Fan, *supra* note 31, at 1662–64.

400. *See, e.g.*, *Counting Drone Strike Deaths*, *supra* note 242, at 15–20 (describing the methodological flaws that can surface when relying on media reports to count drone strike fatalities); *see also* Abernathy, *supra* note 154 (describing the collapse of local newspapers).

4. Privacy and Security Concerns

Public undersight efforts can also raise privacy and retaliation concerns. These concerns fall into two broad categories. First, there is the potential for videos or records generated by these groups to violate the privacy or safety of private citizens—those directly involved in the incident, those filming or reporting it, or those simply passing by. Individuals who are subjected to police abuse may not want that footage out there for the world—future employers, relatives, or children—to see. Heavily policed communities are already subjected to intensive government surveillance,[401] and copwatching efforts add yet another layer of scrutiny that may be unwanted.[402] Similarly, domestic violence victims may not welcome additional public witnesses to cases that are often deeply personal, sensitive, and complex.

Even more concerning, the individuals being filmed or doing the filming risk becoming the targets of a retaliatory action by police officers or immigration officials.[403] This problem is well documented in the case law: there are countless section 1983 cases involving a private citizen's claim of First Amendment retaliation for filming the police.[404] And ICE watching groups routinely warn observers that filming bystanders or family members could place those other individuals at risk. "We know the Department of Homeland Security (DHS) surveils social media and uses facial recognition to track people," warns one immigration organization.[405] "Think before you share or start livestreaming, and determine if you need to protect anyone's identity, including your own."[406] And for those engaged in external monitoring of national security activity, there is the added risk that their efforts will expose a victim, family member, or source to retaliation by their own governments abroad. These concerns likely limit the democratizing potential of public undersight efforts.

401. *See* BROWNE, *supra* note 17, at 10–13 (describing various forms of heightened surveillance of Black communities).

402. *See* Simonson, *supra* note 13, at 432–33 (describing privacy concerns with copwatching).

403. *See id.* at 429.

404. *See, e.g.*, Fields v. City of Philadelphia, 862 F.3d 353, 355 (3d Cir. 2017); Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011); *see also* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 363–66 (2011).

405. *Filming Immigration and Customs Officials*, WITNESS MEDIA LAB, https://lab.witness.org/wp-content/uploads/sites/29/2018/01/Filming-ICE_V1_0_20170421.pdf [https://perma.cc/NY83-82LP].

406. *Id*.

These extralegal channels of government monitoring may be more widely accessible than formal transparency law mechanisms, but they still exclude important segments of the community.[407]

The second concern is that public undersight activity will violate the privacy or safety of government officials. This is less of an issue when government officials object to being filmed on privacy grounds as they engage in their official duties.[408] The courts have been largely unsympathetic to these claims, holding that the First Amendment protects citizens' ability to film police officers and other government officials.[409] Objections based on security and safety grounds—for example, that certain video recordings could endanger the police officer or his or her family—have found somewhat greater purchase with the courts.[410] But even in this context, courts have still been reluctant to place too many restrictions on the public's constitutional right to record the police.[411]

5. The Potential for Blowback

A further concern is that the success of public undersight efforts will spur the government to place even more stringent restrictions on the public oversight regime. Many of the efforts chronicled here utilize both formal and informal mechanisms. The group that recreates the path of CIA extradition flights, for example, relies on a combination of official public records requests, open-source materials like published flight paths, reports from amateur plane spotters, and interviews with the individuals detained on these flights.[412] The group's revelations could push the government to remove some of this material, like flight plans, from the public domain. And it could prompt government actors to release even fewer national security records through formal oversight processes.

To some extent, this has already happened. In the context of FOIA and state public records' disputes, government actors, especially national security and law enforcement agencies, are increasingly

407. *Cf.* Brayne, *supra* note 340, at 385 (finding that individuals who have been stopped, arrested, convicted, or incarcerated are less likely to interact with surveilling institutions that keep formal records).

408. Kreimer, *supra* note 404, at 386–97.

409. *See, e.g.*, State v. Flora, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992).

410. *See, e.g.*, Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010); Kreimer, *supra* note 404, at 357 n.74 (discussing potential fears of undercover officers having their identities revealed).

411. Kreimer, *supra* note 404, at 358–60.

412. *Flight Database Methodology*, *supra* note 243.

making the claim that broad swaths of seemingly harmless government records must be shielded from public view because they could be combined with other, unknown bits of data that will then add up to a harmful national security or law enforcement disclosure.[413] This is often described as the "mosaic theory" of government information, because these individual pieces of data, like the tiles in a mosaic, may be arranged to create a discernible image.[414] In this way, the success of public undersight efforts could, paradoxically, prompt the government to clamp down even further on public oversight disclosures and processes.[415]

6. Rule of Law Concerns

A final concern is that public undersight efforts will subvert the rule of law. Rather than work through disclosure procedures established by democratically elected legislators and applied by neutral and impartial judges, these efforts instead place decision-making authority in the hands of private citizens. Under this view, ordered and reasoned transparency law processes are replaced by a chaotic, disaggregated system with no single decision-maker. As Professor Simonson has noted in the criminal justice context, these grassroots, bottom-up efforts may be critiqued for "surrendering a rational legal process to the whimsy of unelected community groups."[416]

Scholars who have responded to this critique in other contexts, such as jury or bail nullification, offer some guidance. They draw upon the Dworkian view that broader, normative principles implicit in or derived from statutes and case law serve as a valid alternative source of legal authority.[417] And they argue that rather than subvert the rule of law, these efforts in fact represent a legitimate alternative legal source.[418] Efforts like jury nullification or bail nullification, argue scholars like Professor Simonson and Professor Darryl K. Brown,

413. *See* David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 658–62 (2005) (describing national security agencies' use of the mosaic theory); Koningisor, *supra* note 27, at 1785–87 (describing law enforcement agencies' use of the mosaic theory).

414. Pozen, *supra* note 413, at 630.

415. In a similar vein, surveillance scholars have argued that sousveillance efforts directed at police risk creating a "complicated dance" in which police brutality is pushed into more private spaces. Torin Monahan, *Counter-Surveillance as Political Intervention?*, 16 SOC. SEMIOTICS 515, 527 (2006).

416. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 632 (2017).

417. *See id.*

418. *See id.* at 632–33; *see also* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1161–66 (1997).

embody the view that "written law is interpreted through the public norms and social conventions we now understand as part of the law."[419] The jury or the public's rejection of the written law can therefore serve as a corrective to the formal law's contradictions with these larger governing norms, rather than a repudiation of the rule of law altogether.[420]

A similar defense can be raised here. Copwatching, court monitoring, and ICE watching groups allow members of disenfranchised communities to reclaim power over government information. They highlight the inequities of the formal public oversight regime, and they remedy information imbalances between the government and disempowered communities.[421] They represent the community's rejection of the barriers to access that have been baked into the formal oversight regime. This is powerfully illustrated by the example of shadow police disciplinary databases. In constructing these systems, public defenders are helping to rectify the substantial resource imbalances that exist between the prosecution and defense.[422] In the process, these public undersight efforts can make the legal process more just, rather than less.[423]

A separate critique is rooted not in abstract rule of law concerns, but in more concrete policy objections to public undersight agendas. This criticism rejects the claim that the formal oversight regime is failing.[424] Under this view, transparency and accountability law mechanisms are functioning as they are supposed to: police dis-

---

419. Brown, *supra* note 418, at 1182.

420. *See* Simonson, *supra* note 416, at 633.

421. Telephone Interview with Andrea Prichett, *supra* note 173 (explaining that the copwatching organization's video database allows for "local control and curation" of information).

422. *See, e.g.*, Rebecca Wexler, *Privacy Asymmetries*, 68 UCLA L. REV. 212, 257–58 (2021); *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS i, 13–14 (Dec. 2004), https://www.in.gov/publicdefender/files/ABAGideonsBrokenPromise.pdf [https://perma.cc/MJ4L-QYRP] (discussing the imbalances between prosecutors and defendants in criminal cases).

423. *Cf.* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 705–12 (1995) (arguing that jury nullification can create justice). Of course, transparency is a transsubstantive issue, and more privileged communities could engage in similar tactics to reinforce and entrench their power. Overall, however, these communities will likely be better positioned to utilize formal legal avenues to achieve these ends—to lobby legislators, make campaign donations, bring lawsuits, etc., without resorting to public undersight mechanisms.

424. *See* discussion *infra* notes 447–448 and accompanying text (discussing justifications for keeping information hidden from the public).

ciplinary records, CIA black site data, drone strike death tallies, and body camera videos are all properly shielded from public view.

It is difficult to address this critique in the abstract. The policy arguments for and against, say, increased public access to police disciplinary records are entirely different from those for and against greater transparency in the nation's drone strike program. Yet as a generalized response, public undersight concentrates attention where private citizens have come together and decided that the information imbalance between the government is both most significant and least justifiable. For those who would argue that the public oversight regime is working, the question is: working for whom? The mere existence of these efforts serves as a rebuke to the assertion that the public oversight system is informing the public about government efforts in the manner and to the extent that it should.

C. POTENTIAL REMEDIES

There are two central alternative paths to improving the information ecosystem that provides public access to government information. The first is to remedy breakdowns in the formal legal mechanisms that govern information access. The second is to capitalize on the benefits of these public undersight efforts—to further empower these community groups, and to maximize the advantages of these extralegal monitoring activities while minimizing some of their potential harms.

1. Improve Public Oversight

Repairing the formal public oversight regime could help ease the pressures on these grassroots movements. A more accessible and better-functioning set of transparency laws could alleviate some of the need to compensate for these failings with extralegal measures. Transparency law scholars have proposed myriad ways that this body of law could be improved: they have suggested ramping up affirmative disclosure requirements,[425] amending discovery requirements to reduce the burdens on public access laws,[426] extending FOIA to cover certain private contractors,[427] and tightening the re-

425. David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1108 (2017).

426. Kwoka, *supra* note 24, at 2256–61.

427. Alfred C. Aman, Jr. & Landyn Wm. Rookard, *Private Government and the Transparency Deficit*, 71 ADMIN. L. REV. 437, 450–54 (2019).

quirements for government open meeting laws,[428] along with a variety of other potential fixes.

One of the most powerful ways to improve the public oversight regime would be to expand public access to these laws. When it comes to transparency statutes, this could be accomplished in a variety of ways. FOIA and state public records laws could be reworked to reduce the financial costs they impose on requesters.[429] States could impose meaningful limitations on the costs that can be passed on to the public, for example, or introduce fee waivers for requests that are made in the public interest.[430] Further, states without an administrative appeals process in place could establish one, making it easier for requesters to overturn an adverse agency determination without incurring the costs and complexities involved with a lawsuit.[431]

Public undersight efforts could also help guide reformers' priorities. Clusters of public undersight activity could be used to signal where the government would benefit most from additional scrutiny. If the goal is to improve the benefits of these laws for the public at large—bringing them closer in line with the drafters' original, democracy-enhancing goals—then making the information sought by these groups more accessible offers a good place to start. Disclosing even a handful of categories of records—body camera footage, police disciplinary materials, or stop and frisk data—could have an outsized impact. Those who advocate for legislative and policy changes in the statutory transparency regime could look to public undersight efforts when setting their agenda for reform.

In terms of constitutional and common law access rights, the courts could take measures to improve the public's ability not just to attend judicial proceedings, but to meaningfully participate in them. Although difficult to track empirically, the public's constitutional right of access is most likely violated on a routine basis. As one court monitor put it, judges and court officials "have a tendency to push you around if you don't speak up."[432] Courts could do a better job of addressing these barriers. They could educate their staff about what the First Amendment right of access requires, address space constraints in courtrooms, and equip judges and lawyers with micro-

428. Mulroy, *supra* note 125, at 367–70.

429. FOIA has provisions to limit costs to "reasonable" charges, but that still imposes financial burdens on requestors. 5 U.S.C. § 552(a)(4)(A)(ii).

430. FOIA already includes such a provision. 5 U.S.C. § 552(a)(4)(A)(ii).

431. *See* discussion *supra* note 151 and accompanying text.

432. Telephone Interview with Sheila Jaffe, Founder & Member, Fams. Against Ct. Travesties Delray, Fla. (Feb. 3, 2021).

phones so that the proceedings can be heard.[433]

There are other steps that could be taken. Judges could permit audience members to record proceedings and disseminate those recordings to the public at large. This would extend public access beyond the four walls of the courtroom. Further, sealing practices could be changed: courts could stop permitting parties to automatically file broad swaths of records under seal—for example, discovery materials previously covered by a protective order, or even the briefs' themselves[434]—and instead make individualized findings on the record, as required by law.[435] Courts could also reduce or eliminate paywalls for court records. Public Access of Court Electronic Records (PACER) acts as a substantial barrier to public access to judicial materials, and removing these fees could make judicial records more accessible to a wider cross-section of the public.[436] Further, courts can and should continue to recognize a robust First Amendment right to record police and immigration officials.[437]

A second improvement would be to establish a more formal mechanism for the public to influence the government's data gathering practices. An ambitious solution would be to amend FOIA and state public records laws to create some procedure by which the public could compel government actors to gather data. This may require some intermediate step—an advisory board, for example, that evaluates the public's proposals and makes recommendations on

433. Simonson, *The Criminal Court Audience*, *supra* note 31, at 2223–29.

434. *See, e.g.*, Bernard Chao, *Not So Confidential: A Call for Restraint in Sealing Court Records*, 2011 PATENTLY-O PATENT L.J. 6, 9–10; Leslie Brueckner & Beth Terrell, *When It Comes to Sealing Records, the Presumption of Public Access Requires that You "Just Say No*," PUB. JUST. (July 6, 2017), https://www.publicjustice.net/comes-sealing-court-records-presumption-public-access-requires-just-say-no [https://perma.cc/L4ES-ZYZL].

435. *See, e.g.*, *In re* Providence J. Co., Inc., 293 F.3d 1, 13 (1st Cir. 2002) (finding district court's blanket nonfiling policy violated First Amendment right of access requirements); Letter from Bruce D. Brown, Exec. Dir., Reps. Comm. for Freedom of the Press, to Chief Justice John G. Roberts, Sup. Ct. U.S. (Dec. 16, 2019), https://www.rcfp.org/wp-content/uploads/2019/12/2019.12.16_SCOTUS_Sealing_Letter_FINAL.pdf [https://perma.cc/3USP-EN2K] (requesting that the Supreme Court amend its sealing practice to prohibit sealing solely on the grounds that the records were sealed below).

436. *See* Corrected Br. of Amici Curiae the Reps. Comm. for Freedom of the Press and 27 Media Orgs. in Support of Plaintiffs-Appellants, Nat'l Veterans Legal Servs. Program v. United States, at 12-17, 2019 WL 424753 (C.A. Fed. Jan 28, 2019) (describing how PACER fees prevent journalists from reporting on the judicial system).

437. *See* Skinner-Thompson, *supra* note 31, at 133–43 (describing how a right to record government actors advances First Amendment values).

which ones to adopt. Yet establishing some process for the public to contest the absence of critical data could help remedy the problem of government actors circumventing oversight requirements by simply not gathering information in the first place.

There are other, quieter fixes that could be adopted. Certain categories of missing data receive outsized public undersight attention, and these should be prioritized. Many public undersight efforts seek more and better data about racial disparities within the criminal justice system, for example, and data that allows for more individualized accountability—not just data averages, but numbers that reflect the practices and approaches of specific prosecutors or judges—could be very useful. This is an area where federal and state intervention could help. Right now, for instance, law enforcement agencies' provision of police use of force data is voluntary. This is one of the reasons that federal data in this realm is so deficient.[438] The government could and should take steps to make these data requirements mandatory—for example, by making federal funds contingent on participation.[439]

These proposals merely scratch the surface. There is a wealth of legal scholarship that puts forth recommendations for fixing the law of public oversight, one that is too voluminous to adequately summarize here. But the suggestions above provide at least some examples of the ways that formal transparency and accountability laws could be amended to ease the burdens and pressures on extralegal forms of government monitoring.

2. Improve Public Undersight

Even if public oversight laws were to undergo substantial reforms, public undersight efforts would still have a role to play. A more functional and progressive transparency law regime would probably still place decision-making power in the hands of government actors. And inevitably, flaws in the law's application would remain: government officials would be reluctant to enforce the dictates

438. Press Release, Fed. Bureau of Investigation, FBI Releases 2019 Participation Data for the National Use-of-Force Data Collection (July 27, 2020), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-participation-data-for-the-national-use-of-force-data-collection [https://perma.cc/HFS9-2JS7] (noting that only forty-one percent of law enforcement agencies submitted use of force data in 2019).

439. *See* Matthew Stanford, *The Constitutional Challenges Awaiting Police Reform—and How Congress Can Try to Address Them Preemptively*, 11 CALIF. L. REV. ONLINE. 296, 297–98, 303–04 (July 2020).

of the law, or resource constraints would prevent full compliance. Further, the "agonistic" benefits of forcing the government to engage with extralegal monitoring cannot be fully captured through improvements to the formal legal regime. As a result, it is important to explore how the public undersight regime could be improved upon and strengthened as well.

There are a number of ways that these groups could mitigate the costs of public undersight. First, they could take ex ante steps to minimize the amount of intrusive or harmful information that they gather. Many of them do so already: copwatching and ICE watching groups, for example, routinely instruct their members to focus their cameras on the government officials involved rather than family members or bystanders to reduce the risks of retaliation.[440] Additional steps could be taken after information is gathered. One copwatching group, for example, suggests securing consent from the individuals who appear in copwatching videos and offering to redact or blur faces or personal identifying information before uploading the videos to a database or otherwise sharing them more widely.[441]

Second, these groups can take steps to mitigate the risk of publishing erroneous information. Some of them have done so already—for example, by publishing information to a database only after independently authenticating the incident,[442] by offering the police department an opportunity to comment,[443] or by minimizing the risk of reputational harm to government officials by limiting who can access the data or reports.[444] Academic institutions could also play a role by auditing this data externally or engaging in a comparative review of different organizational approaches. The human rights clinic at Columbia Law School, for example, recently took this approach.[445] It selected three organizations that had recreated drone strike data ex-

440. *See supra* notes 403–406 and accompanying text.

441. *Planning Workshop: Police Violence Video Database*, WITNESS 1, 19–20, 23, http://www.mediafire.com/file/9n4986sq30p2oh6/FULL_ElGritoWorkbook_V1_1_13Sept2018.pdf/file [https://perma.cc/6VR9-UA47].

442. *See, e.g.*, Telephone Interview with Dan Staples, *supra* note 215 (explaining that the website only relies on reputable news sites and will not upload information from individual citizen interactions, such as cell footage).

443. *See, e.g.*, Tate et al., *supra* note 223 (explaining *Washington Post's* authentication efforts).

444. A number of public undersight databases already do this. *See, e.g.*, *People's Database*, BERKELEY COPWATCH, https://www.berkeleycopwatch.org/people-s-database [https://perma.cc/5B6U-MJJ5] (restricting public access for "privacy and security" reasons).

445. *See Counting Drone Strike Deaths*, *supra* note 242, at 20–26.

tralegally and it reexamined their sources, accounted for any discrepancies, and came up with their own figures and conclusions.[446]

Third, these organizations could take steps to minimize the risk that the data collected will embolden bad actors—what Professor Jonathan Manes has referred to as the "anti-circumvention" concern, or the fear that the release of information will allow criminals to circumvent the bounds of the law.[447] These concerns are often raised in the national security or law enforcement context.[448] Yet again, public undersight groups can and do take steps to help limit this risk. Media organizations routinely inform the government before they publish sensitive national security information, and they often engage in a dialogue with the government about ways to minimize the risks to government officials or overseas informants.[449] Human rights organizations could pursue this same approach, alerting the government to especially sensitive national security disclosures and working with government officials to minimize any threats to human lives.

These suggestions largely focus on ways to reduce the risks of public undersight activity. But it is equally important to maximize their benefits and expand their reach. These grassroots efforts have demonstrated a viable, more equitable path forward for improving transparency and accountability in government. The question is what can be done to support these groups. One option would be to expand their scope and scale by improving coordination among these organizations. This could be financial: better-funded and more established groups could share financial resources with smaller, newer public undersight initiatives in smaller cities or towns. It could also be logistical. Berkeley Copwatch, for example, is building a database system that is easier to manage and operate so that other local organizations can gather, archive, and curate their own video footage.[450] Successful and entrenched groups like Court Watch NYC or Berkeley Copwatch could distribute training resources, court monitoring forms, data analysis tools, and so on. Umbrella organiza-

446. *See id.*

447. Jonathan Manes, *Secrecy & Evasion in Police Surveillance Technology*, 34 BERKELEY TECH. L.J. 503, 507 (2019).

448. These are the concerns that undergird FOIA's Exemption 1, which permits the withholding of classified information. 5 U.S.C. § 552(b)(1)(A).

449. David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post*-Pentagon Papers *World*, 48 HARV. C.R.-C.L. L. REV. 473, 482–83 (2013).

450. Telephone Interview with Andrea Prichett, *supra* note 173.

tions could also help coordinate efforts among multiple chapters.[451]

Increased external support could also help. Government funding for extralegal monitoring groups is most likely not a viable solution: the risk that financial entanglements would diminish the independence of these organizations is too great. But other, non-governmental institutional actors could pitch in. Law schools, for example, could provide legal help. A coalition of law clinics around the country are already providing access litigation support for smaller news outlets.[452] Their mission could be expanded to assist with these extralegal movements—defending copwatching and ICE watching groups against government retaliation, for instance. Again, none of these proposals serves as a panacea, and some of the risks and costs associated with public undersight will never be fully neutralized. But these suggestions offer a few places to start.

CONCLUSION

Expanding the scope of the transparency law scholarship to encompass public undersight both complicates and enriches our understanding of the information ecosystems that sustain a liberal democracy. By circumventing impediments in the formal transparency law, rather than trying to tunnel through them, these efforts help to expand and democratize transparency and accountability in government. They fill in gaps in the government's data-collection efforts, allow marginalized communities a more direct voice in matters of transparency and accountability, and permit communities long subjected to intrusive government surveillance to stare back. This is not to say these efforts are cost-free: they can impose privacy, security, and other harms. Yet the fact remains that these efforts are growing in size and in impact. Scholars, legislators, and policymakers must begin to grapple with the implications and effects of the public's growing ability to monitor the government from below.

---

451. *See, e.g.*, *About*, WECOPWATCH, https://wecopwatch.org/about [https://perma.cc/W5Y8-A4UC].

452. *See About*, FREEDOM OF EXPRESSION LEGAL NETWORKS, https://freeexpression.law/about-feln [https://perma.cc/7HCZ-TD66].