

California County Oversight of Use Policies For Surveillance Technology

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California Senate Bill 1186 (SB 1186), proposed in 2018, would have implemented surveillance transparency, accountability, and oversight measures over the California Highway Patrol, the California Department of Justice, and every California police department, sheriff's office, district attorney's office, and school district and state university public safety department. Had it been enacted, SB 1186 would have required sheriffs to obtain public approval from a county board of supervisors before acquiring and implementing new surveillance technologies. Law enforcement groups that opposed its enactment argued that the bill conflicted with a provision in Section 25303 of the California Government Code that prevents County Boards from obstructing the "investigative function of the sheriff."

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This Note addresses whether law enforcement groups are correct. If so, sheriffs would be exempt from submitting their surveillance use policies for public review to boards of supervisors, thereby limiting civilian oversight of their operations. Because sheriffs are the chief law enforcement officers in unincorporated areas, exempting them from publicly reviewable surveillance use policies would mean that a substantial percentage of Californians living in unincorporated areas would not have the opportunity to engage in civilian oversight. Ultimately, this Note suggests that the language in SB 1186 does not conflict with the aforementioned provisions in Section 25303 because sheriffs act as county actors, not state actors, when submitting a surveillance use policy to a board of supervisors. Consequently, should a bill substantially similar to SB 1186 be submitted to the legislature soon, as is likely, this particular conflict should not impede its passage. Asserting that the mandate of a proactive surveillance use policy obstructs investigative functions of sheriffs misinterprets SB 1186, misreads Section 25303, and suggests law enforcement's lack of respect for civilian oversight, privacy, and protection of civil liberties.

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INTRODUCTION

In the past few decades, local law enforcement agencies have dramatically expanded their use of surveillance technologies to monitor civilian populations. These rapidly evolving technologies are capable of collecting vast amounts of personal information and aggregating that information into easily searchable, integrated databases.¹ With minimal oversight, law enforcement agencies often surreptitiously acquire and inequitably employ technological surveillance tools such as drones, automatic license plate readers, cell-site simulators, and social media monitoring software.² This unregulated collection of personal information threatens the privacy rights and civil liberties of all individuals and puts marginalized communities, which are underserved and over-policed, most at risk.³

One recent effort to respond to this growing threat of surveillance was the introduction of Senate Bill 1186 (SB 1186) in the California legislature.⁴ This bill emphasized the importance of local democratic oversight of the surveillance technologies used by law enforcement. The bill would have mandated that local law enforcement create a publicly reviewable surveillance use policy for each type of technology that it intended to acquire or deploy.⁵ The policy would have set parameters on how the data collected by the technological tool would be used, who would be able to access the information, for how long the information would be stored, and what the consequences of the information being misused or abused would be.⁶ Either city councils or county boards were authorized to either approve or reject the acquisition if the law enforcement agency's policy did not protect citizens' civil rights and liberties.⁷

SB 1186 enjoyed broad support from various civil rights and civil liberties groups because it gave communities the chance to comment on and review the surveillance technologies that were being used locally to monitor and collect

1. See Catherine Crump, *Surveillance Policy Making by Procurement*, 91 WASH. L. REV. 1595, 1597–98 (2016).

2. *Street-Level Surveillance: A Guide to Law Enforcement Spying Technology*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/street-level-surveillance/> [<https://perma.cc/J67F-TGSF>].

3. See generally Mary Madden et al., *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. U. L. REV. 53 (2017) (examining the effect of data collection on low-income people).

4. See S.B. 1186, 2017–18 Leg., Reg. Sess. (Cal. 2018).

5. See *id.*

6. See *id.*

7. See *id.*

highly sensitive personal information.⁸ However, the bill ultimately failed after vocal criticism from law enforcement groups and associations.⁹ These groups contended that by requiring a sheriff to obtain public approval from the county board of supervisors in order to acquire surveillance equipment, SB 1186 conflicted with statutory provisions in Government Code of California Section 25303 (Section 25303), which prevents the board of supervisors from obstructing the “investigative function of the sheriff” or “the investigative and prosecutorial function of the district attorney.”¹⁰ Law enforcement groups claimed that because the authority over sheriffs and district attorneys depends on whether sheriffs and district attorneys are undertaking state officer duties or county officer duties, a board would have limited supervisory authority over sheriffs or district attorneys in such a situation.¹¹

This Note argues that SB 1186’s requirement that sheriffs submit a surveillance use policy to boards of supervisors did not conflict with Section 25303. By blurring the distinction between a sheriff’s role as a state actor and a county actor, law enforcement groups obfuscated their overarching concerns about civilian oversight of their investigatory methods. Because sheriffs are often the chief law enforcement officers in unincorporated areas, arguments that legislative attempts to improve accountability conflict with Section 25303 can lead to unacceptable limitations of civilian oversight for the many Californians who live in unincorporated regions.¹²

Though SB 1186 ultimately did not become law, it represented an important trend in California municipal, county, and state surveillance technologies and surveillance use policies. With public pressure, Santa Clara County and cities such as Davis, Berkeley, and Oakland passed ordinances that require government entities, including law enforcement, to proactively disclose information about the surveillance technology they intend to acquire and how they will use the data

8. Matt Cagle, *A New Bill Restores California’s Power to Fight Secret Surveillance*, AM. C.L. UNION NORTHERN CAL. (May 3, 2018), <https://www.aclunc.org/blog/new-bill-restores-california-s-power-fight-secret-surveillance/> [<https://perma.cc/4HGE-YPZU>].

9. See *Law Enforcement Agencies: Surveillance: Policies: Hearing on S.B. 1186 Before the S. Comm. on Pub. Safety*, 2017–18 Leg., Reg. Sess. (Cal. 2018); see also Shaun Rundle, *Surveillance Technology Bill Gets Amended; Yet CPOA Opposes*, CAL. PEACE OFFICERS ASS’N, (June 5, 2018), <https://cpoa.org/surveillance-technology-bill-gets-amended-yet-cpoa-opposes/> [<https://perma.cc/LPE9-2L87>]; Shaun Rundle, *CPOA Expresses Concerns Over Surveillance Policy Release Bill*, CAL. PEACE OFFICERS ASS’N, (Apr. 4, 2018), <https://cpoa.org/cpoa-expresses-concerns-over-surveillance-policy-release-bill/> [<https://perma.cc/3ADK-K4AQ>].

10. CAL. GOV’T CODE § 25303 (1977); see *Law Enforcement Agencies: Surveillance: Policies: Hearing on S.B. 1186 Before the S. Comm. on Pub. Safety*, *supra* note 9.

11. See *County Structure & Powers*, CAL. STATE ASS’N OF COUNTIES, <http://www.counties.org/general-information/county-structure-0/> [<https://perma.cc/Z6Y9-F3RB>] [hereinafter *County Structure*].

12. See CAL. GOV’T CODE § 26600–16 (2016); see also MARK BALDASSARE, *WHEN GOVERNMENT FAILS: THE ORANGE COUNTY BANKRUPTCY 67–68* (1998) (describing the complex role county governments play, especially in unincorporated areas).

that those technologies gather.¹³ SB 1186 was the latest in a series of bills that attempted to institutionalize these successful local reforms across the state of California. And it is very likely that SB 1186, or a substantially similar bill, will be proposed again.

Had SB 1186 passed, California would have become the first state to enact such a proactive measure. California has always been a leader on technology and surveillance issues, and this bill would have contributed to that legacy.¹⁴ This Note hopes to resolve one of the critical issues that led to SB 1186 not passing the Assembly Committee on Appropriations and to generate interest in similar bills that would extend the mandate for surveillance use policies vetted by locally elected representatives statewide.¹⁵

Part I of this Note discusses the need for legislation like SB 1186. First, it addresses the consequences of the unchecked use of surveillance technology by local law enforcement. Second, it analyzes the need for local regulation of surveillance technology and examines the California legislature's unsuccessful

13. See Robyn Greene, *How Cities are Reigning in Out-of-Control Policing Tech*, SLATE (May 14, 2018), <https://slate.com/technology/2018/05/oakland-california-and-other-cities-are-reining-in-out-of-control-police-technologies.html/> [<https://perma.cc/TMN6-JCUC>]; Dave Maass & Mike Katz-Lacabe, *Alameda and Contra Costa County Sheriffs Flew Drones Over Protests*, ELECTRONIC FRONTIER FOUND. (Dec. 5, 2018), <https://www.eff.org/deeplinks/2018/12/alameda-and-contra-costa-county-sheriffs-flew-drones-over-protests/> [<https://perma.cc/ES5G-2SPQ>].

14. See Zack Whittaker, *California to Close Data Breach Notification Loopholes Under New Law*, TECHCRUNCH (Feb. 21, 2019), <https://techcrunch.com/2019/02/21/california-data-breach-laws/> [<https://perma.cc/4N3S-5T7W>] (detailing a bill that would require companies to be more open with customers when personal data is stolen); Kim Zetter, *California Now Has the Nation's Best Digital Privacy Law*, WIRED (Oct. 8, 2015), <https://www.wired.com/2015/10/california-now-nations-best-digital-privacy-law/> [<https://perma.cc/D5CA-BDE9>].

15. Although law enforcement opposition to S.B. 1186 has been strong and well-documented, there is no conclusive reason as to why S.B. 1186 stalled in the Assembly Committee on Appropriations. S.B. 1186 passed the Senate Public Safety, Judiciary, and Appropriations Committee and was referred first, to the Assembly Committee on Public Safety and second, to the Assembly Committee on Privacy and Consumer Protection. It passed both committees before being referred to the Assembly Committee on Appropriations on June 26, 2018. S.B. 1186 then died at the end of the 2017–2018 Legislative Session. The Assembly Public Safety Committee hearing on June 19, 2018 and the Privacy and Consumer Protection hearing on June 26, 2018 were the last public statements on the bill. Both hearings were informative in assessing the support and opposition for the bill, though neither offered conclusive evidence as to why the bill ultimately failed to pass. At different times, the same legislator supported and opposed the bill. Lawmakers were generally supportive of the bill's attempt to increase transparency regarding novel surveillance technologies and protect the privacy of California residents, but were conflicted about what they perceived as onerous demands on law enforcement's methods and techniques and the idea that the bill infringed on the investigative authority of sheriffs and district attorneys in their constitutional roles as elected officials. This was evident during the Assembly Privacy and Consumer Protection hearing on June 26, 2018, and the Assembly Public Safety Committee hearing on June 19, 2018. California State Assembly Media Archives, *Assembly Privacy and Consumer Protection Committee, Tuesday, June 26, 2018* CAL. ST. ASSEMBLY <https://www.assembly.ca.gov/media/assembly-privacy-consumer-protection-committee-20180626/video> [[HTTPS://PERMA.CC/CKY5-K4C9](https://perma.cc/CKY5-K4C9)]; California State Assembly Media Archives, *Assembly Public Safety Committee, Tuesday, June 19th, 2018*. CAL. ST. ASSEMBLY <https://www.assembly.ca.gov/media/assembly-public-safety-20180619/video> [[HTTPS://PERMA.CC/H9ZV-ASR4](https://perma.cc/H9ZV-ASR4)].

attempts to regulate the use of such technologies. Third, it discusses the legislative history of SB 1186 and identifies a critical issue that led to the bill's failure: whether SB 1186 conflicts with the provisions in Section 25303 by requiring that the sheriff obtain public approval from the board of supervisors to acquire surveillance equipment.

Part II analyzes the supposed conflict between SB 1186 and Section 25303 in greater detail. First, it focuses on the statutory language of Section 25303. Second, it discusses how courts have interpreted the scope of boards of supervisors' authority over county and state law enforcement actors. Third, it applies the relevant law to SB 1186, first summarizing the oversight provisions in SB 1186 and then analyzing Section 25303 as it applies to law enforcement requests for surveillance technology acquisitions. It concludes that this purported conflict misinterprets the relevant statutory provisions because approval of surveillance use policies by boards of supervisors implicates sheriffs' roles as county actors.

Finally, Part III focuses on potential policy solutions to successfully enact a robust and democratic surveillance oversight and accountability bill by the California legislature.

I.

AN OVERVIEW OF USE POLICIES FOR SURVEILLANCE TECHNOLOGIES AND SB 1186

A. *Privacy as a Right*

It is no secret that there has been substantial growth in the use of surveillance technology by law enforcement and other public agencies. While these technologies can be useful for improving the safety of communities, overly broad surveillance invades citizens' privacy and encroaches on citizens' civil rights and liberties.

In particular, local police departments have dramatically increased their reliance on technological surveillance, rising from 20 percent of departments using at least one type of tech-based surveillance in 1997 to 90 percent in 2013.¹⁶ State and local departments have acquired most of this invasive technology with very little, if any, oversight.¹⁷ A report released by the White House in 2014 noted that, between 2009 and 2014, the federal government made available to local departments approximately \$18 billion in funds, equipment, and resources through grants from the Departments of Justice, Department of Defense, Department of Homeland Security, and Department of the Treasury, as well as

16. Justin Jouvenal, *The New Way Police Are Surveilling You: Calculating Your Threat 'Score,'* WASH. POST (Jan. 10, 2016), https://www.washingtonpost.com/local/public-safety/the-new-way-police-are-surveilling-you-calculating-your-threat-score/2016/01/10/e42bccac-8e15-11e5-baf4-bdf37355da0c_story.html/ [https://perma.cc/6KSQ-QU4S].

17. See Greene, *supra* note 13.

the Office of National Drug Control Policy.¹⁸ The report also observed that local elected officials were routinely left out of the decision-making process about the use and acquisition of surveillance technology, resulting in what is called “surveillance use policymaking by procurement.”¹⁹

Privacy is a fundamental and an explicit right in California.²⁰ Article 1, Section 1 of the California Constitution states that “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”²¹ In 1972, California voters added privacy to the state constitution to combat the growing “proliferation of government snooping and data collecting.”²² Compelling research suggests that the scope of the state’s constitutional right to privacy is broader than the implicit federal right to privacy, especially with respect to the conduct of state actors.²³ Beyond the state constitution, the California legislature has enacted over seventy general privacy laws, many of which limit the ability of law enforcement agencies to unilaterally deploy surveillance technologies.²⁴ Placing SB 1186 in context with California’s reverence for individual privacy rights suggests that the bill represents an important step in creating accountability measures in the face of ever-expanding surveillance technology usage by law enforcement.

B. Proliferation of Surveillance Technologies and Use by Local Law Enforcement

Surveillance technologies encompass a variety of electronic devices and systems that collect personal information of some form on any individual or group. While surveillance technologies have the potential to improve public safety, they also gather vast amounts of data on private populations—often negatively impacting individuals’ privacy, civil liberties, and free speech.²⁵

18. EXEC. OFF. OF THE PRESIDENT, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION 3 (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf [<https://perma.cc/U6RK-S5A4>] (reviewing federal funding programs that provide equipment, training, and resources to state and local law enforcement agencies).

19. *See id.*; *see also* Crump, *supra* note 1, at 1595 (noting that federal funding of surveillance technology acquisition and use by local law enforcement allows local law enforcement agencies to “short-circuit” civilian oversight by locally elected representatives).

20. CAL. CONST. art. I, § 1.

21. *Id.*

22. *Id.*

23. Gerald B. Cope, Jr., Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 631, 702–04 (1977); J. Clark Kelso, *California’s Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 332 (1992).

24. *See Privacy Laws*, CAL. DEP’T JUSTICE, <https://oag.ca.gov/privacy/privacy-laws/> [<https://perma.cc/XED8-XYM5>].

25. *See Street-Level Surveillance, A Guide to Law Enforcement Spying Technology*, *supra* note 2.

The most common forms of surveillance technologies employed by local law enforcement include the following:²⁶

(1) Automatic license plate readers (ALPR): these include both mobile and fixed cameras that photograph license plates and assemble the collection into a searchable database that helps law enforcement construct a virtual map of all locations a particular driver visited.²⁷ Not only can ALPRs help construct a time-sensitive tracking map of all the places a particular driver visited—including visits to sensitive locations such as health centers, immigration clinics, and places of religious worship—but ALPRs also capture this information about all cars that pass in front of the video surveillance device.²⁸ This allows ALPRs to compile a significant amount of sensitive information on all residents into a searchable, digitized database.

(2) Cell-site simulators: these, also known as Stingrays, imitate cell phone communication towers and collect information on all phones within a certain geographic area that are forced to connect to that device.²⁹ Depending on the type of technology, the data gathered not only includes a phone's location information and call history, but can also include the unencrypted content of calls and texts, as well as any metadata affiliated with the phone.³⁰ The device can also be used to divert or edit calls and messages, which allows law enforcement to gather a significant amount of information, opening the general population to broad surveillance.³¹

(3) Video surveillance, such as closed-circuit television cameras (CCTV), drones, networked surveillance, and body cameras: these allow law enforcement to create an efficient, centralized monitoring tool to broadly surveil populations.³² Cameras with different capabilities, including 360 degree video, infrared vision, zoom, and audio recording,

26. See *Community Control over Police Surveillance: Technology 101*, AM. C.L. UNION, 3–9, https://www.aclu.org/sites/default/files/field_document/tc2-technology101-primer-v02.pdf [<https://perma.cc/LAK5-FGC3>]; *Street-Level Surveillance, A Guide to Law Enforcement Spying Technology*, *supra* note 2.

27. See *You Are Being Tracked: How License Plate Readers are Being Used to Record Americans' Movements*, AM. C.L. UNION, <https://www.aclu.org/issues/privacy-technology/location-tracking/you-are-being-tracked/> [<https://perma.cc/PWZ4-YZ4J>].

28. See *Street-Level Surveillance: Automated License Plate Readers (ALPRs)*, ELECTRONIC FRONTIER FOUND. (Aug. 28, 2017), <https://www.eff.org/pages/automated-license-plate-readers-alpr/> [<https://perma.cc/N32T-8LXU>].

29. See *Stingray Tracking Devices*, AM. C.L. UNION, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices/> [<https://perma.cc/LD4A-3TNP>].

30. See *Street-Level Surveillance: Cell-Site Simulators/IMSI Catchers*, ELECTRONIC FRONTIER FOUND. (Aug. 28, 2017), <https://www.eff.org/pages/cell-site-simulatorsimsi-catchers/> [<https://perma.cc/R222-DJK9>].

31. See *id.*

32. See *Police Body Cameras*, AM. C.L. UNION, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/police-body-cameras/> [<https://perma.cc/8SLZ-LH7L>]; *Video Surveillance*, AM. C.L. UNION, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/video-surveillance/> [<https://perma.cc/W2VS-89AZ>].

as well as those affixed to drones, allow law enforcement to record substantial amounts of data, which can be digitized and aggregated, either in real-time or at a later date, to create extensive location, biometric, and ALPR databases.³³ Pervasive use of such technologies makes it increasingly likely that different types of video surveillance will be aggregated into a centralized database.³⁴

(4) Biometric databases, such as fingerprints, DNA, voice recognition, face recognition, iris recognition, and gait recognition: these are used in conjunction with CCTVs and other video surveillance to monitor an individual's location and activity over time and compile a readily searchable database of highly sensitive personal information on generally surveilled populations.³⁵ This data can be gathered surreptitiously, which has broad, negative implications for individual privacy and consent.³⁶ Furthermore, this type of data is often prone to inaccuracies, especially in surveillance of people of color, which shifts the enormous burden of correcting false-positives from the government to individuals.³⁷

(5) Social media monitoring tools: these can assist law enforcement by covertly collecting and analyzing data on individuals from activity on social media platforms such as Facebook, Instagram, and Twitter.³⁸ Law enforcement can use this gathered information about participation in political movements, religious affiliations, and romantic history to track and surveil populations, creating environments that may chill individuals' free speech and freedom of association in addition to invading their privacy and civil liberties.³⁹

33. See *Street-Level Surveillance: Surveillance Cameras*, ELECTRONIC FRONTIER FOUND. (Feb. 2, 2019), <https://www.eff.org/pages/surveillance-cameras/> [<https://perma.cc/D8WL-EZ78>]; *Street Level Surveillance: Body-Worn Cameras*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/pages/body-worn-cameras/> [<https://perma.cc/E8R7-ZJMV>]; *Street Level Surveillance: Drones/Unmanned Aerial Vehicles*, ELECTRONIC FRONTIER FOUND. (Aug. 28, 2017), <https://www.eff.org/pages/dronesunmanned-aerial-vehicles/> [<https://perma.cc/74AQ-SJ92>].

34. See *Street-Level Surveillance: Surveillance Cameras*, *supra* note 33; *Street-Level Surveillance: Body-Worn Cameras*, *supra* note 33; *Street-Level Surveillance: Drones/Unmanned Aerial Vehicles*, *supra* note 33.

35. See *Biometrics*, AM. C.L. UNION, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/biometrics/> [<https://perma.cc/WS6V-73FC>].

36. See *Street Level Surveillance: Iris Recognition*, ELECTRONIC FRONTIER FOUND. (Oct. 29, 2018), <https://www.eff.org/pages/iris-recognition/> [<https://perma.cc/5YBF-L8JV>].

37. See *Street-Level Surveillance: Face Recognition*, ELECTRONIC FRONTIER FOUND. (Oct. 24, 2017), <https://www.eff.org/pages/face-recognition/> [<https://perma.cc/K2EJ-4UHH>]; *Street Level Surveillance: Tattoo Recognition*, ELECTRONIC FRONTIER FOUND. (Nov. 30, 2017), <https://www.eff.org/pages/tattoo-recognition/> [<https://perma.cc/6Q4M-JZGX>].

38. See *Social Media Monitoring: Government Surveillance of Public Space*, ELECTRONIC PRIVACY INFO. CTR. (June 2018), <https://epic.org/privacy/surveillance/spotlight/0518/Social-Media-Monitoring.pdf/> [<https://perma.cc/MT5E-B47P>]; see also COMMUNITY CONTROL OVER POLICE SURVEILLANCE: TECHNOLOGY 101, *supra* note 26.

39. See Megan Rose Dickey, *Police Are Increasingly Using Social Media Surveillance Tools*, TECHCRUNCH (Sept. 23, 2016), <https://techcrunch.com/2016/09/23/police-are-increasingly-using-social-media-surveillance-tools/> [<https://perma.cc/ZYZ6-TAWJ>].

The aforementioned technologies are only some of the many new tools available to local law enforcement. Because new surveillance technologies are being developed and marketed to law enforcement by private companies at a rapid pace, it is difficult to assess individually the impact of each technology's use on individual rights to privacy and protection of civil liberties.⁴⁰ Furthermore, the developers and vendors of such surveillance technologies are incentivized to reject oversight measures to maintain proprietary secrets and protect their market power.⁴¹

Privacy concerns surrounding these technologies aren't merely theoretical. Between June and November of 2014, the American Civil Liberties Union (ACLU) of California analyzed publicly available meeting minutes in 58 counties and 60 cities for discussions of surveillance technologies these localities used.⁴² These technologies included drones, body cameras, video surveillance, Stingrays, ALPR software, facial recognition, and social media monitoring. Of the 127 counties and cities surveyed, 100 had some form of surveillance, but only 3 had public policies for all technology being used in a particular geographic area.⁴³ The total spending on all of this technology was over \$45 million.⁴⁴

C. *Effect of Surveillance on Vulnerable Populations and Local Responses*

Throughout the United States, there is ample evidence that law enforcement and local governments are using various forms of surveillance technologies without limitations to safeguard individual privacy, putting marginalized groups at the greatest risk for illegal and invasive government surveillance.⁴⁵ Vulnerable communities have long been the recipients of targeted surveillance technology usage.⁴⁶ For example, Immigration and Customs Enforcement (ICE) officers were able to access a nationwide license plate reader database containing over

40. See Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. 101, 112 (2017) (noting that private companies that market directly to local police departments are indirectly incentivized to erode transparency and oversight protections by creating better surveillance technology tools for law enforcement purposes); Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. LAW & POL'Y REV. 15, 40–41 (2016) (observing that new surveillance tools, such as big data, dramatically change policing behavior, which can result in reduced accountability and transparency by police departments).

41. See Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, *supra* note 40, at 129–30.

42. *Map: State of Surveillance in California*, AM. C.L. UNION OF NORTHERN CAL., <https://www.aclunc.org/article/map-state-surveillance-california#tab1/> [<https://perma.cc/D2RZ-9E96>].

43. *Id.*

44. *Id.*

45. See Somini Sengupta, *Privacy Fears Grow as Cities Increase Surveillance*, N.Y. TIMES (Oct. 13, 2013), <https://www.nytimes.com/2013/10/14/technology/privacy-fears-as-surveillance-grows-in-cities.html/> [<https://perma.cc/B4TE-NGXC>].

46. See Alex Campbell & Kendall Taggart, *A Traffic Cop's Ticket Bonanza in a Poor Texas Town*, BUZZFEED NEWS (Jan. 26, 2016), <https://www.buzzfeednews.com/article/alexcampbell/the-ticket-machine#jhnweqNL4J/> [<https://perma.cc/8WWT-EK3X>]; Alvaro M. Bedoya, *The Color of Surveillance*, SLATE (Jan. 18, 2016), <https://slate.com/technology/2016/01/what-the-fbis-surveillance-of-martin-luther-king-says-about-modern-spying.html/> [<https://perma.cc/34XG-6U39>].

two billion location records to track and target individuals for deportation proceedings.⁴⁷ Similarly, local law enforcement used ALPRs to monitor cars and congregants at mosques.⁴⁸

There are many examples of abuses of surveillance technologies in California. The City of San Diego assembled a database of over one million faces by allowing police officers to use mobile devices to photograph individuals they had either lawfully detained or surveilled from a distance.⁴⁹ Police officers were submitting photographs without objective reasons to justify their suspicions, sharing this database widely—often with federal agencies like ICE—and employing algorithmic face-matching technology with limited oversight and accuracy auditing.⁵⁰ San Jose’s police department secretly purchased a drone, though the overwhelmingly negative community response prevented it from using the drone for surveillance purposes.⁵¹ Oakland’s creation of the Domain Awareness Center (DAC)—initially envisioned as a centralized surveillance hub that would have integrated public and private cameras and sensors throughout the City of Oakland—provides another example of the effects of aggregation of

47. See Russell Brandom, *Exclusive: ICE is About to Start Tracking License Plates Across the US*, THE VERGE (Jan. 26, 2018), <https://www.theverge.com/2018/1/26/16932350/ice-immigration-customs-license-plate-recognition-contract-vigilant-solutions/> [https://perma.cc/E8AV-665T]; Conor Friedersdorf, *An Unprecedented Threat to Privacy*, ATLANTIC (Jan. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/01/vigilant-solutions-surveillance/427047/> [https://perma.cc/CKY6-H9UX].

48. Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, ASSOCIATED PRESS (Feb. 23, 2012), <https://www.ap.org/ap-in-the-news/2012/with-cameras-informants-nypd-eyed-mosques/> [https://perma.cc/5CL7-SR8P].

49. See Dave Maass & Jennifer Lynch, *San Diego Gets in Your Face with New Mobile Identification System*, ELECTRONIC FRONTIER FOUND. (Nov. 7, 2013), <https://www.eff.org/deeplinks/2013/11/san-diego-gets-your-face-new-mobile-identification-system/> [https://perma.cc/CK7H-5PKG].

50. See *id.* Assembly Bill 1215, which put a three-year moratorium on statewide facial recognition networks, recently went into effect on January 1, 2020. Katy Stegall, *3-year Ban on Police Use of Facial Recognition Technology to Start in the New Year*, SAN DIEGO UNION TRIB. (Dec. 20, 2019), <https://www.sandiegouniontribune.com/news/public-safety/story/2019-12-20/3-year-ban-on-police-use-of-facial-recognition-technology-in-california-to-start-in-the-new-year/> [https://perma.cc/98XT-GKT5]. The passage of this bill meant that San Diego County’s TACIDs facial recognition would also have to be halted. An analysis of the program over the seven years in which it had been in effect showed that it had been used over 65,000 times and had not resulted in any known successful arrests and prosecutions. See DJ Pangburn, *San Diego’s Massive, 7-Year Experiment with Facial Recognition Technology Appears to Be a Flop*, FAST CO. (Jan. 9, 2020), <https://www.fastcompany.com/90440198/san-diegos-massive-7-year-experiment-with-facial-recognition-technology-appears-to-be-a-flop/> [https://perma.cc/QCH8-W7KU]; Dave Maass, *Victory: San Diego to Suspend Face Recognition Program, Limits ICE Access to Criminal Justice Data*, ELECTRONIC FRONTIER FOUND. (Dec. 11, 2019), <https://www.eff.org/deeplinks/2019/12/victory-san-diego-suspend-face-recognition-program-cuts-some-ice-access/> [https://perma.cc/U53D-PDZC].

51. See Chris Nguyen, *City of San Jose Approves One-year Program for SJPd Drone*, ABC 7 NEWS (Aug. 11, 2015), <https://abc7news.com/technology/san-jose-approves-one-year-program-for-sjpd-drone/921610/> [https://perma.cc/CWX2-6NMR].

multiple surveillance technologies producing a synergistic effect that compromises individual privacy.⁵²

Shortly after the DAC controversy, the Oakland City Council created the Privacy Advisory Commission by ordinance to review and approve requests by city departments, including local law enforcement agencies, to acquire and use any new surveillance technology before implementation.⁵³ Oakland was one of several cities and counties to enact such a measure; the cities of Berkeley and Davis, as well as Santa Clara County, also have enacted robust surveillance use policies to govern the acquisition and use of all surveillance technology.⁵⁴ These policies have gathered significant support from civil rights and civil liberties interest groups and organizations.⁵⁵

D. California's Legislative Attempts to Enact Surveillance Oversight

Since 2015, some California legislators have attempted to make the creation and implementation of surveillance use policies by local law enforcement agencies a statewide initiative. However, these efforts have been

52. See Devin Katayama, *Oakland's Privacy Commission Could Lead Nation on Surveillance Oversight*, KQED NEWS (Jan. 22, 2016), <https://www.kqed.org/news/10824952/oaklands-privacy-commission-could-be-one-of-most-active-in-country/> [<https://perma.cc/QH6L-E8NX>]. Using federal funds, the City of Oakland began building the DAC in 2010. See Catherine Crump, *supra* note 1, at 1619–20. The purpose of the DAC was to create a surveillance network that monitored Oakland's port facilities. See *id.* at 1620. To achieve this, DAC aggregated existing surveillance data from around the city into one facility using information from citywide surveillance cameras, the port's intrusion detection system, gunfire location sensors, and mapping software. This aggregation made it easier to share information across city departments, especially for law enforcement purposes. See *id.* at 1621. Despite Oakland's history of poor relations between law enforcement and the community, the DAC was approved unanimously by the Oakland City Council without objections from the public or the press. See *id.* at 1617, 1622. In 2013, when representatives from the Oakland Police and Fire Departments appeared before City Council to request permission to expand the scope and capabilities of the DAC through the acquisition of more federal funds, public outcry was swift and overwhelmingly negative. See *id.* at 1622–23. In 2014, the Council restricted DAC's monitoring only to Oakland port facilities and limited its access to surveillance technologies throughout the city, enforcing a more purpose-specific surveillance data gathering approach in the City of Oakland. See *id.* at 1626.

53. Oakland, Cal., Ordinance 13349 (Jan. 19, 2016).

54. See Cyrus Farivar, *Oakland Passes "Strongest" Surveillance Oversight Law in US*, ARS TECHNICA (May 3, 2018), <https://arstechnica.com/tech-policy/2018/05/oakland-passes-strongest-surveillance-oversight-law-in-us/> [<https://perma.cc/CP2E-TTNH>]; Eric Kurhi, *Surveillance Tech Ordinance Adopted by Santa Clara County, Calif., Supervisors*, GOV'T TECH. (June 8, 2016), <http://www.govtech.com/dc/articles/Surveillance-Tech-Ordinance-Adopted-by-Santa-Clara-County-Calif-Supervisors.html/> [<https://perma.cc/LX8T-7LCQ>]; Michael Maharrey, *Davis California Passes Ordinance Creating Oversight and Transparency for Surveillance Programs*, TENTH AMEND. CTR. (Apr. 6, 2018), <https://offhow.org/davis-california-passes-ordinance-creating-oversight-and-transparency-for-surveillance-programs/> [<https://perma.cc/86GP-2WCS>]; Emilie Raguso, *Officials Approve New Rules on City Surveillance; May Be First in the Nation*, BERKELEYSIDE (Mar. 15, 2018), <http://www.berkeleyside.com/2018/03/15/berkeley-officials-approve-new-rules-city-surveillance-may-first-nation/> [<https://perma.cc/B8D3-NBTV>].

55. See Matt Cagle, *Californians Are Winning the Fight Against Secret Surveillance*, AM. C.L. UNION OF NORTHERN CAL. (Apr. 5, 2018), <https://www.aclunc.org/blog/californians-are-winning-fight-against-secret-surveillance/> [<https://perma.cc/DFZ4-TJMX>]; see also Cagle, *supra* note 8.

minimally successful. In 2015, California enacted SB 34, which placed restrictions on the use of ALPRs, and SB 741, which established that law enforcement could only acquire cellular communications interception technology with the approval—either by resolution or ordinance—of the local legislative body.⁵⁶ Additionally, both SB 34 and SB 741 mandated that the local law enforcement agency interested in using such technologies would have to implement a usage and privacy policy to ensure that the collection, use, storage, and sharing of surveillance data comply with existing law and respect individual privacy and civil liberties.⁵⁷

While these laws went into effect in 2016, it is not clear that either bill has been enforced throughout the state. The Electronic Frontier Foundation, with help from various citizen watchdog groups, conducted a survey of local law enforcement and public safety agency websites in early 2016 to assess whether these departments were in compliance with the new laws.⁵⁸ Using data gathered from online research and public records requests, the survey found that sixty-nine cities and counties were likely using license plate surveillance data without posting use policies in violation of SB 34.⁵⁹ Similarly, it found that eight cities and counties were likely using cell site simulators without posting use policies in violation of SB 741.⁶⁰

In December 2015, state senators introduced SB 21, a bill designed to remedy the lack of civilian oversight over all surveillance technologies through increased transparency.⁶¹ The legislators wanted to expand the mandate for surveillance use policies to all types of surveillance technologies in order to build on the promise of SB 34 and SB 741.⁶² Nevertheless, SB 21 failed.⁶³

Before it died at the end of the session, SB 21 advanced through the legislature. It passed the Senate Public Safety, Judiciary, and Appropriations Committees, the Assembly Committee on Public Safety, and the Assembly Committee on Privacy and Consumer Protection.⁶⁴ It was then referred with amendments to the Assembly Committee on Appropriations, where it was heard

56. See 2015 Cal. Stat. 532 (amending §§ 1798.29, 1798.82 of and adding Title 1.81.23 (§§ 1798.90.5-1798.90.55)) to Part 4 of Division 3 of the CAL. CIVIL CODE); 2015 Cal. Stat. 741 (adding Article 11 (§ 53166) to Chapter 1 of Part 1 of Division 2 of Title 5 of the CAL. GOV'T CODE).

57. *Id.*

58. Dave Maass, *Here Are 79 California Surveillance Tech Policies. But Where Are the Other 90?*, ELECTRONIC FRONTIER FOUND. (Apr. 11, 2016), <https://www.eff.org/deeplinks/2016/04/here-are-79-policies-california-surveillance-tech-where-are-other-90/> [<https://perma.cc/XRY9-MQ6T>].

59. *Id.*

60. *Id.*

61. See S.B. 21, 2017–18 Leg., Reg. Sess. (Cal. 2016) (adding Chapter 15 (§ 54999.8-54999.95) to Part 1 of Division 2 of Title 5 of the Cal. Gov't Code).

62. *Id.*

63. See S.B. 21, BILL HISTORY (Cal. 2017–18).

64. See S.B. 21, BILL VOTES (Cal. 2017–18).

on September 1, 2017.⁶⁵ It was held in the Appropriations Committee where it eventually died at the end of the 2016-2017 legislative session.⁶⁶

SB 21 proposed that certain law enforcement agencies develop a surveillance use policy for each type of technology and the data gathered by that technology.⁶⁷ Each policy would include guidelines for the collection, use, maintenance, and sharing of surveillance data to better protect an individual's privacy and civil liberties.⁶⁸ The agency's governing body would need to vote on these policies, and the agency would be required to cease all use of a particular technology within thirty days if the policy were not approved.⁶⁹ Additionally, the agency would need to publish the use policy online and update the policy with any amendments, whenever necessary, along with a report of how that technology was used.⁷⁰

SB 21 also included a separate protocol for sheriff's departments and district attorneys to create their own use policies that would be available for public comment instead of being voted on by their governing bodies.⁷¹ This protocol would have also mandated that the agency publish a report detailing a department's use of surveillance technology at least every two years.

E. SB 1186

SB 1186 was the legislature's most recent attempt to create more transparency through surveillance use policy. Introduced in early 2018, SB 1186 would have required law enforcement agencies to submit proposed surveillance use policies to their governing bodies for each type of surveillance technology they intended to use.⁷² The bill would have prohibited agencies from selling or sharing surveillance data, except to other law enforcement agencies, unless permitted by policies or exigent circumstances.⁷³ Knowing or intentional violations of the sharing and selling of surveillance data would have resulted in injunctive relief to stop data sharing, possible recovery of costs and attorney's fees, and disciplinary action.⁷⁴

It is important to note that the bill designated sheriffs and district attorneys as law enforcement agency actors in counties, indicating that any surveillance use policies they created would have had to be voted on and approved by their

65. *Id.*

66. *See* S.B. 21, BILL HISTORY (Cal. 2017-18).

67. *See* S.B. 21, 2016-17 Leg., Reg. Sess. (Cal. 2017).

68. *See id.*

69. *See id.*

70. *See id.*

71. *See* S.B. 21, BILL HISTORY (Cal. 2017-18).

72. *See* S.B. 1186, 2017-18 Leg., Reg. Sess. (Cal. 2018).

73. *See id.*

74. *See id.*

governing bodies.⁷⁵ SB 1186 specifically limited the application of Section 25303 of the Government Code of California, which prevents a board of supervisors from obstructing the investigative and prosecutorial functions of sheriffs and district attorneys respectively.⁷⁶ Additionally, SB 1186 noted that Section 25303 would still apply to the proposed bill's mandates.⁷⁷

Section 25303 prevents a board of supervisors, a form of a legislative governing body, from obstructing the “investigative function of the sheriff” or “the investigative and prosecutorial function of the district attorney.”⁷⁸ Though law enforcement argues otherwise, SB 1186's requirement that sheriffs or district attorneys obtain approval from the board to acquire and deploy surveillance technologies does not conflict with Section 25303.

Like SB 21, SB 1186 passed the Senate Public Safety, Judiciary, and Appropriations Committees, as well as the Assembly Committee on Public Safety and the Assembly Committee on Privacy and Consumer Protection, before it was referred to the Assembly Committee on Appropriations.⁷⁹ It was then held in the Appropriations Committee where it eventually died at the end of the 2017-2018 Legislative Session.⁸⁰

F. Support for and Opposition to SB 1186

Across California and the United States, over thirty civil rights and civil liberties groups, along with a diverse coalition of academics, supported the passage of SB 1186 because they believed that the bill would help protect Californians from intrusive, discriminatory, and unsupervised use of surveillance technologies by law enforcement.⁸¹ These interest groups encompassed a diverse alliance of voices dedicated to protecting the privacy rights of Californians.⁸²

75. See *id.* S.B. 1186 also proposed a separate set of procedures for the California Highway Patrol and the California Department of Justice to establish their own surveillance use policies.

76. It is important to note that the proposed legislation would have covered cities and counties. No one questioned the authority of the state legislature to require city law enforcement to obtain approval for surveillance through an open democratic process, which is likely why city ordinances are being used. This issue is much more complex for counties because of the provisions highlighted in the California Government Code. See *id.*

77. See *id.* § 2 (adding § 54999.85(f)(3) to the Cal. Gov't Code).

78. CAL. GOV'T CODE § 25303 (2016).

79. See S.B. 1186, BILL VOTES (Cal. 2017).

80. See S.B. 1186, BILL HISTORY (Cal. 2017–18).

81. Cagle, *supra* note 8.

82. See, e.g., *id.*; Greene, *supra* note 13. The group included the ACLU of California, Asian Law Alliance, Black Lives Matter Sacramento, California Immigrant Policy Center, Centro Legal de la Raza, Clergy and Laity United for Economic Justice in Ventura County, Coalition for Human Immigrant Rights, Coalition for Justice and Accountability, Color of Change, Council on American-Islamic Relations in California, Courage Campaign, Defending Rights & Dissent, Electronic Frontier Foundation, Ella Baker Center for Human Rights, Fair Chance Project, Fools Mission, Freedom of the Press Foundation, Greenlining Institute, Indivisible California, Media Alliance, Oakland Privacy, Orange County Communities Organized for Responsible Development (OCCORD), Our Family Coalition, Presente Action, Peninsula Peace and Justice Center, Restore the 4th SF-Bay Area, San

Law enforcement groups, however, had a different reaction. Many sheriff and district attorney associations throughout the state opposed the bill during the initial Senate Committee on Public Safety hearing on April 3, 2018.⁸³ Their opposition centered on the premise that mandating a surveillance use policy that would be voted on by locally elected government bodies would hamper their investigatory duties by revealing law enforcement techniques to potential criminals.⁸⁴ Specifically, sheriffs voiced concerns that the provision in SB 1186 creating publicly reviewable surveillance use policies conflicted with their investigatory authority under Section 25303 of the California Government Code.⁸⁵ During the Senate Judiciary Committee Hearing, sheriffs especially raised concerns about whether county governing bodies, such as boards of supervisors, could enact meaningful oversight by voting on their surveillance use policies.⁸⁶ In response to these concerns, lawmakers added the language about Section 25303 to the bill, noting that nothing in the bill would “[l]imit the application of Section 25303.”⁸⁷

G. Reasons for the Failure of SB 1186

Despite that revision, SB 1186 died in the Assembly Appropriations Committee, much like SB 21 before it.⁸⁸ Though there is no clear indication of what led to SB 1186’s failure, civil society organizations, such as the Electronic Frontier Foundation and the ACLU of Northern California, have recognized the impact of the powerful law enforcement lobby.⁸⁹ Therefore, understanding the

Francisco Peninsula People Power, San Jose Peace & Justice Center, Tenth Amendment Center, and The Utility Reform Network. Cagle, *supra* note 8.

83. See *Law Enforcement Agencies: Surveillance: Policies: Hearing on S.B. 1186 Before the S. Comm. on Pub. Safety*, *supra* note 9; see also Rundle, *Surveillance Technology Bill Gets Amended*, *supra* note 9; Shaun Rundle, *CPOA Expresses Concerns Over Surveillance Policy Release Bill* *supra* note 9.

84. See *Law Enforcement Agencies: Surveillance: Policies: Hearing on S.B. 1186 Before the S. Comm. on Pub. Safety*, *supra* note 9.

85. See *id.*; Letter from Senator Hannah-Beth Jackson, Chair, Senate Judiciary Committee, on S.B. 1186 (Apr. 17, 2018) (on file with author). Groups opposing the bill included the Association of Orange County Deputy Sheriffs, California Association of Code Enforcement Officers, California College and University Police Chiefs Association, California District Attorneys Association, California Narcotics Officers Association, California Peace Officers’ Association, California Public Defenders Association, California State Sheriffs’ Association, California Statewide Law Enforcement Association, Fraternal Order of Police, Long Beach Police Officers Association, Los Angeles County Professional Peace Officers Association, Los Angeles County Sheriff’s Department, Los Angeles Police Protective League, Sacramento County Deputy Sheriffs’ Association, and the San Bernardino County Sheriff.

86. See *id.*

87. See S.B. 1186 § 2, 2017–18 Leg., Reg. Sess. (Cal. 2018) (adding § 54999.85(f)(3) to the Cal. Gov’t Code).

88. S.B. 1186 History, (Cal. 2017–18).

89. See California State Assembly Media Archives, *supra* note 15 and accompanying text. See also Shahid Buttar, *California Assembly Acquiesces in Secret Police Surveillance*, ELECTRONIC FRONTIER FOUND. (Aug. 21, 2018), <https://www.eff.org/deeplinks/2018/08/california-assembly-acquiesces-secret-police-surveillance/> [https://perma.cc/UFQ6-LX29]. See Cyrus Farivar, *Why Does One California county Sheriff Have the Highest Rate of Stingray Use?*, ARS TECHNICA (Oct. 24, 2018),

concerns of law enforcement, and especially sheriffs, is imperative to prevent the failures of future transparency-enacting, privacy-preserving bills.

In the state of California, a sheriff is the chief law enforcement officer for a county and is responsible for policing that county's unincorporated areas.⁹⁰ All counties in California, except the City and County of San Francisco, have unincorporated areas, which contain significant proportions of the California population. Over one million individuals live in the 65 percent area of Los Angeles County that is unincorporated.⁹¹ A sheriff's surveillance technology use, therefore, affects a substantial number of California residents over a large geographic area.

What complicates attempts to control that use is that the county and state share authority over sheriffs. A board of supervisors in a California county has both legislative and executive authority.⁹² Consequently, boards have the authority to supervise sheriffs when they act as county officers.⁹³ However, the California Attorney General has direct supervision over sheriffs when they enforce state law.⁹⁴ This raises the question of whether requiring sheriffs to adopt a surveillance use policy, subject to review by a board of supervisors, implicates the sheriff's position as a state or a county officer. This potential conflict likely formed the basis of opposition groups' objections to SB 1186.

II.

AN ANALYSIS OF THE TENSION BETWEEN SECTION 25303 AND SB 1186

If there is a true conflict between SB 1186 and Section 25303, then future legislative attempts to improve accountability for surveillance use technologies will have to reconcile that problem. The following analysis attempts to tackle this issue. First, it discusses Section 25303's language regarding the supervisory authority of boards of supervisors and how courts have interpreted the scope of that authority. Second, it applies the relevant law to SB 1186, summarizing the

<https://arstechnica.com/tech-policy/2018/10/eff-sues-county-sheriff-claims-agency-wont-give-up-stingray-related-records/> [<https://perma.cc/3Z4M-8HCB>]; Chloe Triplett, *Police Are Acquiring Surveillance Tech in Secret. A California Bill Would Give the Public a Say.*, AM. C.L. UNION NORTHERN CAL. (Aug. 7, 2018), <https://www.aclunc.org/blog/police-are-acquiring-surveillance-tech-secret-california-bill-would-give-public-say/> [<https://perma.cc/S24S-42DF>]; see also Christopher Damien, *The San Bernardino Sheriff Fought Against New Statewide Surveillance Regulation and Won*, DESERT SUN, (Aug. 23, 2018), <https://www.desertsun.com/story/news/2018/08/23/san-bernardino-sheriff-opposed-failed-california-surveillance-regulation/1074490002/> [<https://perma.cc/6ULG-UH2B>].

90. See CAL. GOV'T CODE § 26600–16 (2016); see also Baldassare, *supra* note 12, at 67–68 (describing the complex role county governments play, especially in unincorporated areas).

91. *Unincorporated Areas*, CTY. LOS ANGELES, <https://www.lacounty.gov/government/about-la-county/unincorporated-areas/> [<https://perma.cc/3UL8-F93Q>].

92. See *Board of Supervisors*, CAL. STATE ASS'N COUNTIES, <http://www.counties.org/post/board-supervisors/> [<https://perma.cc/S99W-QCQX>].

93. See *id.*

94. See *id.*

oversight provisions in SB 1186 and then analyzing Section 25303 as it applies to those requests.

A. Statutory Text of Section 25303

In order to better understand whether there is an actual conflict between SB 1186 and Section 25303 of the Government Code, the best place to start is with the text of the statute itself. Section 25303 states:

The board of supervisors shall supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and particularly insofar as the functions and duties of such county officers and officers of all districts and subdivisions of the county relate to the assessing, collecting, safekeeping, management, or disbursement of public funds. It shall see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary, require them to renew their official bond, make reports and present their books and accounts for inspection.

This section shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney of a county. *The board of supervisors shall not obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county.*

Nothing contained herein shall be construed to limit the budgetary authority of the board of supervisors over the district attorney or sheriff.⁹⁵

Within the state of California, counties are “legal subdivisions of the State.”⁹⁶ Thus, counties can only exercise the powers the state has and grants to the county.⁹⁷ A county board of supervisors is created by the California Constitution and by statute—it has no inherent powers beyond those either explicitly or implicitly designated by the legislature.⁹⁸ Additionally, the power of the board to act under the legislature’s authority must be defined by applicable statutes.⁹⁹

95. CAL. GOV'T CODE § 25303 (1977). (emphasis added).

96. CAL. CONST. art. XI, § 1(a).

97. See *Cty. of Marin v. Superior Court*, 349 P.2d 526, 529–30 (Cal. 1960) (holding that, since the county is “merely a political subdivision of state government,” it can only exercise its powers granted by the state to advance state policy and the general administration of justice).

98. See CAL. CONST. art. XI, §§ 1(b), 4(a)–(h); see also *Cty. of Modoc v. Spencer*, 37 P. 483, 483–84 (Cal. 1894) (holding that boards of supervisors are “creatures of the statute” and that no order made by a board of supervisors is valid or binding unless it is authorized by law or by the legislature).

99. See *Hammond Lumber Co. v. Bd. of Supervisors*, 193 P.2d 503, 504–05 (Cal. Ct. App. 1948) (holding that the board must operate within the confines of public policy set forth in the relevant statutes passed by the legislature).

B. Powers of the Board of Supervisors

Because of the powers granted by the legislature, boards of supervisors have broad legislative, executive, and quasi-judicial powers.¹⁰⁰ However, the California Constitution and existing statutes can still limit counties' powers.¹⁰¹ A board can exercise its authority "in the best of faith" over matters it believes to be under its purview, but some of these actions may only pass muster until challenged in court.¹⁰²

The legislative powers include the authority to purchase land, levy taxes, and create and enforce local ordinances that do not conflict with state law.¹⁰³ The California Constitution only grants these powers to boards of supervisors and county officers under the boards' authority.¹⁰⁴

The executive responsibilities of a board include setting policy priorities for the county by overseeing budget proposals, supervising county officers' and employees' official conduct, controlling use and development of county property, and appropriating funds to spend on county programs for residents.¹⁰⁵

A board's quasi-judicial powers include the ability to "control . . . litigation in which the county or any public entity which the Board governs is a party," the power to audit county officers pertaining to their official duties, the power to subpoena individuals involved in litigation, the power to employ outside lawyers to help the county counsel for litigation purposes, and the choice to hire special counsel.¹⁰⁶ But a board also "shares funding responsibilities for the courts with the state."¹⁰⁷ Thus, a board cannot completely control courts' budgets or operations, which preserves the judiciary's independent and integral role in county government.¹⁰⁸

Because a board has legislative, executive, and quasi-judicial functions, its supervisory role exists in tension with its authority over county officials with statutorily designated duties, who may simultaneously be under the authority of other institutions.¹⁰⁹ The Government Code authorizes boards to supervise the official conduct of county officers by ensuring that they faithfully discharge their duties.¹¹⁰ The Government Code specifies that these actors include sheriffs, district attorneys, county clerks, and assessors.¹¹¹ However, a board cannot

100. See *County Structure*, *supra* note 11.

101. See CAL. CONST. art. XI, §§ 1(b), 4(a)–(h).

102. See *Modoc*, 37 P. at 483–84 (indicating that, though the board may act "in the supposed discharge of their duty" when representing the County's interests, these "unchallenged" acts can be struck down for exceeding the board's authority once challenged).

103. See CAL. CONST. art. XI, §§ 1(b), 4(a)–(h).

104. See *Modoc*, 37 P. at 483–84.

105. See *County Structure*, *supra* note 11.

106. *Id.*

107. *Id.*

108. *Id.*

109. See *County Structure*, *supra* note 11; see also CAL. GOV'T CODE § 25303 (1977).

110. CAL. GOV'T CODE § 25303.

111. CAL. GOV'T CODE § 24000 (2017).

augment these duties or relieve the officers from these obligations.¹¹² Additionally, a board may not direct the day-to-day operations of a county department or otherwise limit the exercise of discretion that the law grants a particular officer.¹¹³ These restrictions raise the question of whether SB 1186 improperly augments a board's authority or limits officers' discretion.

C. Elected Officials

A board of supervisors generally has more limited oversight over elected county officers such as district attorneys, sheriffs, and county assessors.¹¹⁴ As

112. See *County Structure*, *supra* note 11; see also *Skidmore v. Amador County*, 59 P.2d 818, 820–21 (Cal. 1936) (holding that the board did not have the authority to hire individuals to perform the duties of county actors, but it could contract with non-county actors to discharge county duties that were not the responsibility of county actors); *Hicks v. Bd. of Supervisors*, 138 Cal. Rptr. 101, 108 (1977) (holding that the board exceeded its authority when it attempted to transfer the district attorney's investigative functions into the sheriff's office because this action interfered with the investigative and prosecutorial functions of the district attorney's office); *People v. Langdon*, 126 Cal. Rptr. 575, 578–79 (1976) (holding that the board could not enact a local ordinance to combine judicial districts because that surpassed its supervisory authority and encroached on the statutory duty of the county clerk to select jurors).

113. See *County Structure*, *supra* note 11; see also *Modoc v. Spencer*, 37 P. 483, 483–84 (Cal. 1984) (holding that the board could not hire a private law firm to assist the District Attorney in criminal cases because doing so interfered with the District Attorney's statutorily designated operations); *Galli v. Brown*, 243 P.2d 920, 929 (Cal. Ct. App. 1952) (holding that the board, though authorized to supervise the conduct of all county officers, didn't have cause to intervene in hiring decisions by the district attorney).

114. See *County Structure*, *supra* note 11; see also CAL. GOV'T CODE § 24000 (2017); CAL. GOV'T CODE § 25303 (1977). County assessors occupy a more liminal space, as they are elected but not under the authority of the Attorney General. See *County Structure*, *supra* note 11. Thus, the board has greater supervisory authority and oversight capabilities over county assessors than over sheriffs or district attorneys because of the executive and legislative roles of the board and the many financial responsibilities of the assessor's office. See *County Structure*; see also *Assessor*, CAL. STATE ASS'N OF COUNTIES, <https://www.counties.org/county-office/assessor/> [<https://perma.cc/Y8QC-FG49>] (explaining the role of a county assessor). The tension between the board's executive and legislative power and supervisory authority is especially apparent in cases involving county assessors. See *County Structure*, *supra* note 11. The office of county assessor is an elected position. CAL. CONST. art. XI, §§ 1(b), 4(c). County assessors' duties are also statutorily designated, including their responsibility to value assessable property owned by taxpayers. See CAL. REV. & TAX. CODE § 405 (1981). While the board can supervise the quality and conduct of the county assessor's statutory duties, it can neither encroach on those duties nor force the assessor to perform duties outside the scope of the statute. However, it may be held responsible for not enforcing its supervisory authority. See *Skidmore*, 59 P.2d at 819–21 (holding that the non-county actor was providing “expert aid” beyond the skill level of the county assessor, which did not encroach on the assessor's statutorily designated duties); *Bd. of Supervisors v. Archer*, 96 Cal. Rptr. 379, 381–82 (Cal. Ct. App. 1971) (holding that the board had authority to supervise the official conduct of all county officers regarding the collection and management of public revenues; it was therefore authorized to sue the county assessor to enforce determinations by the board of equalizations regarding property tax collections); *Knoff v. City etc. of San Francisco*, 81 Cal. Rptr. 683, 694–95 (Cal. Ct. App. 1969) (holding that, if the assessor probably failed to discharge his statutory duties, the board also failed to carry out its statutorily designated supervisory duties). *But see Connolly v. Cty. of Orange*, 824 P.2d 663, 667–68 (Cal. 1992) (holding that because the board's authority is limited to ensuring that the assessor faithfully performs the duties of the office, it cannot compel the assessor to perform statutory duties).

elected officials, these county officers may have statutorily designated duties that fall under the direct supervision of other governmental bodies.¹¹⁵

Of greatest relevance to SB 1186, and future versions of the bill, are boards' supervisory powers over sheriffs and district attorneys. Each board has supervisory authority to ensure that both sheriffs and district attorneys faithfully perform their duties and follow budgetary guidelines set by the board. However, a board cannot encroach on the "constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney of a county."¹¹⁶ Oversight of district attorneys and sheriffs regarding the "investigation, detection, prosecution, and punishment of crime" falls within the purview of the California Attorney General.¹¹⁷ Thus, a board's supervisory authority over sheriffs and district attorneys is limited. Sheriffs and district attorneys perform duties as both state and county officers, and whose authority can be exercised over them is dependent on the specific type of duty the sheriffs and district attorneys undertake.¹¹⁸

D. Sheriffs

Because sheriffs function as both state and county actors, determining who has supervisory authority in any case is a difficult process. Sheriffs are elected locally according to procedures determined by the legislature.¹¹⁹ But sheriffs often enforce state law and are also under the dominion of the California Attorney General.¹²⁰ Specifically, the Attorney General has "direct supervision over every district attorney and sheriff" in their criminal investigation and prosecution capacities.¹²¹ Section 25303 limits the supervisory authority of the board of supervisors such that it does not "obstruct the investigative function of the sheriff of the county," because such a duty would fall under the Attorney General's purview.¹²²

But the sheriff has a broad array of statutory duties, of which only a handful pertain to investigation.¹²³ For example, the various duties encompassed by Section 26605 and Section 26610, such as the supervision of the county jail and care of the inmates within, are county-mandated statutory duties.¹²⁴ Therefore, the board of supervisors may exercise standard supervisory authority in regard to the sheriff's duties as a county officer.¹²⁵ When enforcing state law, however,

115. See *County Structure*, *supra* note 11.

116. CAL. GOV'T CODE § 25303 (2017).

117. See CAL. CONST. art. V, § 13.

118. See *County Structure*, *supra* note 11.

119. CAL. CONST. art. XI, §§ 1, 4(c).

120. CAL. CONST. art. V, § 13.

121. *Id.*

122. See CAL. GOV'T CODE §§ 12560 (1945), 25303 (1977).

123. See CAL. GOV'T CODE §§ 26600–16 (2016).

124. See *id.* §§ 26605, 26610.

125. See *County Structure*, *supra* note 11.

the sheriff is under the direct supervision of the Attorney General, whose authority takes precedence.¹²⁶

Yet, the existing case law delineating supervisory authority in specific scenarios remains blurry. In federal courts, the consensus is that if sheriffs are the “final policymakers”—regardless of whether they are enforcing state law or county ordinances—they, as well as the county, could be liable for any actions that infringe on the constitutional rights of individuals.¹²⁷ If sheriffs uphold a policy during their investigatory functions that is not supported by the county and that routinely harms individuals, only they may likely be liable; the county will not.¹²⁸

In state courts, the consensus seems to be that sheriffs act as state actors when investigating possible criminal activity.¹²⁹ California appellate courts have acknowledged sheriffs as county officers, but the courts have held that sheriffs’ functional independence from boards of supervisors outweighs their designation as a county official.¹³⁰ And yet, neither *Venegas v. County of Los Angeles* nor *County of Los Angeles v. Superior Court* clearly articulates the specific investigative law enforcement functions or duties of sheriffs.¹³¹ Because of the significant overlap between the sheriffs’ dual roles as state actors and county actors when conducting investigations, the determination regarding whose authority takes precedence is highly fact intensive and requires in-depth analysis.¹³²

What is not true, however, is that county boards of supervisors would have no interest in, or authority over, how sheriffs perform their investigative duties. Section 25303 grants boards of supervisors the supervisory authority to oversee the performance of the sheriff’s duties, but this authority does not permit a board to interfere with the “investigative function of the sheriff.”¹³³ Among the

126. *Id.*

127. *See Brewster v. Cty. of Shasta*, 275 F.3d 803, 808–10 (9th Cir. 2001) (holding that, despite the sheriff’s dual responsibilities as a state actor and a county actor, he was the “final policymaker” when investigating crime within the county and could be liable under 42 U.S.C. § 1983); *Streit v. Cty. of Los Angeles*, 236 F.3d 552, 561–62 (9th Cir. 2001) (holding that since the county controls and operates jails, and the sheriff is the “final policymaker” for county jail-release policies, both sheriffs and the county can be liable under 42 U.S.C. § 1983).

128. *See Roe v. Cty. of Lake*, 107 F. Supp. 2d 1146, 1151–53 (N.D. Cal. 2000) (holding that the sheriff was the “chief policymaker” for a tacit policy encouraging civil rights abuses against women in the county, but that the board and county were not liable because it was not a county policy).

129. *See Venegas v. Cty. of Los Angeles*, 87 P.3d 1, 11 (Cal. 2004) (holding that the sheriff is performing law enforcement duties when conducting a specific search into a particular plaintiff and thus is immune from liability under 42 U.S.C. § 1983); *Cty. of Los Angeles v. Superior Court*, 80 Cal. Rptr. 2d 860, 866–68 (Cal. Ct. App. 1998) (holding that the sheriff’s determination of whether to release an individual who may have an outstanding warrant was part of his law enforcement duties, and that consequently the sheriff was not liable under 42 U.S.C. § 1983).

130. *See Venegas*, 87 P. 3d at 8–9; *Cty. of Los Angeles v. Superior Court*, 80 Cal. Rptr. 2d at 866–67.

131. *See id.*

132. *See Brewster*, 275 F.3d at 808–09.

133. CAL. GOV’T CODE § 25303 (West 1977).

statutorily designated investigative functions of the sheriff are the duties to “preserve peace,” arrest all persons who have “committed a public offense,” “prevent and suppress any affrays, breaches of the peace, [and] riots,” and “investigate public offenses which have been committed.”¹³⁴ In light of these statutory definitions of sheriffs’ law enforcement investigative functions, it is important to balance the interests of a board authorizing sheriffs to enforce county policies with the sheriffs’ functions under the authority of the Attorney General.

Courts have previously evaluated the tension between sheriffs’ two roles. The best articulation of this tension can be found in *Dibb v. County of San Diego*.¹³⁵ In that case, the county passed an ordinance that created the Citizens Law Enforcement Review Board (CLERB) and appointed citizens to CLERB with the power to subpoena witnesses, administer oaths, and require the production of evidentiary documents.¹³⁶ CLERB had jurisdiction over citizen complaints against the sheriff’s department for issues such as discrimination, sexual harassment, and the use of excessive force during investigations.¹³⁷ The California Supreme Court noted that CLERB was only “advisory” and could not set policies or direct the activities of county officers.¹³⁸ Taxpayers filed suit to prevent the county and the San Diego County Board of Supervisors (SD Board) from spending funds to implement CLERB, asserting that CLERB was not authorized to handle the portfolio of issues assigned to it.¹³⁹

The court found that the ordinance that created CLERB was an acceptable use of the Board’s authority. It recognized that Section 25303 only gave the SD Board authority to supervise the official conduct of county actors; the SD Board could not interfere with the statutorily designated “investigative and prosecutorial functions” of the sheriff.¹⁴⁰ However, Section 31000.1 of the Government Code gave the SD Board the authority to “appoint commissions or committees of citizens to study problems of general or special interest to the board and to make reports and recommendations.”¹⁴¹ Additionally, the ordinance that created CLERB said that CLERB had to “cooperate and coordinate” with the sheriff and district attorney so that all three could discharge their responsibilities.¹⁴² Hence, CLERB was authorized by statute and was a valid exercise of authority by the SD Board.¹⁴³ A concurring opinion noted that CLERB could easily conflict with the investigative and supervisory duties of the

134. CAL. GOV’T CODE §§ 26600–02 (2016).

135. 884 P.2d 1003, 1005 (Cal. 1994).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1005–06.

140. *Id.* at 1008.

141. *Id.* at 1007–08.

142. *Id.* at 1009.

143. *Id.*

sheriff and the district attorney; however, this would require a highly fact-specific determination by the court and thus should not be overgeneralized or applied to this case, which did not raise such an issue.¹⁴⁴

In *Hicks v. Board of Supervisors*, the California Courts of Appeal tried to articulate the limits of the Orange County Board of Supervisors' (OC Board) authority. The court held that, by attempting to transfer the district attorney's investigatory functions to the sheriff's office, the OC Board had exceeded its authority by interfering with the investigative and prosecutorial functions of the district attorney's office.¹⁴⁵ The district attorney brought an action against the OC Board to invalidate the transfer of twenty-two investigative positions from the district attorney's staff to the sheriff-coroner's staff.¹⁴⁶ The court recognized that there was compelling evidence that indicated "no overlap in the investigative functions performed by the district attorney and the sheriff."¹⁴⁷ The OC Board claimed it had the budgetary supervisory authority to delete positions and equipment from the district attorney's budget and add those to the sheriff's budget—effectively transferring investigatory functions and powers from one office to another.¹⁴⁸

The court held that the OC Board could not transfer twenty-two individuals on the district attorney's staff to the sheriff's jurisdiction because this interfered with the investigative and prosecutorial functions of the district attorney.¹⁴⁹ Although California Government Code Sections 25300 and 29601 enumerated the OC Board's budgetary powers—which included the ability to add and eliminate county employee positions and determine the number, compensation, tenure, and conditions of employment—the court found that the transfer would allow the OC Board to dictate the manner in which the district attorney's duties were being performed.¹⁵⁰ The court noted that the district attorney acted on behalf of the people, and that controlling proceedings—including the investigation and gathering of evidence—was part of the district attorney's prosecutorial function and not under the purview of the OC Board.¹⁵¹ The court also noted that the OC Board's use of budgetary control was purposefully misleading, as some OC Board members explicitly mentioned their reasons for

144. *Id.* at 1015 (Kennard, J., concurring).

145. 138 Cal. Rptr. 101, 108–09 (Cal. Ct. App. 1977). Though *Hicks* specifically pertains to the board's authority over district attorneys, the sheriff's relationship with the board and the Attorney General, which is the focus of this section, is substantially analogous to the district attorney's relationship to the board and the Attorney General. See CAL. GOV'T CODE §§ 12550 (1945), 12560 (2016), 25303 (1977).

146. *Hicks*, 138 Cal. Rptr. at 103.

147. *Id.*

148. *Id.* at 107.

149. *Id.* at 108–09.

150. *Id.* at 106–09.

151. *Id.* at 108.

supporting the transfer of investigative positions while conducting a sham budgetary hearing.¹⁵²

The California Courts of Appeal, in *Scott v. Common Council*, attempted to clarify the court's interpretation of county boards of supervisors' authority from *Hicks*. In *Scott*, the court held that judicial intervention into the San Bernardino City Council's (SB Council) budgetary process was permissible only when the court could factually prove that budget cuts prevented a county actor from carrying out a mandatory duty.¹⁵³ The Common Council of the City of San Bernardino adopted a budget resolution to eliminate the only two investigator positions in the city attorney's office.¹⁵⁴ The court recognized that since the SB Council had the authority to add and eliminate city employee positions and create and adopt the budget, it could use the budgetary process to eliminate individual jobs.¹⁵⁵ However, since the city attorney proved that those individuals were necessary to perform the city attorney's statutory investigative functions, the court intervened, noting that courts may not intercede "when the Common Council is cutting fat and muscle, but the courts may act when the council cuts into bone."¹⁵⁶

In contrast, in *County of Butte v. Superior Court*, the county adopted a budget that reduced the sheriff's department by twenty-three positions.¹⁵⁷ The sheriff filed suit to prevent the layoffs, claiming that the layoffs prevented him from performing his statutorily mandated duties.¹⁵⁸ The court noted that the Butte County Board of Supervisors (BC Board) had power to enact the county's budget according to Article XI, Section 4 of the California Constitution and California Government Code Sections 29088 and 25300. The statutes and Constitution gave the BC Board the power to determine the number of county employees in each office, their compensation, and their conditions of employment.¹⁵⁹ Additionally, the charter required the BC Board to determine annually the number of support staff for each county office, with the provision that these salaries could be increased and decreased if necessary for the best interests of the county.¹⁶⁰ Therefore, the BC Board had not operated beyond its purview when it laid off staff from the sheriff's office.¹⁶¹

152. *Id.* at 110.

153. 52 Cal. Rptr. 2d 161, 164 (Cal. Ct. App. 1996). The powers attributed to the Council over city actors in *Scott* is analogous to the authority granted to board of supervisors over county actors. However, this would not be the case in all matters, as cities generally have greater revenue-generating authority. *See id.* at 170.

154. *Id.* at 162

155. *Id.* at 168–69.

156. *Id.* at 164, 170.

157. 222 Cal. Rptr. 429, 430–31 (Cal. Ct. App. 1985).

158. *Id.* at 431.

159. *Id.* at 432.

160. *Id.*

161. *Id.* at 433.

E. Text of SB 1186

SB 1186 would have created a surveillance oversight structure for the purchase and use of surveillance technology by local and county law enforcement agencies.¹⁶² The bill would have required law enforcement agencies to develop a surveillance use policy that would have been submitted to the governing body to ensure that the collection, use, maintenance, and sharing of surveillance information respected individuals' privacy and civil liberties.¹⁶³ Among other things, SB 1186 would have required the policy to be open to public comment and subject to amendment before any new technology could be acquired or used, except in the case of "exigent circumstances."¹⁶⁴

SB 1186 defined the following terms: (1) "law enforcement agency," which included the police department, sheriff's department, district attorney, and county probation department; (2) "governing body," which referred to the elected or appointed body that oversees a law enforcement agency; (3) "exigent circumstances," which included any emergency involving death or serious physical injury; and (4) "surveillance technology," which included any electronic device that monitored and collected audio and video information, except cellphones.¹⁶⁵ Notably, the definition of surveillance technology in this bill was far more expansive than previous definitions used by other surveillance policy oversight and transparency bills in California.¹⁶⁶

The content of SB 1186 was never intended to circumvent Section 25303. Indeed, SB 1186 explicitly stated that nothing in the bill would "[l]imit the application of Section 25303."¹⁶⁷ Thus, it recognized the supervisory authority that Section 25303 grants boards over sheriffs seeking to use surveillance technology as part of their county duties, while simultaneously limiting boards' supervisory authority over sheriffs' investigative duties.¹⁶⁸ Additionally, SB 1186 indicated that the bill should not be construed to limit the "authority of a governing body to exercise its budgetary authority in any way" if an agency were to request funds to acquire surveillance technology.¹⁶⁹ The bill, therefore, preserved the status quo of Section 25303 by ensuring that sheriffs and boards of supervisors retained their statutorily mandated relationship.

162. See S.B. 1186, 2017–18 Leg., Reg. Sess. (Cal. 2018).

163. See *id.* § 2 (adding § 54999.85(a)(1), (4) to the Cal. Gov't Code).

164. See *id.* (adding § 54999.85(a)(2), (c)(4) to the Cal. Gov't Code).

165. See *id.* (adding § 54999.8(a)–(d) to the Cal. Gov't Code).

166. See Letter from Senator Hannah-Beth Jackson, Chair, Senate Judiciary Committee, *supra* note 85.

167. See S.B. 1186 § 2 (adding § 54999.85(f)(3) to the Cal. Gov't Code).

168. See *id.* (adding § 54999.85(f)(3) to the Cal. Gov't Code); CAL. GOV'T CODE § 25303 (1977).

169. See *id.* (adding § 54999.85(e) to the Cal. Gov't Code).

Various law enforcement organizations, including the California State Sheriffs' Association, vocally opposed SB 1186.¹⁷⁰ They did not clearly articulate their reasoning besides drawing attention to the conflict between provisions in SB 1186 and Section 25303. However, one can assume that these organizations considered requiring the board's approval to acquire and implement surveillance technology an infringement of their "investigative function," which would be under the supervision of the Attorney General. The following section explains that this is not the correct interpretation of the statutes.

F. Analysis of Surveillance Use Policy in Light of Dobb, Hicks, Scott, and Butte

This section first looks into boards' budgetary authority under SB 1186. It then differentiates county boards' supervisory authority from that of the state Attorney General. It concludes that SB 1186 protected sheriffs' independence when performing certain enumerated investigative duties, but recognized county boards' executive and legislative supervisory authority over sheriffs when performing other duties.

Using budgetary authority, boards have attempted to eliminate or transfer positions and equipment on numerous occasions.¹⁷¹ This is beyond the scope of boards' authority, as it interferes with sheriffs' investigative functions.¹⁷² When courts review evidence that such an elimination or transfer prevented county actors from carrying out their statutory duties, they have held that such actions interfered with sheriffs' and district attorneys' investigative and prosecutorial functions.¹⁷³ But courts have recognized the board's budgetary supervisory authority where allegations of such interference could not be proved.¹⁷⁴

The surveillance use policy requirement in SB 1186 did not go nearly as far as these examples because it would have required boards only to approve or deny sheriffs' requests for acquiring and using surveillance technology within a county.¹⁷⁵ SB 1186 did not indicate that boards could penalize sheriffs' departments by limiting their budgets for other functions, which would have been a blatant attempt to interfere with sheriffs' performance of their duties.¹⁷⁶

170. See Letter from Senator Hannah-Beth Jackson, Chair, Senate Judiciary Committee, *supra* note 85; *An Act to add Chapter 15 (commencing with Section 54999.8) to Part 1 of Division 2 of Title 5 of the Government Code, Relating to Law Enforcement Agencies: Hearing on SB 1186 Before the Assemb. Comm. on Privacy & Consumer Protection*, 2017–18 Leg., Reg. Sess. (Cal. 2018).

171. See *Cty. of Butte v. Superior Court*, 222 Cal. Rptr. 429, 430–31 (Cal. Ct. App. 1985); *Hicks v. Board of Supervisors*, 138 Cal. Rptr. 101, 106–07 (Cal. Ct. App. 1977); see also *Scott v. Common Council*, 52 Cal. Rptr. 2d 161, 164 (Cal. Ct. App. 1996) (holding that the Common Council could not eliminate city investigator positions via budgetary process).

172. See CAL. GOV'T CODE § 25303 (1977).

173. See *Hicks*, 138 Cal. Rptr. at 106–09; *Scott*, 52 Cal. Rptr. at 168–69.

174. See *Butte*, 222 Cal. Rptr. at 433.

175. See S.B. 1186 § 2, 2017–18 Leg., Reg. Sess. (Cal. 2018) (adding § 54999.85(c)(3) to the Cal. Gov't Code).

176. See *id.*

In *Hicks* and *Scott*, boards of supervisors were attempting to micromanage the control of operations within county actors' offices.¹⁷⁷ In contrast, SB 1186 only would have allowed boards to confirm that the county's policy honored its residents' civil liberties.¹⁷⁸

Those who opposed the bill could have contended that the surveillance use policy requirement concerned the purchasing of surveillance technology, which was essential for the performance of the sheriff's investigative functions. However, such an assertion would be unlikely to survive judicial review.

First, a sheriff would have to prove that such technology was essential for the sheriff's investigative functions.¹⁷⁹ Sheriffs are part of a constitutionally created office and have been investigating crimes in California for more than a century without the use of surveillance technologies like those covered by the bill. Therefore, it is unlikely that sheriffs could claim that a sudden lack of novel surveillance technology impeded them from carrying out their statutory duties.¹⁸⁰

Second, boards would not be cutting "into bone," but simply trimming "fat and muscle" to ensure that their policies of protecting individuals' privacy and civil liberties are being respected. Boards have a legislative budgetary authority to allocate resources to various county departments in furtherance of their general policy goals and their officers' statutory duties. Therefore, denying sheriffs permission to purchase, acquire, or use very expensive surveillance technology is within a board's budgetary authority.¹⁸¹

Thus, the surveillance use policy required in SB 1186 would have provided a statutorily permissible form of oversight over sheriffs and other law enforcement agencies for the protection of individuals' privacy and civil liberties. Boards of supervisors have the authority to enforce their policy interests as part of their executive role within county governments.¹⁸² Further, as part of their statutorily designated supervisory authority, boards can look into the investigative policies, practices, and methods used by sheriffs' departments during the investigation of potential crimes.¹⁸³ SB 1186's proposed grant of authority to boards is considerably less than the authority granted to the San Diego County CLERB. CLERB's expansive authority, derived wholly from the county board of supervisors, included the ability to subpoena witnesses, administer oaths, and require the production of evidentiary documents to advise the sheriff's office on how to conduct better investigations that respected the county's policy initiatives.¹⁸⁴ CLERB had jurisdiction over the sheriff's

177. See 52 Cal. Rptr. 2d at 168-69; 138 Cal. Rptr. at 106-09.

178. See S.B. 1186.

179. See *Cty. of Butte v. Superior Court*, 222 Cal. Rptr. 429, 433 (Cal. Ct. App. 1985).

180. See CAL. CONST. art. xi, § 1.

181. See *Scott*, 52 Cal. Rptr. 2d at 164; see also *County Structure*, *supra* note 11.

182. See S.B. 1186; see also *County Structure*, *supra* note 11.

183. See CAL. GOV'T CODE § 25303 (1977); *Dibb v. Cty. of San Diego*, 884 P.2d 1003, 1005 (Cal. 1994).

184. See *Dibb*, 884 P.2d at 1005, 1009.

department regarding incidents involving discrimination, sexual harassment, and the use of excessive force that occurred during sheriff's investigations.¹⁸⁵ Similarly, the surveillance use policy requirement focuses on the sheriff's ability to infringe on an individual's privacy and civil liberties when conducting investigations.¹⁸⁶

Those who opposed SB 1186 may also have been concerned that the surveillance use policy infringed on the sheriff's investigative duties that are under the direct supervision of the Attorney General.¹⁸⁷ But this ignores that there is no exact statutory definition of the scope of a sheriff's investigative law enforcement duties.¹⁸⁸ Further, both federal and state courts acknowledge boards' supervisory role while disagreeing on whose authority governs in any given set of facts.¹⁸⁹ Since SB 1186 would have only provided oversight by either approving or rejecting a surveillance use policy crafted by a sheriff for an investigative purpose, it would not have set broad investigative policies that fall under the purview of the Attorney General.¹⁹⁰ Rather, it would have required compliance with a board's own policy priorities of protecting the privacy and civil liberties of county residents.¹⁹¹ SB 1186 aimed to ensure that boards retained their supervisory authority.¹⁹²

Finally, SB 1186 contained an "exigent circumstances" exception that would have given sheriffs the temporary authority to use surveillance techniques and equipment without prior permission from boards for any emergency involving death or serious physical injury.¹⁹³ When necessary, the sheriff could discharge investigative law enforcement functions without prior approval of a surveillance use policy. SB 1186 respected the importance of the sheriff's independence from a board's authority while performing investigative duties such as those defined by Sections 26000–02 of the California Government Code, but also recognized boards' supervisory authority in line with their executive and legislative duties.

185. *See id.* at 1005–06.

186. *See* S.B. 1186 § 2.

187. *See* CAL. CONST. art. V, § 13; CAL. GOV'T CODE § 12560 (1945).

188. *See* *Brewster v. Shasta*, 275 F.3d 803, 808–10 (9th Cir. 2001); *Venegas v. Cty. of Los Angeles*, 87 P.3d 1, 11 (Cal. 2004).

189. *See* *Brewster*, 275 F. 3d at 808–10; *Roe v. Cty. of Lake*, 107 F. Supp. 2d 1146, 1151–53 (N.D. Cal. 2000); *Venegas*, 87 P. 3d at 8–9; *Cty. of Los Angeles v. Superior Court*, 80 Cal. Rptr. 2d, 860, 866–68 (Cal. Ct. App. 1999).

190. *See* CAL. GOV'T CODE § 12560; S.B. 1186 § 2.

191. *See* S.B. 1186.

192. *See* *Dibb v. Cty. of San Diego*, 884 P.2d 1003, 1005, 1009 (Cal. 1994).

193. *See* S.B. 1186 § 2.

III.

A POTENTIAL POLICY FOR ENACTING DEMOCRATIC SURVEILLANCE
OVERSIGHTA. *Takeaways*

When taken together, the cases discussed above indicate that eliminating positions or deciding the resources available to an office is a budgetary matter. However, manipulating whether specific jobs can be assigned to specific offices or micromanaging law enforcement duties interferes with the investigative functions of the county official. Such decisions by boards, therefore, go beyond their authority and encroach on the Attorney General's authority. Still, enacting oversight remains within a board's supervisory authority as part of its legislative and executive duties. The surveillance use policy requirement is fundamentally about oversight to protect the civil liberties of county residents. Asserting that the policy requirement severely impacts sheriffs' investigative functions misrepresents the content of SB 1186, misunderstands the statutory provisions, and showcases the lack of respect for both civilian oversight and civil liberties.

The purpose of a surveillance use policy is not to impede local law enforcement's ability to conduct investigations and protect citizens from criminal activity. Rather, a surveillance use policy proactively identifies potential harms to privacy, civil rights, and civil liberties by answering questions such as what information is being collected, for how long that information is being retained, who is collecting that information, why that information is being collected, with whom that information is being shared, and how that information is being used.¹⁹⁴ A surveillance use policy forces law enforcement to proactively analyze the impacts of deploying a particular technological tool with vast data-gathering capabilities within a community.¹⁹⁵ Ensuring that a policy is submitted for public review allows the community to weigh in before such information is collected—and to have a say as to whether such information should be collected in the first place.¹⁹⁶

There is some indication that the recent California legislature is not averse to reining in the use of certain mass surveillance technologies by law enforcement agencies. For example, the legislature successfully adopted SB 34 and SB 741, which mandate surveillance use policies for deployment of automated license plate readers (ALPR) and cellular communications

194. See Crump, *supra* note 1, at 1642.

195. See Shahid Buttar, *An Open Letter to Assemblymember Lorena Gonzalez Fletcher, Chair of the California Assembly Appropriations Committee*, ELECTRONIC FRONTIER FOUND. (Aug. 1, 2018), <https://www.eff.org/deeplinks/2018/07/open-letter-assemblymember-lorena-gonzalez-fletcher-chair-california-assembly/> [<https://perma.cc/JL5U-MKUU>].

196. See *id.*

interception technologies respectively.¹⁹⁷ Although SB 21 and SB 1186 ultimately failed, both were examples of California legislators attempting to expand the model used for ALPRs and Stingrays to encompass all forms of surveillance technology.

Facial recognition bans throughout California are another example of California cities' and counties' rapid response to the growing threat of mass surveillance. San Francisco became the first major city in the United States to ban local government agencies', including law enforcement's, use of facial recognition technology.¹⁹⁸ The Stop Secret Surveillance ordinance, the seventh major surveillance oversight provision within California, was passed by the San Francisco Board of Supervisors in May 2019.¹⁹⁹ The ordinance specifically noted that the benefits of using such technology were outweighed by the "endanger[ment of] civil rights and civil liberties" and the "exacerbate[ion of] racial injustice."²⁰⁰ Oakland became the third city in the United States, and the second in California, to ban facial recognition surveillance by local agencies via ordinance in June 2019, recognizing that facial recognition is often inaccurate, invasive, and racially and gender biased.²⁰¹ The Oakland City Council President specifically noted that facial recognition technology would make Oakland residents feel less safe and could lead to "the misuse of force, false incarceration, and minority-based persecution."²⁰² Berkeley followed shortly after, becoming the fourth city in the U.S. to ban all local government use of facial recognition technology, citing the potential of the technology to violate residents' Fourth Amendment rights.²⁰³ California also enacted a more limited statewide three-

197. See Matt Cagle, *California Just Got a Privacy Upgrade – Alameda County, It's Your Move*, AM. C.L. UNION OF NORTHERN CAL. (Nov. 17, 2015), <https://www.aclunc.org/blog/california-just-got-privacy-upgrade-alameda-county-its-your-move/> [<https://perma.cc/G64F-TT88>].

198. Dave Lee, *San Francisco is First US City to Ban Facial Recognition*, BBC NEWS (May 15, 2019), <https://www.bbc.com/news/technology-48276660> [<https://perma.cc/85M7-A5UH>].

199. Shirin Ghaffary, *San Francisco's Facial Recognition Technology Ban, Explained*, VOX (May 14, 2019), <https://www.vox.com/recode/2019/5/14/18623897/san-francisco-facial-recognition-ban-explained/> [<https://perma.cc/DJ6R-DX2R>]; Taylor Hatmaker, *San Francisco Passes City Government Ban on Facial Recognition Tech*, TECHCRUNCH (May 14, 2019), <https://techcrunch.com/2019/05/14/san-francisco-facial-recognition-ban/> [<https://perma.cc/KPQ5-3R55>].

200. San Francisco, Cal., Ordinance 90,110 on Administrative Code – Acquisition of Surveillance Technology (May 6, 2019).

201. Sarah Ravani, *Oakland Bans Use of Facial Recognition Technology, Citing Bias Concerns*, S.F. CHRON. (Jul. 17, 2019), <https://www.sfchronicle.com/bayarea/article/Oakland-bans-use-of-facial-recognition-14101253.php> [<https://perma.cc/6NSN-AJTW>].

202. Caroline Haskins, *Oakland Becomes Third U.S. City to Ban Facial Recognition*, VICE (Jul. 17, 2019), https://www.vice.com/en_us/article/zmpaex/oakland-becomes-third-us-city-to-ban-facial-recognition-xz/ [<https://perma.cc/46JW-QBWH>]; Oakland, Cal., Ordinance Amending Oakland Municipal Code Chapter 9.64 to Prohibit the City of Oakland from Acquiring and/or Using Face Recognition Technology (June 6, 2019).

203. Tom McKay, *Berkeley Becomes Fourth U.S. City to Ban Face Recognition in Unanimous Vote*, GIZMODO (Oct. 16, 2019), <https://gizmodo.com/berkeley-becomes-fourth-u-s-city-to-ban-face-recogniti-1839087651/> [<https://perma.cc/S72B-2NNU>]; Levi Sumagaysay, *Berkeley Bans Facial*

year ban on local law-enforcement using facial recognition software in body cameras through Assembly Bill (AB) 1215 in October 2019. The bill, which went into effect in January 2020, prohibits use of biometric surveillance in police body cameras as well as police running body camera footage through any facial-recognition software. The bill has already led to the shutdown of San Diego's TACIDs expansive program, which had been in effect for seven years, contained almost two million images, and was being used approximately twenty-five thousand times a year.²⁰⁴

One of the major reasons why SB 1186 did not pass was likely the vocal concern of sheriffs over the legal issue addressed in this Note.²⁰⁵ But this may not be the only reason why law enforcement opposed the bill. Law enforcement's response to the enactment of SB 34 and SB 741 suggests that, despite a statewide mandate to create publicly reviewable surveillance use policies that govern the deployment of ALPRs and cell-site simulators, law enforcement remains resistant to such oversight.²⁰⁶ In San Diego, as of 2018, law enforcement was still in violation of SB 34 after it had been deemed to be in violation of the bill in both 2016 and 2017.²⁰⁷ This suggests that law enforcement remains unwilling to solicit civilian oversight, whether mandated by law or not.

B. Recommendations

This Note delineates the separation between a sheriff's role as a county actor under the supervision of a county board of supervisors and as a state actor under the authority of the California Attorney General. Since sheriffs' associations used this issue to oppose the passage of SB 1186, this Note hopes to put to rest concerns that this bill, or a substantially similar one, would allow county boards of supervisors to encroach on the state Attorney General's oversight responsibilities for sheriffs.²⁰⁸

Introducing a similar bill would not be outside the realm of possibility. Senator Jerry Hill, the author of SB 34, SB 741, SB 21, and SB 1186, continues to serve as the representative for the Thirteenth Senate District of California.²⁰⁹ The aforementioned bills were brought in quick succession, beginning in 2015,

Recognition, MERCURY NEWS (Oct. 16, 2019), <https://www.mercurynews.com/2019/10/16/berkeley-bans-facial-recognition/> [<https://perma.cc/SL2R-U9XW>].

204. Stegall, *supra* note 50.

205. See *Law Enforcement Agencies: Surveillance: Policies: Hearing on S.B. 1186 Before the S. Comm. on Pub. Safety*, *supra* note 9.

206. Maass, *supra* note 58.

207. Andrew Keatts, *SDPD May Not Be Following State Law on License Plate Readers*, VOICE OF SAN DIEGO (Apr. 23, 2018), <https://www.voiceofsandiego.org/topics/public-safety/sdpd-may-not-be-following-state-law-on-license-plate-readers/> [<https://perma.cc/K535-296C>].

208. See Tracey Rosenberg, *Taming High Tech Law and Order in the Wild Wild West*, MEDIUM (Aug. 2, 2018), <https://medium.com/@tracyrosenberg/taming-high-tech-law-and-order-in-the-wild-wild-west-30e365a6c99a/> [<https://perma.cc/V6GL-QZHE>].

209. See *Biography*, SENATOR JERRY HILL, <https://sd13.senate.ca.gov/biography/> [<https://perma.cc/FK6R-LE3V>].

in response to widespread allegations of abuses of specific surveillance technologies.²¹⁰ Senator Hill has demonstrated a strong interest in issues surrounding surveillance use policies and civilian oversight over law enforcement. This interest seems unlikely to change, especially in light of the growing number and increasing capabilities of available and developing surveillance technologies.²¹¹

More importantly, there is a growing local awareness and backlash that local law enforcement is using surveillance technology to observe the actions of the communities under its protection.²¹² Additionally, such broad and unchecked surveillance puts the greatest risk of abuse on marginalized communities.²¹³ Individual cities and counties in California have recognized this issue and have responded by enacting citywide and countywide surveillance use policy mandates on municipal and county law enforcement agencies.²¹⁴ Extending this mandate statewide, so that all Californians have such protection at the local level, is the logical next step, especially in light of the increasing availability of invasive surveillance technologies.

Enacting an accountability and oversight measure similar to SB 1186 would increase protections for all residents, especially the most vulnerable, by giving them a voice in the process of acquisition and use of surveillance technologies in their communities. It is a form of democracy in action, regardless of whether citizens live in unincorporated or incorporated areas, and regardless of whether the city or county has already enacted such a policy because of public pressure or is just becoming aware of the dangers of oversurveillance. Such a measure would shift the burden of protecting citizens and vulnerable populations from surveillance onto law enforcement, asking them to justify their acquisition of every surveillance technology before its acquisition.

C. Potential Policy Solutions

Based on the city and county approach of enacting local surveillance use policies, there seems to be sufficient support to suggest that residents throughout

210. See 2015 Cal. Stat. 532 (amending §§ 1798.29, 1798.82 of and adding Title 1.81.23 (§§ 1798.90.5-1798.90.55) to Part 4 of Division 3 of the Cal. Civ. Code); 2015 Cal. Stat. 659 (adding Article 11 (§ 53166) to Chapter 1 of Part 1 of Division 2 of Title 5 of the Cal. Gov't Cod); see S.B. 21 2017–18 Leg., Reg. Sess. (Cal. 2017) (adding Chapter 15 (§ 54999.8-95) to Part 1 of Division 2 of Title 5 of the Cal. Gov't Code); SB 1186, 2017–18 Leg., Reg. Sess. (Cal. 2018).

211. See *Street-Level Surveillance: A Guide to Law Enforcement Spying Technology*, *supra* note 2.

212. See *supra* notes 197–204.

213. See Paul Bernal, *Data Gathering, Surveillance and Human Rights: Recasting the Debate*, 1 J. CYBER POL'Y 243, 246 (2016); see also Evan Greer, *More Border Surveillance Tech Could Be Worse For Human Rights Than a Wall*, WASH. POST (Feb. 13, 2019), https://www.washingtonpost.com/outlook/2019/02/13/more-border-surveillance-tech-could-be-worse-human-rights-than-wall/?noredirect=on&utm_term=.e1ae7f22be07/ [https://perma.cc/479W-44T6].

214. See Farivar, *supra* note 54; Kurhi, *supra* note 54; Maharrey, *supra* note 54; Raguso, *supra* note 54.

California are interested in enacting such use policies in their cities and counties. The growth of available technologies means that data can be gathered and aggregated more quickly and efficiently, creating more comprehensive databases containing highly sensitive personal information. Increasing awareness about this issue could shift momentum toward the prospect of enacting a broad, publicly reviewable surveillance use policy throughout the state. This momentum, bolstered by civil society groups such as the American Civil Liberties Union and Electronic Frontier Foundation, could exert sufficient pressure on lawmakers to either resurrect a version of SB 1186 or to at least support it in committees once introduced.²¹⁵

Another potential solution is to put a surveillance use policy mandate for all law enforcement agencies on the ballot either through legislative referral or signature-gathering. This solution is arguably the most democratic approach. A powerful law enforcement lobby might have difficulty mounting a successful campaign against California residents who, in light of recent developments in surveillance technology, may be more disposed toward robust civilian oversight. Based on current trends in the general voting population in California, there is compelling evidence to suggest that this measure might pass.²¹⁶

Regardless of the path to enactment, it is imperative that a bill like SB 1186 passes soon. This Note focused on the failed SB 1186, rather than the enacted SB 34 and SB 741, because SB 1186 was a bold, progressive approach to expanding the oversight mandate to all surveillance technologies currently in use and development. SB 1186 was flexible, preserving the authority of local governments to follow state law. Enacting technology-specific surveillance use policies on a piecemeal basis is an inefficient solution that is ultimately detrimental to Californians, who must wait for the law to catch up to rapidly developing technology. A proactive solution is required.

CONCLUSION

California should either resurrect Senate Bill 1186 or propose a substantially similar bill because such a bill would enact necessary surveillance transparency, accountability, and oversight measures over every California law enforcement agency, including sheriffs and district attorneys. The provisions in Section 25303 of the California Government Code do not conflict with the language of SB 1186 because providing a publicly reviewable surveillance use

215. Both SB 21 and SB 1186 were inspired by the ACLU's model local ("CCOPS") legislation adopted in NorCal communities and elsewhere. Nicole Ozer & Chad Marlow, *A Promising California Bill Could Help Communities Stop Secret And Discriminatory Police Surveillance*, AM. C.L. UNION (Aug. 29, 2017), <https://www.aclu.org/blog/national-security/privacy-and-surveillance/promising-california-bill-could-help-communities/> [<https://perma.cc/5UPX-XBSE>]; Chloe Triplett, *Police Are Acquiring Surveillance Tech in Secret*, *supra* note 89.

216. *California Statewide Survey Re: Poll Results of Likely 2020 Voters*, DAVID BINDER RESEARCH, 2 https://www.aclunc.org/docs/DBR_Polling_Data_On_Surveillance.pdf [<https://perma.cc/E3DQ-9U87>].

policy to a county board of supervisors does not obstruct the investigative function of sheriffs. By requiring the submission of a surveillance use policy for each technology that is operational in a county, sheriffs are simply performing their roles as county actors. This issue, raised by sheriffs in opposition to the bill, should not influence the bill's analysis. California can once again continue its leadership on the issue of enacting powerful surveillance use policies, as it has done on the municipal and county level. To ignore that call would squander the opportunity to enact proper democratic civilian oversight over law enforcement. The failure to enact such a bill exposes community residents to greater risk of having their privacy and civil rights violated. Further, this failure exacerbates the encroachment of surveillance technologies, silencing the critical and necessary voices that should be part of the debate in a functioning democracy.