

**THE STATE OF THE POLICE IN MODERNITY:
THE CONVERGENCE OF TWO FORMS OF
PUNISHMENT**

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INTRODUCTION

The profound influence of French philosopher and historian Michel Foucault reverberates across various fields of study, notably in law and the social sciences.¹ One of his most prominent works is *Discipline and Punish*, a genealogical study outlining the development of the punitive state.² In the book, Foucault discusses two eras of punishment: the premodern and modern periods.³ Foucault asserts that premodern punishment was rooted in the persistent occurrence of public torture and execution,⁴ while the silent and powerful strategy of discipline characterizes modern punishment.⁵ However, *Discipline and Punish* was written in the mid-1970s,⁶ and it is no secret that technology has advanced significantly since Foucault put his pen to paper.⁷ Society now witnesses ruthless violence performed on behalf of the state through phone screens and social media,⁸ mirroring the public torture and execution that distinguished the premodern era.⁹ Concurrently, police officers have become subjects of constant observation, adding a fascinating dimension to Foucault's foundational theories on discipline.¹⁰ Taken together, these developments indicate that Foucault's work exists as a baseline for contemporary discussions regarding social media and its relationship to police accountability. Premodern and modern punishment coexist today, and their coexistence demands that legal scholars and institutions simultaneously consider the theories, aims, and results of both punishment styles. As a result, the overlapping theories this Note discusses serve as necessary policy considerations that must be examined when

1. Gary Cutting, *Michel Foucault*, STAN. ENCYC. OF PHIL. (Aug. 5, 2022), <https://plato.stanford.edu/entries/foucault/#HistPris>.

2. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH I* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); Cutting, *supra* note 1.

3. See FOUCAULT, *supra* note 2, at 7 (referring to newly established codes of punishment as “modern”). Foucault does not explicitly term the eras that he describes as “pre-modern” or “modern.” However, for the purposes of this paper, the later era discussed by Foucault will be called “modern,” referring to the late 18th century and onward. See *id.* The era prior to “modern” punishment will be labeled “pre-modern” and refers to the period between 15th century and the 18th century. See *id.* at 35.

4. See *id.* at 7.

5. See *id.* at 35.

6. See *id.* at 7.

7. *Id.*

8. See, e.g., *Mobile Fact Sheet*, PEW RSCH. CTR. (Nov. 13, 2024), <https://www.pewresearch.org/internet/fact-sheet/mobile/> (“The vast majority of Americans – 98% – now own a cellphone of some kind. About nine-in-ten (91%) own a smartphone, up from just 35% in the Center’s first survey of smartphone ownership conducted in 2011.”).

9. See Sherri Williams, *Stream of Sadness: Young Black Women’s Racial Trauma, Police Brutality and Social Media*, 21 FEMINIST MEDIA STUD. 1270, 1271, 1273 (2021).

10. See FOUCAULT, *supra* note 2, at 7.

10. See Ajay Sandhu & Kevin D. Haggerty, *Policing on Camera*, 21 THEORETICAL CRIMINOLOGY 78, 79 (2017).

advocating for changes in legislation or judicial doctrine regarding police violence.

Part I of this Note summarizes *Discipline and Punish*, while offering essential background information and explaining Foucault's theories. Part II then applies Foucault's work to modernity, pointing to various ways that both premodern and modern punishment exist within the contemporary period, especially due to the mass dissemination of media on various platforms. Finally, Part III outlines how lawmakers and the judiciary should use Foucault's framework as a foundation when analyzing law and policy, specifically examining body-worn camera laws and the ways in which such programs may aid in preventing police violence.

I. A REITERATION OF FOUCAULT'S IDEOLOGY

A clear understanding of Foucault's theoretical framework is essential before comparing the ideology outlined in *Discipline and Punish* and the state of contemporary punishment. Foucault divides his theory into two distinct periods of punishment: the premodern and modern eras.¹¹ Foucault's discussion of the premodern era does not include a specified range of dates to define the period; however, he examines various polities between the fifteenth¹² and eighteenth centuries¹³ when referencing the punishment style of the premodern era. The author's focus then shifts to the modern style of punishment of the late eighteenth century and onward.¹⁴ Given that Foucault published *Discipline and Punish* in 1975, one can reasonably assume that Foucault's conception of the modern era of punishment began in the late eighteenth century and continued through the twentieth century.

Foucault characterizes premodern punishment as physically brutal with an exhibitionist flair. In contrast, his description of modern punishment indicates the necessary presence of technologies and strategies that ensure internalized discipline and silent coercion.¹⁵ Foucault also differentiates between premodern and modern punishment through his discussion of the several unintended consequences that accompanied the tactics used in the premodern era.¹⁶ Most importantly, Foucault views the premodern style of

11. See FOUCAULT, *supra* note 2, at 7, 35.

12. See *id.* at 35.

13. See *id.* at 7.

14. *Id.*

15. See *id.* at 136-37.

16. See, e.g., *id.* at 9 (explaining that the executioner was often seen as a villain); *id.* at 61 (explaining how the public's emotional response to violent injustice often heroized the suspected criminal); *id.* at 60 (explaining that onlooking citizens rioted at the foot of the scaffold).

punishment as entirely separate from that of the modern era.¹⁷ The state of punishment in the twenty-first century, however, seems to challenge Foucault's purely binary conception of punishment.

A. *Premodern Punishment*

A reading of *Discipline and Punish* suggests that two elements characterize premodern punishment. The first component was the prevalence of physical torture and execution.¹⁸ The second crucial piece was the public nature of that violence.¹⁹ The publicity of both torture and execution achieved two goals: (1) to facilitate²⁰ and eventually terminate the sovereign's investigation into the suspect;²¹ and (2) to demonstrate the sovereign's omnipotent power.²² However, the public spectacles of punishment in the premodern era also produced several unintended consequences, as they generated sympathy for the condemned, redistributed blame, and sparked civil unrest.

1. *The Investigative Process*

First, torture was an essential tool in the investigative process, specifically employed to coerce confessions.²³ Charges against citizens were kept secret, meaning individuals remained unaware of their alleged crimes until they were publicly subjected to pain, either as a means of extracting a confession or as a form of punishment for the accusation itself.²⁴ Foucault emphasizes that the premodern judicial process determined guilt in a fundamentally different manner than contemporary legal systems.²⁵ Rather than having a bifurcated system where one was found guilty or not guilty, guilt existed on a spectrum; even a hint of suspicion sufficed to inculcate the alleged criminal to some degree.²⁶ As a result, "the suspect . . . always deserved a certain punishment; one could not be the object of suspicion and be completely innocent."²⁷ Investigation and punishment were therefore inseparable,²⁸ and if a confession did result from the torture

17. *See id.* at 7.

18. *See id.*

19. *See id.*

20. *See id.* at 42.

21. *See id.*

22. *See id.* at 45.

23. *See id.* at 41.

24. *See id.* at 39.

25. *See id.* at 42.

26. *See id.*

27. *Id.*

28. *See id.* at 41.

inflicted on a citizen's body, it merely served to justify the horrific acts already taken in the name of the sovereign.²⁹ The fact that the torture took place in front of the population was intended to convey that truth had been unearthed by the state and that justice had been served.³⁰ By doing so, the sovereign was to be deemed a hero—the champion of the battle against delinquency.³¹

2. *An Assertion of Power*

The sovereign also implemented public torture and execution with the goal of affirming and continuously re-establishing their power.³² Within the investigative process, the certainty of torture “reflect[ed] the principle that in criminal matters the establishment of truth was the absolute right and the exclusive power of the sovereign and his judges.”³³ Foucault emphasizes the two-fold effect of the sovereign's exhibition of violence. The brutal display of state authority not only demonstrated the extent of the sovereign's control,³⁴ but it also allowed for the “[coding of] the ‘lack of power’ with which those subjected to punishment [were] marked.”³⁵ In essence, public violence was an inherently political act.³⁶ By singling out an individual and asserting dominion over his body, the sovereign exemplified “the dissymmetry between the subject who has dared to violate the law and the all-powerful sovereign who displays his strength.”³⁷ Foucault labeled this methodology “a policy of terror” that was conveyed directly through the body of the criminal.³⁸

3. *Unintended Consequences*

a. *Premodern: The Condemned Man's Body as a Focus of Sympathy*

The unintended consequences that accompanied public torture and execution often undermined the sovereign's efforts and destabilized the

29. *See id.* at 44.

30. *See id.* at 43-46.

31. *See id.* at 47-48.

32. *See id.* at 49.

33. *Id.* at 35.

34. *See id.* at 48-49.

35. *Id.* at 29.

36. *See id.* at 47.

37. *Id.* at 49.

38. *Id.*

polity.³⁹ For the sovereign’s political tactics to take full effect, the audience needed to bear witness to atrocity;⁴⁰ however, the innate humanity of the crowd could not be circumvented.⁴¹ The gruesome display of prolonged pain inflicted on the body of a fellow citizen inevitably drew sympathy from the hearts of observers.⁴² Foucault describes the brutality as so severe that its occurrence had the power “to make the tortured criminal an object of pity or admiration.”⁴³ Thus, the victim of the state’s dominance was transformed into a martyr, and his mutilated body became a locus of civil disgust.⁴⁴

b. Premodern: The Shifting of Blame

An execution performed in the name of the sovereign redistributed blame, inverting “the shame inflicted on the victim into pity or glory,” and further turning “the legal violence of the executioner into shame.”⁴⁵ Although the executioner was endowed with power by the state, he wielded the weapons that bludgeoned the condemned man, and his ruthlessness quickly led to infamy.⁴⁶ As a result, the executioner became the target of hurled rocks and severe criticism.⁴⁷ Hired to punish the condemned, the executioner was incidentally made to “resemble a criminal” himself.⁴⁸

c. Premodern: Creating Conflict at the Location of Violence

The site of the public execution also became a hub of political discontent.⁴⁹ Though the sovereign called the citizenry to the spectacle with the intent to terrorize, the populace began to use the arena to “express its rejection of the punitive power and sometimes revolt.”⁵⁰ In some circumstances, before the final blow could befall the victim, those watching in the crowd would “[snatch] a condemned man from the hands of the executioner, obtaining his pardon by force.”⁵¹ Foucault notes, “[t]his was

39. See, e.g., *id.* at 9 (explaining that the executioner was often seen as a villain); *id.* at 61 (explaining how the public’s emotional response to violent injustice often heroized the suspected criminal); *id.* at 60 (explaining that onlooking citizens rioted at the foot of the scaffold).

40. See *id.* at 58.

41. See *id.* at 60.

42. See *id.*

43. *Id.* at 9.

44. See *id.* at 61.

45. *Id.* at 9.

46. See *id.* at 9, 53.

47. See *id.* at 59.

48. *Id.* at 9.

49. See *id.* at 62.

50. *Id.* at 59.

51. *Id.*

especially the case if the conviction was regarded as unjust.”⁵² Onlooking citizens personally witnessed the differences in punishment inflicted on those in varying social classes, often seeing “a man of the people put to death, for a crime that would have merited, for someone better born or richer, a comparatively light penalty.”⁵³ Foucault deemed the reactionary civil unrest to be “disturbances around the scaffold,” pointing out that the protests took place at the situs of the violence.⁵⁴

B. Modern Punishment and the Panopticon

Contrary to the premodern era, Foucault suggests that modern punishment is characterized by a perpetual policy of coercion rather than discrete violent acts inflicted upon the body.⁵⁵ Foucault specifically notes that the prison system emerged as a form of punishment based on the eighteenth-century development of discipline as a technique.⁵⁶ According to Foucault, modern punishment required the ceaseless enforcement of disciplinary measures to achieve the state’s goal of creating “docile bodies,” meaning a population of people who could “be subjected, used, transformed and improved.”⁵⁷

Foucault also contrasts the public nature of premodern punishment with modern punishment when asserting that “[d]isciplinary power . . . is exercised through its invisibility.”⁵⁸ Such invisibility merged with the powerful effects of uninterrupted coercion to ensure that man internalized his reality and became “the principle of his own subjection.”⁵⁹ As a result, the modern era exercised power in ways that would affect people’s minds, not just the visible body.

52. *Id.* at 61.

53. *Id.*

54. *Id.* at 60.

55. *See id.* at 137-38.

56. *See id.* at 171-72, 199.

57. *Id.* at 136.

58. *Id.* at 187.

59. *Id.* at 203.

Foucault recognized that only a particular type of institution could create such a compliant citizenry.⁶⁰ He describes the necessity of observation when forcing conformity, specifically arguing that building a society of “docile bodies” requires some form of Jeremy Bentham’s panopticon.⁶¹ The panopticon is an architectural scheme that was designed in such a way that prisoners within its walls could never be sure whether a guard was watching them.⁶² The guards were positioned in a central tower that was not visible to the prisoners. However, the prisoners were keenly aware that the guards—if in the tower—could see the activity of the prisoners below.⁶³ Foucault emphasized that this form of discipline is characterized by an unequal gaze where the captive “is totally seen, without ever seeing” and the authority “sees everything without ever being seen.”⁶⁴ The prospect of observation and the ever-looming possibility that any bad act could be incidentally performed under the gaze of a prison official forced the internalization of discipline.⁶⁵ The panopticon functioned “to induce . . . a state of conscious and permanent visibility that assures the automatic functioning of power.”⁶⁶

II. A CONTEMPORARY APPLICATION OF FOUCAULT’S FRAMEWORK

The rise of social media and other technological advancements in the contemporary period have significantly impacted society’s understanding of discipline and punishment, and the American police officer stands as a symbol of that change. While the prevalence of mobile recording technology and the ease of informational dissemination on social media

60. *See id.* at 202-03.

61. *Id.* at 200 (“[A]t the periphery, an annular building; at the centre, a tower; this tower is pierced with wide windows that open onto the inner side of the ring; the peripheric building is divided into cells, each of which extends the whole width of the building; they have two windows, one on the inside, corresponding to the windows of the tower; the other, on the outside, allows the light to cross the cell from one end to the other. All that is needed, then, is to place a supervisor in a central tower and to shut up in each cell a madman, a patient, a condemned man, a worker or a schoolboy. By the effect of backlighting, one can observe from the tower, standing out precisely against the light, the small captive shadows in the cells of the periphery. They are like so many cages, so many small theatres, in which each actor is alone, perfectly individualized and constantly visible.”).

62. *Id.*

63. *Id.*

64. *Id.* at 202.

65. *See id.* (“So to arrange things that the surveillance is permanent in its effects, even if it is discontinuous in its action; that the perfection of power should tend to render its actual exercise unnecessary; that this architectural apparatus should be a machine for creating and sustaining a power relation independent of the person who exercises it; in short, that the inmates should be caught up in a power situation of which they are themselves the bearers.”).

66. *Id.*

platforms may be developments of the modern age, that same technology has allowed for the return of premodern punishment.

For instance, videos of American police officers participating in and enabling the killings of Black and Brown people across the country have repeatedly gone viral on social media platforms,⁶⁷ mimicking the public execution and torture that characterized punishment in the premodern era. The protests that occurred in the wake of such killings also generated recordings of violent police misconduct.⁶⁸ Masses have viewed the videos and images of the brutality.⁶⁹ Even the unintended consequences that Foucault discussed in relation to public torture and execution have resurfaced: after observing the cruelty inflicted on the alleged criminal, the victim of the police brutality becomes a focal point of immense emotion;⁷⁰ the viewing effectively delegitimizes and villainizes the officer;⁷¹ and protests erupt at the location of the violence and beyond.⁷²

Concurrently, technology has transformed the United States into a surveillance state, where citizens are constantly observed in an effort to prevent future criminal activity and to gather evidence of completed crimes. However, police officers are not exempt from this observation.⁷³ The widespread presence of body cameras and camera phones makes surveillance a persistent possibility.⁷⁴ Whether state-enforced punishment may befall an insubordinate officer often depends simply on whether the right digital evidence reaches a responsive authority. The extent of

67. See, e.g., Yarimar Bonilla & Jonathan Rosa, *#Ferguson: Digital Protest, Hashtag Ethnography, and the Racial Politics of Social Media in the United States*, 42 AM. ETHNOLOGIST 4, 5 (2015); Williams, *supra* note 8.

68. See Deen Freelon et al., *Beyond the Hashtags: #Ferguson, #Blacklivesmatter, and the Online Struggle for Offline Justice*, AM. UNIV. CTR. FOR MEDIA & SOC. IMPACT (forthcoming 2016) (manuscript at 45) (on file at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747066).

69. See *id.* at 7.

70. Compare FOUCAULT, *supra* note 2, at 61 (explaining how the public's emotional response to violent injustice often heroized the suspected criminal), with Freelon et al., *supra* note 68, at 82-83 (“[T]he video and photographic evidence that is often available provokes public outrage and disgust, which sometimes leads to solidarity.”).

71. Compare FOUCAULT, *supra* note 2, at 9 (explaining that the executioners display of legal violence often brought shame upon him), with Sara M. Hockin & Rod K. Brunson, *The Revolution Might Not Be Televised (But It Will Be Lived Streamed): Future Directions for Research on Police-Minority Relations*, 8 RACE & JUST. 199, 201 (2018) (explaining that knowledge of racial discrimination at the hands of police “reduces citizen confidence in and support for officers.”).

72. Compare FOUCAULT, *supra* note 2, at 59-60 (explaining that onlooking citizens rioted at the foot of the scaffold), with Williams, *supra* note 8, at 1279 (“[V]ideos related to the 2016 fatal police shooting of Keith Lamont Scott in Charlotte, North Carolina . . . sparked at least six days of massive protests in the city where the mayor enacted a state of emergency, and the state's governor deployed the National Guard”).

73. See Mary Angela Bock, *Film the Police! Cop-Watching and Its Embodied Narratives*, 66 J. COMMUN 13, 14 (2016).

74. See Sandhu & Haggerty, *supra* note 10, at 79.

observation in today's world is reminiscent of the panopticon, except the police are no longer the sole observers.⁷⁵

Incredible technological progress combined with the presence of social media has allowed for the simultaneous rise of both premodern and modern forms of punishment, and the police officer stands at the intersection of the two. For this reason, Foucault's work serves as a fundamental reference point for contemporary dialogues on police enforcement and accountability. The coexistence of both premodern and modern styles of punishment demands that legal scholars and institutions consider the theories, aims, and results of both punishment styles as they occur simultaneously in modern society. Especially in light of the rise in public discourse regarding the law's role in holding police legally accountable,⁷⁶ the overlapping theories this Note discusses must guide the conversation about changes in legislation and judicial doctrine.

A. *The Return of Public Torture and Execution*

1. *Contemporaneous Public Viewings, Investigation, and Assertions of Power:*

The population no longer needs to gather in the town square to bear witness to state-sanctioned torture and execution. Instead, they can sit on their couches and watch viral footage of police brutality in real time. This is how people witnessed Derek Chauvin “[pressing] his knee and his body weight on [George] Floyd’s neck for 9 minutes and 29 seconds.”⁷⁷ Others lay in their beds staring at a video that depicted Philando Castile being fatally shot by police while his girlfriend and her four-year-old daughter sat in the car with him.⁷⁸ Americans across the country gathered around small glass screens to view footage of “a white police officer [picking] up a 16-

75. *See id.*

76. *See* Felicia Campbell & Pamela Valera, “*The Only Thing New is the Cameras*”: A Study of U.S. College Students’ Perceptions of Police Violence on Social Media, 51 J. BLACK STUD. 654, 654 (2020).

77. Williams, *supra* note 8, at 1270. Derek Chauvin was the police officer who knelt on the neck of George Floyd, an unarmed Black man, eventually killing him. *See Former Minneapolis Police Officer Derek Chauvin Sentenced to More Than 20 Years in Prison for Depriving George Floyd and a Minor Victim of Their Constitutional Rights*, Press Release, U.S. DEP’T OF JUST. (July 7, 2022), <https://www.justice.gov/opa/pr/former-minneapolis-police-officer-derek-chauvin-sentenced-more-20-years-prison-depriving>.

78. *See* Williams, *supra* note 8, at 1276. Philando Castile, a Black man, was shot and killed by Officer Jeronimo Yanez during a traffic stop in 2016. *See* Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, CNN (June 21, 2017, 10:14 AM), <https://www.cnn.com/2017/06/20/us/philando-castile-shooting-dashcam/index.html>.

year-old Black girl... [and flipping] her to the floor while she was still sitting in her desk, then [dragging] her across the floor and [putting] her in handcuffs”⁷⁹ Viewers did not even have to leave their homes to see “Eric Garner being confronted, taken down, and restrained by several police officers, one of whom [placed] him in the chokehold that led to his death.”⁸⁰ Nor did people need to travel to Missouri to see Michael Brown’s uncovered body lying in the street for hours after he was killed by former police officer Darren Wilson.⁸¹ Horrific police violence at protests has also been “documented in detail across social media platforms like Twitter, Instagram, [and] YouTube. . . .”⁸² In all these instances, a cell phone transported the viewer to the exact moment of the brutality.

Though these horrifying deaths and incidents of abuse were shared online rather than viewed in person,⁸³ heavily documented police violence of the 21st century shares several similarities with the public execution and torture that took place during the premodern era. This suggests that the punishment style of the premodern period has made an unpredictable and even inadvertent return. What was once the town square is now the social media platform, and the executioner now carries a badge and a gun.

The widespread publicity of such instances of state violence cannot be overstated. In 2024, around 91% of the U.S. population owned smartphones,⁸⁴ providing “marginalized and racialized populations with new tools for documenting incidents of state-sanctioned violence”⁸⁵ The ability to capture high-quality visual evidence of police brutality works in conjunction with social media to widely publicize gruesome depictions of police violence, fostering “conditions of mass visibility.”⁸⁶ Academics credit Twitter for playing “a particularly strong role in a wide range of

79. See Williams, *supra* note 8, at 1278. Former South Carolina Sheriff’s Deputy Ben Fields physically picked up a young Black student while she sat at her desk, throwing her to the ground. See Richard Fausset & Ashley Southall, *Video Shows Officer Flipping Student in South Carolina, Prompting Inquiry*, N.Y. TIMES (Oct. 26, 2015), <https://www.nytimes.com/2015/10/27/us/officers-classroom-fight-with-student-is-caught-on-video.html>.

80. Freelon et al., *supra* note 68, at 32. Officer Daniel Pantaleo was fired after putting Eric Garner in a chokehold which led to the death of the Black Staten Island native in 2014. See Ashley Southall, *Daniel Pantaleo, Officer Who Held Eric Garner in Chokehold, Is Fired*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/nyregion/eric-garner-daniel-pantaleo-fired.html>.

81. Freelon et al., *supra* note 68, at 31. Former police officer, Darren Wilson, shot and killed Michael Brown, a Black teenager, in Ferguson, Missouri in 2014. See John Eligon, *No Charges for Ferguson Officer Who Killed Michael Brown, New Prosecutor Says*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/us/michael-brown-darren-wilson-ferguson.html>.

82. Bonilla & Rosa, *supra* note 67, at 4. Twitter is now known as “X.”

83. See James P. Walsh & Christopher O’Connor, *Social Media and Policing: A Review of Recent Research*, 13 SOCIO. COMPASS, Nov. 2018, at 3.

84. PEW RSCH. CTR., *supra* note 7.

85. Bonilla & Rosa, *supra* note 67, at 5.

86. Walsh & O’Connor, *supra* note 83, at 3.

contemporary social movements⁸⁷ such as the Black Lives Matter movement.⁸⁸ Individuals tweeted an image of Darren Wilson standing over Michael Brown's corpse in Ferguson, Missouri 41,618 times.⁸⁹ Twitter users also shared the video of Eric Garner's tragic death at the hands of police at least 27,647 times.⁹⁰ During the first week of protests after the killing of Michael Brown, over 3.6 million posts appeared on Twitter documenting and reflecting on the emerging details surrounding the young man's death and the protests that followed.⁹¹ Such figures become even more staggering given that the individual tweets do not account for the number of times the tweet, picture, or video was viewed, nor do they consider the number of shares or views on other platforms.⁹²

Much like the image of the executioner and his victim, posts on social media depict police "in positions of authority" and victims "as dead or as ordinary, living citizens."⁹³ Additionally, the geographic spread of viewers does not detract from the collective temporal facet of these instances of public violence.⁹⁴ Academic works discussing social media's impact on activism suggest that "the dialogicality and temporality of Twitter create a unique feeling of direct participation."⁹⁵ The protests in Ferguson, Missouri, following the death of Michael Brown were documented via livestream "[creating] a similar feeling of shared temporality," allowing "users on Twitter [to feel] like they were participating in [the protests], as they tweeted in real time about the unfolding events."⁹⁶

As for the investigative aspect of premodern punishment, the police act not only as the executioner but also as an arm of the sovereign, exerting fact-finding power. In his study of American police officers, Professor Jerome Skolnick went as far as to say that "[a]s invokers of the criminal law, the police frequently act in practice as its chief interpreter."⁹⁷ Much like the condemned man in the premodern era, a potential victim of police violence is often unaware of whether a call has been made to the police regarding their activity or whether an officer may be lurking nearby; it may not be until the moment of confrontation between the police and the accused

87. Hockin & Brunson, *supra* note 71, at 203.

88. See Freelon et al, *supra* note 68, *passim*.

89. See *id.* at 31.

90. See *id.* at 32.

91. Bonilla & Rosa, *supra* note 67, at 4.

92. See Freelon et al, *supra* note 68, at 30-31.

93. See *id.* at 30.

94. Bonilla & Rosa, *supra* note 67, at 7.

95. *Id.*

96. *Id.*

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

that the supposed criminal understands that they are a suspect.⁹⁸ Therefore, the secrecy of the investigative process in the premodern period has continued into the contemporary period.⁹⁹ When accompanied by police misconduct, premodern punishment seems to mirror the scene so often filmed and posted to social media.

Another important point of similarity between premodern punishment and the police violence of today lies in the discriminatory distribution of physical violence. Foucault demonstrates that the sovereign enforced different penalties on citizens depending on the suspect's class standing.¹⁰⁰ Police violence also occurs disproportionately, subjecting Black people and other minority groups to significantly more state intervention than their white counterparts.¹⁰¹ Finally, much like Foucault deems premodern punishment to be governed by a "policy of terror" that exemplifies and reinstates the sovereign's power,¹⁰² scholars have emphasized that, in any form, "[v]iolence is a demonstration of power,"¹⁰³ and that "symbolic violence has the impact of actual violence because it makes violence that was otherwise unknown visible."¹⁰⁴ When posted, footage of police killing or otherwise harming Black people "terrorizes potentially a larger audience of Black distant witnesses and reifies ideas of white supremacy . . ."¹⁰⁵ Therefore, the publication of images and videos depicting police violence inflicted upon Black people reinforces current power structures and aids in

98. Speed traps serve as a good example of secrecy in investigation and enforcement by police. The police officer parks out of sight and then pulls over vehicles that are suspected of speeding or other illegal activity. The driver is unaware of the presence of the officer until the officer leaves their hidden spot to pursue the suspect.

99. There have been several instances of police brutality stemming from confrontations with police during traffic stops. *See, e.g.*, Campbell & Valera, *supra* note 76, at 656 ("Philando Castile (an unarmed 32-year-old Black man, was pulled over and killed by a police officer in Falcon Heights, MN in 2016). Walter Scott (a police officer killed an unarmed 50-year-old Black man following a traffic stop for a non-functioning brake light in North Charleston, SC in 2015)"). In such instances it is common that the driver of the vehicle does not know of the police officer's presence until that driver is being actively pursued.

100. *See* FOUCAULT, *supra* note 2, at 61 (noting the "difference in penalties according to social class").

101. *See, e.g.*, Campbell & Valera, *supra* note 76, at 655 ("Despite only being 13% of the population, Black Americans in 2017 were 25% of those killed by police and 35% of them have been known to be unarmed. Furthermore, Black people are three times more likely to be killed by police than white people, and five times more likely to be unarmed when killed.") (citations omitted); Report of Jeffrey Fagan, Ph.D. at 13 *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (finding that from 2010-2012, stops by New York City police were concentrated in areas with a high percentage of Black and Hispanic residents).

102. FOUCAULT, *supra* note 2, at 49.

103. Williams, *supra* note 8, at 1272.

104. ALLISSA V. RICHARDSON, *BEARING WITNESS WHILE BLACK: AFRICAN AMERICANS, SMARTPHONES, AND THE NEW PROTEST #JOURNALISM* 169 (2020).

105. Williams, *supra* note 8, at 1274 (quoting RICHARDSON, *supra* note 104).

accomplishing what Foucault labeled as a “policy of terror.”¹⁰⁶ As a result, the dissemination of graphic and racially charged content on social media not only shares the public, violent, and investigative characteristics of premodern punishment, but also aids in accomplishing the systemic purposes of the premodern punishment style.

2. *The Resurfacing of Unintended Consequences*

a. *Contemporary: The Condemned Man’s Body as a Focus of Sympathy*

While discussing premodern punishment, Foucault notes that the citizens who observed the violent torture and execution of suspected criminals expressed sympathy for the victim and even exalted the victim to the status of hero.¹⁰⁷ Similarly, witnessing police violence through social media sometimes elevates the victim to a state of martyrdom. For example, during a 2014 incident, a police officer choked Eric Garner to death while Garner “repeated, ‘I can’t breathe’ 11 times before losing consciousness.”¹⁰⁸ Mr. Garner’s dying words “became a popular and powerful protest statement.”¹⁰⁹ Six years later, George Floyd uttered those same words¹¹⁰ as a police officer knelt on the back of his neck for over eight minutes.¹¹¹ Mr. Floyd’s death reignited the use of the phrase as a rallying cry, signifying the legacy of both Mr. Floyd and Mr. Garner and their impact on the movement for racial justice.¹¹² Therefore, the exaltation Foucault discussed when noting the emotional reactions of onlookers¹¹³ is similarly present when viewing such violence on social media.

Additionally, observing violent police misconduct on social media elicits highly emotional responses from viewers,¹¹⁴ paralleling the sympathy expressed by the polity in Foucault’s work and further exemplifying the effects of the “policy of terror.” In a study on the experiences of young Black women and how the deadly and violent images of police brutality that

106. FOUCAULT, *supra* note 2, at 49.

107. *See id.* at 60-61.

108. *See* Campbell & Valera, *supra* note 76, at 656.

109. *Id.*

110. *See* Mike Baker et al., *Three Words. 70 Cases. The Tragic History of ‘I Can’t Breathe.’*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html>.

111. *See* Campbell & Valera, *supra* note 76, at 656.

112. *See* Baker et al., *supra* note 110.

113. *See* FOUCAULT, *supra* note 2, at 60-61.

114. Williams, *supra* note 8, at 1276.

circulated on social media have affected them, one college student recalled her immediate reaction to the video of police shooting and killing Philando Castille in front of his girlfriend and her child:¹¹⁵

I started crying. I couldn't think. My heart was beating. It felt like it was going to come out of my throat. I just wanted to speak to people. I wanted to go out and protest. I wanted to call my friends . . . I felt this fire in the pit of my stomach that just wouldn't go out.¹¹⁶

In a different study analyzing how viewing videos on social media that depicted police brutality against Black men impacted college students of color, a respondent noted, “[i]t’s honestly traumatizing, and I oftentimes can’t get the images out of my head. Till [*sic*] this day I still remember how Eric Garner lay lifeless on the ground and the stillness of Philando Castile’s body haunts me.”¹¹⁷ Another student in the same study recalled feeling “sadness, anger, [and] hopelessness.”¹¹⁸ Both studies concluded that viewing police brutality targeted toward Black people on social media can potentially induce racial trauma among Black Americans and even PTSD.¹¹⁹ The potential for this effect is higher for younger Black people who are active on social media and whose brains and identities are still developing.¹²⁰

The trauma from watching these videos has even led several people to voice concern about the continuous posting of videos and images of police violence on social media.¹²¹ Members of the Black community urged their peers to stop retweeting images of police violence.¹²² Individuals on Twitter called the content “trauma porn.”¹²³ Some reported having no place to escape from the heaviness of police brutality and racism because social

115. *Id.*

116. *Id.*

117. Campbell & Valera, *supra* note 76, at 663.

118. *Id.* at 662.

119. See Campbell & Valera, *supra* note 76, at 654; Williams, *supra* note 8, at 1275.

120. See Williams, *supra* note 8, at 1271.

121. See, e.g., Melanye Price, *Please Stop Showing the Video of George Floyd’s Death*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/opinion/george-floyd-video-social-media.html>; Allissa V. Richardson, *We Have Enough Proof*, VOX (Apr. 21, 2021), <https://www.vox.com/first-person/22391964/george-floyd-derek-chauvin-adam-toledo-police-violence>.

122. See, e.g., @lienflickashit, X (May 8, 2019) (post is now unavailable; screenshot on file with Washington University Jurisprudence Review); @ExpiiredMilk, X (May 26, 2020) (post has been deleted; screenshot on file with Washington University Jurisprudence Review); @alexisisbestest, X (May 26, 2020), <https://twitter.com/alexisisbestest/status/1265478503773827073> (screenshot on file with Washington University Jurisprudence Review).

123. See @repressingitall, X (May 5, 2020) (post is now unavailable; screenshot on file with Washington University Jurisprudence Review).

media was inundated with graphic images.¹²⁴ Other posts called the videos “triggering.”¹²⁵ Pleas to end the dissemination were strong enough to elicit apologies from other Twitter users who had previously retweeted the violent content.¹²⁶ Even publications like the *New York Times* and PBS released pieces highlighting the need to avoid publishing footage showing police brutality inflicted upon Black people.¹²⁷ This information suggests that witnessing state-enforced violence through a screen rather than at the foot of a scaffold does not eliminate the emotional toll taken upon the viewer.

b. Contemporary: The Shifting of Blame

Another unintended consequence of premodern punishment was the redistribution of blame; the shame intended for the suspect latched itself onto the executioner.¹²⁸ Comparably, the broadcasting of police violence on social media has increased the public’s distrust in law enforcement and led to a delegitimization of the police.¹²⁹ When examining how public perceptions of law enforcement changed after exposure to police violence, a study found that “[e]xposure to all forms of police victimization was associated with less favorable perceptions of police effectiveness . . .”¹³⁰ The study also concluded that nearly “all forms of police violence” negatively impacted “perceived police legitimacy/trust and satisfaction with police performance.”¹³¹ A similar study “analyzed how one of Milwaukee’s most publicized cases of police violence against an unarmed Black man, the beating of Frank Jude, affected police-related 911 calls.”¹³² The results indicated that “residents of Milwaukee’s neighborhoods, especially

124. See @BrownSkinGem90, X (May 28, 2020) (post is now unavailable; screenshot on file with Washington University Jurisprudence Review).

125. See @tyra_0127, X (May 13, 2019) (post is now unavailable; screenshot on file with Washington University Jurisprudence Review).

126. See, e.g., @NicholsonTrain, X (May 31, 2020) (post is now unavailable; screenshot on file with Washington University Jurisprudence Review).

127. See Price, *supra* note 121; Geoff Bennett & Courtney Norris, *How Videos of Police Brutality Traumatize Many Americans*, PBS NEWS (Jan. 30, 2023, 6:50 PM), <https://www.pbs.org/newshour/show/how-videos-of-police-brutality-traumatize-many-americans>.

128. See FOUCAULT, *supra* note 2, at 9.

129. See Ashley N. Jackson et al., *Police Violence and Associations with Public Perceptions of the Police*, 12 J. SOC’Y FOR SOC. WORK & RSCH. 303, 305 (2021). See also Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1009 (1999) (“[T]he history of antagonistic relations between the police and individuals of color has fostered general uneasiness among people of color about contact with police officers.”).

130. Ashley N. Jackson et al., *supra* note 129, at 320.

131. *Id.*

132. Johanna Lacroë & Jillian Stein, *Exploring the Policy Implications of High-Profile Police Violence*, 17 CRIMINOLOGY & PUB. POL’Y 859, 861 (2018) (citing Matthew Desmond et. al, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOCIO. REV. 857).

residents of Black neighborhoods, were far less likely to report crime even 1 year after the event.”¹³³ These studies demonstrate how the publication of videos and images of police violence on social media negatively affects public perceptions of law enforcement officials. The police are cloaked in a sense of liability that is analogous to the blame associated with the public executioner.

c. Contemporary: Creating Conflict at the Location of Violence

Foucault details the “disturbances around the scaffold” in discussing the repercussions of premodern punishment.¹³⁴ He suggests that in response to perceived inequality, citizens would rebel against the executioner and the sovereign power, obtaining a pardon of the suspect by force.¹³⁵ In recent history, viral depictions of police violence have also led to uprisings and protests, often based on the public’s desire for justice.¹³⁶ Protests have frequently begun in the city where the police violence took place.¹³⁷ Just hours after a white police officer shot and killed Michael Brown in 2014, protesters gathered at the site of his killing in Ferguson, Missouri.¹³⁸ Soon, thousands of people “from around the nation flocked to Ferguson to participate in demonstrations calling for the arrest of the officer responsible for the fatal shooting.”¹³⁹ The death of Mr. Brown was not the last instance of widely publicized police violence that would cause massive protests at the location of the incident.¹⁴⁰

In 2020, police officers killed George Floyd in Minneapolis, and the video of his death spread rapidly across social media.¹⁴¹ The next night, “hundreds of protesters flooded into the Minneapolis streets.”¹⁴² Two days later, the governor of Minnesota mobilized the National Guard in the city in an attempt to quell the growing crowds.¹⁴³ In early 2023, several officers

133. *Id.*

134. FOUCAULT, *supra* note 2, at 57-69.

135. *See id.* at 59.

136. *See, e.g.,* Williams, *supra* note 8, at 1272 (discussing the recordings of police brutality and the ability to “amplify [the footage] on social media to gain justice”).

137. *See* Linda Poon & Marie Patino, *Rodney King to Tyre Nichols: A Timeline of U.S. Police Protests*, BLOOMBERG (Jan. 30, 2023, 1:16 PM), <https://www.bloomberg.com/news/articles/2020-06-09/a-history-of-protests-against-police-brutality>.

138. *See* Bonilla & Rosa, *supra* note 67, at 4.

139. *Id.*

140. *See* Poon & Patino, *supra* note 137.

141. *See* Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

142. *Id.*

143. *See id.*

brutally beat Tyre Nichols during a traffic stop in Memphis, Tennessee.¹⁴⁴ Mr. Nichols died in the hospital from his injuries three days later.¹⁴⁵ Police body camera footage capturing the incident was published online,¹⁴⁶ causing “a group of demonstrators [to gather] at a downtown park and then [take] to the streets, shutting down the I-55 bridge over the Mississippi River between Memphis and West Memphis.”¹⁴⁷ The demonstration “clos[ed] the bridge for nearly three hours before peacefully disbanding.”¹⁴⁸ The public responses to contemporary police violence strongly mirror the “disturbances around the scaffold” Foucault details in *Discipline and Punish*.

B. *The Panopticon and Surveillance*

Scholars of varied disciplines have considered the panopticon as it applies to modernity.¹⁴⁹ Particularly, academics have actively applied the concept of the panopticon to modern policing.¹⁵⁰ One scholarly article notes that “[t]he police are central actors in a criminal justice system that Foucault . . . identified as exercising disciplinary power.”¹⁵¹ The potential, but always uncertain, presence of police “shapes individual behavior” by “subjecting people to a . . . form of panoptic surveillance.”¹⁵² However, the article further suggests that “the recent growth of surveillance cameras trained on the police themselves . . . accentuates a parallel form of power.”¹⁵³ Professor Thomas Mathiesen proffered the idea of reverse surveillance in 1997.¹⁵⁴ In Foucault’s model, the few watch the many, but Professor Mathiesen’s theory suggests that newer forms of media allow the many to watch the few.¹⁵⁵ Professor Mathiesen’s work led to the development of the term “synoptic

144. See Jaclyn Diaz et al., *The City of Memphis Releases Videos of Tyre Nichols’ Arrest and Beating*, NPR (Jan. 27, 2023, 10:37 PM), <https://www.npr.org/2023/01/27/1152029954/memphis-police-tyre-nichols-body-camera-footage-release>.

145. See *id.*

146. See *id.*

147. Giulia Heyward, *Mostly Peaceful Protests Held Across the U.S. After Release of Tyre Nichols Footage*, NPR (Jan. 28, 2023, 3:36 AM), <https://www.npr.org/2023/01/27/1152255708/memphis-police-killing-tyre-nichols-protests>.

148. *Id.*

149. See, e.g., Thomas Mathiesen, *The Viewer Society: Michel Foucault’s Panopticon Revisited*, 1 THEORETICAL CRIMINOLOGY 215, 230 (1997); Jerome E. Dobson & Peter F. Fisher, *The Panopticon’s Changing Geography*, 97 GEOGRAPHICAL REV. 307 (2007); Dusty Lavoie, *Escaping the Panopticon: Utopia, Hegemony, and Performance in Peter Weir’s The Truman Show*, 22 UTOPIAN STUD. 52 (2011).

150. See Sandhu & Haggerty, *supra* note 10, at 79.

151. *Id.*

152. *Id.*

153. *Id.*

154. See Mathiesen, *supra* note 149, at 219.

155. See *id.*

power” to describe the effects of this type of surveillance,¹⁵⁶ while other scholars call it “sousveillance.”¹⁵⁷

Though police usually function as the enforcers of panoptic power, the increasing number of eyes trained on the officers themselves has shifted the position of police officers from observer to observed. The authors of a study on body-worn cameras discuss the synoptic framework as it applies to police, noting that at any given moment, public or private surveillance cameras might be filming officers.¹⁵⁸ As far as the officers are concerned, the object capturing the footage may be “the cameras of journalists, businesses . . . a range of police-operated cameras such as those attached to an officer’s uniform, or fixed to a patrol car’s dashboard,” and any “network of smartphone cameras carried by individual citizens or activists”¹⁵⁹ Police are also the subject of observation by groups across the country known as “copwatchers.”¹⁶⁰ Copwatchers are “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.”¹⁶¹ Copwatching stands as a form of counter-surveillance that seeks to subject police to the same disciplinary authority that looms over average citizens and assists in the enforcement of discipline and punishment.¹⁶² Officers are aware that footage of their wrongdoings could be broadcast to the public at any moment.¹⁶³ Synoptic power supplements Foucault’s model of panoptic surveillance as an opposite but equally functional form of power.¹⁶⁴

Turning panoptic power on its head has several legal implications, especially concerning the Fourth Amendment. The Fourth Amendment is the baseline constitutional protection used to hold police officers accountable in a court of law.¹⁶⁵ However, scholars have noted “the limits of traditional political and legal channels to hold police accountable to local communities.”¹⁶⁶ Professor Jocelyn Simonson takes aim at the notoriously weak enforcement mechanisms of the Fourth Amendment, stating that the Fourth Amendment’s “vague standards of ‘reasonableness,’ . . . leave courts

156. See Sandhu & Haggerty, *supra* note 10, at 79.

157. See Bock, *supra* note 73, at 15.

158. See Sandhu & Haggerty, *supra* note 10, at 79.

159. *Id.*

160. Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 393 (2016).

161. *Id.*

162. Bock, *supra* note 74, at 14.

163. See Sandhu & Haggerty, *supra* note 10, at 79.

164. *See id.*

165. See Simonson, *supra* note 160, at 399.

166. *See id.*

room to interpret those standards in favor of police officers”¹⁶⁷ Additionally, current interpretations of the Fourth Amendment grant police officers significant discretion while removing much of police behavior from the scope of the Amendment’s protections.¹⁶⁸

Even politicians have recognized the necessity of new methods to hold police accountable outside the bounds of the Fourth Amendment.¹⁶⁹ Following the protests in Ferguson that occurred in reaction to Michael Brown’s death, President Barack Obama created a task force to control tensions between local communities and precincts while also searching for effective strategies that would prevent police misconduct.¹⁷⁰ Rather than encouraging constituents to rely on Fourth Amendment enforcement and traditional legal channels when seeking redress, the President instead sought new methods to pursue justice in ways that the Fourth Amendment could not.¹⁷¹

Legal scholars’ and high-level government officials’ acknowledgment of the Fourth Amendment’s weaknesses necessitates a new understanding of what police accountability can and should look like. The synoptic power described by Mathiesen¹⁷² and enforced by the public through filming and posting police misconduct allows local communities to express their views about Fourth Amendment enforcement and “reasonableness.”¹⁷³ Professor Simonson emphasizes the necessity of the public enforcing synoptic power as a strategy to encourage democratic discourse and shape “the substantive contours of Fourth Amendment reasonableness doctrine.”¹⁷⁴

III. CONTEMPORARY PUNISHMENT AND BODY-WORN CAMERAS

Thus far, this Note has established that the essence of both of Foucault’s theories of punishment have become entrenched in contemporary America, meaning the effects of both forms of punishment coexist and compound. Both premodern and modern punishment directly implicate police officers because they stand at the intersection of Foucault’s theories. Therefore, lawmakers and legal scholars must examine the overlapping punishment theories and their implications when advocating for changes in legislation or judicial doctrine.

167. *Id.*

168. *Id.*

169. *Id.* at 401.

170. *Id.*

171. *Id.*

172. See Mathiesen, *supra* note 149, at 219.

173. See Simonson, *supra* note 160, at 421.

174. *Id.* at 412-13.

The return of premodern punishment via the contemporary mass dissemination of recorded police violence and public access to images of state-enforced violence reinforces existing racial power structures, destabilizes democracy, delegitimizes public authority, and traumatizes the polity. Concurrently, modern punishment and synoptic power stimulate democratic discourse by allowing direct citizen participation in dialogue relating to the contours of the Fourth Amendment, and may deter police brutality while providing crucial data on police violence and racism in the United States. Almost paradoxically, modern punishment as it occurs today relies entirely on the continuation of contemporary premodern punishment. Without the threat of captured footage that subjects viewers to the effects of public violence, there can be no “sousveillance.” It is at this point of irony that enormous tension exists which must be settled to answer several legal questions involving police accountability.

One example of an area of law in flux is police officers’ use of body cameras. Conversations about the legal implementation of body-worn cameras (“BWCs”) tend to focus predominantly on privacy law.¹⁷⁵ However, these legal considerations, when examined through a theoretical lens, invite a more thorough conversation about whether the laws requiring the use of BWCs are an appropriate allocation of resources and if they will prevent police misconduct. Foucault’s work and the theories he puts forth can assist in shaping the contours of BWC laws.

In 2018, the Bureau of Justice Statistics (“BJS”) published a report on the use of BWCs by law enforcement agencies in the United States.¹⁷⁶ The report stated that 47% of general-purpose law enforcement agencies had acquired body-worn cameras, and for large police departments, that number rose to 80%.¹⁷⁷ A later report published by BJS indicates that about 62% of local police departments deployed BWCs by 2020.¹⁷⁸ However, only some states require BWCs,¹⁷⁹ and on average, police departments have about twice as many officers as they do available cameras.¹⁸⁰ State laws regarding

175. See, e.g., Richard Lin, *Police Body Worn Cameras and Privacy: Retaining Benefits While Reducing Public Concerns*, 14 DUKE L. & TECH. REV. 346 (2016).

176. U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., BULL. NO. 251775, BODY-WORN CAMERAS IN LAW ENFORCEMENT AGENCIES, 2016 (Nov. 2018) [hereinafter *Body-Worn Cameras in Law Enforcement Agencies*].

177. *Id.* at 1-2.

178. U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., BULL. NO. 307405, LOCAL POLICE DEPARTMENTS, PROCEDURES,

POLICIES, AND TECHNOLOGY, 2020 – STATISTICAL TABLES, 2020, 2 (NOV. 2023) [hereinafter *Local Police Departments, Procedures, Policies, and Technology*].

179. *Body-Worn Camera Laws Database*, NAT’L CONF. OF STATE LEGIS. (Apr. 30, 2021), <https://www.ncsl.org/civil-and-criminal-justice/body-worn-camera-laws-database>.

180. *Local Police Departments, Procedures, Policies, and Technology*, *supra* note 178, at 10.

BWCs generally regulate how long enforcement agencies must keep the footage and may also limit who has access to such footage.¹⁸¹ Additionally, legislatures dictate the funding allocated to BWC programs.¹⁸²

BWC programs come at an immense cost.¹⁸³ Most states without BWC programs report that their lack of the technology stems from financial concerns.¹⁸⁴ Therefore, government entities conduct cost-benefit analyses when considering whether to implement a BWC program. The Foucault-derived framework outlined in this paper can be most helpful in the cost-benefit analysis and can expand policymakers' existing conversations about BWCs. In essence, BWCs enforce synoptic power, which is a benefit that legislators must consider. However, release and access to the footage on BWCs implicates the pitfalls of contemporary public torture and execution. Government officials must consider both factors when deciding whether the funding of BWCs is a net positive investment or whether they should allocate such resources to other, more effective police accountability programs.

When considering BWC law as it relates to contemporary punishment, the extent of the dissemination of the footage is of utmost importance. Some states permit the release of footage to the people involved in a recording or their attorneys. In contrast, others allow release when the public interest outweighs the need for confidentiality.¹⁸⁵ Maryland, for example, allows for camera footage to be released under the state's public information act, but some other states only allow the release of footage pursuant to a court order.¹⁸⁶ Often, if an encounter between a police officer and a citizen leads to a complaint or litigation, the BWC footage will be released to the public and eventually posted on social media and the internet.¹⁸⁷ The broadcasting of BWC footage connects directly to the premodern punishment style Foucault discusses, especially because the most contentious police interactions usually require public access.

As for the effectiveness of legally implemented BWC programs, the results look less promising than they once did.¹⁸⁸ The earliest pivotal study

181. See *Body-Worn Camera Laws Database*, *supra* note 179.

182. See *id.*

183. See *id.*

184. See *id.*

185. See *id.*

186. See *id.*

187. See, e.g., @elicurwin, X (Sep. 13, 2023), <https://twitter.com/elicurwin/status/1701944386949394789>; *Tyre Nichols Video: Memphis Releases Police Body-Cam Footage*, WALL STREET J. (Jan. 27, 2023), <https://www.wsj.com/video/series/on-the-news/tyre-nichols-video-memphis-releases-police-body-cam-footage/A8527C8B-5764-405C-BE77-9271DF89A27F>.

188. See *Research on Body-Worn Cameras and Law Enforcement*, NAT'L INST. JUST. (Jan. 7,

on BWCs was a field experiment performed in 2012 by several legal and criminal scholars alongside the Rialto, California Police Department.¹⁸⁹ The study found that “when police were equipped with cameras during the test period, use-of-force incidents and citizen complaints against officers were reduced by 50 and 90 percent, respectively.”¹⁹⁰ The results of the study garnered national attention and suggested BWCs were a viable solution to increased instances of police violence.¹⁹¹ That said, the results also encouraged further research, which has since seemed to debunk the success of the Rialto study.¹⁹²

A 2015 study sought to find out what impact, if any, an officer’s awareness of counter-surveillance had on their policing.¹⁹³ The study’s findings suggest officers are not limited to a purely antagonistic relationship with cameras.¹⁹⁴ Rather, the study indicates that police officers’ views are individually and contextually variable.¹⁹⁵ Some officers were highly aware of the risks associated with being filmed, while others saw the presence of the cameras as an opportunity.¹⁹⁶ The authors of the study suggest that the officers’ responses generally fall into one of three categories: “(1) camera shy; (2) habituated; and (3) strategic advantage.”¹⁹⁷ The authors are careful to note that these categories “should not be taken as stable opinions officers hold” but rather as varying “orientations officers adopt depending on context.”¹⁹⁸

The officers who were considered “camera shy” would attempt to avoid cameras due to “anxieties about the risks and annoyances of working in an environment where officers are regularly recorded—or have the realistic prospect of being recorded.”¹⁹⁹ Habituated officers had simply accepted the presence of cameras as “a new occupational reality.”²⁰⁰ Surprisingly, officers within the category of strategic advantage saw the cameras as providing “pragmatic benefits,” noting that footage can serve as evidence to refute criticism aimed at police and contest “what officers allege are unfair

2022),<https://web.archive.org/web/20241224084854/https://nij.ojp.gov/topics/articles/research-body-worn-cameras-and-law-enforcement#note3>.

189. See *Body-Worn Camera Laws Database*, *supra* note 179.

190. *Id.*

191. *See id.*

192. See *Research on Body-Worn Cameras and Law Enforcement*, *supra* note 188.

193. See Sandhu & Haggerty, *supra* note 10, at 80.

194. *See id.* at 81.

195. *See id.* at 80.

196. *See id.*

197. *Id.* at 81.

198. *Id.* at 92.

199. *Id.* at 81-82.

200. *Id.* at 80.

depictions and bogus complaints about police actions.”²⁰¹ The variance in orientations suggests that “officers have fluid and contextually specific views” about the dangers and benefits of cameras.²⁰² Therefore, the study indicates that the idea of a camera’s inherent ability to police the police is simplistic and incomplete.²⁰³

Later studies that focus on implementing BWCs in police departments across the country also suggest some uncertainty as to the effectiveness of the technology.²⁰⁴ One source notes, “[a] comprehensive review of 70 studies of body-worn cameras use found that the larger body of research on body-worn cameras showed no consistent or no statistically significant effects.”²⁰⁵ Additionally, of ten studies on BWC effectiveness supported by the National Institute of Justice, only a slim majority had promising results.²⁰⁶

Based on the mixed findings regarding the effects of BWC on police violence, it seems that the benefits of BWC programs are questionable at best when considering deterrence. At the same time, the aforementioned studies do not consider the idea Professor Jocelyn Simonson proffers, which suggests that BWC programs and the public footage that results could still promote democratic discourse, helping to shape the “reasonableness” doctrine of the Fourth Amendment.²⁰⁷ Therefore, there may be long-term benefits from BWC programs that have yet to be demonstrated due to the glacial pace at which judicial doctrine changes. Further development in the court system is likely necessary to determine the accuracy of Professor Simonson’s assertion. Still, both legal scholarship and judicial history confirm that social movements like Black Lives Matter can and do influence the language of the law.²⁰⁸

For example, in 2013, Professors Lani Guinier and Gerald Torres introduced the concept of demosprudence.²⁰⁹ The authors acknowledge the historical impact of social movements on politics and the law, specifically describing demosprudence as “the study of the dynamic equilibrium of power between lawmaking and social movements.”²¹⁰ Therefore, though studies suggest an indeterminate relationship between BWCs and incidents

201. *Id.* at 89.

202. *Id.* at 93.

203. *Id.* at 93.

204. See *Research on Body-Worn Cameras and Law Enforcement*, *supra* note 188.

205. *Id.*

206. See *id.*

207. See Simonson, *supra* note 160, at 440-41.

208. See Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2757-68 (2014).

209. See *id.*

210. *Id.* at 2749.

of police violence, theory indicates that BWC programs, together with social media, could alter the landscape of Fourth Amendment jurisprudence. By implication, BWCs theoretically act as a form of panoptic power and may assist in decreasing incidents of police brutality.

Policymakers must then weigh the theoretical potential of BWC programs against the consequences that come with exposing the public to state-enforced violence through the release of body camera footage. As discussed, scholars have shown that premodern punishment in the contemporary period has significant psychological effects on Black Americans,²¹¹ traumatizing viewers and instilling a tremendous fear of the state.²¹² Such fear stems from the fact that police violence inflicted on Black people underscores the continued existence of racial power structures.²¹³ Widespread consumption of imagery depicting state violence against Black people reifies concepts of racial subordination and white supremacy because legal entities often condone and enable such brutality.²¹⁴ Protests that result from viewing footage of police brutality also destabilize democracy by increasing tensions between local governments and citizens²¹⁵ while fueling distrust in public authority.²¹⁶

Examining the use of BWC through a Foucault-derived framework illustrates that the negative effects of premodern punishment that result from the use of BWC fall predominantly on Black Americans. In contrast, synoptic power has some potential to decrease instances of police brutality and spearhead a shift in Fourth Amendment jurisprudence.²¹⁷ As a result, the advantages of contemporary modern punishment and BWC programs would act to benefit Black people particularly, as police violence disproportionately affects Black Americans.²¹⁸ I do not suggest that the framework described in this Note provides a definitive answer as to whether BWC programs are net positive or negative; rather, the framework itself allows for a more expansive conversation to be had by lawmakers considering allocating funds toward BWC programs. Specifically, the discussion of premodern punishment reveals the effects that result from the mass dissemination of footage containing police brutality, acting to further center the voices and experiences of the Black community.

211. See Campbell & Valera, *supra* note 76, at 654; Williams, *supra* note 8, at 1275.

212. See sources cited *supra* note 211; Jackson et al., *supra* note 129, at 320-32.

213. Williams, *supra* note 8, at 1274.

214. See *id.*

215. See, e.g., Taylor, *supra* note 141.

216. See Williams, *supra* note 8, at 1276; Lacroë & Stein, *supra* note 132, at 861.

217. See Simonson, *supra* note 160, at 440-41.

218. See Campbell & Valera, *supra* note 76, at 654.

CONCLUSION

In conclusion, the relevance of Michel Foucault's seminal work, *Discipline and Punish*, persists into the contemporary era, albeit with nuanced complexities brought about by technological advancements. Foucault's delineation of premodern and modern punishment sheds light on the evolution of state control mechanisms, offering invaluable insights into the dynamics of power and surveillance. However, as our society grapples with the proliferation of social media and digital surveillance, Foucault's theories take on new dimensions, inviting critical examination of the intersection between technology, law enforcement, and accountability.

The juxtaposition of premodern spectacle with modern disciplinary strategies emphasizes the paradoxical nature of contemporary punishment regimes, wherein state violence is broadcast across digital platforms while simultaneously subjecting law enforcement to potentially constant scrutiny. This duality necessitates a holistic approach to understanding and addressing issues of police violence, one that acknowledges the interplay between historical legacies and present-day realities. Moreover, Foucault's framework provides a valuable lens through which policymakers and legal scholars can evaluate and reform current practices. By considering the implications of media dissemination and the surveillance apparatus on policing, initiatives such as body-worn camera programs can be more intricately evaluated based on relevant policy considerations concerning the deterrence of police violence and the well-being of already marginalized groups.

As discourse surrounding police accountability continues to evolve, it is imperative that we engage with Foucault's insights, not as immutable doctrines, but as guiding principles for navigating the complexities of contemporary law. By integrating Foucault's theories with contemporary analyses of technology and law enforcement, we may be able to work toward a more equitable and just society. In essence, Foucault's work serves as both a foundation and a springboard for ongoing discussions about the intersection of power, punishment, and technology in the contemporary period. By interrogating the nuances of disciplinary mechanisms and their manifestations in today's digital landscape, we can strive toward a more informed and effective approach to addressing systemic issues of injustice and inequality.