

# NOTES

## CALLING OFFICER HESTER PRYNNE! THE PROMISES AND PITFALLS OF EMPLOYING PUBLIC SHAME AS A DETERRENT FOR POLICE MISCONDUCT

Quinlan Cummings\*

### INTRODUCTION

“I literally could not put my phone down. Whether I got shot or not, this needed to be documented.”<sup>1</sup> Those words were spoken by the bystander who used their smartphone to capture the moment that police in Austin, Texas opened fire on peaceful protestors seeking medical assistance for 20-year-old Justin Howell.<sup>2</sup> An officer had shot Howell in the back of the head with “nonlethal” beanbag rounds.<sup>3</sup> The video spread like wildfire on social media, leading to a ban on nonlethal rounds by the Austin City Council and a proposed 100 million dollar budget cut for the Austin Police Department.<sup>4</sup> This event, while horrifying, is not uncommon. In the past decade, a proliferation of bystander videos of police violence have circulated online, revealing the disturbing extent to which some officers abuse their authority and enflaming public unrest about police misconduct.<sup>5</sup> This increased trend in civil vigilantism raises the question: why do civilians feel obligated to film officer misconduct?

---

\* Georgetown University Law Center, J.D. 2022; Georgetown University, B.A. 2019. I would like to extend a special thank you to Professor Christy E. Lopez, who offered invaluable guidance throughout the writing process of this Note. I also extend thanks to the entire staff of the *American Criminal Law Review* for their diligent effort and professionalism in the editing of this Note—as always, the work of the *ACLR* staff is unparalleled in quality. © 2023, Quinlan Cummings

1. *The Peace Reporters: The Police Dressed for War. The People Showed Up with Cameras*, THE VERGE, <https://www.theverge.com/c/21355122/police-brutality-violence-video-effects-trauma-civil-rights-black-lives-matter> (last visited Dec. 2, 2021).

2. *See id.*; *see also* Christina Maxouris & Raja Razek, *Austin Police Fired at Crowd Transporting Protester Injured by an Officer*, CNN (June 7, 2020, 10:26 PM), <https://www.cnn.com/2020/06/07/us/austin-texas-police-bean-bag-20-year-old-injured/index.html>.

3. *See The Peace Reporters: The Police Dressed For War. The People Showed Up With Cameras*, *supra* note 1.

4. *Id.*

5. *See* Nicol Turner Lee, *Where Would Racial Progress in Policing be Without Camera Phones?*, BROOKINGS INST. (June 5, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/05/where-would-racial-progress-in-policing-be-without-camera-phones/>; Karen Hao, *How to Turn Filming the Police Into the End of Police Brutality*, MIT TECH. REV. (June 10, 2020), <https://www.technologyreview.com/2020/06/10/1002913/how-to-end-police-brutality-filming-witnessing-legislation/>.

This Note argues that our system has failed to employ formal measures to deter inappropriate use of force by police.<sup>6</sup> Therefore, bystanders film and circulate videos of police misconduct online to use public shame as extrajudicial deterrence. While evidence is limited on this novel topic, public shame appears to be an effective deterrent to police misconduct. This Note shall proceed in three parts: Part I explains deterrence theory generally, how it applies to police misconduct, and how public shame acts as a deterrent to wrongdoing. Part II explores how public shaming, by filming the police, deters police misconduct. While body-worn cameras demonstrate that filming the police can reduce their propensity for misconduct, they have been insufficient deterrents because the police control how these cameras, and their footage, are used. Bystander videos, in contrast, present the promise of effective deterrence because the public controls the footage. When these videos are circulated online, the public shame they inspire presents an extrajudicial sanction that deters the police from misconduct. Finally, Part III argues that the deterrent effect of public shame should only be used as a *means* of reforming police misconduct, not as an end. Public shaming cannot be accepted as an end itself without undermining legitimate rule of law, where respect for the law rather than fear of public shaming deters misconduct.

## I. APPLYING DETERRENCE THEORY TO POLICE MISCONDUCT AND PUBLIC SHAMING

Deterrence theory rests on the notion that rational actors will avoid wrongdoing where the likely punishments for such actions outweigh the probable benefits. Thus, the police are theoretically rational actors who will be deterred from misconduct because job loss and legal sanctions are severe punishments. In practice, the police continue to commit misconduct because our system weakens the likelihood of adequate repercussions. This Part will consider how deterrence theory *should* apply to cases of police misconduct and the ways in which our system undermines the efficacy of deterrence.

### A. *The Foundational Theory of Deterrence*

The preeminent foundational sources of deterrence theory are *On Crimes and Punishments* (“*On Crimes*”),<sup>7</sup> an essay written by Enlightenment philosopher Cesare Beccaria in 1764, and *An Introduction to the Principles of Morals and Legislation* (“*Introduction to the Principles*”),<sup>8</sup> a book written by philosopher Jeremy Bentham in 1789. Beccaria, considered the father of deterrence theory,

---

6. While “police misconduct” can refer to a number of wrongful police actions, from using offensive language with a civilian to unlawful searches and seizures, this Note will use police misconduct to solely refer to “uses of force,” or excessive and/or unreasonable levels of violence employed by an officer against a civilian in the course of duty. For example, uses of force include chokeholds, beatings, and unnecessary roughness when executing arrests and searches.

7. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (W.C. Little & Co. 1872) (1764).

8. JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* (Batoche Books 2000) (1789).

writes that humans are rational actors who weigh the costs and benefits of their actions. They will avoid an action if its costs outweigh its benefits.<sup>9</sup> *On Crimes* urges that the purpose of punishment is not to inflict suffering on wrongdoers, as was the goal of the traditional form of retributive punishment in Beccaria's time, but to deter crime.<sup>10</sup> To this end, punishments must be proportionate to the injury done to society and the minimum required by the circumstances.<sup>11</sup> If a punishment is significantly greater or lesser than the harm caused by the crime, an actor cannot rationally weigh the costs and benefits of their actions.<sup>12</sup> Furthermore, rational actors cannot engage in a cost-benefit analysis of crime without a clear understanding of outcomes. Punishments, therefore, have to be "public, immediate . . . and determined by the laws."<sup>13</sup>

Bentham refined Beccaria's work into "a more fully articulated theory of crime."<sup>14</sup> Like Beccaria, Bentham saw humans as rational actors seeking to increase pleasure while avoiding pain; where the pain of punishment outweighs the pleasure of the crime, a rational person will avoid such criminal conduct.<sup>15</sup> Punishment, because it decreases pleasure, is inherently a "mischief" upon mankind and is only justifiable to Bentham where it (1) is used to prevent crimes, (2) encourages criminals to choose less mischievous crimes, (3) encourages criminals to do no more mischief than necessary, and (4) prevents the crimes as inexpensively as possible.<sup>16</sup> Whereas retributionists believe in an "eye for an eye" approach, where punishment correlates to the wrongdoer's moral blameworthiness, Bentham argues punishment should be "no . . . more than what is necessary" to convince a would-be criminal that the pain of punishment would outweigh the pleasure of wrongdoing.<sup>17</sup> Beccaria and Bentham crafted a utilitarian foil to retributive theory, endorsing punishment under the minimum necessary conditions to render crime unattractive.

---

9. BECCARIA, *supra* note 7, at 32–33.

10. *See id.* at 94–95 ("The countries and times most notorious for severity of punishments, were always those in which the most bloody and inhuman actions and the most atrocious crimes were committed . . . [because] cruel punishments . . . counteract the purpose of their institution, which was, to prevent crimes.").

11. *See id.* at 32–33.

12. *See id.* ("If an equal punishment be ordained for two crimes that injure society in different degrees, there is nothing to deter men from committing the greater, as often as it is attended with greater advantage.").

13. *See id.* at 160–61 ("That a punishment may not be an act of violence, of one or of many, against a private member of society, it should be public, immediate and necessary; the least possible in the case given; proportioned to the crime, and determined by the laws.").

14. *See* Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765, 768 (2010).

15. BENTHAM, *supra* note 8, at 14 ("Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.").

16. *See id.* at 140; *see generally also* Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 3 FED. PROB. 33, 33 (2016).

17. *See* BENTHAM, *supra* note 8, at 142.

*B. Why Formal Punishments Should Deter Police Misconduct, But Haven't*

Police wrongdoing should be deterred by institutional and judicial punishments. In practice, our system limits the efficacy of deterrence theory on police misconduct. Police officers are, in theory, the type of rational actors whom Beccaria and Bentham envisioned would make cost-benefit analyses before committing misconduct. They are “carefully selected and screened”<sup>18</sup> for their jobs, suggesting that they lack any obvious deviant qualities that would make them unresponsive to deterrence measures.<sup>19</sup> There is a risk of “painful” punishment which outweighs the “pleasure” of misconduct: “[officers] have a stake—their job—in conformity, [so] it seems reasonable to posit that officers should be responsive to the threat of discipline . . . [and] are therefore deterrable.”<sup>20</sup> While there is scant research on the connection between deterrence theory and police misconduct, one recent study finds that police officers may be deterred from misconduct by the certainty and swiftness of punishment, as well as embarrassment and shame.<sup>21</sup>

Despite this, many police officers still commit misconduct. There are no official national statistics on police misconduct because an insufficient amount of police departments report “use of force” incidents to the Federal Bureau of Investigation (“FBI”) to establish a statistically significant figure.<sup>22</sup> However, independent investigations have found that roughly 1,000 people die every year from police shootings,<sup>23</sup> with the average lifetime chances of being killed by police at 1 in 2,000 for men and 1 in 33,000 for women.<sup>24</sup> Police officers *should* be rational actors who avoid misconduct to preserve their jobs, yet real-world statistics indicate that this is not the case.

Our system inhibits deterrence theory from effectively limiting police misconduct in several ways. First, there is a strong association between impulsivity and misconduct. When an officer senses sudden danger and acts in the heat of the moment, they are no longer a “rational” actor as Bentham envisioned. Instead, they react instinctively, without calculating the pains and pleasures that will result

---

18. Christopher J. Harris & Robert E. Worden, *The Effect of Sanctions on Police Misconduct*, 60 CRIME AND DELINQ. 1258, 1260 (2014).

19. See Silvia M. Mendes, *Certainty, Severity, and Their Relative Deterrent Effects: Questioning the Implications of the Role of Risk in Criminal Deterrence Policy*, 32 POLICY STUD. J. 59, 63 (2004) (finding that risk averse individuals require more severe punishments to be deterred from crime, while risk acceptant individuals require increased certainty of punishment).

20. See Harris & Worden, *supra* note 18.

21. See Greg Pogarsky & Alex R. Piquero, *Studying the Reach of Deterrence: Can Deterrence Theory Help Explain Police Misconduct?*, 32 J. CRIM. JUST. 371, 371–72 (2004).

22. See Tom Jackman, *FBI May Shut Down Police Use-of-Force Database Due to Lack of Police Participation*, WASH. POST (Dec. 9, 2021, 6:00 AM), <https://www.washingtonpost.com/crime-law/2021/12/09/fbi-police-shooting-data/>.

23. See *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (last visited Oct. 31, 2022). At least 1030 individuals were shot and killed by the police in 2022. See *id.*

24. See Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCIS. U.S.A. 16793, 16793 (2019).

from their actions.<sup>25</sup> However, we may assume that heat-of-the-moment misconduct ought to be rare where officers are trained to “plac[e] [themselves] in life-threatening situations and follow[] procedure to make the right call, regardless of fear.”<sup>26</sup> Further, multiple prolific cases of prolonged misconduct that lack impulsivity suggest there is a more nuanced explanation for why the police are immune to deterrence. Perhaps the most infamous example of prolonged misconduct was when Officer Derick Chauvin fatally kneeled on George Floyd’s neck for over eight minutes as Mr. Floyd and onlookers begged him to stop.<sup>27</sup> Three fellow officers stood by and failed to act as Chauvin suffocated Mr. Floyd.<sup>28</sup>

Second, legal and institutional safeguards overly-protect the police from facing consequences for their actions, thus frustrating deterrence theory. The police union’s disproportionate political leverage has enabled legislation and collective bargaining agreements that heavily favor police officers charged with misconduct.<sup>29</sup> These officers may delay interrogations and have access to the evidence against them prior to their interrogations—a luxury not afforded to civilians charged with criminal conduct.<sup>30</sup> Arbitration is the common model for resolving disciplinary actions against an officer and the police union has significant power to pick the arbiter, whose decision is final.<sup>31</sup> Even when an officer is disciplined, their

---

25. See Pogarsky & Piquero, *supra* note 21, at 381 (“[I]mpulsivity was strongly and positively associated with police misconduct. In particular, more present-oriented officers reported they were more likely to commit misconduct. Again consistent with prior work using other subject populations, impulsivity diminished the deterrent influence of legal sanction threats.”); see also Arthur Rizer, Abdul Rad & Jonathan Haggerty, *Can Deterrence Theory Explain the Stephon Clark Shooting?*, AMER. INT. (May 8, 2018), <https://www.the-american-interest.com/2018/05/08/can-deterrence-theory-explain-the-stephon-clark-shooting/>.

[E]ven though officers should operate rationally, they will inevitably fail to make rational calculations in situations where their lives are on the line, at least from time to time . . . deterrence relies on individuals who are, at least to some extent, deterrable, but who is and who is not deterrable can vary according to circumstances.

*Id.*

26. See Rizer, Rad & Haggerty, *supra* note 25.

27. See *How George Floyd Died, and What Happens Next*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/article/george-floyd.html>.

28. See Becky Sullivan, *Three Ex-Minneapolis Police Officers Guilty of Violating George Floyd’s Civil Rights*, NPR (Feb. 24, 2022), <https://www.npr.org/2022/02/24/1082643767/george-floyd-civil-rights-trial>.

29. See Sam Blum, *Police Unions Wield Massive Power in American Politics – For Now*, ROLLING STONE (July 7, 2020), <https://www.rollingstone.com/politics/politics-features/police-unions-politics-george-floyd-breonna-taylor-1024473/>; see also Nick Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability*, 52 U. S.F. L. REV. 275, 290–96 (2018); Anthony O’Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 120 COLUM. L. REV. 1327, 1347 (2020) (“To begin, there appears to be a strong correlation between the collective bargaining power of a police workforce and the incidence of violent misconduct among its members.”); Robert M. Bloom & Nina Labovich, *The Challenge of Detering Bad Police Behavior: Implementing Reforms that Hold Police Accountable*, 71 CASE W. RESV. L. REV. 923, 939–44 (2021).

30. See Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1222 (2017).

31. See Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary*, 89 J. CRIM. L. & CRIMINOLOGY 215, 224 (1999); see also Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 551–52 (2019); Daniel DiSalvo, *Enhancing Accountability: Collective Bargaining and Police Reform*, MANHATTAN INST. (Jan. 12, 2021), <https://www.manhattan-institute.org/enhancing-accountability-collective-bargaining-and-police-reform>.

record is often expunged or otherwise hidden from the public,<sup>32</sup> and many terminated officers are successful in being rehired.<sup>33</sup> Accordingly, punishment is neither swift nor certain for officers who commit misconduct, weakening the power of deterrence.

Third, our legal system favors protecting officers charged with misconduct. The Supreme Court has established precedent which weakens liability for police misconduct, for reasons such as the officers' need for "breathing room to make reasonable but mistaken judgments . . ." <sup>34</sup> Prosecutors are reluctant to even bring charges against police officers for misconduct due to the high burden of proof required in "use of force" cases.<sup>35</sup> Further, prosecutors do not want to risk alienating the police force with whom they work "day in [and] day out."<sup>36</sup> Accordingly, even if officers engage in a cost-benefit analysis before committing misconduct, the costs are minimal because there is a low likelihood of legal consequences.

---

32. See Reade Levinson, *Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017), <https://www.reuters.com/investigates/special-report/usa-police-unions/>; Place, *supra* note 29, at 284–85.

33. Rushin, *supra* note 31, at 550–51, 580–81 (2019).

34. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) for the standard of qualified immunity; although this case applies qualified immunity to an Attorney General, the standard extends to the police as well. See *also, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (establishing a lower standard for warrantless arrests from "probable cause" to "reasonable suspicion" to enable the "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat"); *Tennessee v. Garner*, 471 U.S. 1, 3–4, 7 (1985) (introducing an "objective reasonableness" standard for police use of deadly force in this case against a fleeing unarmed teenager); *Graham v. Connor*, 490 U.S. 386, 387–88, 396–97 (1989) (upholding an "objective reasonableness" standard for alleged excessive force in police arrests, stops, or seizures, taking into account that "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation"); *Whren v. United States*, 517 U.S. 806, 816, 819 (1996) (upholding unanimously the use of pretextual traffic stops so long that even a minor traffic violation had been committed); *Illinois v. Wardlow*, 528 US 119, 119 (2000) (holding that the police may use being in a "high crime area" to determine whether there is reasonable suspicion and justify a stop); *Heien v. North Carolina*, 574 U.S. 54, 68 (2014) (holding that an officer may engage in a traffic stop where the individualized suspicion is the product of a reasonable mistake of law); *Vega v. Tekoh*, 142 S. Ct. 2095, 2101, 2108 (2022) (holding that a violation of *Miranda* warnings under the Fifth Amendment does not provide the basis for a section 1983 claim against the offending officer); Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV., 149, 158 (1998) ("However, a line of Supreme Court cases subsequently erected nearly insurmountable standing requirements for plaintiffs pursuing equitable relief against police departments.").

35. See *Lawful But Awful: High Burden for Prosecution of Bad Police Actions*, AM. BAR ASS'N (Feb. 16, 2020), [https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/\\_lawful-but-awful-high-burden-for-prosecution-of-bad-police-act/](https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/_lawful-but-awful-high-burden-for-prosecution-of-bad-police-act/); Kelly M. Hogue, *When an Officer Kills: Turning Legal Police Conduct into Illegal Police Misconduct*, 3 TEX. L. REV. 601, 603–11 (2020); see also Kristy Parker, *Prosecutors Need to Do Their Part*, ATLANTIC (June 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/prosecutors-need-to-do-their-part/612997/> ("But even prosecutors with an interest in fighting police abuse . . . can be too hesitant to bring police-misconduct cases, especially when the bad conduct unfolds quickly or doesn't result in a serious physical injury . . . Existing laws with difficult burdens of proof (and which are indeed in need of reform) are one reason.").

36. Jon Swaine, *Ties that Bind: How the Bond Between Police and Prosecutors Impedes Justice*, GUARDIAN (Dec. 31, 2015), <https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings>.

### C. *The Deterrent Effect of Public Shame*

Contemporary academics considering the effectiveness of legal sanctions in deterring crime have reached conflicting results,<sup>37</sup> but much research suggests that the extralegal punishment of *public shame* has a deterrent impact on wrongdoing. The origins of public shame lie in deterrence theory: it developed as a “means of promoting obedience to the rules that helped humans live and survive together.”<sup>38</sup> The use of public shaming as a deterrent is intertwined with American history. The Puritans employed public stocks, whipping, branding of letters,<sup>39</sup> and even exile to deter deviant behavior.<sup>40</sup> Benjamin Rush, a signatory of the Declaration of Independence, went so far as to comment that public shaming in the United States is “universally acknowledged to be a worse punishment than death.”<sup>41</sup> Today, many judges still rely upon public shame as punishment, whether it be forcing criminals to publicly wear signs which advertise their wrongdoing<sup>42</sup> or to complete community service in costume.<sup>43</sup> These controversial punishments “work because shame is effective in altering the behavior of individuals.”<sup>44</sup> Theoretically, “[f]ear of public exposure and community disapproval . . . [are] extremely effective [in] deterr[ing] crime . . . [and] can serve as a general deterrent to the entire public by reinforcing the community’s norms.”<sup>45</sup>

---

37. Much research has been conducted on whether legal sanctions deter crime, with mixed results. Generally, threats of criminal sanctions deter crime based on how well-known the punishment is and the high level of certainty of punishment, but there are many confounding variables. See George Antunes & A. Lee Hunt, *Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis*, 64 J. CRIM. L. & CRIMINOLOGY 486, 489–90 (1973) (reviewing existing research on the relationship between deterrence and the certainty and severity of punishment); Tomlinson, *supra* note 16, at 34. For example, highly “deterrent” laws, such as three strike laws, which are well-known and have a high level of certainty, have not deterred crime because there are other socioeconomic and environmental factors which lead to crime. In fact, harsh laws are related to increased levels of crime in some instances. See Tomislav V. Kovandzic, John J. Sloan III & Lynne M. Vieraitis, “*Striking Out*” as Crime Reduction Policy: The Impact of “Three Strikes” Laws on Crime Rates in U.S. Cities, 21 JUST. Q. 207, 207 (2004); VALERIE WRIGHT, SENT’G PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 6–8 (2010).

38. Joseph Burgo, *Shame Has Fallen out of Fashion, But It Can Be a Force for Good*, WASH. POST (Nov. 17, 2017), [https://www.washingtonpost.com/outlook/shame-has-fallen-out-of-fashion-but-it-can-be-a-force-for-good/2017/11/17/735af0d4-ca3b-11e7-8321-481fd63f174d\\_story.html](https://www.washingtonpost.com/outlook/shame-has-fallen-out-of-fashion-but-it-can-be-a-force-for-good/2017/11/17/735af0d4-ca3b-11e7-8321-481fd63f174d_story.html).

39. This punishment is centered in NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 56–57 (Boston, James R. Osgood and Co. 1878).

40. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1881–82 (1991).

41. BENJAMIN RUSH, *AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS, AND UPON SOCIETY* 8 (1787), <https://quod.lib.umich.edu/e/evans/N16141.0001.001/1:2?rgn=div1;view=fulltext>.

42. See *United States v. Gementera*, 379 F.3d 596, 598 (9th Cir. 2004).

43. See David M. Reutter, *For Shame! Public Shaming Sentences on the Rise*, PRISON LEGAL NEWS (Feb. 4, 2015), <https://www.prisonlegalnews.org/news/2015/feb/4/shame-public-shaming-sentences-rise/> (“Judge Cicconetti ordered Jeffrey Gregg to complete 400 hours of community service – while wearing a Santa Claus hat . . . ‘It is too easy to put people in jail,’ Cicconetti said. ‘They go to jail and . . . it does not deter the crime.’”).

44. Dustyn Coontz, *Beyond First Blush: The Utility of Shame as a Master Emotion in Criminal Sentencing*, 2015 MICH. ST. L. REV. 415, 444 (2015).

45. Lauren M. Goldman, *Trending Now: The Use of Social Media Websites in Public Shaming Punishments*, 52 AM. CRIM. L. REV. 415, 419, 431 (2015).

In 1980, Harold G. Grasmick and Donald E. Green were among the first to publish a formal study hypothesizing that the “threat of social disapproval” can deter wrongdoing.<sup>46</sup> Their study, while limited to a small sample of adults in one city, found that social disapproval may deter wrongdoing in some situations.<sup>47</sup> Importantly, they found a trend that individuals who “[f]ear[] social disapproval . . . will conform to the law regardless of their perceptions of the threat of legal punishment.”<sup>48</sup> This hypothesis has been retested in other contexts, including performance-enhancing drug use by amateur athletes,<sup>49</sup> drunk driving among teenagers,<sup>50</sup> and littering within a midwestern community,<sup>51</sup> with similar results: the fear of public shame has a deterrent effect on wrongdoing.<sup>52</sup> These actors, in support of Beccaria and Bentham’s theory, are deterred by the potential consequences for their wrongdoing—but those consequences need not be legal.

The rise of social media activism is a modern day case study of how public shaming acts as a deterrent to wrongdoing.<sup>53</sup> Perhaps the most poignant example is the #MeToo movement, where online exposure of affluent sexual harassers, like Bill O’Reilly, Harvey Weinstein, and Roger Ailes, led to extralegal sanctions such

---

46. See Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980).

47. *Id.* at 329, 332–34.

48. *Id.* at 333–34.

49. See, e.g., B. Andrew Cudmore & Sherry Jensen, *Performance Enhancing Drug Usage: The Influence of Adverse Health Effects and Public Embarrassment*, 12 J. MGMT. & ENG’G INTEGRATION 16, 22 (2019) (“Yet the causal design of this study revealed that only the perceived social cost of embarrassment [meaning, social disapproval] significantly affected attitudes toward PEDs.”).

50. See, e.g., Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865, 865, 878–80 (2001) (finding that the “the extralegal consequences of crime seem at least as great a deterrent as do the legal consequences” to drunk driving among college students).

51. See, e.g., Harold G. Grasmick, Robert J. Bursik, Jr. & Karyl A. Kinsey, *Shame and Embarrassment as Deterrents to Noncompliance with the Law: The Case of an Antilittering Campaign*, 23 ENV’T. AND BEHAV. 233, 247–48 (1991) (finding that ad campaigns threatening shame and embarrassment effectively lowered the rate of littering in an Oklahoma town).

52. See, e.g., Harold G. Grasmick, Brenda Sims Blackwell, Robert J. Bursick, Jr. & Suzanne Mitchell, *Changes in Perceived Threats of Shame, Embarrassment, and Legal Sanctions for Interpersonal Violence, 1982-1992*, 8 VIOLENCE & VICTIMS 313, 313, 321–23 (1993) (noting a public campaign against interpersonal violence among a sample of adults in a southwestern city resulted in an increase in “perceived threat of embarrassment [meaning, social disapproval] for physically hurting someone on purpose” over ten years); see also Gregory M. Zimmerman, *Beyond Legal Sanctions: The Correlates of Self-Imposed and Socially Imposed Extralegal Risk Perceptions*, 29 DEVIANT BEHAV. 157, 179 (2008) (“Not only have such non-formal sanctions [referring to ‘moral regret and the perceived risk of informal sanctions by family and friends’] been substantiated as highly influential, independent deterrents of criminal behavior, but most studies comparing the effects of legal and extralegal sanctions have concluded that extralegal sanctions are more important than legal sanctions in deterring criminal behavior.”).

53. See Lauren M. Goldman, *Trending Now: The Use of Social Media Websites in Public Shaming Punishments*, 52 AM. CRIM. L. REV. 415, 441–45 (2015). But see Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1044–51, 1057 (2016) (arguing that online public shaming is “overdetermined” and arbitrary, meaning, the punishments are not proportional to the crime per classic deterrence theory).



as social ostracization and job loss.<sup>54</sup> #MeToo caused what the *New York Times* described as a “seismic shift in what behavior is tolerated in the workplace” and put workers on guard about what behavior would result in shaming and repercussions if exposed.<sup>55</sup> One study even found that “74% of women [employees] said they thought they would be more willing now to speak out against harassment, and 77% of men anticipated being more careful about potentially inappropriate behavior [in the workplace].”<sup>56</sup>

From its very roots, public shaming has been a tool of deterrence to reinforce community norms.<sup>57</sup> From Puritan exiling to modern “canceling”<sup>58</sup> of wrongdoers on Twitter, the intent has always been to prevent wrongdoing through communal outrage.

## II. EFFECTIVE USES OF PUBLIC SHAME AS EXTRALEGAL DETERRENTS TO POLICE MISCONDUCT

While the police are shielded from *legal* discipline by a force of legal precedent, union bargaining power, and prosecutorial discretion,<sup>59</sup> the *extralegal* threat of public shame can be a powerful deterrent against misconduct. The limited existing research on the relationship between the police and public shame suggests that “extralegal sanctions [referring to shame and embarrassment] provide[] a strong deterrent against misconduct . . . consistent with extant deterrence work.”<sup>60</sup> This Part will consider how bystander video surveillance of the police has increased public shame of their misconduct and thereby deterred future misconduct. Body-worn cameras demonstrate that filming the police may have a deterrent effect on their propensity to commit misconduct; however, internal police department policies about body-worn cameras limit those deterrent effects. Meanwhile, when police misconduct is filmed by and distributed among the public, public shame provides an extralegal deterrent to police misconduct.

### A. *Body-worn Cameras Demonstrate that Filming the Police Can Deter Misconduct*

In the wake of the deaths of Michael Brown and Eric Garner at the hands of police officers, reformists hailed body-worn cameras as a game-changing solution

54. See Burgo, *supra* note 38.

55. See Joy Leopold, Jason R. Lambert, Ifeyimika O. Ogunyomi & Myrtle P. Bell, *The Hashtag Heard Round the World: How #MeToo Did What Laws Did Not*, 40 EMERALD INSIGHT 461, 469 (2019).

56. Tim Bower, *The #MeToo Backlash*, HARV. BUS. REV. (2019), <https://hbr.org/2019/09/the-metoo-backlash>.

57. See Burgo, *supra* note 38.

58. See *What It Means to Get ‘Cancelled,’* MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/cancel-culture-words-were-watching> (last visited Dec. 2, 2021).

59. See *supra* Part I.B.

60. See Pogarsky & Piquero, *supra* note 21, at 381; see generally Harris & Worden, *supra* note 18, at 1263–64 (reviewing why formal sanctions fail to deter police misconduct).

to police misconduct.<sup>61</sup> Despite the “tremendous promise [of body-worn cameras] for enhancing transparency, promoting accountability and advancing public safety for law enforcement officers and the communities they serve,”<sup>62</sup> deadly police encounters *rose* even after nearly half of all national police departments outfitted their officers with the cameras.<sup>63</sup>

Multiple researchers have studied what accounts for the failed promise of body-worn cameras, with incongruent results. In June of 2020, Michael White, the Co-Director of Training and Technical Assistance for the Justice Department’s body-worn camera policy, found that among the nineteen available studies regarding the impact of body-worn cameras on police use of force within local departments, eleven showed a reduction in use of force.<sup>64</sup> In some cases, use of force incidents by the local departments studied decreased by almost sixty percent,<sup>65</sup> and use of force complaints in some departments even decreased by seventy-five percent.<sup>66</sup> Other studies claim there was no decrease in use of force incidents after the introduction of body-worn cameras.<sup>67</sup>

Barak Ariel, William Farrar, and Alex Sutherland addressed this inconsistency as a function of the “deterrence spectrum,” or the impact of officer discretion on

---

61. See Kami Chavis Simmons, *Body-Mounted Police Cameras: A Primer on Police Accountability vs. Privacy*, 58 HOW. L.J. 882, 882–83 (2015); Press Release, Dep’t of Just. Off. of Pub. Affs., Justice Department Awards over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States (Sept. 21, 2015), <https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>.

62. David Jackson, *Obama Team Will Fund Police Body Camera Project*, USA TODAY (May 1, 2015), <https://www.usatoday.com/story/news/nation/2015/05/01/obama-police-body-cameras-josh-earnest-baltimore/26696517/>.

63. See *Deadly Police Encounters Are Rising. How Much Do Body-Worn Cameras Help?*, CBS NEWS (June 25, 2021), <https://www.cbsnews.com/news/deadly-police-encounters-body-worn-cameras/>.

64. See Candice Norwood, *Body Cameras Are Seen as Key to Police Reform But Do They Increase Accountability?*, PBS (June 25, 2021), <https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability>.

65. See Barak Ariel, William A. Farrar & Alex Sutherland, *The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANT. CRIMINOLOGY 509, 524 (2014) [hereinafter *Effects*]; Stay Ziv, *Study Finds Body Cameras Decrease Police’s Use of Force*, NEWSWEEK (Dec. 28, 2014, 2:31 PM), <http://www.newsweek.com/amidst-debate-study-finds-body-cameras-decrease-polices-use-force-295315>.

66. OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 6 (2014) (citing Harold Rankin, *End of Program Evaluation and Recommendations: On-Officer Body Camera System*, MESA POLICE DEP’T (2013)).

67. See, e.g., David Yokum, Anita Ravishankar & Alexander Coppock, *Evaluating the Effects of Police Body-Worn Cameras: A Randomized Control Trial* 11 (Oct. 20, 2017) (working paper), [https://bwc.thelab.dc.gov/TheLabDC\\_MPD\\_BWC\\_Working\\_Paper\\_10.20.17.pdf](https://bwc.thelab.dc.gov/TheLabDC_MPD_BWC_Working_Paper_10.20.17.pdf); Cynthia Lum, Christopher S. Koper, David B. Wilson, Megan Stoltz, Michael Goodier, Elizabeth Eggins, Angela Higginson & Lorraine Mazerolle, *Body-Worn Cameras’ Effects on Police Officer and Citizen Behavior: A Systematic Review*, 16 CAMPBELL SYSTEMATIC REV. e1112 (2020) (A meta-analysis finding that “the use of BWCs [body-worn cameras] does not have consistent or significant effects on officers’ use of force, arrest activities, proactive or self-initiated activities, or other measured behaviors.”); Ethan Zuckerman, *Why Filming Police Violence Has Done Nothing to Stop It*, MIT TECH. REV. (June 3, 2020), <https://www.technologyreview.com/2020/06/03/1002587/sousveillance-george-floyd-police-body-cams/>.

the deterrent effect of body-worn cameras.<sup>68</sup> When department policies afford officers the discretion to decide when to turn on their cameras and officers apply strong discretion on when to turn the cameras on and off, the odds of a use of force incident taking place may increase by seventy percent.<sup>69</sup> This is because such a policy “will not deter [an officer] from applying unnecessary force, because the sanction risk is low. The camera could . . . be turned on while the parties are already in a physical struggle, and the antecedents of this aggressive interaction have gone unrecorded.”<sup>70</sup> This is what happened “[i]n 2016 . . . [when] a Washington, DC, police officer simply didn’t turn on his camera until after he shot Terrence Sterling.”<sup>71</sup> In contrast, in cases where officers did keep their cameras on throughout their interactions with civilians, use of force incidents decreased by nearly forty percent.<sup>72</sup> This outcome is consistent with deterrence theory because “[d]eterrence theory relies heavily on self-awareness and how being watched would lead to socially desirable behaviors.”<sup>73</sup> Research on body-worn cameras supports the conclusion that police oversight via video can deter misconduct because the police are aware that their actions are being filmed and the threat of punishment for misconduct is higher. However, this deterrent effect is frustrated when officers are afforded discretion in using body-worn cameras.

Officer discretion is not the only barrier to the efficacy of body-worn cameras; because “bodycams are controlled by the police themselves . . . they don’t produce [effective] transparency and accountability.”<sup>74</sup> Internal department policies often bar videos from being released to the public in a timely manner (if released at all).<sup>75</sup> Public access to these videos aside, police unions have kept these videos from being released even as evidence in private investigations of police

---

68. Barak Ariel, Alex Sutherland, Darren Henstock, Josh Young & Gabriela Sosinski, *The Deterrence Spectrum: Explaining Why Police Body-Worn Cameras ‘Work’ or ‘Backfire’ in Aggressive Police–Public Encounters*, 12 POLICING: J. POL’Y AND PRAC. 1, 7–8 (2017) [hereinafter *Deterrence*].

69. See *id.* at 8 (citing Barak Ariel, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jayne Sykes, Simon Megicks & Ryand Henderson, *Report: Increases in Police Use of Force in the Presence of Body-Worn Cameras are Driven by Officer Discretion: A Protocol-Based Subgroup Analysis of Ten Randomized Experiments*, 12 J. EXPERIMENTAL CRIMINOLOGY 453 (2016)).

70. *Id.* at 14.

71. See Nathalie Baptiste, *Why Body Cameras Can Still Fail to Hold Police Accountable*, MOTHER JONES (May 3, 2021), <https://www.motherjones.com/crime-justice/2021/05/why-body-cameras-can-still-fail-to-hold-police-accountable/>.

72. See Ariel, Sutherland, Henstock, Young & Sosinski, *supra* note 68, at 8.

73. See TONY FARRAR, SELF-AWARENESS TO BEING WATCHED AND SOCIALLY-DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF BODY-WORN CAMERAS ON POLICE USE-OF-FORCE, NAT’L POLICE FOUND. 3 (Mar. 2013), <https://www.policefoundation.org/wp-content/uploads/2015/06/The-Effect-of-Body-Worn-Cameras-on-Police-Use-of-Force.pdf>.

74. See Hao, *supra* note 5.

75. See, e.g., *id.*; Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 393, 416–17 (2016); Radley Balko, *Opinion: Police Cameras are Important, But They’re Useless Without Policies to Ensure They’re Used Properly*, WASH. POST (Aug. 19, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/08/19/police-cameras-are-important-but-theyre-useless-without-proper-policies-to-ensure-theyre-used-properly/>; ALLISSA V. RICHARDSON, BEARING WITNESS WHILE BLACK 184 (2020) (“Most often, however, police do not release these videos immediately.”).

misconduct. For example, “[i]n New York City, the Civilian Complaint Review Board—the very agency with the power to investigate allegations of police abuse—said . . . that it hadn’t received footage it requested in hundreds of cases. Sometimes . . . the NYPD denied that tapes existed when it had them all along.”<sup>76</sup> Even when such videos are released, sometimes they have been altered or falsified.<sup>77</sup>

While body-worn cameras have the potential to deter the police from misconduct, they cannot create the necessary deterrent threat of sanction when internal policies protect officers from the consequences of their actions. As discussed in Part I.B, without the threat of legal sanctions for police misconduct, the rational cost-benefit analysis under deterrence theory is warped in favor of committing misconduct.

### *B. Bystander Videos Employ Public Shame as a More Effective Extralegal Deterrent Against Police Misconduct*

#### 1. How Bystander Videos Lead to Public Shaming

Smartphone technology and social media have enabled the public to pull back the curtain on police misconduct and introduce a powerful deterrent—widespread public shame. Traditional forms of legal sanctions—including disciplinary records, judicial punishment, and body-worn camera footage used as evidence of wrongdoing—have failed to deter misconduct because police unions and departments are able to control information related to officer wrongdoing.<sup>78</sup> Bystander video surveillance of police misconduct strips the police of their control over the narrative, and “empower[s] the public to scrutinize the conduct of the police.”<sup>79</sup> These videos have galvanized public shame, empowering one of the largest police accountability and racial justice movements ever—the Black Lives Matter Movement.<sup>80</sup>

Thirty years ago, a key moment in the rise of bystander filming of the police occurred when George Holliday recorded four Los Angeles Police Department officers beating Rodney King.<sup>81</sup> When the officers were acquitted for their

76. Louise Matsakis, *Body Cameras Haven’t Stopped Police Brutality. Here’s Why*, WIRED (June 17, 2020), <https://www.wired.com/story/body-cameras-stopped-police-brutality-george-floyd/>.

77. See, e.g., *id.*; RICHARDSON, *supra* note 75, at 184 (“When footage is released . . . manipulated audio or video quality could leave [viewers] more confused than ever.”); Kevin Rector, *Baltimore Police Officer Found Guilty of Fabricating Evidence in Case Where His Own Body Camera Captured the Act*, BALT. SUN (Nov. 9, 2018, 12:00 PM); Evan Sernoffsky, *Edited Body Camera Footage Raises Questions about Police Accountability*, FOX KTVU (Sept. 23, 2020), <https://www.ktvu.com/news/edited-body-camera-footage-raises-questions-about-police-accountability>.

78. See *supra* Part I.B.

79. Bryce Clayton Newell, *Context, Visibility, and Control: Police Work and the Contested Objectivity of Bystander Video*, 21 NEW MEDIA & SOC’Y 60, 63 (2019).

80. See Larry Buchanan, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

81. See Simonson, *supra* note 75, at 408; Newell, *supra* note 79, at 62; RICHARDSON, *supra* note 75, at 3–4.

misconduct, riots broke out as the public sought to extrajudicially hold the police accountable. The driving force of this public shaming was the bystander video: “‘There was ocular proof of what happened . . . ,’ [said Jody David Armour, a law professor at the University of Southern California] of the videotape. ‘[A]nd yet, we saw a verdict that told us we couldn’t trust our lying eyes.’”<sup>82</sup>

The Rodney King protests reflect a pattern that persists today with the Black Lives Matter Movement, where bystander video drives mass public outrage regarding instances of police misconduct. The rallying cry of Black Lives Matter protestors, “I can’t breathe,” was inspired by Eric Garner, an unarmed Black man who was captured on bystander video uttering these words as he was fatally pinned to the ground by a police officer.<sup>83</sup> In response to the acquittal of the officer who killed Garner, nationwide protests against police brutality erupted, in stark parallel with the Rodney King protests twenty-five years before.<sup>84</sup> In 2020 alone, “hundreds more incidents of police brutality [were] uploaded to social media” and were viewed tens of millions of times, including bystander videos where “[a] mounted officer tramples a woman[,] [c]op cars accelerate into a crowd, [and] [o]fficers shove an elderly man, who bashes his head when he hits the pavement, and walk away as his blood pools on the ground.”<sup>85</sup> These videos resulted in “over 450 protests in the US and hundreds more in dozens of countries.”<sup>86</sup> Impressively, these videos can motivate typically disinterested groups to voice their opposition to police misconduct. A study by the Massachusetts Institute of Technology found that the Black Lives Matter protests are increasingly the most racially diverse in history as “white Americans have slowly converged with [B]lack Americans on the belief that police brutality is a major cause of violence.”<sup>87</sup> These results led the researchers to conclude that “smartphones are . . . the best tool for proving police brutality and shifting public opinion.”<sup>88</sup>

---

82. Anjul Sastry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR NEWS (Apr. 26, 2017), <https://www.wbur.org/npr/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>.

83. Erik Ortiz & Gabe Gutierrez, *For Eric Garner’s Mom, Video of Man Pleading ‘I Can’t Breathe’ to Police Is ‘Reoccurring Nightmare,’* NBC NEWS (May 26, 2020, 4:45 PM), <https://www.nbcnews.com/news/us-news/eric-garner-s-mom-video-man-pleading-i-can-t-n1215031>.

84. *See id.*

85. Hao, *supra* note 5.

86. *Id.*

87. *Id.*

88. *Id.*; *see also* Ashley K. Farmer, *Copwatchers: Citizen Journalism and the Changing Police-Community Dynamic* 37 (2016) (Ph.D. dissertation, University of Delaware), [https://udspace.udel.edu/bitstream/handle/19716/19904/2016\\_FarmerAshley\\_PhD.pdf?sequence=1&isAllowed=y](https://udspace.udel.edu/bitstream/handle/19716/19904/2016_FarmerAshley_PhD.pdf?sequence=1&isAllowed=y) (“Individual citizens filming the police are seen as a preferred method over body cameras because of who controls the medium and ultimately the act of recording itself, including dissemination of footage taken by the public.”).

## 2. The Deterrent Impact of Public Shame from Bystander Video on Police Misconduct

“Everybody’s trying to shame us. The legislators. The press. Everybody’s trying to shame us into being embarrassed of our profession . . . . We’ve been vilified.”<sup>89</sup>

While there is limited data and empirical research on the deterrent effect of bystander videos on police misconduct, ample informal evidence suggests that these videos can serve as a deterrent. When someone is being watched, they are more likely to alter their behavior to act positively—“to be on [their] best behavior.”<sup>90</sup> While the surveillance of body-worn cameras could deter police misconduct, deterrence is unlikely as the police know that videotaped misconduct likely will not be seen outside their departments and the odds of sanctions are low.<sup>91</sup> The deterrent effect of bystander videos lies in the fact that the public, rather than the police, take control of the narrative.<sup>92</sup> Where traditional systems of sanctioning fail, public bystander videos “shift[] the judgment of wrongdoing . . . into the hands of a potentially angry public.”<sup>93</sup> Bystander filming effectively deters police misconduct because the extralegal sanction of public shame is likely.

There are few empirical studies on this novel topic. Of the limited research that exists, one study shows that police officers feel more negatively about having their filmed conduct *uploaded* to YouTube or Facebook than they do about the *act* of bystander filming.<sup>94</sup> This demonstrates that officers significantly fear “the risk[] brought about by visibility and the persistent and perpetual memory of the internet . . . [and] their loss of (informational) power . . . .”<sup>95</sup> This conclusion is fortified by the anxiety police officers have towards “copwatchers,” or organized groups of

---

89. Boer Deng & Jessica Lussenhop, *George Floyd Death: What US Police Officers Think of Protests*, BBC NEWS (June 26, 2020), <https://www.bbc.com/news/world-us-canada-53159496>.

90. See Sander van Linder, *How the Illusion of Being Observed Can Make You a Better Person*, SCI. AM. (May 3, 2011), <https://www.scientificamerican.com/article/how-the-illusion-of-being-observed-can-make-you-better-person/> (summarizing studies finding that when subjects experience the sensation of being watched, they are more likely to positively alter their behavior); Jason Goldman, *How Being Watched Changes You—Without You Knowing*, BBC (Feb. 9, 2014), <https://www.bbc.com/future/article/20140209-being-watched-why-thats-good> (summarizing studies finding that children and adults will positively alter their behavior when they feel they are being watched); Simonson, *supra* note 75, at 413 (“Social science confirms that people behave better when they know that they are being watched.”); see also Farmer, *supra* note 88, at 37 (noting there is evidence that police behave differently when they are watched).

91. See Hao, *supra* note 5 (“Why rely on the presence of bystanders when police could be monitored at all times? Because bodycams are controlled by the police themselves, so they don’t produce the same transparency and accountability.”); see also *supra* Part I.B (discussing why formal punishments should deter police misconduct but have not).

92. See Simonson, *supra* note 75, at 396, 416–19.

93. Alberto R. Gonzales & Donald Q. Cochran, *Police-Worn Body Cameras: An Antidote to the “Ferguson Effect”?*, 82 MO. L. REV. 299, 321 (2017).

94. Newell, *supra* note 79, at 72 (2018).

95. *Id.*

civilians who film police interactions with the public to deter police misconduct.<sup>96</sup> Unlike bystanders, who typically film once a situation begins to escalate, cop-watchers make a point to continuously monitor the police. They make their presence known by wearing uniforms or otherwise vocalizing their identity.<sup>97</sup> A staple of copwatching is that videos of police misconduct are posted online, sometimes immediately, unlike body camera footage which is controlled by police departments.<sup>98</sup> The police know that “the observation of copwatchers is backed up by the implicit threat that any video captured can be used in the future, not only in formal legal proceedings . . . but also in the . . . public sphere.”<sup>99</sup> Thus, police anxiety regarding the public distribution of bystander videos means that “[c]itizen journalism can lead to modification of [their] behavior . . . .”<sup>100</sup>

Anecdotal evidence strongly suggests that public shaming has a deterrent effect on police misconduct—if not an *overdeterrent* one. With the rise of the Black Lives Matter Movement, FBI Director James Comey asserted that police officers felt “under siege” in “today’s YouTube world” where “officers [are] reluctant to get out of their cars and do the work that controls violent crimes . . . [while] being surrounded by young people with mobile cameras held high . . . .”<sup>101</sup> Various police chiefs echoed Mr. Comey’s sentiment that police officers “have stopped policing as aggressively as they used to, fearing that they could be . . . in a uniform featured on a career-ending viral video.”<sup>102</sup> At the same time, the murder rate increased by seventeen percent in fifty-six major U.S. cities.<sup>103</sup> This “Ferguson Effect,” coined by the Chief of St. Louis police,

suggests that officers are conscious of the negative publicity surrounding their profession, understand that their actions could be recorded by the public at any given time, and become less willing to do their job as a way to avoid being accused of racial profiling or excessive force. In turn, this de-policing leads to increases in crime.<sup>104</sup>

---

96. See generally Simonson, *supra* note 75, at 413–16 (“Social science confirms that people behave better when they know that they are being watched.”).

97. See *id.* at 410.

98. See *id.* at 414.

99. See *id.*

100. Farmer, *supra* note 88, at 150.

101. James Comey, Director, FBI, Remarks at the University of Chicago Law School: Law Enforcement and the Communities We Serve: Bending the Lines Toward Safety and Justice (Oct. 23, 2015).

102. See Aaron C. Davis, ‘YouTube Effect’ Has Left Police Officers under Siege, *Law Enforcement Leaders Say*, WASH. POST. (Oct. 8, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/10/08/youtube-effect-has-left-police-officers-under-siege-law-enforcement-leaders-say/>.

103. See Martin Kaste, *Murder Rate Spike Could Be ‘Ferguson Effect,’ DOJ Study Says*, NPR (June 15, 2016), <https://www.npr.org/2016/06/15/482123552/murder-rate-spike-attributed-to-ferguson-effect-doj-study-says>.

104. See Scott Wolfe & Justin Nix, *The Alleged “Ferguson Effect” and Police Willingness to Engage in Community Partnership*, 40 LAW & HUM. BEHAV. 1 (2015); see also Aaron C. Davis, *supra* note 102 (quoting former FBI Director Mr. James Comey that “[he doesn’t] like the term ‘post-Ferguson,’ because [he] actually

This “Ferguson Effect” suggests that public shame has deterred police misconduct *as well as* non-nefarious acts of policing. Such an outcome would undermine Beccaria’s conception of deterrence where “[t]he end of punishment . . . ought to be [to] make the strongest and most lasting impressions on the minds of others, with *the least torment to the body of the criminal*.”<sup>105</sup> A rational actor requires the minimum punishment appropriate in a given circumstance because if the pain of punishment outweighs its pleasure, the actor will avoid inoffensive conduct to protect themselves from undue backlash. The “Ferguson Effect” may be an example of *overdeterrence*, in which the police have been overly punished by public shaming and are hypersensitive about engaging with civilians. Consider, for instance, the seasoned Chicago police officer whose head was smashed into the pavement by a civilian; the officer never fought back because “she didn’t want her family or the department to go through the scrutiny the next day on the national news.”<sup>106</sup>

Many researchers have rejected the “Ferguson Effect,” finding that there are a number of unrelated factors which may have increased the murder rate in the relevant cities. This includes fewer 911 calls by those civilians distrustful of police intervention,<sup>107</sup> increased heroin trading,<sup>108</sup> falling populations,<sup>109</sup> higher poverty rates,<sup>110</sup> and increased unemployment.<sup>111</sup> Further, research from the Brennan Center in 2016 suggested that more than half of the increase in murders was localized in three U.S. cities—Chicago, Washington, D.C., and Baltimore.<sup>112</sup> The research implies that the increase in murders may be more related to local factors than a nationwide trend in public shaming of the police.<sup>113</sup> Thus, while the “Ferguson Effect” may not establish *overdeterrence*, it supports the conclusion

---

believe[s] the ‘YouTube era’ captures it better,” arguably emphasizing his potential belief that online public shaming of police has a strong deterrent effect on police behavior).

105. BECCARIA, *supra* note 7, at 47 (emphasis added).

106. Derek Hawkins, ‘Ferguson Effect’? Savagely Beaten Cop Didn’t Draw Gun for Fear of Media Uproar, Says Chicago Police Chief, WASH. POST (Oct. 7, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/10/07/ferguson-effect-savagely-beaten-cop-didnt-draw-gun-for-fear-of-media-uproar-says-chicago-police-chief/>.

107. See Mathew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOCIO. REV. 857, 870 (2016) (“An important implication of this finding is that publicized cases of police violence not only threaten the legitimacy and reputation of law enforcement; they also—by driving down 911 calls—thwart the suppression of law breaking, obstruct the application of justice, and ultimately make cities as a whole, and the black community in particular, less safe.”); see also German Lopez, *Did Protests over Police Shootings Cause a Rise in Murders? A Researcher Says. . . Maybe*, VOX (June 29, 2016), <https://www.vox.com/2016/5/23/11722634/ferguson-effect-richard-rosenfeld>.

108. See Shaila Dewan, *Deconstructing the Ferguson Effect*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/interactive/2017/us/politics/ferguson-effect.html>.

109. See Gonzales & Cochran, *supra* note 93, at 303.

110. *See id.*

111. *See id.*

112. See Alisa Tiwari, *Protests, Policing, and Crime: An Analysis of Evidence Regarding the Ferguson Effect*, J. PUB. & INT’L AFFS. 115, 120 (2016).

113. *Id.*



that the police are at least threatened by the public shame accompanying the online circulation of bystander videos.

Without a broad set of data made available by police departments, it is impossible to discern empirically whether police use of force incidents have declined as bystander surveillance has increased.<sup>114</sup> However, the limited research and ample anecdotal evidence that are available suggest public shame deters police misconduct.

### III. WHY PUBLIC SHAMING OF THE POLICE IS ONLY AN APPROPRIATE MEANS, NOT END, OF POLICE ACCOUNTABILITY

Public shaming may very well have a deterrent effect on police misconduct, but ultimately should be supported only as a *means* to changing the system rather than an *end*, or permanent fixture, of police accountability. Currently, public shaming is an important step towards ending police misconduct. The act of recording and uploading videos of police misconduct for public consumption is intended to undermine any misconception that our system is functioning correctly. The only way that the legislature and judiciary will feel the urgency to correct the laws and practices enabling police misconduct is if they hear public outcry. Public shame also signals to the police that their behavior violates community values and must change. However, public shaming is not the end of police accountability because the most functional rule of law is one in which the police and public follow the law out of respect for a system they believe is legitimate. This cannot occur when public shaming fosters the suspicion that the police will abuse their power and extrajudicial oversight must compensate for a weak system.

The aforementioned idea is rooted in the conception of a “legitimate” rule of law, articulated by Yale Law School Professor Tom Tyler. Tyler found that the fear of being caught or punished for wrongdoing is less effective in promoting obedience to the law than the belief that the system is legitimate.<sup>115</sup> Where people believe that the law is righteous and the system is fair, they are more likely to avoid wrongdoing out of “obligation and responsibility” than out of fear of punishment.<sup>116</sup> This is consistent with several studies on psychology, deterrence theory, and the law, which find that internal guilt over breaking the law is a more powerful deterrent to criminal behavior than “the more ‘public’ emotion arising from

---

114. See Jackman, *supra* note 22.

115. See Tom R. Tyler, Yale L. Sch., Keynote Address at SELA Conference in Mexico City: Legitimacy and the Maintenance of Public Order (June 7, 2012), [https://law.yale.edu/sites/default/files/documents/pdf/sela/Tyler\\_Mexico\\_talk\\_final.pdf](https://law.yale.edu/sites/default/files/documents/pdf/sela/Tyler_Mexico_talk_final.pdf) (“An organization or society whose governance is motivated only by incentives and sanctions is at risk of disintegrating during times of trouble or change. If a system enjoys widespread legitimacy, authorities can appeal to members based upon their shared purposes and values, providing the system with much-needed stability.”).

116. See Tom R. Tyler, *Procedural Justice, Legitimacy, and Effective Rule of Law*, 30 CRIME & JUST. 283, 306, 323 (2003) (“The important role legitimacy plays in shaping people’s law-related behavior indicates the possibility of a self-regulating society in which citizens internalize values that lead to voluntary deference to the law and to legal authorities.”).

exposure to disapproving others.”<sup>117</sup> Thus, public shaming cannot be relied on to end police misconduct. Public shaming of the police exposes the ways in which our system *lacks* legitimacy. Accepting shaming as a permanent form of accountability implies that the system cannot reform and needs extrajudicial oversight, rather than legitimate rule of law, to deter misconduct.

Jocelyn Simonson, a professor at Brooklyn Law School, offers an opposing viewpoint. She favors state-sponsorship of “collective contestation,” or collective resistance by marginalized groups to reclaim power within our system.<sup>118</sup> Marginalized groups are limited to superficial involvement in politics, like listening sessions, while the elites maintain the power to determine how debates are conducted and what reforms are appropriate.<sup>119</sup> Instead, Simonson argues that effective reform requires a redirection of power from the elite to the marginalized through “adversarial, contestatory forms of participation and resistance.”<sup>120</sup> To achieve this, the state should “enact policies that allow for disruptive but nonviolent forms of protest and intervention.”<sup>121</sup>

Examples of collective contestation that “put[] forth new visions of what our criminal justice system can and should look like” are courtwatching, prison-striking, and copwatching.<sup>122</sup> These tactics implicitly utilize public shame as deterrence. Similar to the copwatchers addressed in Part II.B.2, courtwatchers observe local court proceedings and “present [to the public] the results of their observations in their own words . . . independent of official accounts.”<sup>123</sup> Likewise, groups organize prison-striking to expose abhorrent prison conditions to the public.<sup>124</sup> The goal of contestation is the same as that of posting bystander videos online: to challenge elites, like the police or the courts, by empowering the public to critically observe our broken system. The resulting public shame deters those elites from continuing their abuses of power. While Simonson does not directly endorse public shame as a permanent form of police accountability, she supports contestation

---

117. See June P. Tangney, Jeff Stuewig & Logaina Hafez, *Shame, Guilt and Remorse: Implications for Offender Populations*, 22 J. FORENSIC PSYCHIATRY & PSYCH. 706, 707–08; see also Harold G. Grasmick & Robert J. Bursik Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 LAW & SOC’Y. REV. 837, 853–56 (1990) (finding that internal shame is the threat that has the greatest deterrent effect of an arrest); Toni Makkai & John Braithwaite, *The Dialectics of Corporate Deterrence*, 31 J. RSCH. CRIME & DELINQ. 347, 360 (Nov. 1994) (“Theorists often posit that self-disapproval is a more immediate and potent sanction than disapproval by others . . . it can begin to influence an actor as soon as an act is contemplated and before it is committed, whereas social disapproval and formal punishment can only be mobilized after the event and only in circumstances where others acquire evidence of who committed the act.”); J. Daw Holloway, *Guilt Can Do Good*, 36 MONITOR ON PSYCH. 22 (2005) (“Dr. Tangney] urged corrective authorities to emphasize moral change and action [meaning, guilt], not anxiety and shame.”).

118. Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 Nw. U. L. REV. 1609, 1609, 1622 (2017).

119. See *id.* at 1610–11.

120. See *id.* at 1612.

121. *Id.* at 1622.

122. *Id.* at 1617–21.

123. See *id.* at 1617–18.

124. See *id.* at 1619–20.

statutes that would effectively imbed public shame into our system, because public shame is critical to how contestation destabilizes power.<sup>125</sup> However, public shaming of the police should encourage reforms to our system, not assume a permanent role within it. The goal of rendering contestation—and, implicitly, public shame—a permanent form of accountability assumes several positions which would establish an illegitimate and dysfunctional rule of law.

First, by endorsing an adversarial<sup>126</sup> relationship between the police and public, Simonson ignores that a legitimate rule of law requires cooperation between these parties. Contestation is inherently adversarial because it involves public shame. It is a tool to alert the police that if they abuse their power, public shame will be used to reclaim it. Thus, any system that relies on shame anticipates that the police will behave illegitimately. Consider Simonson's argument that the state should facilitate copwatching as a form of contestation.<sup>127</sup> By recording the police and publicizing their misconduct, disempowered groups may “challenge[] the traditional monopoly that courts and police officers have to determine what is ‘reasonable’ or ‘suspicious’ under the Fourth Amendment [a]nd . . . can in turn affect larger legal and constitutional understandings [by the public and judiciary].”<sup>128</sup> Here, Simonson touches on the value of public shame as a *means* of changing the system. Because the police are supposed to uphold legitimate rule of law, videos depicting officer misconduct are abhorrent to the public. When our courts excuse such misconduct,<sup>129</sup> it becomes clear that our laws and Constitution are being interpreted illegitimately. By Simonson's own admission, public shaming of the police through copwatching can influence judicial reform.<sup>130</sup> What this position overlooks is that reform should enact a system where there is no longer a place for an adversarial relationship between the police and public. The public should trust that the police are not abusing their power and, if otherwise, our legal system will punish them. Conversely, permanent contestation would imply that legitimate rule of law is futile because the police and judiciary will always threaten the rights of citizens.

---

125. *See id.* at 1622.

126. *See id.* at 1612 (“A complete blueprint for democratic criminal justice requires embracing *adversarial*, contestatory forms of participation and resistance that go beyond the decorum of calm deliberation to build power and push for transformation.”) (emphasis added).

127. *Id.* at 1622. Simonson notes:

The state should facilitate—rather than silence—the efforts of disenfranchised groups to participate in criminal justice through contestatory modes of popular resistance. All too often, police and courts meet bottom-up participatory tactics with resistance, calling them disruptive and harmful to the decorum of everyday justice. [For example,] [p]olice arrest organized copwatchers for filming . . .

*Id.*

128. *Id.* at 1618–19.

129. *See* Levinson, *supra* note 32 (describing instances of police misconduct).

130. *See* Simonson, *supra* note 118, at 1620–21. Simonson even acknowledges that contestation “destabilizes [the] entrenched legal understandings upon which the *legitimacy* of the criminal justice system relies.” *Id.* (emphasis added).

Therefore, while the state may consider contestation as a short-term avenue to reform, it should not permanently adopt it as a form of police oversight.

Further, adopting contestation as an end of police oversight would inhibit effective policing from a practical standpoint. A “well-functioning police force that maintains order through *legitimate power* is vital to maintain public order, safety, and security”<sup>131</sup> and legitimacy is not achieved “even primarily . . . by performance [but] [r]ather [by] the views of the public . . . [on] the manner in which the police exercise their authority.”<sup>132</sup> Public trust is therefore necessary for the police to feel legitimate, which in turn enables officers to serve with greater assurance.<sup>133</sup> It also allows the police more open communication with the public which is vital to preventing and solving crimes.<sup>134</sup> Again, the police *should* feel a lack of legitimacy currently—police misconduct is an abuse of power that must be addressed and reformed. But police trust and legitimacy are essential to effective police service and, thus, reform to reestablish that trust and legitimacy is needed.

Studies have shown that if the public view the police as illegitimate, instances of violence will increase “because [civilians] believe that they cannot depend on the police to help them.”<sup>135</sup> This is consistent with the “Ferguson Effect” discussed in Part II.B.2, which posits that violence increased in the wake of widespread bystander videos of police misconduct because citizens were distrustful of the police and unwilling to call 911.<sup>136</sup> By sponsoring public shaming as a form of accountability, the state would be telling the public to remain wary even when the police are employing legitimate practices. The public will be less likely to seek police assistance when needed, and the public may, dangerously, ignore good-faith policing directives out of suspicion.<sup>137</sup> Thus, a permanent state of contestation

---

131. See Lana M. Browning, Mara Merlino & Johnathon Sharp, *Citizen Journalism and Public Cynicism toward Police in the USA*, 36 J. POLICE & CRIM. PSYCH. 372, 375 (2020) (emphasis added).

132. See Tyler, *supra* note 115, at 351; see also Farmer, *supra* note 88, at 35 (arguing that a “trusting public can enhance effectiveness of police organizations” by improving their sense of legitimacy).

133. Farmer, *supra* note 88, at 32.

134. See generally DEP’T OF JUST. COMMUNITY RELATIONS SERVICE, IMPORTANCE OF POLICE-COMMUNITY RELATIONSHIPS AND RESOURCES FOR FURTHER READING 1 (2021), <https://www.justice.gov/file/1437336/download> (discussing how mutual trust enables greater cooperation between police and communities); see also Justin Nix & Scott E. Wolfe, *Sensitivity to the Ferguson Effect: The Role of Managerial Organizational Justice*, 47 J. OF CRIM. JUST. 12, 14 (Dec. 2016) (discussing how officers who believe citizens have worse opinions of them are less likely to engage in successful crime reduction strategies).

135. See Browning, Merlino & Sharp, *supra* note 131, at 375; see generally Jonathan Intravia, Andrew J. Thompson & Justin T. Pickett, *Net Legitimacy: Internet and Social Media Exposure and Attitudes Toward the Police*, 40 SOCIO. SPECTRUM 58, 58–59 (2020) (finding that consumption of negative media about police erodes civilian belief in police legitimacy).

136. See Kaste, *supra* note 103.

137. Tyler, *supra* note 115, at 286.

People also accept the directives of police officers . . . because they believe that such legal authorities are entitled to be obeyed. This feeling of obligation is rooted in a general judgment that the police are legitimate or in features of the situation or the actions of particular police officers that create feelings of legitimacy . . . .

*Id.*

would solidify an adversarial relationship between the police and public, thereby undermining legitimate policing and rendering society more unsafe.

Second, public shaming is inspiring reform to create a legitimate rule of law where contestation is unnecessary—thus, maintaining public shaming would impede the very goals of reform. The illegitimacy of our system is being exposed and reformed due to public shaming. Famously, Daniella Frazier’s bystander video of George Floyd’s killing, in which an officer kneeled on Floyd’s neck for over eight minutes as his fellow officers looked on, revealed that the police report filed on the incident contained false information.<sup>138</sup> Her footage was featured heavily in the trial against the offending officer, Derek Chauvin, and helped lead to his conviction on murder and manslaughter charges.<sup>139</sup> The jury was influenced by public shame as they “presumably understood that the larger crowd [of Black Lives Matter protestors] had the ability to act [and] to take to the streets” if the video evidence resulted in an acquittal.<sup>140</sup> Public shame signaled to the jury that police misconduct, particularly when caught on video, may not go unpunished, and led to judicial sanctions against Officer Chauvin.

Furthermore, several high-profile politicians who had previously criticized the Black Lives Matter protests pivoted to support the cause over the course of the George Floyd trial.<sup>141</sup> Politicians recognized the public mandate and refocused on police reform, with governors nationwide signing over 240 police reform bills in the year following Floyd’s death.<sup>142</sup> These bills include banning police chokeholds and tear gas, enforcing body-worn camera policies, and more.<sup>143</sup> Similarly, in

---

138. See Audra D. S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. TIMES (May 26, 2020, updated Nov. 24, 2021), <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html>.

139. See Jeannie Suk Gersen, *The Vital Role of Bystanders in Convicting Derek Chauvin*, NEW YORKER (Apr. 21, 2021), <https://www.newyorker.com/news/our-columnists/the-vital-role-of-bystanders-in-convicting-derek-chauvin>.

140. See *id.*; see also Nesrine Malik, *The George Floyd Verdict Would Not Have Happened Without Months of Protests*, GUARDIAN (Apr. 25, 2021), <https://www.theguardian.com/commentisfree/2021/apr/25/justice-george-floyd-streets-courtroom-blm-protests> (arguing that public opinion jumpstarted an otherwise broken justice system into action); Gonzales & Cochran, *supra* note 93, at 321–22 (“Additionally, public outrage and mob mentality in response to a publicly available video can potentially influence the decisions of senior officials in subsequent disciplinary actions against officers and sway jury opinion in subsequent litigation.”).

141. See Malik, *supra* note 140.

142. See Liz Crampton, *States Passed 243 Policing Bills - and Left Activists Wanting*, POLITICO (May 26, 2021), <https://www.politico.com/news/2021/05/26/states-policing-bills-490850>.

143. See Orion Rummeler, *The Major Police Reforms Enacted Since George Floyd’s Death*, AXIOS (Oct. 1, 2020), <https://www.axios.com/police-reform-george-floyd-protest-2150b2dd-a6dc-4a0c-a1fb-62c2e999a03a.html>. Consider that in Washington, D.C., a reform bill has been proposed which “prohibits officers from reviewing their body-worn camera footage; requires that police and the mayor make the name of an officer involved in a serious use of force public, as well as their body-cam footage, within 72 hours . . . [and] expands [the] Use of Force Review Board.” See Will Vitka & Abigail Constantino, *DC Council Unanimously Approves Sweeping Police Reforms in Emergency Legislation*, WTOP NEWS (June 9, 2020), <https://wtop.com/dc/2020/06/dc-council-police-reform-legislation/>. In Maryland, the legislature amended the Law Enforcement Officers’ Bill of Rights to reform disciplinary processes. See Dominique Maria Bonessi, *Maryland Senate Passes Package of Police Reform Measures*, NPR (Mar. 3, 2021), <https://www.npr.org/local/305/2021/03/03/973420907/maryland-senate-passes-package-of-police-reform-measures>.

2022, President Biden signed an executive order on police reform, requiring all federal law enforcement agencies to submit data on police misconduct to the FBI and to revise their use-of-force policies to meet DOJ standards.<sup>144</sup> Perhaps most significantly, in 2021, “15 unions that represent law enforcement officers across the US . . . endorsed a blueprint for policing that includes an unprecedented shift in the way unions protect bad police officers.”<sup>145</sup>

These reforms seek to create a legitimate system where police misconduct is constrained and marginalized people need not use the extrajudicial sanction of public shame to seek justice. If the state were to adopt these reforms while also permanently adopting contestation, it would present a logical paradox: the state would be rectifying a power imbalance through consensus-building strategies, but maintaining contestation, which challenges imbalances of power. What is implicit in this paradox is that the system can never truly reform to legitimacy.

Finally, we should ask ourselves whether we truly want to live in Simonson’s world rather than Tyler’s, where the system is held together by contestation instead of respect for the law. It is tempting to support public shaming of police misconduct because it allows community members to directly hold the police accountable without waiting for the “political system to lurch into motion.”<sup>146</sup> Given that the police are currently shielded from consequences for their actions by union policies and weak laws,<sup>147</sup> extrajudicial accountability is necessary to deter police misconduct and galvanize reform. But “shaming occurs in the absence of due process” and society should be wary of any system which resolves disputes without the protections of an impartial tribunal or jury, scrutiny of evidence, and an opportunity for *both* sides to argue their cases.<sup>148</sup> Though due process is presently skewed in favor of the police, permanently stripping the police of their due process rights cannot be the solution to the existing imbalance. Formally adopting public shame as a fixture of police accountability is an admission that democratic rule of law is an impossibility. It concedes that the police cannot enforce the law without risk of abuse, the legal system cannot keep that abuse in check, and extrajudicial oversight is therefore required.

But such a defeatist conclusion is not necessary. Our system is broken, but it is not immune to change. By exposing police misconduct and reacting with public shame, society expresses that we strive for higher standards of an equal, fair, and legitimate rule of law. And, albeit more slowly than is desirable, lawmakers and

---

144. See Exec. Order No. 14,074, 87 Fed. Reg. 32,945 (May 25, 2022). The DOJ’s new use-of-force policy provides that such force is only permitted where “no reasonably effective, safe, and feasible alternative appears to exist.” U.S. Dep’t of Just., Just. Manual § 1-16.100 (2022).

145. See Peter Nickeas, ‘This is a Huge Step for Law Enforcement.’ *Police Unions Shift Stance on Protecting Bad Officers*, CNN (May 18, 2021), <https://www.cnn.com/2021/05/17/us/police-unions-intervention-blueprint/index.html>.

146. See Eric Posner, *A Terrible Shame*, SLATE (Apr. 9, 2015), <https://slate.com/news-and-politics/2015/04/internet-shaming-the-legal-history-of-shame-and-its-costs-and-benefits.html>.

147. See *supra* Part I.B.

148. See Posner, *supra* note 146.

the judiciary are responding to public outcry and reforming to a greater state of legitimacy. Thus, it is unnecessary to settle for a permanent state of contestation, or a rule of law built on public shame: the goal of legitimacy is attainable and is in the process of being realized.

#### CONCLUSION

In 2022, over 1,030 individuals were shot and killed by the police.<sup>149</sup> Just roughly one percent of officers who kill civilians are charged with murder or manslaughter—not convicted, *charged*.<sup>150</sup> Police misconduct is the product of gross power. When the police are given undue authority over civilians without judicial sanctions for misconduct, abuses of power are inevitable. Thus, our system does not deter misconduct but instead signals to the police that misconduct is condoned and will go unpunished. Now, the public is sending a new message. Using bystander footage and social media, the public is galvanizing shame to tell the police that their misconduct is an unacceptable affront to communal values. This extrajudicial deterrent is necessary right now: our system is failing to protect American citizens from police misconduct, and public shame has the promise to deter such abuses of power.

That the public must act extrajudicially to protect itself from the officers who are tasked with upholding law and order indicates our society's sad state. However, while public shame can challenge and re-envision the status quo, it must not be accepted as our new status quo. The most effective deterrent—and the one our society should strive for—is shared respect for the rule of law. Rather than live in a state of mistrust and contestation, we may use public shame to forge a more legitimate system.

---

149. *Fatal Force*, *supra* note 23.

150. John Eligon & Shawn Hubler, *Throughout Trial over George Floyd's Death, Killings by Police Mount*, N.Y. TIMES (Apr. 17, 2021, updated Nov. 30, 2021), <https://www.nytimes.com/2021/04/17/us/police-shootings-killings.html>.