



Black Lives Monitored

Chaz Arnett

University of Maryland Francis King Carey School
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ABSTRACT

The police killing of George Floyd added fuel to the simmering flames of racial injustice in America following a string of similarly violent executions during a global pandemic that disproportionately ravaged the health and economic security of Black families and communities. The confluence of these painful realities exposed deep vulnerabilities and renewed a reckoning with the long unfulfilled promise of racial equality, inspiring large-scale protests around the country and across the globe. As with prior movements for racial justice, from slavery abolition to the civil rights movement's demand to end Jim Crow, protests have been met with extreme force, either state-led or state-sanctioned. Historically, and currently, these aggressive responses to frustrate and limit the effectiveness of racial justice movements have been aided by targeted surveillance strategies. Most recently, these surveillance tactics have grown in sophistication and capability, as seen with state and national police forces using an array of advancing technologies that capture biometric data, deploy artificial intelligence (A.I.), and visually track and record personal movements over wide distances and time periods. The ability to surveil and disrupt protests has profound implications for political expression, democratic governance, and the possibilities of achieving racial justice. This Article argues that while the Fourth Amendment is presumed to check the state's power to surveil, it often facilitates the very practices it should limit. Fourth Amendment jurisprudence on surveillance and the legal norms that have developed around police monitoring present significant barriers to challenges of the contemporary surveillance technologies utilized against Black Lives Matter movements. Given the limits of traditional privacy frameworks to account for the historical realities and threats of racialized surveillance practices, the Article promotes a race justice lens as necessary in understanding and navigating police surveillance technology discourse and fashioning appropriate responses. It concludes that local and federal advocacy, a reckoning with constitutional interpretation, and legislative action may be necessary to counter police power to surveil, including concerted efforts to meet the demands of the movement. Those demands call for shifting the dominant narrative on what safety entails and requires and limiting the reach of and reliance on law enforcement.



AUTHOR

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*I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.*¹

INTRODUCTION

On the morning of August 7, 2020, Derrick Ingram, a Black cofounder of the social activist group “Warriors in the Garden,” awoke to find that dozens of police officers had descended on his New York City apartment.² A drone hovered outside of his apartment window, and he believed that his frantic phone calls for help were being intercepted and blocked by law enforcement.³ He specifically recalled the red laser beam that passed in front of his face in the living room, trained there by one of the armed officers posted on the other side of the courtyard, and thinking that he was going to be shot and killed.⁴ He started livestreaming what was happening.⁵ What was Ingram’s offense? He participated in a protest in Times Square where he chanted into a megaphone while police officers attempted to barricade a large group of protestors.⁶ Ingram was charged with assaulting a police officer when a patrolwoman claimed that he spoke in the bullhorn near her ear, causing temporary hearing loss.⁷ It was a case that ultimately would be dismissed. But Ingram was not arrested at the protest that day. Law enforcement later tracked him down using facial recognition technology with video from that protest, which led them to his Instagram profile.⁸

This intensification of surveillance using advanced technologies and the corresponding militarized response are indicative of the law enforcement activity at the local, state, and federal level that took place in the wake of George

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1. RALPH ELLISON, *INVISIBLE MAN* 3 (Vintage Int’l ed. 1990).
 2. Adrienne Green, *The Room Where It Happened*, N.Y. MAG. (May 25, 2021), <https://nymag.com/intelligencer/2021/05/derrick-ingram-nypd-standoff.html> [<https://perma.cc/S2UL-3R4P>]; Liam Stack, Annie Correal & Juliana Kim, *N.Y.P.D. Besieges a Protest Leader as He Broadcasts Live*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/nyregion/nypd-derrick-ingram-protester.html> [<https://perma.cc/VTF6-RVBU>].
 3. *Id.*
 4. *Id.*
 5. *Id.*
 6. *Id.*
 7. *Id.*
 8. James Vincent, *NYPD Used Facial Recognition to Track Down Black Lives Matter Activist*, VERGE (Aug. 18, 2020), <https://www.theverge.com/2020/8/18/21373316/nypd-facial-recognition-black-lives-matter-activist-derrick-ingram> [<https://perma.cc/AP2K-HT7U>].

Floyd's murder and the global uprising. That moment and the ensuing years after have become known as a long overdue period of racial reckoning. This racial reckoning has raised tough questions about racial equality and exposed the disproportionate harms of policing and contact with the criminal legal system. Legal scholars have only now just begun wrestling with the significant impact and legacy of this defining moment on criminal policy, jurisprudence, and legal theory. Examining the reckoning is important for interrogating the relationship between social protest and big data policing. It is also necessary for highlighting the profound sociopolitical implications for an increasingly powerful and voracious policing surveillance apparatus, built upon a foundation of institutionalized discriminatory policing. In previous work I have made historical connections between discriminatory policing and racialized surveillance practices, noting that "race- and class-targeted policing does more than generate animosity or legitimacy gaps between law enforcement and Black communities, it also actively facilitates . . . underdevelopment and subordination . . ."⁹ Racializing surveillance is important in the context of the racial reckoning because it acts to determine who is within and without the body politic—limiting the free exercise of rights along racial lines and signaling what social causes are just.

The Fourth Amendment is widely understood as providing some protections against police surveillance. Yet, for decades, criminal law scholars have highlighted a disconnect between these professed protections and the reality of contemporary policing. As Professor Tracey Maclin has noted, "The Fourth Amendment protects rights that Americans like to brag about in the abstract. Too many, however, are reluctant to enforce these rights in the real world."¹⁰ This disconnect is even more pronounced in the instance of policing Black people, communities, and causes. More recently, scholars have argued that conservative conceptions and applications of unreasonable search and seizure standards have weakened the Fourth Amendment's protections against unconstitutional policing of protests.¹¹ This Article contributes to this body of literature by examining the rapidly changing technological dimensions of police surveillance of social protest, using the Black Lives Matter demonstrations as the focal point. It argues that Fourth Amendment law and norms are unresponsive

9. Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO STATE L.J. 1103, 1106 (2020).

10. Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 72 (1994).

11. See Karen J. Pita Loor, *An Argument Against Unbounded Arrest Power: The Expressive Fourth Amendment and Protesting While Black*, 120 MICH. L. REV. 1581 (2022); Shawn E. Fields, *Protest Policing and the Fourth Amendment*, 55 U.C. DAVIS L. REV. 347 (2021); Brandon Hasbrouck, *Who Can Protect Black Protest?*, 170 UNIV. PA. L. REV. ONLINE 39 (2022).

to racialized surveillance and further police efforts to intimidate, delegitimize, and frustrate protest movements for racial justice. The Article suggests that in addition to a racial reckoning with policing and prisons, there must be a racial reckoning with criminal legal jurisprudence which 1) challenges historically limited conceptions of privacy, 2) interprets the Fourth Amendment to protect against new modes of policing in an increasingly digitally surveilled and automated society, and 3) recognizes the growing overlap between government and private action, where big data processes take precedence in the emerging datafied state. Ultimately, the Article stresses that such a reckoning cannot be achieved without complementary transformations in law and social policy guided by a racial justice lens informed by Critical Digital Studies. A critical race, tech, and law approach is not only recommended, but also necessary to navigate this fraught terrain.

This Article proceeds in three parts. Part I highlights how surveillance technologies were used in response to public demonstrations against police violence during the racial reckoning and responds to important questions about the selective use of these tactics. Part II details the barriers faced by advocates seeking to use Fourth Amendment protections as avenues for limiting police monitoring. It highlights how colorblind logics in both law and technology norms work together to dilute channels of resistance and reform. Part III of the Article explores what some of these barriers and challenges may mean for the future of racial justice movements like Black Lives Matter and suggests strategies for furthering such efforts in the face of extensive tech facilitated surveillance.

I. PROTESTING WHILE BLACK

“Stay Black and Live” was the sobering yet powerful title and theme of the 2020 Juneteenth celebration organized by members of Austin’s Black community.¹² Held just weeks after the horrifying execution of George Floyd by Minneapolis police officer Derek Chauvin,¹³ on the heels of news of the

12. See STAY BLACK & LIVE: A VIRTUAL JUNETEENTH 2020 FESTIVAL, <https://juneteenth.tx.com> [<https://perma.cc/N33N-6G3A>].

13. See, e.g., Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/3UBL-TMHY>].

killings of Breonna Taylor¹⁴ and Ahmaud Arbery,¹⁵ and during the early days of a pandemic which had already begun to show signs of disproportionate harms on Black communities,¹⁶ the need to affirm the right and desire to “Live” was obvious. Yet the call to both “Stay Black” and “Live” hinted at an even more depressing tension. The reality is that, in America, staying Black and alive is more often a levied demand than a given. But this did not spoil the joys of the day as community members observed film screenings, led art auctions, listened to live music and poetry, and participated in raffles.¹⁷ Unbeknownst to the participants, however, the Austin Regional Intelligence Center (ARIC) was actively surveilling the event.¹⁸ ARIC is a part of a nationwide network of fusion centers¹⁹ developed after 9/11 with the purported aim of gathering and sharing intelligence with local, state, and federal law enforcement concerning presumed threats to the nation.²⁰

This form of extensive surveillance mirrored a militarized national response by law enforcement agencies in the weeks and months after the video of George Floyd’s killing went viral and people flooded the streets to demand justice.²¹ Thus, as armored vehicles and law enforcement officers collided with

14. See, e.g., Richard A. Oppel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Dec. 12, 2022), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/9YY5-BXX8>].

15. See, e.g., Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/AY5N-Y3WE>].

16. See, e.g., Editorial, *Too Many Black Americans Are Dying from COVID-19*, SCI. AM. (Aug. 1, 2020), <https://www.scientificamerican.com/article/too-many-black-americans-are-dying-from-covid-19> [<https://perma.cc/69ZW-THAR>].

17. Austin Parks & Recreation, *Juneteenth 2020: Stay Black and Live*, YOUTUBE (June 19, 2020), <https://www.youtube.com/watch?v=sDiiXgFD-NM> [<https://perma.cc/D8RS-FP6M>].

18. Mara Hvistendahl, *Austin Fusion Center Spied on Nonpolitical Cultural Events*, INTERCEPT (Nov. 30, 2020, 12:00 PM), <https://theintercept.com/2020/11/30/austin-fusion-center-surveillance-black-lives-matter-cultural-events> [<https://perma.cc/J4SE-3WGC>].

19. The Department of Homeland Security describes fusion centers as “state-owned and operated centers that serve as focal points in states and major urban areas for the receipt, analysis, gathering and sharing of threat-related information between State, Local, Tribal and Territorial (SLTT), federal and private sector partners.” *Fusion Centers*, U.S. DEP’T HOMELAND SEC. (Oct. 27, 2022), <https://www.dhs.gov/fusion-centers> [<https://perma.cc/WQ3X-FE55>].

20. See *id.*

21. See Tom Nolan, *Militarization Has Fostered a Policing Culture That Sets Up Protesters as ‘the Enemy’*, RICE KINDER INST. URB. RSCH. (June 10, 2020), <https://kinder.rice.edu/urbanedge/2020/06/10/police-brutality-militarization-racism-protests> [<https://perma.cc/8HM3-ZM4D>]; U.S. *Current Trend: Militarization, the Freedom of Assembly, and the George Floyd Protests*, INT’L CTR. NOT-FOR-PROFIT L. (May 31, 2020), <https://www.icnl.org/post/>

protestors, police utilized a series of surveillance strategies alongside the physical encounters.²² These surveillance practices were deeply racialized and divorced from genuine claims of public safety, as demonstrated by the monitoring of the Austin Juneteenth celebration, which did not involve protests and was held online.²³ The racial dimensions were further belied by the sharp contrast in law enforcement response witnessed in the preceding weeks to the gathering of overwhelmingly White protestors at state capitols across the country.²⁴ As the largely White groups of protestors defiantly stood in opposition to COVID-19 face mask mandates and stay-at-home orders, many were equipped with high-powered firearms and bulletproof armor.²⁵ In Michigan, a group of White men even plotted the kidnapping of Governor Gretchen Whitmer as a means to stop the coronavirus lockdown.²⁶ It is no coincidence that these armed demonstrations and open resistance efforts occurred as data emerged showing that COVID-19 was having a particularly harmful impact on Black communities.²⁷

Not only were lockdown protests unencumbered by aggressively militarized shows and uses of force, law enforcement often appeared to be wholly absent. This stark reality was highlighted when state representative Sarah Anthony was escorted to the Michigan capitol under the protection of a collective band of

analysis/u-s-current-trend-militarization-the-freedom-of-assembly-and-the-george-floyd-protests [https://perma.cc/B8P6-89WN].

22. See, e.g., Matthew Guariglia, *How to Identify Visible (and Invisible) Surveillance at Protests*, ELEC. FRONTIER FOUND. (Nov. 5, 2020), <https://www.eff.org/deeplinks/2020/06/how-identify-visible-and-invisible-surveillance-protests> [https://perma.cc/ALE9-MVTH]; Zolan Kanno-Youngs, *U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html> [https://perma.cc/4ED6-WJSG].
23. Hvistendahl, *supra* note 18.
24. See Lois Beckett, *Armed Protesters Demonstrate Against Covid-19 Lockdown at Michigan Capitol*, GUARDIAN (Apr. 30, 2020, 6:54 PM), <https://www.theguardian.com/us-news/2020/apr/30/michigan-protests-coronavirus-lockdown-armed-capitol> [https://perma.cc/K33A-ECZA]; Mike Baker, *Armed Protestors Angry Over Virus Restrictions Try to Force Their Way Into the Oregon Statehouse*, N.Y. TIMES (Dec. 21, 2020), <https://www.nytimes.com/2020/12/21/world/oregon-coronavirus-protests.html> [https://perma.cc/2RTM-2WBU].
25. See Beckett, *supra* note 24; Baker, *supra* note 24.
26. See Nicholas Bogel-Burroughs, *What We Know About the Alleged Plot to Kidnap Michigan's Governor*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/10/09/us/michigan-militia-whitmer.html> [https://perma.cc/62YU-J4LS].
27. See, e.g., Stephanie Soucheray, *US Blacks 3 Times More Likely Than Whites to Get COVID-19*, CTR. INFECTIOUS DISEASE RSCH. & POL'Y (Aug. 14, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/08/us-blacks-3-times-more-likely-whites-get-covid-19> [https://perma.cc/6895-DTNY].

citizen volunteers.²⁸ It must be said that in no way is the opposition to public health regulations during a pandemic, or more recently the challenging of presidential election results on overwhelmingly false pretenses, comparable to the righteous demands for justice with unlawful police killings. But when primarily White protestors effectuated an attempted coup at the U.S. Capitol and were initially met with “little resistance,”²⁹ just six months after a Black Lives Matter (BLM) protest on the other side of the National Mall was greeted by rows of armed National Guard troops,³⁰ the message was clear: aggressive and armed White protestors and insurrectionists are patriots while demonstrators of color, with only symbolic fists to raise, are threats to the country.³¹ The sad irony is that these same “patriots,” that supposedly champion “law and order,” threatened the seat of power in this country with such dedicated and unrestrained violence that five people were left dead as a result.³²

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28. Lois Beckett, *Armed Black Citizens Escort Michigan Lawmaker to Capitol After Volatile Rightwing Protest*, GUARDIAN (May 7, 2020, 9:31 PM), <https://www.theguardian.com/us-news/2020/may/07/michigan-lawmaker-armed-escort-rightwing-protest> [<https://perma.cc/TDK8-X6GU>].
 29. See, e.g., Leila Fadel, ‘Now the World Gets to See the Difference’: BLM Protesters on the Capitol Attack, NPR (Jan. 9, 2021, 1:53 PM), <https://www.npr.org/2021/01/09/955221274/now-the-world-gets-to-see-the-difference-blm-protesters-on-the-capitol-attack> [<https://perma.cc/89XA-N9RT>]; Derecka Purnell, Opinion, *Look at the Capitol Hill Rioters. Now Imagine if They Had Been Black*, GUARDIAN (Jan. 7, 2021, 9:02 AM), <https://www.theguardian.com/commentisfree/2021/jan/07/capitol-hill-trump-rioters-race-power> [<https://perma.cc/JN3E-U9NA>]. It has been revealed that part of this limited resistance resulted from Capitol police officers conspiring with the insurrectionists, which led to officer suspensions and investigations. See Whitney Wild & Paul LeBlanc, *6 Capitol Police Officers Suspended, 29 Others Being Investigated for Alleged Roles in Riot*, CNN (Feb. 28, 2021, 6:35 PM), <https://www.cnn.com/2021/02/18/politics/capitol-police-officers-suspended/index.html> [<https://perma.cc/Y6UH-AH2F>].
 30. Nicole Chavez, *Rioters Breached US Capitol Security on Wednesday. This Was the Police Response When It Was Black Protesters on DC Streets Last Year*, CNN (Jan. 10, 2021, 11:30 PM), <https://www.cnn.com/2021/01/07/us/police-response-black-lives-matter-protest-us-capitol/index.html> [<https://perma.cc/UEE8-PGCF>].
 31. Tommy Beer, *Trump Called BLM Protesters ‘Thugs’ but Capital-Storming Supporters ‘Very Special’*, FORBES (Jan. 6, 2020, 6:63 PM) <https://www.forbes.com/sites/tommybeer/2021/01/06/trump-called-blm-protesters-thugs-but-capital-storming-supporters-very-special/?sh=49d3f6a43465> [<https://perma.cc/JXL6-ZWMB>]. Former President Donald Trump articulated this message when describing BLM protestors as “thugs,” “terrorists,” and “anarchists” and Capitol rioters as “very special” and “great patriots.” *Id.*
 32. Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html> [<https://perma.cc/FGH2-GSHA>].

The often unspoken context here is race-neutral pretext³³ that obscures the stigmatization of crime as “Black” and attributes crime committed by Whites to personal failings.³⁴ The denial of White violence was reflected in the frequently expressed exclamation, “This is not who we are,” in the aftermath of the U.S. Capitol riot.³⁵ This revealed the inability of many White Americans to come to terms not only with the country’s violent settler colonial history, but also how that legacy is still active and manifests in contemporary assaults against the establishment of a truly representative democracy.³⁶ Yet, in the midst of the uprising, mainstream media gave significant attention to alleged instances of looting, property damage, and other feigned acts of lawlessness by Black people.³⁷ These actions, whether real or purported as rhetorical fodder³⁸ and

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33. Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1598–99 (2018); see also Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 141 (2017).
34. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 3* (First Harvard Univ. Press 2011).
35. Kelebogile Zvobgo, *‘This Is Not Who We Are’ Is a Great American Myth*, FOREIGN POL’Y (Jan. 8, 2020, 6:13 PM), <https://foreignpolicy.com/2021/01/08/great-american-myth-capitol-maga-trump-black-lives-matter-transitional-justice> [<https://perma.cc/A5D6-Q9GC>].
36. *Id.*
37. See John Blake, *The George Floyd Protests Are Sparking a Surprising Debate in Black America*, CNN (June 4, 2020), <https://www.cnn.com/2020/06/04/us/protests-black-americans-debate-blake/index.html> [<https://perma.cc/UVK8-MJ43>]; Miranda Bryant, *George Floyd Protesters Condemn ‘Opportunistic’ Looting and Violence*, GUARDIAN (May 31, 2020), <https://www.theguardian.com/us-news/2020/may/31/george-floyd-protesters-condemn-opportunistic-looting-violence> [<https://perma.cc/8PBY-PCAN>]; Helier Cheung, *George Floyd Death: Why Do Some Protests Turn Violent?*, BBC NEWS (May 31, 2020), <https://www.bbc.com/news/world-us-canada-52869563> [<https://perma.cc/CJ7K-U5DA>]; Rudy Chinchilla & David Chang, *Looting, Violence Drown Out Peaceful George Floyd Protests in Philadelphia*, NBC PHILA. (May 31, 2020), <https://www.nbcphiladelphia.com/news/local/after-violent-protests-philadelphia-wakes-up-a-city-in-tatters/2414067> [<https://perma.cc/EV3F-CNUS>]; Olga Khazan, *Why People Loot*, ATLANTIC (June 2, 2020), <https://www.theatlantic.com/health/archive/2020/06/why-people-loot/612577> [<https://perma.cc/CS67-TR8X>]; Maya Lau, Alejandra Reyes-Velarde & Matt Hamilton, *Looters Who Hit L.A. Stores Explain What They Did*, L.A. TIMES (June 5, 2020), <https://www.latimes.com/california/story/2020-06-05/looting-protests-george-floyd> [<https://perma.cc/XVF6-2792>]; Tom Perkins, *‘Respect Our City’: Tension Among Detroit Protesters as Unrest Grows After Dark*, GUARDIAN (May 31, 2020), <https://www.theguardian.com/us-news/2020/may/31/detroit-protests-george-floyd-tensions> [<https://perma.cc/X253-82VB>]; Staff Reports, *Looting, Vandalism and Violence in Boston After Peaceful Protests*, NBC BOST. (May 31, 2020), <https://www.nbcboston.com/news/local/justice-for-george-floyd-protest-at-boston-city-hall/2134211> [<https://perma.cc/MSH3-SPX4>].
38. Gibreel Sadeq Alaghbary, *Looting Leads to Shooting: A Pragma-Dialectical Analysis of President Trump’s Argumentative Discourse on Floyd’s Death*, 16 J. LANGUAGE & LINGUISTIC

“dog whistling,”³⁹ were attributed to the BLM movement not only as a way to undermine efforts to hold law enforcement accountable for unlawful killings but also as a means to legitimize aggressive responses, restrictive curfews, disproportionate prosecutions⁴⁰, and surveillance practices.⁴¹ Rumors spread with claims that undercover law enforcement and other right-wing infiltrators⁴² were engaging in property destruction with the hopes of tying their actions to BLM,⁴³ in addition to stories of White protestors with little connection to the larger movement vandalizing property.⁴⁴

Some of these suspicions were proven true. A member of the White supremacist group, Boogaloo Boys, pled guilty to a federal rioting charge in which he admitted to firing thirteen rounds from an assault rifle into a Minneapolis police precinct.⁴⁵ One of the Boogaloo Movement’s primary aims

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- STUD. 1854, 1857–62 (2020); Lalitha Joseph, *Re-Presenting Protestors as Thugs: The Politics of Labelling Dissenting Voices*, 12 RUPKATHA J. INTERDISC. STUD. HUMAN. 1, 1–3 (2020).
39. See generally IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014) (explaining the concept of “dog whistling” as racial coding).
 40. MUDASSAR TOPPA & PRINCESS MASILUNGAN, *STRUGGLE FOR POWER: THE ONGOING PERSECUTION OF THE BLACK MOVEMENT BY THE U.S. GOVERNMENT* 3 (2021), <https://m4bl.org/wp-content/uploads/2021/08/Struggle-For-Power-The-Ongoing-Persecution-of-Black-Movement-by-the-U.S.-Government.pdf> [<https://perma.cc/U5DB-25CJ>].
 41. VICKY OSTERWEIL, *IN DEFENSE OF LOOTING: A RIOTOUS HISTORY OF UNCIVIL ACTION* (2020); Robin D.G. Kelley, *What Kind of Society Values Property over Black Lives?*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/opinion/george-floyd-protests-looting.html> [<https://perma.cc/4H5Y-R5D2>].
 42. See, e.g., Charlie Porterfield, *Who Is ‘Umbrella Man’? Mystery Vandal at Minneapolis Riot Spurs Conspiracy Theories*, FORBES (May 30, 2020, 4:54 PM), <https://www.forbes.com/sites/carlieporterfield/2020/05/30/who-is-umbrella-man-mystery-vandal-at-minneapolis-riot-spurs-conspiracies> [<https://perma.cc/YM9D-3CG4>] (describing an instance of an alleged “provocateur” at the Minneapolis protests).
 43. See, e.g., Mia Bloom, *Far-Right Infiltrators and Agitators in George Floyd Protests: Indicators of White Supremacists*, JUST SEC. (May 30, 2020), <https://www.justsecurity.org/70497/far-right-infiltrators-and-agitators-in-george-floyd-protests-indicators-of-white-supremacists> [<https://perma.cc/W9VC-3GYX>] (describing instances in which far right activists engaged in property destruction in order to frame BLM as the perpetrators)
 44. See Isaac Scher, *They Gonna Blame That on Us’: Videos Show White Protesters Smashing Windows and Defacing Stores as Black Protesters Tell Them They’re Endangering Black Lives*, INSIDER (June 1, 2020), <https://www.insider.com/white-protesters-deface-and-destroy-property-endangering-black-protesters-2020-6> [<https://perma.cc/2LLZ-6KV4>].
 45. Dustin Siebert, *White Supremacist Posed as Black Lives Matter Supporter to Shoot Up Police Station*, YAHOO (Oct. 1, 2021), <https://www.yahoo.com/now/white-supremacist-posed-black-lives-001200383.html> [<https://perma.cc/RP4Q-EV5X>]; THE ASSOCIATED PRESS, *Texas Man in ‘Boogaloo’ Movement Pleads Guilty to Firing at Police Station During Floyd Protest*, NBC NEWS (Oct. 1, 2021, 7:35 AM),

is to incite a second civil war.⁴⁶ They were not, however, the only group attempting to incite violence toward and within the demonstrations. Body camera footage released over a year after the initial demonstrations shows Minneapolis officers engaging in violent provocation through “hunting” peaceful protestors with rubber bullets.⁴⁷ These episodes helped contribute to the dominant narrative that Black demonstrators were dangerous and unjustifiably angry at the law enforcement that showed up to the protests. They also demonstrate the power of the racialization of crime as a means to accept the use of violence as an instrument for public safety.⁴⁸

This contemporary leveraging of racial tropes should be unsurprising considering the continuing legacy of the White supremacist aims woven into the very fabric of America, enabling centuries of economic exploitation and inequitable distribution of wealth and resources.⁴⁹ Movements for racial justice challenge the United States’ hubris on the world stage by pulling back the proverbial curtain and exposing the country’s disingenuous commitment to democracy.⁵⁰ Thus, repressive state response to racial justice movements

news/texas-man-boogaloo-movement-pleads-guilty-firing-police-station-floyd-rcna2499 [https://perma.cc/TMK7-2D6N].

46. Michael J. Mooney, *The Boogaloo Bois Prepare for Civil War*, ATLANTIC (Jan. 15, 2021), <https://www.theatlantic.com/politics/archive/2021/01/boogaloo-prepare-civil-war/617683> [https://perma.cc/DVP3-NBM6]; Masood Farivar, *Boogaloo Boys Aim to Provoke 2nd US Civil War*, VOA (June 23, 2020, 8:28 AM), https://www.voanews.com/a/usa_race-america_boogaloo-boys-aim-provoke-2nd-us-civil-war/6191552.html [https://perma.cc/522F-DCWW].
47. Tim Dickinson, *Minneapolis Police Caught on Video ‘Hunting’ Activists*, ROLLING STONE (Oct. 13, 2021, 8:30 AM), <https://www.rollingstone.com/politics/politics-features/minneapolis-police-video-hunting-activists-jaleel-stallings-1241227> [https://perma.cc/BFV4-GQBR].
48. MUHAMMAD, *supra* note 34, at 4.
49. See, e.g., DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2009); *FOUR HUNDRED SOULS: A COMMUNITY HISTORY OF AFRICAN AMERICA 1619–2019* (Ibram X. Kendi & Keisha N. Blain eds., 2021); MUHAMMAD, *supra* note 34 (2010).
50. See, e.g., Erik S. McDuffie, *Black and Red: Black Liberation, the Cold War, and the Horne Thesis*, 96 J. AFR. AM. HIST. 236 (2011). The relationship between the Civil Rights and Black Power movements and the Cold War is a good example of this point. - “Locked in a Manichean struggle with the Soviet Union for global supremacy, U.S. cold warriors, he argues, realized that legal or Jim Crow segregation was the “Achilles heel” for Washington’s propaganda campaign to win the “hearts and minds” of people throughout the emerging “Third World.” As a result, U.S. government officials brutally suppressed W. E. B. Du Bois, Shirley Graham Du Bois, Claudia Jones, Paul Robeson, William L. Patterson, Ferdinand Smith, and other African American leftists who pursued an anti-racist, anti-imperialist, proletarian internationalist agenda. Simultaneously, the U.S. ruling class acquiesced to civil rights reforms for African Americans and other people of color out of fear that legal

through criminalization and extensive surveillance is nothing new: it has happened in every push for recognition of Black life, from enslavement to Jim Crow⁵¹ to the current BLM movement in which racial justice activists are labeled “Black Identity Extremists.”⁵² Today’s racial justice movement is subjected to hyper-surveillance practices facilitated through advancing technology.⁵³ In particular, at the height of the racial reckoning in the summer of 2020, BLM protesters’ demands for justice were not met with transformational changes to how we approach safety and policing, but rather spy planes,⁵⁴ facial recognition software,⁵⁵ and social media monitoring technologies.⁵⁶

racial segregation would invalidate the U.S. claim to being the leader of the “democratic free world.”

51. See generally Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO ST. L.J. 1103 (2020) (tracing the intersections of race, police surveillance, and resistance).
52. Mike German, Opinion, *The FBI Has a History of Targeting Black Activists. That’s Still True Today*, GUARDIAN (June 26, 2020, 5:41 AM), <https://www.theguardian.com/commentisfree/2020/jun/26/fbi-black-activism-protests-history> [<https://perma.cc/6HVL-AASF>]; Jana Winter & Sharon Weinberger, *The FBI’s New U.S. Terrorist Threat: ‘Black Identity Extremists’*, FOREIGN POL’Y (Oct. 6, 2017, 11:42 AM), <https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists> [<https://perma.cc/K4LL-M23T>].
53. See, e.g., Anjuli R. K. Shere & Jason Nurse, *Police Surveillance of Black Lives Matter Shows the Danger Technology Poses to Democracy*, CONVERSATION (July 24, 2020, 10:38 AM), <https://theconversation.com/police-surveillance-of-black-lives-matter-shows-the-danger-technology-poses-to-democracy-142194> [<https://perma.cc/57JS-7K7D>].
54. Peter Aldhous, *The FBI Used Its Most Advanced Spy Plane to Watch Black Lives Matter Protests*, BUZZFEED NEWS (June 20, 2020, 10:35 AM), <https://www.buzzfeednews.com/article/peteraldhous/fbi-surveillance-plane-black-lives-matter-dc> [<https://perma.cc/MDW9-6BGN>]; J. Cavanaugh Simpson, *Prying Eyes*, BALT. MAG. (Aug. 5, 2020, 1:08 PM), <https://www.baltimoremagazine.com/section/community/surveillance-planes-watch-over-baltimore-but-catch-few-criminals> [<https://perma.cc/955K-PAHY>].
55. Evan Selinger & Albert Fox Cahn, Opinion, *Did You Protest Recently? Your Face Might Be in a Database*, GUARDIAN (July 17, 2020, 6:27 AM), <https://www.theguardian.com/commentisfree/2020/jul/17/protest-black-lives-matter-database> [<https://perma.cc/XWL2-TAG9>]; James Vincent, *NYPD Used Facial Recognition to Track Down Black Lives Matter Activist*, VERGE (Aug. 18, 2020, 5:26 AM), <https://www.theverge.com/2020/8/18/21373316/nypd-facial-recognition-black-lives-matter-activist-derrick-ingram> [<https://perma.cc/5YK2-922E>].
56. Sam Biddle, *Police Surveilled George Floyd Protests with Help from Twitter-Affiliated Startup Dataminr*, INTERCEPT (July 9, 2020, 2:00 PM), <https://theintercept.com/2020/07/09/twitter-dataminr-police-spy-surveillance-black-lives-matter-protests> [<https://perma.cc/2HRH-VVZD>].

A. Aerial Surveillance

On the night of June 1, 2020, and for several days after, the Federal Bureau of Investigation (FBI) launched its Cessna Citation plane over the skies of Washington, D.C. in an effort to monitor BLM protests.⁵⁷ One of a few elite aircrafts of its kind, the FBI spy plane is equipped with military-grade long range cameras built for persistent video surveillance capability during both day and night.⁵⁸ Hovering above the city on flight paths that last hours, it can collect vast amounts of visual data and create a detailed picture of movement in public and private locations. Its use is typically reserved for the most serious criminal investigations, yet records indicate that it was not only used to surveil D.C. protests in 2020 but also Freddie Gray protests in Baltimore in 2015.⁵⁹ For years, however, the FBI has denied claims that it engages in surveillance of First Amendment activities and released statements expressing respect for peaceful protests.⁶⁰

Meanwhile, in Baltimore, identical aerial surveillance was utilized during BLM protests in the weeks after Floyd's killing.⁶¹ By the summer of 2020, the city had commissioned its own privately operated Cessna plane fleet through a partnership funded by philanthropists at the cost of nearly four million dollars.⁶² Even more, spy planes were flown by Minnesota State Police over protests in Minneapolis.⁶³ After being pushed by Freedom of Information Act requests regarding aerial surveillance activities during the Minneapolis protests, state police released limited footage that revealed the use of a Cirrus aircraft with powerful thermal imaging technology.⁶⁴ These aerial surveillance

57. Aldhous, *supra* note 54.

58. Aldhous, *supra* note 54; Simpson, *supra* note 54.

59. Aldhous, *supra* note 54.

60. Aldhous, *supra* note 54; *see also* Press Release, FBI National Press Office, Seeking Information on Individuals Inciting Violence During First Amendment-Protected Peaceful Demonstrations (June 1, 2020), <https://www.fbi.gov/news/pressrel/press-releases/seeking-information-on-individuals-inciting-violence-during-first-amendment-protected-peaceful-demonstrations> [<https://perma.cc/Z7TB-U5TA>] (“The FBI respects the rights of individuals to peacefully exercise their First Amendment rights. Our mission of protecting the American people and upholding the Constitution is dual and simultaneous, not contradictory.”).

61. Simpson, *supra* note 54.

62. Simpson, *supra* note 54.

63. Sam Richards, *This Is Footage From a Spy Plane That Flew Above George Floyd Protests in Minneapolis*, VICE (July 29, 2020, 8:07 PM), <https://www.vice.com/en/article/qj4end/this-is-footage-from-a-spy-plane-that-flew-above-george-floyd-protests-in-minneapolis> [<https://perma.cc/6Z2G-53NC>].

64. *Id.*

activities in the early summer were later revealed to be only a small part of a larger national effort to use aircraft to monitor protestors, which even included the Department of Homeland Security deploying helicopters, planes, and drones in over fifteen cities.⁶⁵

B. Facial Recognition Technologies

Law enforcement's use of facial recognition technologies during the protests was extensive.⁶⁶ In early June 2020, in a now infamous political stunt by former President Donald Trump, U.S. Park Police pushed and pepper-sprayed protestors gathered in Washington, D.C.'s Lafayette Square to make way for a facemask-less Trump to have a Bible-toting photo op in front of St. John's Episcopal Church.⁶⁷ This episode unfolded while the rest of the country reeled from the lack of an adequate response to COVID-19 and police killings.⁶⁸ The aggressive move against protestors was a direct affront to the right to peacefully assemble. Following the incident, a protestor was alleged to have assaulted a police officer but could not be identified.⁶⁹ Officers scoured social media to find an image to link to the purported face of the protestor.⁷⁰ They ultimately found an image and inputted it into a facial recognition system that identified a match and led officers to make an arrest.⁷¹ Similar uses of the technology took place in Miami to identify a young woman accused of throwing a rock toward law enforcement,⁷² in Philadelphia to find a man alleged to have vandalized a police cruiser during a demonstration,⁷³ in

65. Kanno-Youngs, *supra* note 22.

66. Selinger & Cahn, *supra* note 55; Vincent, *supra* note 55.

67. Justin Jouvenal & Spencer S. Hsu, *Facial Recognition Used to Identify Lafayette Square Protester Accused of Assault*, WASH. POST (Nov. 2, 2020, 1:45 PM), https://www.washingtonpost.com/local/legal-issues/facial-recognition-protests-lafayette-square/2020/11/02/64b03286-ec86-11ea-b4bc-3a2098fc73d4_story.html [https://perma.cc/N97M-EZ9V].

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Connie Fossi & Phil Prazan, *Miami Police Used Facial Recognition Technology in Protester's Arrest*, NBC MIAMI (Aug. 17, 2020, 7:14 PM), <https://www.nbcmiami.com/investigations/miami-police-used-facial-recognition-technology-in-protesters-arrest/2278848> [https://perma.cc/24QY-C8U7].

73. Jeremy Roebuck & Vinny Vella, *A Philly Man Who Warned Not to Share Protest Photos Online Was Charged With Trashing Cop Cars Based on Pics Posted to His Instagram*, PHILA. INQUIRER (July 31, 2020), <https://www.inquirer.com/news/philly-protests-676-arrests-social-media-state-police-instagram-facebook-sammy-rivera-luke-cossmann-20200731.html> [https://perma.cc/39FX-QA9M].

Columbia, South Carolina to arrest more than eighty people for a range of offenses, including curfew violation,⁷⁴ and in New York City in the arrest of Derrick Ingram.⁷⁵

Before the racial reckoning of 2020, facial recognition had already been extensively criticized by scholars and advocates for its ineffectiveness at identifying people of color, particularly Black people.⁷⁶ By 2020, the calls to reimagine public safety and defund police also included calls to get rid of facial recognition tools, which are emblematic of this country's deeply biased and defunct criminal legal system.⁷⁷ For instance, two of the first documented wrongful arrests and prosecutions of Black men in Michigan and New Jersey were made on the basis of faulty facial recognition identification.⁷⁸ Beyond accuracy concerns, however, is the troubling fact that facial recognition tools can only work with access to massive databases.⁷⁹ So, the use of facial recognition does not just pose a threat for those accused of an offense at a demonstration, but anyone who attends a protest where law enforcement utilizes the technology because officers constantly capture vast amounts of images and feed them into databases.⁸⁰

74. David Travis Bland, *Richland, Columbia Police Use Facial Recognition, Social Media in Protest Tied Arrests*, STATE (Aug. 2, 2020, 5:00 AM), <https://www.thestate.com/news/local/crime/article244433082.html>.

75. Vincent, *supra* note 55.

76. See, e.g., Joy Buolamwini, *How I'm Fighting Bias in Algorithms*, TED (Nov. 2016), https://www.ted.com/talks/joy_buolamwini_how_i_m_fighting_bias_in_algorithms?language=en [<https://perma.cc/76QQ-7QGH>] (last visited Mar. 1, 2023) (introducing Buolamwini as a founder of the Algorithmic Justice League, an organization blending art and research to highlight social harms and impacts of artificial intelligence); Clare Garvie & Jonathan Frankle, *Facial-Recognition Software Might Have a Racial Bias Problem*, ATLANTIC (Apr. 7, 2016), <https://www.theatlantic.com/technology/archive/2016/04/the-underlying-bias-of-facial-recognition-systems/476991> [<https://perma.cc/LXZ5-XY7B>]; Selena Silva & Martin Kenney, *Algorithms, Platforms, and Ethnic Bias: An Integrative Essay*, 55 PHYLON 13 (2018).

77. Malkia Devich-Cyril, *Defund Facial Recognition*, ATLANTIC (July 5, 2020), <https://www.theatlantic.com/technology/archive/2020/07/defund-facial-recognition/613771> [<https://perma.cc/4JRH-TWD2>].

78. Kashmir Hill, *Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html> [<https://perma.cc/UP77-VVNZ>]; Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html> [<https://perma.cc/5UP4-QHAT>].

79. See, e.g., *Street Level Surveillance: Face Recognition*, ELEC. FRONTIER FOUND. (Oct. 24, 2017), <https://www.eff.org/pages/face-recognition> [<https://perma.cc/F2FV-RSB2>].

80. Selinger & Cahn, *supra* note 55.

C. Social Media Monitoring

Social media has played a tremendous role in the BLM movement, from providing a platform to share digital images of police violence,⁸¹ to establishing a supportive space to collectively grieve, celebrate, and build community,⁸² to organizing and capturing the attention of companies, persons, or authorities in efforts to demand change.⁸³ Yet, the use of social media platforms also comes with a cost.⁸⁴ Although social media is the primary reason that the video of George Floyd's murder became viral, galvanizing millions across the globe to take action, it also exposed protesting citizens to greater law enforcement surveillance.⁸⁵ During the protests, social media became a prime resource for law enforcement to mine and collect data on identity, social networks, and location.⁸⁶ This data mining was conducted with the paid assistance of A.I. companies like Dataminr.⁸⁷ Dataminr leveraged its status as an official "Twitter Partner"⁸⁸—meaning they paid Twitter for access to large streams of data content—to profit off of BLM demonstrations and accompanying racialized fears.⁸⁹ Using algorithms that pulled content supposedly relevant to public safety from Twitter, Dataminr conducted social media monitoring and location tracking of protestors in cities across America and delivered the data to local and state law enforcement.⁹⁰ Police departments, who paid Dataminr a premium for this service, used the information to effectively conduct further surveillance, anticipate meeting locations, and intercept marches.⁹¹

81. Mariya Abdulkaf, *Recording Police Brutality: How One Snap Decision Changed This Town*, VERGE (Aug. 31, 2020, 9:10 AM), <https://www.theverge.com/21378157/police-brutality-violence-recording-videos-black-lives-matter-consequences> [<https://perma.cc/4B27-CYUU>].

82. See, e.g., ANDRÉ BROCK, JR., *DISTRIBUTED BLACKNESS: AFRICAN AMERICAN CYBERCULTURES* 1–7 (2020).

83. See, e.g., SARAH J. JACKSON, MOYA BAILEY & BROOKE FOUCAULT WELLES, *#HASHTAGACTIVISM: NETWORKS OF RACE AND GENDER JUSTICE* 185–9 (2020).

84. Arnett, *supra* note 9, at 1128.

85. Arnett, *supra* note 9, at 1129.

86. Arnett, *supra* note 9, at 1130.

87. DATAMINR, <https://www.dataminr.com/about> (last visited Apr. 30, 2021) [<https://perma.cc/99N7-PYPJ>].

88. Sushil Trivedi, *Twitter Curation Team Breaks News Faster with Dataminr*, TWITTER (Mar. 2, 2021), <https://partners.twitter.com/en/partner-resources/twitter-curation-team-breaks-news-faster-with-dataminr> [<https://perma.cc/7T9E-8F74>].

89. Sam Biddle, *Twitter Surveillance Startup Targets Communities of Color for Police*, INTERCEPT (Oct. 21, 2020, 12:55 PM), <https://theintercept.com/2020/10/21/dataminr-twitter-surveillance-racial-profiling> [<https://perma.cc/8VZ8-TCP8>].

90. Biddle, *supra* note 56.

91. Biddle, *supra* note 56.

Dataminr's A.I. platform has been pitched as a neutral tool that gathers publicly available data, which it then subjects to a process of scoring, classifying, tagging, and clustering before a final evaluation.⁹² The company has said that upwards of 97 percent of the alerts it provides through its First Alert software are generated solely by A.I. without human involvement.⁹³ Yet, investigations have revealed that Dataminr relies heavily on biased human input in processing social media content—such as which neighborhoods, activities, and organizations to focus on—in developing the crime alerts it sells to public sector clients.⁹⁴ Presumably, these same biases were at play in surveilling social media content related to BLM demonstrations.

D. Equal Surveillance?

Targeted surveillance reifies perceptions of the Black protestor as criminal while signaling the BLM movement as at best worthy of skepticism and at worse deserving of dismissal. Other recent large protest movements and public demonstrations have been spared such intensive surveillance measures.⁹⁵ This discrepancy raises the question of whether all protest movements should be subjected to identical levels of police surveillance, for parity or fairness, or whether surveillance should be selectively used for demonstrations deemed most offensive and dangerous. This line of questioning may be particularly interesting to those contemplating the law enforcement failures leading up to the Capitol building riots and asking why the event did not prompt the same level of invasive state surveillance as the BLM movement.⁹⁶ While understandable, such questioning overlooks several important points. As previously noted, when considering the aims of

92. Jason Wilcox, *The Multi-Dimensional Value of Public Twitter Data for Real-Time Event Detection*, DATAMINR (Dec. 6, 2019), <https://www.dataminr.com/blog/the-multi-dimensional-value-of-public-twitter-data-for-real-time-event-detection> [<https://perma.cc/G6DU-LNQK>].

93. Jason Wilcox, *Maximizing Event Detection for Unanticipated Major Event “Cascades” like COVID-19*, DATAMINR (Sept. 22, 2020), <https://www.dataminr.com/blog/maximizing-event-detection-for-unanticipated-major-event-cascades-like-covid-19> [<https://perma.cc/2M7Y-Q3JU>]. *But see* Biddle, *supra* note 56 (describing sources contacted for that article's reporting on Dataminr as “befuddled by the 97 percent figure”).

94. Biddle, *supra* note 56.

95. *See* Purnell, *supra* note 29.

96. Dareh Gregorian & Frank Thorp V, *Capitol Security Officials Blame Poor Intelligence—and One Another—for the Jan. 6 Riot*, NBC News (Feb. 23, 2021), <https://www.nbcnews.com/politics/congress/key-capitol-security-officials-be-grilled-about-what-went-wrong-n1258530> [<https://perma.cc/ZBA2-HKLD>].

the demonstrations, comparing the two is neither fair nor justified. Even more, the central tenet of leveling the surveillance playing field trifles in neoliberal logics of equality at the expense of equity. If one of the cherished values of American freedom is the “right to be let alone,”⁹⁷ then it makes more sense that the solution should be for BLM demonstrations, like other movements, to occur unmolested by state disruptive interference.

Furthermore, suggesting that the surveillance state must expand to keep White supremacists in check overlooks the degree to which law enforcement arose as a tool of White supremacy⁹⁸ and the fact that it remains deeply captured.⁹⁹ In some ways, seeking law enforcement surveillance of White supremacists would ask police to police themselves. One of the reasons the January coup attempt was so successful in allowing hundreds of rioters to destructively stroll through the halls of the Capitol and come within feet of sitting Congress members was because some officers let it happen.¹⁰⁰ Current investigations have led to at least four police officers and three former officers

97. Pub. Utils. Comm’n of D.C. v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting) (“Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom. Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures.”); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (“[N]ow the right to life has come to mean the right to enjoy life,—the right to be let alone . . .”).

98. See, e.g., Arnett, *supra* note 9, at 1111–16.

99. Richard J. Smith & Anna Maria Santiago, *The Storming of Washington, DC: The City of Love Against the City of White Supremacy*, 29 J. CMTY. PRAC. 1, 2 (2021); Rui Kaneya & Taylor Johnston, *Capitol Attack Underscores White Supremacist Infiltration of Police, Military*, CTR. PUB. INTEGRITY (Jan. 15, 2021), <https://publicintegrity.org/inside-publici/newsletters/watchdog-newsletter/capitol-attack-underscores-white-supremacist-infiltration> [<https://perma.cc/D6BJ-LNVJ>]; Vida Johnson, *Capitol Siege Raises Questions Over Extent of White Supremacist Infiltration of US Police*, CONVERSATION (Jan. 14, 2021, 8:21 AM), <https://theconversation.com/capitol-siege-raises-questions-over-extent-of-white-supremacist-infiltration-of-us-police-153145> [<https://perma.cc/E7GU-2FZU>]; William Finnegan, *Law Enforcement and the Problem of White Supremacy*, NEW YORKER (Feb. 27, 2021), <https://www.newyorker.com/news/daily-comment/law-enforcement-and-the-problem-of-white-supremacy> [<https://perma.cc/M7NX-C79B>].

100. Barbara Campbell, *Capitol Police Officers Suspended for Actions During Rioters’ Attack on Capitol*, NPR (Jan. 11, 2021, 10:13 PM), <https://www.npr.org/2021/01/11/955809557/two-capitol-police-officers-suspended-for-actions-during-rioters-attack-on-capit> [<https://perma.cc/ZBB5-ZC4J>]; Finnegan, *supra* note 99; Elliot Hannon, *Police Officers Suspected of Assisting Capitol Riot Suspended; Other Sympathizers Under Investigation*, SLATE (Jan. 12, 2021, 8:17 AM), <https://slate.com/news-and-politics/2021/01/capitol-police-officer-suspended-support-sympathizers-trump-riot.html> [<https://perma.cc/DDG7-EXBF>].

facing federal charges.¹⁰¹ Additionally, out of 324 arrests made in the Capitol riot thus far, “43 are current or former first responders or military veterans.”¹⁰² Even some National Guard troops deployed to D.C. after the Capitol attack were relieved of duty after an FBI probe.¹⁰³

Moreover, instances of expanded surveillance, criminalization, and carcerality, regardless of their initial intent, often come back to hurt Black and Brown communities the hardest.¹⁰⁴ To the specific question of whether facial recognition technologies should have been used in response to the Capitol riots, Professor Chris Gilliard, an expert on discriminatory practices found in data mining and algorithmic decision-making, has cautioned:

I don't want it to sound like I don't want white supremacists or insurrectionists to be held accountable. But I do think because systemically most of those forces are going to be marshaled against Black and brown folks and immigrants, it's a very tight rope. We have to be careful.¹⁰⁵

His concerns emanate from a clear recognition of times where state responses to White violence have harmed Black people. For example, in the years following the Columbine High School shooting, executed by White

101. Bart Jansen, ‘A Nightmare Scenario’: *Extremists in Police Ranks Spark Growing Concern After Capitol Riot*, USA TODAY (Mar. 22, 2021, 5:04 PM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/03/21/police-charged-capitol-riot-reignite-concerns-racism-extremism/4738348001> [<https://perma.cc/DLW5-94D7>].

102. *Id.*

103. NBC Washington Staff & Associated Press, *12 National Guard Members Removed From Inauguration Duty, 2 for ‘Inappropriate’ Posts*, NBC WASH. (Jan. 19, 2021, 6:05 PM), <https://www.nbcwashington.com/news/local/2-national-guard-members-removed-from-inauguration-duty-after-militia-links-found/2545777> [<https://perma.cc/EAE8-DGKM>].

104. A good example is the security increases in the aftermath of 9/11, where global terror was presented as Brown and Black faces, leading to extreme racial profiling and surveillance measures. See, e.g., Benard E. Harcourt, *Muslim Profiles Post-9/11: Is Racial Profiling an Effective Counterterrorist Measure and Does it Violate the Right to be Free from Discrimination?* (U. CHI. L. & ECON. OLIN., Working Paper No. 288, 2006); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1186 (2002); Sangay Mishra & Jinee Lokaneeta, *Subjects of ‘Suspicion’: Racial Profiling of Muslims, South Asians, and Arabs in the Post-9/11 U.S.* (Aug. 12, 2012) (Annual Meeting Paper, Am. Pol. Sci. Ass’n); Carlos Torres, Azadeh Shahshahani, & Tye Tavaras, *Indiscriminate Power: Racial Profiling and Surveillance Since 9/11*, 18 U. PA. J.L. & SOC. CHANGE 283, 295 (2015).

105. Johana Bhuiyan, *Facial Recognition May Help Find Capitol Rioters—But it Could Harm Many Others, Experts Say*, L.A. TIMES (Feb. 4, 2021), <https://www.latimes.com/business/technology/story/2021-02-04/facial-recognition-surveillance-capitol-riot-black-and-brown-communities> [<https://perma.cc/29UQ-ZM2X>]. For more on Professor Chris Gilliard, see *Chris Gilliard*, DIGIT. PEDAGOGY LAB <https://digitalpedagogylab.com/chris-gilliard> [<https://perma.cc/CUY7-ZHLV>].

students at a primarily White high school, there was a strong push for zero tolerance school policies and greater security measures.¹⁰⁶ These policies and practices have helped entrench a school-to-prison pipeline that now disproportionately pushes Black children out of school and into contact with the criminal legal system.¹⁰⁷ As famed civil rights attorney Judith Browne Dianis noted, while the push for securitization in schools began with Columbine, “our [Black] children are more likely to be in schools where there are police.”¹⁰⁸ However, “Columbine does not have police. They do not have metal detectors in Columbine. Nor do they have them in Paducah where there was another school shooting.”¹⁰⁹

Lastly, law enforcement knew enough to prevent what happened well in advance of the Capitol riots, without deploying advanced surveillance technologies.¹¹⁰ Three days before the riot, the intelligence unit of the U.S. Capitol Police noted in an internal memo that there was a threat of violence that would be aimed at Congress.¹¹¹ Despite this information, U.S. Capitol Police did not accept additional law enforcement assistance leading up to the incident.¹¹²

The key to understanding these current dynamics is the ability to connect historical patterns of state responses to perceived threats at the intersection of race, politics, crime, and surveillance. The myriad ways in which surveillance technologies were used during the summer 2020 uprising are part of a long historical arc of criminalizing racial justice movements. The challenge of disparate racial profiling cannot be resolved with efforts to balloon an already ever-growing surveillance state.

106. ADVANCEMENT PROJECT, TEST, PUNISH, PUSHOUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE, 10–12 (2010), https://b3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf [https://perma.cc/JW97-UX3L].

107. *Id.*

108. Children’s Defense Fund, *Judith Browne-Dianis, Esq.: Dec. 15, 2010 at BCCC*, YOUTUBE (Jan. 12, 2011), <https://youtu.be/ZhMkTQvNIIE?t=308> [https://perma.cc/VW7A-H85R].

109. *Id.*

110. Rachael Levy, *Ahead of Riot, Capitol Police Knew of Potential for Violence, Official Says*, WALL ST. J. (Jan. 26, 2021), <https://www.wsj.com/articles/ahead-of-riot-capitol-police-knew-of-potential-for-violence-official-says-11611691783> [https://perma.cc/FZ5A-YEWA].

111. Carol D. Leonnig, *Capitol Police Intelligence Report Warned Three Days Before Attack that ‘Congress Itself’ Could Be Targeted*, WASH. POST (Jan. 15, 2021, 7:43 PM), https://www.washingtonpost.com/politics/capitol-police-intelligence-warning/2021/01/15/c8b50744-5742-11eb-a08b-f1381ef3d207_story.html [https://perma.cc/B5UZ-W3NP].

112. Joshua Kaplan, *Before Mob Stormed the Capitol, Days of Security Planning Involved Cabinet Officials and President Trump*, PROPUBLICA (Jan. 9, 2021, 9:19 PM), <https://www.propublica.org/article/before-mob-stormed-the-capitol-days-of-security-planning-involved-cabinet-officials-and-president-trump> [https://perma.cc/WZ2A-X6FR].

II. LIMITS OF FOURTH AMENDMENT PROTECTIONS¹¹³

The high-tech surveillance strategies deployed in response to the BLM uprising were intended to disrupt, infiltrate, sabotage, and discourage, in the same ways that older surveillance measures were aimed against earlier generations of racial justice movements.¹¹⁴ These tactics have profound effects on freedom of speech, political expression, and democratic participation. Even more, they undermine the possibilities of establishing a more fair, just, and equitable society. Guaranteeing and protecting those promises and values are at the heart of the Fourth Amendment.¹¹⁵ Although the plain language of the Fourth Amendment does not mention “surveillance,” it has been understood as a primary channel for challenging government surveillance and holding law enforcement accountable.¹¹⁶ When the Framers adopted the Fourth Amendment along with the Bill of Rights, their concern was the abuse of search warrants by the British government.¹¹⁷ Their fear extended beyond lofty notions of privacy and centered on the harm such intrusions meant for facilitation of the political organizing and expression essential for a robust and just society.¹¹⁸

113. The author acknowledges that there are also significant First Amendment questions raised with police surveillance of BLM demonstrations. While these issues are important, this Article aims to examine the role of the Fourth Amendment in limiting government surveillance practices. For more on the First Amendment issue, see Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J. F. 685 (2018).

114. See, e.g., #ProtectBlackDissent: Campaign to End Surveillance of Black Activists, ACLU, <https://www.aclu.org/issues/racial-justice/protectblackdissent-campaign-end-surveillance-black-activists> [<https://perma.cc/6XXQ-YNVD>]; Virgie Hoban, ‘Discredit, Disrupt, and Destroy’: FBI Records Acquired by the Library Reveal Violent Surveillance of Black Leaders, Civil Rights Organizations, BERKELEY LIBR. NEWS (Jan. 18, 2021), <https://news.lib.berkeley.edu/fbi> [<https://perma.cc/5JP9-C4EC>].

115. See, e.g., Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L.REV. 1409, 1410–15 (2018); Mary H. Wimberly, *Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment*, 60 VANDERBILT L. REV. 286 (2007).

116. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018); DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* 14–17 (2017).

117. See, e.g., Timothy Casey, *Electronic Surveillance and the Right to Be Secure*, 41 U.C. DAVIS L. REV. 977, 983, 1026 (2008); Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1052–56 (2011).

118. Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1006–12 (2011) (John Adam’s thinking on rights and liberties that would be reflected in the Fourth Amendment was deeply influenced by cases where the English crown used writs to disrupt to creation and distribution of political organizing and protest pamphlets). The irony here is that America was already beginning as a fundamentally unjust society, as millions were enslaved and there were clear sex and class barriers to political participation.

In recent years, American media has become obsessed with how those liberties are threatened in countries like China by extensive digital tracking and surveillance measures.¹¹⁹ Curiously absent from much of the coverage are our struggles to tame the rise of a data hungry surveillance state in our own country.¹²⁰ The omission presumes that our legal systems are better equipped to respond to those expanding threats. Yet, questions remain about how effective the Fourth Amendment is in responding to surveillance measures in the digital age, particularly in the instance of racialized surveillance practices.¹²¹

The rest of Part II proceeds in two parts. Subpart A examines Fourth Amendment jurisprudence on government surveillance and highlights several limitations relevant for potential challenges to police monitoring of protest movements. Subpart B argues that both legal and tech norms erect additional barriers to relief as they both espouse and propagate harmful colorblind logics.

A. Doctrinal Barriers

The Fourth Amendment's ability to act as an adequate guardian of rights is beleaguered by doctrinal limitations, namely the distinctions between government and private action and public and private locations.¹²² Fourth Amendment protections are limited to spaces where there is a reasonable expectation of privacy. Thus, generally, the more public the location, the less reasonable the expectation of privacy. For example, in *United States v. Knotts*, the Court held that a police officer's use of a beeper tracking device attached to a drum containing chemicals carried by a vehicle traveling on public roads did not

119. See, e.g., Paul Mozur & Aaron Krolik, *A Surveillance Net Blankets China's Cities, Giving Police Vast Powers*, N.Y. TIMES (Dec. 17, 2019), <https://www.nytimes.com/2019/12/17/technology/china-surveillance.html> [<https://perma.cc/4JP5-QBEA>]; see also Khaled Ali Beydoun, *The New State of Surveillance: Societies of Subjugation*, 79 WASH. & LEE L. REV. 769 (2022).

120. "The United States and other countries use some of the same techniques to track terrorists or drug lords. Chinese cities want to use them to track everybody." See, e.g., Mozur & Krolik, *supra* note 119 (describing the United States's hyper focus on China's surveillance instead of focusing on the former's own surveillance measures); Alexandra Ma & Katie Canales May, *China's 'Social Credit' System Ranks Citizens and Punishes Them with Throttled Internet Speeds and Flight Bans if the Communist Party Deems Them Untrustworthy*, BUS. INSIDER (May 9, 2021), <https://www.businessinsider.com/china-social-credit-system-punishments-and-rewards-explained-2018-4> [<https://perma.cc/U5FV-GCXX>].

121. See, e.g., Arnett, *supra* note 9, at 1138–40.

122. See, e.g., *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (distinguishing between government and private action); *Katz v. United States*, 389 U.S. 347, 351–52 (1967) (distinguishing between public and private locations).

violate the Fourth Amendment.¹²³ The Court reasoned that the police did not infringe on a reasonable expectation of privacy because, by driving on public roads, the defendant voluntarily conveyed to the public information about the location of the vehicle.¹²⁴ The Court further noted that this information could have been discovered even without the beeper.¹²⁵ The Court has continued to rely on this rationale even in instances in which law enforcement surveilled citizens on private property.¹²⁶ In *California v. Ciraolo* and *Florida v. Riley*, police officers used aerial surveillance to monitor marijuana growing activities.¹²⁷ In both cases the Court found that such naked eye observations from public airspace did not violate the Fourth Amendment because the defendants knowingly exposed their activities to the public.¹²⁸ Key to the holdings was the idea that general members of the public could have made the same observations that police officers did.¹²⁹

When parsing through the logics at play in these cases about our expectations of privacy against the general public and police, the reasoning seems to, at times, defy common sense. For example, most people would find it reasonable to expect privacy after erecting a ten-foot-high fence around their yard. The fact that a neighbor or some other citizen might catch a glimpse of the inside of the yard while looking out of the window of a plane on a commercial flight would likely not change that opinion. However, the shaky justifications may appear less absurd when one notes that these opinions were drafted during the “War on Drugs”¹³⁰ and that there was a concerted effort to provide law enforcement the constitutional flexibility to fight a “threat” labeled as “public enemy number one.”¹³¹ The case law in this area makes it exceedingly hard for BLM protest participants to challenge the constitutionality of being

123. *United States v. Knotts*, 40 U.S. 276, 285 (1983).

124. *Id.* at 281–85.

125. *Id.*

126. *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986).

127. *Ciraolo*, 476 U.S. at 209 (peering into a fenced yard from a private plane flying at 1000 feet); *Riley*, 488 U.S. at 447–48 (peering into a greenhouse from a helicopter flying at 400 feet).

128. *Ciraolo*, 476 U.S. at 213–15; *Riley*, 488 U.S. at 449–51.

129. *Ciraolo*, 476 U.S. at 213–14; *Riley*, 488 U.S. at 451.

130. *See, e.g.*, David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 237 (1994).

131. Ed Vulliamy, *Nixon’s ‘War on Drugs’ Began 40 Years Ago, and the Battle is Still Raging*, *GUARDIAN* (July 23, 2011, 7:07 PM), <https://www.theguardian.com/society/2011/jul/24/war-on-drugs-40-years> [<https://perma.cc/U7PG-YHN2>]; *see also* Chris Barber, *Public Enemy Number One: A Pragmatic Approach to America’s Drug Problem*, RICHARD NIXON FOUND. (June 29, 2016), <https://www.nixonfoundation.org/2016/06/26404/> [<https://perma.cc/2Q98-XRU5>] (describing drug abuse as “public enemy number one”).

subjected to aerial surveillance and facial recognition while knowingly exposing themselves at public protests and subsequently lacking constitutional standing.¹³² Although it may make sense to draw some lines to triggering Fourth Amendment scrutiny in public places, where law enforcement surveillance measures bear on fundamental values of political organizing and expression, such distinctions are less defensible.

The Fourth Amendment also only provides protection against unreasonable surveillance conducted by state actors, with few exceptions.¹³³ Yet, new surveillance technologies developed and often run by private companies make it difficult to find a line between government and private action.¹³⁴ It is clear that Baltimore's hiring of Persistent Surveillance Systems to conduct aerial surveillance would make the company a state actor under the Fourth Amendment. However, the status of digital middlemen (such as Dataminr) who surveil, organize, and sell content from social media platforms to law enforcement is less clear. These public/private partnerships will only continue to grow as the market for data commodification expands¹³⁵ and as public entities double down on data collection mandates,¹³⁶ with devastating impacts on the ability to organize movements for racial justice.

But all may not be lost. Over the past decade, a series of Fourth Amendment cases show that complete or total surveillance ventures into the area of constitutional unreasonableness.¹³⁷ In *United States v. Jones*, the Court ruled that use of a GPS

132. For more on facial recognition technology and the Fourth Amendment, see Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 MINN. L. REV. 1105 (2021). For more on Fourth Amendment and standing issues, see David Gray, *Collective Standing Under the Fourth Amendment*, 55 AM. CRIM. L. REV. 77 (2018); Richard B. Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493 (1979); David G. Trager & Eric J. Lobenfeld, *The Law of Standing under the Fourth Amendment*, 41 BROOK. L. REV. 421 (1974); Eulis Simien Jr., *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487 (1988).

133. Such exceptions include when a private party acts pursuant to a government policy or regulation or when a private party acts as an instrument or agent of the government. See, e.g., *Skinner v. Ry. Lab. Execs. Ass'n*, 489 U.S. 602, 613–14 (1989).

134. See, e.g., Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. ANN. SURV. AM. L. 553, 581–639 (2017).

135. See, e.g., SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 8–12 (2019).

136. Marion Fourcade & Jeffrey Gordon, *Learning like a State: Statecraft in the Digital Age*, 1 J.L. & POL. ECON. 78, 78 (2020).

137. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Riley v. California*, 573 U.S. 373 (2014); *United States v. Jones*, 565 U.S. 400 (2012); *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010).

tracking device on a car without a warrant was a Fourth Amendment violation.¹³⁸ The Court distinguished *Jones* from *Knotts* by noting that in *Knotts* the government installed the beeper with consent of the original owner, so there was no intrusion on the owner's reasonable expectation of privacy, whereas in *Jones*, the government installed the GPS tracking device without the defendant's consent.¹³⁹ In the D.C. Circuit decision affirmed in *Jones*, the majority opinion also ruled that the defendant's expectation of privacy had been violated.¹⁴⁰ However, the Circuit Court ruling also mentions "mosaic theory" as an important frame for understanding why the police surveillance was particularly offensive to the Fourth Amendment.¹⁴¹ According to the Circuit Court, mosaic theory rests on the notion that "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene."¹⁴² This logic was used to distinguish prolonged surveillance from short-term surveillance, in that knowing what a person does repeatedly over time can "reveal more about a person than does any individual trip viewed in isolation."¹⁴³ This was particularly compelling because the defendant in *Jones* had been surveilled for over a month.¹⁴⁴

Justice Sotomayor relied on a similar rationale in her concurrence in *Jones* when she noted that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."¹⁴⁵ She argues that exposure of this sensitive information may act to "chill[] associational and expressive freedoms."¹⁴⁶ This connection between monitoring and political suppression was also espoused in *Riley v. California*, where the Court ruled that police officers violated the Fourth Amendment when they searched a cell phone without a warrant incident to an arrest.¹⁴⁷ Again, the danger presented was the state's ability to pull large amounts of data spanning vast time periods and reconstruct the most intimate details of a person's life.¹⁴⁸ Most recently in *Carpenter v. United States*, the Court found unconstitutional law enforcement's

138. *Jones*, 565 U.S. at 409–10.

139. *Id.* at 408–09.

140. *Maynard*, 615 F.3d at 558–62 (D.C. Cir. 2010).

141. *Id.* at 562.

142. *Id.* (citing *CIA v. Sims*, 471 U.S. 159, 178 (1985)).

143. *Id.*

144. *Id.* at 558.

145. *United States v. Jones*, 565 U.S. 400, 415 (Sotomayor, J., concurring) (2012).

146. *Id.* at 416.

147. *Riley v. California*, 573 U.S. 373, 386–94 (2014).

148. *Id.* at 394–97.

gathering of location data from cell phone service providers without a warrant.¹⁴⁹ At the heart of the opinion is a refutation of the idea that there is no reasonable expectation of privacy when citizens knowingly expose their location data to the third-party phone companies.¹⁵⁰ The Court describes cell phones as indispensable parts of our daily lives, rendering the choice of whether or not to use them a false one.¹⁵¹

These rulings are certainly relevant to potential challenges to law enforcement surveillance of BLM demonstrations. The use of spy planes for aerial surveillance that tracks one's movement in public for hours over multiple days and weeks, with video technology much more powerful than the naked eye observations of *Ciraolo* and *Riley*, could be likened to the prolonged total surveillance at issue in *Jones* and *Carpenter*. The increasing capabilities of facial recognition technology to capture and analyze biometric data in ways that reveal mental health and physical wellness details should be alarming and offensive considering the concerns raised in *Riley v. California*.¹⁵² Furthermore, it is not clear why the third party rationale in *Carpenter* would not also hold true for BLM demonstrators' relationships with social media giants. The use of social media for political expression and organizing is all but necessary in today's society.¹⁵³ People are not more knowingly or voluntarily giving location data to Twitter than they are to AT&T.

Unfortunately, many of these legal battles will turn on what courts interpret as the true harms and values at play. These interpretations have always been greatly influenced by sociocultural opinions on policing, technology, and race.¹⁵⁴ The language of the Fourth Amendment, while imperfect, has rarely presented the biggest barrier. It has been the subsequent jurisprudence that has developed around what type and levels of surveillance are reasonable. Thus, one of the most powerful determinants of how the Court will continue to wrestle with these issues in the future is the makeup of the Justices on the bench.

149. *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

150. *Id.* at 2219–20. This was an issue that was presented in *Smith v. Maryland*, 442 U.S. 735 (1979).

151. *Id.* at 2220.

152. See, e.g., Nicole Martin, *The Major Concerns Around Facial Recognition Technology*, FORBES (Sept. 25, 2019, 3:15 PM), <https://www.forbes.com/sites/nicolemartin1/2019/09/25/the-major-concerns-around-facial-recognition-technology/?sh=198e34694fe3> [<https://perma.cc/XDJ9-F63Y>].

153. See, e.g., JACKSON, BAILEY & FOUCAULT WELLES, *supra* note 83, at xxvi–xxxiv; ALLISSA V. RICHARDSON, BEARING WITNESS WHILE BLACK: AFRICAN AMERICANS, SMARTPHONES, & THE NEW PROTEST #JOURNALISM 1–20 (2020).

154. See, e.g., Carbado, *supra* note 33; Devon W. Carbado, *Predatory Policing*, 85 U. MO. KAN. CITY L. REV. 548 (2017).

The importance of such varying interpretations is illustrated in the recent Fourth Circuit Court of Appeals ruling in *Leaders of a Beautiful Struggle v. Baltimore Police Department*.¹⁵⁵ The federal case was brought by a group of Black citizens and community based organizations challenging Baltimore's aerial surveillance program.¹⁵⁶ The plaintiffs argued that the high tech surveillance interfered with their political organizing and community work involving travel on Baltimore streets, and in the case of "cease fire" activity, being near or at the locations of shootings.¹⁵⁷ They stressed that Baltimore City Police Department's ability to ascertain the individuals and communities with whom they work could subject members to potential retaliation "based on their vocal dissent or criticism" of policing and law enforcement policy in the city.¹⁵⁸ Most importantly, their complaint identified the program as a violation of the Fourth Amendment's protection of the reasonable expectation of privacy in the whole of one's movement in public.¹⁵⁹ As they noted, the program "would put into place the most wide-reaching surveillance dragnet ever employed in an American city, giving the BPD a virtual, visual time machine whose grasp no person can escape."¹⁶⁰

However, the lower district court disagreed and stated that the surveillance cameras were not as sophisticated as to be unconstitutionally invasive because they only "register[] individuals as a single pixel" and are unable to record at night.¹⁶¹ The Fourth Circuit Court of Appeals subsequently took a different approach, reasoning that "perfect tracking of all individuals" is not required for a Fourth Amendment violation.¹⁶² The Court argued that the point of analysis with surveillance that transpires over days and weeks at different intervals, must center on the question of whether it "is enough to yield 'a wealth of detail,' greater than the sum of the individual trips," which even the tracking of unfocused

155. *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330 (2021).

156. *Id.* at 333.

157. See Decl. Dayvon Love, *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 456 F.Supp.3d 699 (D. Md. 2020), https://www.aclu-md.org/sites/default/files/field_documents/love_declaration.pdf; Compl. Declaratory and Injunctive Relief, *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 456 F.Supp.3d 699 (D. Md. 2020), https://www.aclu-md.org/sites/default/files/field_documents/lbs_v_bpd_complaint_-_200409_0.pdf. [<https://perma.cc/6NDK-6Q52>]

158. See Decl. Dayvon Love, *supra* note 157.

159. See Compl. Declaratory & Injunctive Relief, *supra* note 157.

160. *Id.*

161. *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 456 F.Supp.3d 699, 717 (D. Md. 2020).

162. *Leaders of a Beautiful Struggle*, 2 F.4th 330 at 342.

pinpoints during the day could provide.¹⁶³ These distinct interpretations of the same data and technology evince not only disparate understandings of the power of advancing police surveillance technology, but also beliefs on the degree of collective harm. Historically, such perceptions are further complicated when they concern targets who are overwhelming Black and poor.¹⁶⁴ The inconsistency in legal reception of these complaints makes it hard to depend on Fourth Amendment litigation as a viable safeguard. In fact, the *Leaders of a Beautiful Struggle* ruling came months after local organizing had already help usher in a new mayoral administration committed to discontinuing the aerial surveillance program.¹⁶⁵

B. Reciprocal Tech & Legal Norms

The use of advancing technology by law enforcement also presents significant normative challenges. As a society we have entrenched deep assumptions about the power and promise of technology.¹⁶⁶ The belief that technology evolves on its own progressive historical arc, developed outside of political and social contexts for which laws and norms play catch up, is a particularly virulent strain of technological determinism.¹⁶⁷ These assumptions allow for the mainstream positioning of technology as fair, neutral, and efficient, and any glitches and “hiccups” along the way as aberrations that can be fixed.¹⁶⁸ This acts to obfuscate the reality that technology designers often encode judgements into technical systems and dismiss negative racial outcomes as

163. *Id.*

164. ELIZABETH HINTON, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (VERA INST. J. 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/4NTK-KFXH>] (stating that the criminal justice system disproportionately targets black Americans as a result of a history of oppression and discriminatory decision-making dating back to slavery).

165. On February 3, 2021, the spending board voted to end the aerial surveillance contract, finally answering questions about whether the program would be discontinued. See Emily Opilo, *Baltimore Spending Board Votes Unanimously to Cancel Surveillance Plane Contract*, BALTIMORE SUN (Feb. 3, 2021, 4:19 PM), <https://www.baltimoresun.com/politics/bs-md-pol-plane-canceled-20210203-ha3ixtgiyfg4rpgmfftrsd6uwu-story.html> [<https://perma.cc/8PK-V-T28V>].

166. See RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 7–8 (2019).

167. *Id.* at 40–41.

168. SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 82 (2018).

extraneous to the encoding process.¹⁶⁹ Thus the operation of racism in technological development and deployment simultaneously heightens behind the scenes while also outwardly “being buried under layers of digital denial” and amnesia.¹⁷⁰

These colorblind logics also manifest in the defense of police surveillance technologies. For instance, when the CEO of Persistent Surveillance Systems, the Ohio-based surveillance company that operated spy planes in Baltimore, was questioned about the company’s monitoring focusing on Black residents, he noted that aerial surveillance is fair and balanced because it can monitor law enforcement as well.¹⁷¹ Additionally, executives at Dataminr have defended their algorithmic monitoring of BLM protests as not amounting to government surveillance, but rather private “ideologically neutral newsgathering.”¹⁷² The RAND Corporation, a proponent of the use of predictive analytics in policing,¹⁷³ has used its media arm to defend the power and efficiency of facial recognition technology even in the face of race-based deficiencies.¹⁷⁴ In early June 2020, when companies like IBM, Microsoft, and Amazon were reconsidering their commitments to facial recognition technology in the midst of the racial justice uprising, two Pardee Rand School¹⁷⁵ faculty members penned an article arguing that although “there’s little question that . . . flaws exist We do not blind ourselves just because our eyes are imperfect. We learn to calibrate our trust in our vision—or we buy glasses.”¹⁷⁶ Here, it is not the technology to blame but rather the power imbalance between citizens and police, which can be accounted

169. BENJAMIN, *supra* note 166, at 11.

170. BENJAMIN, *supra* note 166, at 11.

171. Monte Reel, *Secret Cameras Record Baltimore’s Every Move from Above*, BLOOMBERG BUSINESSWEEK (Aug. 23, 2016), <https://www.bloomberg.com/features/2016-baltimore-secret-surveillance> [<https://perma.cc/2TA8-52TU>].

172. Biddle, *supra* note 56.

173. See R. Joshua Scannell, *This Is Not Minority Report: Predictive Policing and Population Racism*, in CAPTIVATING TECHNOLOGY 107, 110 (Ruha Benjamin ed., 2019).

174. Osonde A. Osoba & Douglas Yeung, *Bans on Facial Recognition are Naive. Hold Law Enforcement Accountable for Its Abuse*, RAND BLOG (June 17, 2020), <https://www.rand.org/blog/2020/06/bans-on-facial-recognition-are-naive-hold-law-enforcement.html> [<https://perma.cc/55HC-UTHK>].

175. The Pardee RAND Graduate School is a public policy doctoral program housed within RAND Corporation. The program describes its relationship with the corporation as “symbiotic,” noting that “policy experiments and methodological innovations within Pardee RAND feed into RAND research, which in turn drives Pardee RAND curricula . . .” *Our RAND Partnership*, PARDEE RAND GRADUATE SCHOOL, <https://www.pardeerland.edu/about/rand-partnership.html> [<https://perma.cc/W9PG-RADH>].

176. *Id.*

for by independent reviews and evaluations.¹⁷⁷ The irony is, however, that this “trust in our vision” significantly impacts our ability to determine what is just.

Similarly, colorblind norms have played a significant role in Fourth Amendment jurisprudence.¹⁷⁸ These norms manifest in significantly harmful ways in police monitoring and profiling.¹⁷⁹ In cases like *Terry v. Ohio*¹⁸⁰ and *United States v. Mendenhall*,¹⁸¹ the Court began paving a path for the constitutional legitimization of racial surveillance and profiling through race neutral seizure doctrine. In *Terry*, the Court determined that a stop and frisk was a constitutional detention only necessitating a reasonable suspicion standard.¹⁸² The Court reasoned that the “brief” investigative detention was a necessary exception to the warrant requirement because it is reasonable when weighing the state’s great interest in preventing crime against the supposed limited nature of intrusion in the momentary stop.¹⁸³ What the opinion does not discuss is how the case arose from a White officer interpreting the behavior of two Black men as suspicious. In *Mendenhall*, a case where the Court further contemplates the parameters of a Fourth Amendment seizure, the opinion puts forth a test that examines whether a reasonable person would have felt that they were free to leave when approached by law enforcement.¹⁸⁴ While the Court acknowledges that race *could* impact whether a reasonable person would have felt free to walk away from two White male police officers, as the defendant was a young Black woman, it quickly dismisses race as nondeterminative in the case.¹⁸⁵

Unsurprisingly, this jurisprudential trajectory culminated in *Whren v. United States*, a case in which the defendant argued that he and his passenger were stopped by police simply because they were Black.¹⁸⁶ In *Whren*, the Court bluntly notes that subjective intentions, even racially motivated ones, “play no role in ordinary, probable-cause Fourth Amendment analysis.”¹⁸⁷ After rendering this decision, the Court has not taken race into account in determining

177. *See id.*

178. *See* Carbado, *supra* note 33, at 141; Daniel Harawa, *Whitewashing the Fourth Amendment*, 111 *Geo. L.J.* (forthcoming 2023, on file with author).

179. *See* Carbado, *supra* note 33 at 129.

180. *Terry v. Ohio*, 392 U.S. 1 (1968).

181. *United States v. Mendenhall*, 446 U.S. 544 (1980).

182. *See Terry*, 392 U.S. at 21–22.

183. *See id.* at 26–27.

184. *See Mendenhall*, 446 U.S. at 551–54.

185. *Id.* at 558.

186. *Whren v. United States*, 517 U.S. 806, 810 (1996).

187. *Id.* at 813.

whether a person has been seized.¹⁸⁸ Not only have these cases made way for expressly legalized racial surveillance and profiling, but law and legal regulation have continually influenced and shaped their larger societal normalization.¹⁸⁹ It is in this normality where purportedly race neutral technologies that encode inequity find ways to work hand in hand with supposedly race neutral laws and policies, masking their role as powerful tools for the maintenance of racial hierarchy.¹⁹⁰

III. SURVEILLANCE AND THE FUTURE FOR RACIAL JUSTICE MOVEMENTS

On March 3, 2018, a billboard designed by the artist Alisha Wormsley was erected in the East Liberty neighborhood of Pittsburgh.¹⁹¹ The billboard's message was simple: "THERE ARE BLACK PEOPLE IN THE FUTURE."¹⁹² These words caused a significant controversy and led to the building owner demanding that it be removed just weeks later.¹⁹³ The message was particularly poignant in the East Liberty neighborhood that was once predominantly Black and has experienced significant forced removals and hyper-gentrification.¹⁹⁴ When asked about the project, Wormsley said that the work was in the spirit of Afrofuturism.¹⁹⁵ Afrofuturism challenges mainstream depictions of sci fi futures devoid of Black life in not only declaring the presence of Black people but also situating them as beautiful architects and visionary developers of the future.¹⁹⁶ Thus, on one hand, the message can be viewed as a forceful critique of representation in mainstream popular culture that envisions the future. On the other hand, it is also a powerful declaration about the fortitude of Black people throughout history to persevere in continual struggles to have their lives valued and seen. And in those efforts one truth has remained clear: that Black communities have always desired to be seen, not watched.

188. See Carbado, *supra* note 33, at 141.

189. See Carbado, *supra* note 33, at 129.

190. BENJAMIN, *supra* note 166, at 35.

191. Sarah Rose Sharp, *Artist's Billboard Declaring "There Are Black People in the Future" Taken Down by Landlord*, HYPERALLERGIC (Apr. 9, 2018), <https://hyperallergic.com/436763/alisha-wormsley-the-last-billboard-pittsburgh-there-are-black-people-in-the-future> [<https://perma.cc/2WFP-8VP6>].

192. *Id.*

193. *Id.*

194. See *id.*

195. *Id.*

196. See *id.*; see also I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019); Taylor Crumpton, *Afrofuturism Has Always Looked Forward*, ARCHITECTURAL DIG.: CLEVER (Aug. 24, 2020), <https://www.architecturaldigest.com/story/what-is-afrofuturism> [<https://perma.cc/4JX9-KNWU>].

This final part of the Article argues that the way forward in protecting protest movements for racial equity and justice necessitates action beyond the confines of current Fourth Amendment jurisprudence and explores what this may mean in the context of (a) challenging law enforcement, (b) holding tech companies accountable, (c) legislating on digital privacy, and (d) radically transforming legal doctrine.

A. Challenging Law Enforcement Power

The future of racial justice movements depends on Black life being seen, not monitored. How do we facilitate this? We must impose greater regulation on both law enforcement and private companies that collect, store, and analyze important data. Much of what we have learned over the past few years about the depth of law enforcement surveillance practices has come as a result of fierce Freedom of Information Act battles or outright leaks by anonymous insiders or activist hackers.¹⁹⁷ The BlueLeaks collection, which is a hacked megatrove of data posted by anonymous hackers in the weeks and months after Floyd's killing, has provided some of the most insightful information on police behavior.¹⁹⁸ However, our ability to know, understand, and govern police conduct should not be dependent on social justice hackers frustrated at police denial and secrecy. Local, state, and federal legislation is needed for more transparency in how law enforcement personnel are currently using surveillance technologies. The public should be aware of what technology is being used, the contracts law enforcement has with private vendors, the type of data being gathered and how they are being used. A group of cities and states across the country have begun implementing similar requirements under Community Control Over Police Surveillance (CCOPS) ordinances.¹⁹⁹ The campaign's principal objective is to pass CCOPS laws that ensure residents, through local city councils, are empowered to decide if and how surveillance technologies are used through a process that maximizes the public's influence over those decisions.²⁰⁰ The ACLU

197. Andy Greenberg, *Hack Brief: Anonymous Stole and Leaked a Megatrove of Police Documents*, WIRED (June 22, 2020, 12:48 PM), <https://www.wired.com/story/blueleaks-anonymous-law-enforcement-hack> [<https://perma.cc/J5KA-GC5R>]; Micah Lee, *Hack of 251 Law Enforcement Websites Exposes Personal Data of 700,000 Cops*, INTERCEPT (July 15, 2020, 11:00 AM), <https://theintercept.com/2020/07/15/blueleaks-anonymous-ddos-law-enforcement-hack> [<https://perma.cc/QD3P-LWXH>].

198. See Greenberg, *supra* note 197; see also Lee, *supra* note 197.

199. See Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 681–82 (2019).

200. *Id.*

provides model CCOPS ordinances from which communities may tailor their legislation. Just how effective these ordinances are has yet to be determined.²⁰¹ Additionally, there must be frontend regulation before policies and programs are implemented. In Maryland, the state legislature recently enacted a racial equity pilot program.²⁰² Under the pilot program, state legislation introduced in the General Assembly will go through a racial equity audit which will evaluate the potential impact the law would have on racial equity and justice.²⁰³ A similar requirement could be implemented to govern the development of policing policies and laws.

Researchers at Columbia University's SAFE Lab have referred to police use of social media monitoring as a form of "21st Century Online 'Stop and Frisk' Policing."²⁰⁴ They suggest centering community involvement in the analysis of online activity and mandating that data collected have a shelf life.²⁰⁵ Policy analysts at the Brookings Institute similarly call for policy changes in response to the expanded scope of law enforcement surveillance of social media.²⁰⁶ They promote the requiring of public hearings and local government approval before police engage in social media monitoring, establishing publicly accessible policies governing police use of social media data, banning police from impersonating other people on social media, and enacting regular audit procedures.²⁰⁷ However, attempts to regulate policing have continually proved daunting.²⁰⁸ Such efforts to

201. See Arnett, *From Decarceration to E-Carceration*, *supra* note 199, at 681–82; Vincent Southerland, *The Master's Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies*, UCLA L. REV. (forthcoming 2023, on file with author) (evaluating the efficacy of CCOPS legislation).

202. Hannah Gaskill, *Jones and Ferguson to Require Racial Impact Statements in Bill Analyses*, MD. MATTERS (Feb. 1, 2021), <https://www.marylandmatters.org/2021/02/01/jones-and-ferguson-to-require-racial-impact-statements-in-bill-analyses> [https://perma.cc/GTQ3-CN7V]; Pamela Wood, *In Pilot Program, Maryland Lawmakers to Give Extra Scrutiny to Racial Equity in Criminal Justice Legislation*, BALT. SUN (Feb. 2, 2021, 4:58 PM), <https://www.baltimoresun.com/politics/bs-md-pol-ga-racial-equity-20210202-ddpqmhoegzblzpo4we25qycqky-story.html> [https://perma.cc/MHZ2-L4AW].

203. See Gaskill, *supra* note 202; see also Wood, *supra* note 202.

204. ENO DARKWA, KELLY ANGUIANO & DESMOND U. PATTON, RECOMMENDATIONS TO END 21ST CENTURY ONLINE "STOP AND FRISK" POLICING 1 (2021), <https://safelab.socialwork.columbia.edu/sites/default/files/content/Copy%20of%20Social%20Media%20Brief.pdf> [https://perma.cc/8WWB-UQKQ].

205. See *id.*

206. See Rachel Levinson-Waldman and Angel Diaz, *How to Reform Police Monitoring of Social Media*, BROOKINGS (July 9, 2020), <https://www.brookings.edu/techstream/how-to-reform-police-monitoring-of-social-media> [https://perma.cc/U8VM-Z65L].

207. *Id.*

208. See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1802–14 (2020) (arguing that attempts to regulate police falls into a persistent cycle of

regulate must be viewed as short-term, immediate responses. In order for there to be effective long term impact on law enforcement surveillance of racial justice movements, the policy demands of the movement must be taken seriously. The most powerful policy emanating from the movement has been the call to defund policing.²⁰⁹ The phrase articulates the idea that, given the obvious harms and dangers of policing,²¹⁰ and that much of policing is composed of services outside of investigating or responding to violent offenses, enormous policing budgets are better spent focusing on what truly leads to safe, healthy, thriving communities: healthcare, education, employment, and other social supports.²¹¹ The call to defund has already had some impact, with cities making symbolic reductions in law enforcement budgets, while others have ended policing in schools.²¹² The Breathe Act Federal Bill Proposal²¹³ is a great example of targeted legislation that would shift focus away from perpetual police regulation to investments in new approaches to community safety.

The key will be maintaining the social pressure for further commitments and also ensuring that our conception of “defund” includes removing monies used for the acquisition and deployment of surveillance technologies. Because it will not matter much if police officers are physically removed from schools, and more officers are physically prevented from responding to nonviolent emergency calls, if their virtual eyes are still present. Some may argue that police departments are turning to surveillance technologies as a result of contemporary constraints

“repair, reform, relegitimize” and highlighting four key efforts that continually prove ineffective: (1) more democracy, (2) more bureaucracy, (3) more procedural justice, and (4) more tools & technology).

209. See, e.g., Sam Levin, *What Does ‘Defund the Police’ Mean? The Rallying Cry Sweeping the US – Explained*, GUARDIAN (June 6, 2020, 1:00 AM), <https://www.theguardian.com/us-news/2020/jun/05/defunding-the-police-us-what-does-it-mean> [<https://perma.cc/KP8W-W9P3>].
210. See, e.g., Akbar, *supra* note 208, at 1781; Levin, *supra* note 209. See generally Jessica Eaglin, *To ‘Defund’ the Police*, 73 STAN. L. REV. ONLINE 120 (2021).
211. See Akbar, *supra* note 208, at 1784–85; see also Akbar, *supra* note 208, at 1820.
212. See, e.g., Jill Cowan, Shawn Hubler & Kate Taylor, *Protesters Urged Defunding the Police. Schools in Big Cities are Doing it*, N.Y. TIMES (Feb. 18, 2021), <https://www.nytimes.com/2021/02/17/us/los-angeles-school-police.html> [<https://perma.cc/74HC-H7UU>]; Alice Yin, *Cook County Board Passes Symbolic Resolution to Shift Money from Police, Jails in Wake of ‘Defund Movements.’* CHI. TRIB. (July 30, 2020, 12:48 PM), <https://www.chicagotribune.com/news/breaking/ct-cook-county-board-police-funding-resolution-20200730-g6ceoshirvblbdujcsww6sjdya-story.html> [<https://perma.cc/2E3D-ERVX>].
213. The BREATHE Act Framework, BREATHEACT.ORG, https://breatheact.org/wp-content/uploads/2020/07/The-BREATHE-Act-PDF_FINAL3-1.pdf [<https://perma.cc/DW67-WJ4W>].

on budgets that limit the hiring of police officers. However, such an argument requires one to ignore the history of racialized surveillance practices. Every racial justice movement has been subjected to the most advanced state led or sanctioned surveillance technologies of their time, regardless of the expense.²¹⁴ This was seen during the Civil Rights Movement with the use of sophisticated wiretaps and other electronic audio devices.²¹⁵ It was also seen during slavery with the earliest form of police utilizing “information technologies” of the written slave pass, wanted posters and advertisements for runaway slaves and servants, and organized slave patrols.²¹⁶ At each of these points, it was neither budgetary concerns nor crime fighting dictating surveillance technology decisions, but rather social control.

B. Holding Tech Companies Accountable

The ability to regulate private companies will also play a tremendous role in responding to the surveillance of the BLM movement. Because private industry is on the forefront of developing surveillance technology, the growth in sophistication of these technologies has often pushed local and state jurisdictions to also rely on private companies to use the technologies on their behalf as clients.²¹⁷ These companies must be regulated with respect to what data can be collected and how it can be used and monetized. Leaving it to profit-motivated corporations to create their own ethical guidelines²¹⁸ is insufficient and dangerous given the expansion of surveillance²¹⁹ and data capitalism.²²⁰ The persistence of new surveillance practices also shows that one-off legislative bans on specific technologies—like placing moratoriums on facial recognition software because of racial bias and ineffectiveness—will not be

214. See Arnett, *supra* note 9, at 1111–16.

215. See S. REP. NO. 94–755, at 58–65 (1976).

216. SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 52 (2015). Dr. Browne references the work of Christian Parenti in *THE SOFT CAGE: SURVEILLANCE IN AMERICA FROM SLAVERY TO THE WAR ON TERROR* (2003).

217. See, e.g., Emily Birnbaum & Issie Lapowsky, *Microsoft, Amazon and IBM Express ‘Solidarity.’ Should They End Police Contracts?*, PROTOCOL (June 3, 2020), <https://www.protocol.com/microsoft-amazon-ibm-police-contracts> [<https://perma.cc/JT9Z-DPD3>].

218. See Anne L. Washington & Rachel Kuo, *Whose Side Are Ethics Codes on? Power, Responsibility and the Social Good*, PROC. ACM FAIRNESS ACCOUNTABILITY TRANSPARENCY CONF. (2020).

219. See, e.g., ZUBOFF, *supra* note 135.

220. See *Data Capitalism*, DATA FOR BLACK LIVES <https://datacapitalism.d4bl.org> [<https://perma.cc/ZUC6-9S32>].

enough by themselves to stop the overall drive for the development and implementation of similar technologies.²²¹ This drive is led in large part by economic interests that look to data as the new oil or gold.²²²

In many ways, the need to regulate private companies resonates beyond police surveillance. The rapid growth of datafication has put large tech and media companies in the driver's seat to surveil, collect data, make digital profiles, sort, and discriminate against us, using what we buy, where we live, how and where we get news, credit and employment profiles, and social media content.²²³ Not only are private companies seeking to influence our daily lives for capital exploits, but they encroach on the very bedrock of a free society: free will and thought.²²⁴ While local and state efforts to rein in large technology companies and data brokers are valiant and necessary, there also needs to be strong overarching federal protections.²²⁵ The United States stands alone from its European Union counterpart in failing to take serious steps to enhance data protections in the digital age.²²⁶ However, we must move

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221. See, e.g., Chaz Arnett, *Data: The New Cotton*, JUST TECH (May 25, 2022) <https://just-tech.ssrc.org/articles/data-the-new-cotton/> [<https://perma.cc/A26-8HPE>]; Damien Patrick Williams, *Fitting the Description: Historical and Sociotechnical Elements of Facial Recognition and Anti-Black Surveillance*, 7 J. RESPONSIBLE INNOVATION 74 (2020); Jessica Glenza, *Minneapolis Poised to Ban Facial Recognition for Police Use*, GUARDIAN (Feb. 12, 2021, 9:07 AM), <https://www.theguardian.com/us-news/2021/feb/12/minneapolis-police-facial-recognition-software> [<https://perma.cc/2PD7-MEW6>].
 222. See, e.g., Stacy-Ann Elvy, *Paying for Privacy and the Personal Data Economy*, 117 COLUM. L. REV. 1369, 1371 (2017).
 223. See, e.g., CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION 1–13 (2017); FRANK PASQUALE, THE BLACK BOX SOCIETY 1–6 (2015).
 224. See, e.g., Brett Frischmann & Evan Selinger, *Engineered Determinism and Free Will*, in RE-ENGINEERING HUMANITY 209, 209–40 (2018); Franklin Foer, *How Silicon Valley Is Erasing Your Individuality*, WASH. POST (Sept. 8, 2017), https://www.washingtonpost.com/outlook/how-silicon-valley-is-erasing-your-individuality/2017/09/08/a100010a-937c-11e7-aace-04b862b2b3f3_story.html [<https://perma.cc/N922-XZA4>].
 225. See, e.g., CAL. CIV. CODE § 1798.100 (Deering 2020); S.B. 2330, 101st Gen. Assemb. (Ill. 2020); see also Ruth Reader, *These States Are on Track to Pass Data Privacy Laws This Year*, FAST COMPANY (Feb. 24, 2021), <https://www.fastcompany.com/90606571/state-data-privacy-laws-2021> [<https://perma.cc/AJA4-DNQN>] (listing states with pending privacy legislation); 2020 *Consumer Data Privacy Legislation*, NAT'L CONF. STATE LEGISLATURES, (Jan. 17, 2021), <https://www.ncsl.org/research/telecommunications-and-information-technology/2020-consumer-data-privacy-legislation637290470.aspx> [<https://perma.cc/WV77-KQSK>] (same).
 226. See Editorial, *Why Is America So Far Behind Europe on Data Privacy?*, N.Y. TIMES (June 8, 2019), <https://www.nytimes.com/2019/06/08/opinion/sunday/privacy-congress-facebook-google.html> [<https://perma.cc/57BZ-TPY7>].

toward something akin to a Digital Bill of Rights, with guidelines to enhance enforcement.²²⁷

Mandated transparency is crucial for private companies as well. A powerful tool in bringing companies to the bargaining table in the wake of the racial justice uprising has been the ability to shine light on the contracts and relationships that they have with law enforcement.²²⁸ Companies like Amazon have only agreed to temporarily halt selling their facial recognition technology once it was exposed in the media and the company was backed into a corner.²²⁹ Social rebuke has been and will remain a powerful tool alongside other advocacy and organizing efforts, particularly when it is connected to reduced patronage and profit.²³⁰ However, even this form of “digital discursive accountability praxis” has been demonized and written off as “cancel culture.”²³¹ Yet, “canceling” originates from Black oral tradition as a powerful expression of agency.²³² The ability to cancel through digital amplification and organizing challenges hierarchies of power and privilege.²³³ Thus, when powerful elites²³⁴ and corporations bemoan

227. Ramesh Srinivasan, Opinion, *Americans Need a ‘Digital Bill of Rights’. Here’s Why*, *GUARDIAN* (Jan. 28, 2020, 5:40 AM), <https://www.theguardian.com/commentisfree/2020/jan/28/americans-need-a-digital-bill-of-rights-heres-why> [https://perma.cc/B8UN-VXWE].

228. See Birnbaum & Lapowsky, *supra* note 217.

229. See Amazon Staff, *We Are Implementing a One-Year Moratorium on Police Use of Rekognition*, *AMAZON: POLY NEWS & VIEWS* (June 10, 2020), <https://www.aboutamazon.com/news/policy-news-views/we-are-implementing-a-one-year-moratorium-on-police-use-of-rekognition> [https://perma.cc/AT4C-U3FU]; Bobby Allyn, *Amazon Halts Police Use of its Facial Recognition Technology*, *NPR* (June 10, 2020, 6:59 PM), <https://www.npr.org/2020/06/10/874418013/amazon-halts-police-use-of-its-facial-recognition-technology> [https://perma.cc/4EEP-FD]2].

230. See Allyn, *supra* note 229; Birnbaum & Lapowsky, *supra* note 217.

231. Meredith D. Clark, *DRAG THEM: A Brief Etymology of So-Called “Cancel Culture,”* 5 *COMM. & PUB.* 88, 88 (2020).

232. See *id.*

233. See *id.* at 90–91.

234. One of “cancel culture’s” most vocal opponents, Elon Musk, has purchased and taken over Twitter. Musk has stated that one of his goals is to promote free speech. It is no coincidence that use of racial slurs and hate speech increased dramatically after his takeover. See Karen Ruiz and Sophie Tanno, “‘More Fun, Less Shun!’ *Elon Musk Calls For The End Of ‘Cancel Culture’ After Grimes’ Mother Slams Him For Tweeting ‘Right Wing Bulls**t’*,” *DAILY MAIL* (May 19, 2020), <https://www.dailymail.co.uk/news/article-8337539/Elon-Musk-tweets-cancel-cancel-culture-amid-Twitter-feud-Grimes-mom.html> [https://perma.cc/7AUB-RA8T]; Kate Conger and Lauren Hirsch, *Elon Musk Completes \$44 Billion Deal to Own Twitter*, *N.Y. TIMES* (Oct. 27, 2022), <https://www.nytimes.com/2022/10/27/technology/elon-musk-twitter-deal-complete.html> [https://perma.cc/XHK2-RWVE].; Joshua Zitser and Sam Tabahriti, *Use of N-word on Twitter Jumped by Almost 500% After Elon Musk’s Takeover as Trolls Test Limits on Free Speech, Report Says*, *BUS. INSIDER* (Oct. 2022), <https://www.businessinsider.com/elon-musk-twitter-takeover-sparked-n-word-use-jump-2022-10> [https://perma.cc/78Y6-2EDM].

the rise of “cancel culture,” they wield the term as a tool to “marginalize[] people who have adapted earlier resistance strategies for effectiveness in the digital space.”²³⁵ Despite this, “cancelling” seems poised to remain a valuable strategy to collectively share harms and push for accountability, even while advocates of using social media for this purpose remain cognizant that it is not always enough by itself to transform those power relations.

C. Legislative Avenues to Protect Digital Privacy

Amid an absence of federal regulation in response to growing concerns over the threats to privacy in an increasingly automated and digitized society, states have stepped in and passed privacy bills.²³⁶ California, Colorado, Virginia, Utah, and Connecticut have passed general consumer privacy law bills, while Illinois, Texas, and Washington have passed targeted bills focused on the regulation of biometric data.²³⁷ Although these laws vary in some mandates and features, they can be generally understood as efforts to address worries about the vulnerability of citizens’ personal data through limiting companies’ ability to share data without consent, granting citizen rights to access, correct, or delete data that may be held by a company, affording opportunities for citizens to opt out of data processing practices, and empowering states to enforce penalties and fines for violations.²³⁸ It could be argued that these bills and similar forthcoming

235. Clark, *supra* note 231, at 89.

236. See Pam Greenberg, *2022 Consumer Privacy Legislation*, NAT’L CONF. STATE LEGISLATURES (June 10, 2022) <https://www.ncsl.org/research/telecommunications-and-information-technology/2022-consumer-privacy-legislation.aspx> [<https://perma.cc/53AQ-S726>]; *The Evolution of Biometric Data Privacy Laws*, BLOOMBERG L. (Jan. 25, 2023) <https://pro.bloomberglaw.com/brief/biometric-data-privacy-laws-and-lawsuits> [<https://perma.cc/5AR2-8YXF>].

237. BLOOMBERG L., *supra* note 236.

238. See, e.g., Text of Proposed California Consumer Privacy Rights Act of 2020(CPRA) Proposition 24, Sec. 2(H), *available at* <https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop24.pdf> [<https://perma.cc/4EB7-4MFC>] (“Consumers need stronger laws to place them on a more equal footing when negotiating with businesses in order to protect their rights. Consumers should be entitled to a clear explanation of the uses of their personal information, including how it is used for advertising, and to control, correct, or delete it”); Colorado Privacy Act, Colo. Rev. Stat. § 6–1–1302(1)(c)(I) (2023) (“ . . . Colorado will be among the States that empower consumers to protect their privacy and require companies to be responsible custodians of data”); The Illinois Biometric Information Privacy Act, 740 ILCS 14/5 (g) (2008), (“The public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.”); Virginia Consumer Data Protection Act, § 59.1–584(A) & (C) (2021), (“The Attorney General shall have exclusive authority to enforce the provisions of this chapter” “ . . . the Attorney General may initiate an action in the name of the

state laws are relevant in efforts to challenge the role that tech companies play in surveilling movements for racial justice. However, many of the bills emerging out of this state-led digital privacy movement have been criticized for being too weak.²³⁹ For example, Utah’s Consumer Privacy Act has been criticized for lacking a private right of action for citizens who want to sue tech companies,²⁴⁰ and Connecticut’s Data Privacy Act has been attacked for lacking “the necessary rulemaking authority, private right of action, strong enforcement, and data minimization requirements” needed to respond to unchecked data capitalism.²⁴¹ These weaknesses have been connected to lobbying efforts by tech companies to water down the substance and strength of new privacy laws.²⁴² Indeed, even current efforts at the federal level to pass the American Data Privacy and Protection Act²⁴³ are seen as attempts to preempt stronger privacy bills such as California’s Consumer Privacy Act.²⁴⁴ Thus, questions remain about how

Commonwealth and may seek an injunction to restrain any violations of this chapter and civil penalties of up to \$7500 for each violation under this chapter . . .”).

239. Daniel Solove, *Further Thoughts on ADPPA, the Federal Comprehensive Privacy Bill*, PRIV. & SEC. BLOG (July 30, 2022) <https://teachprivacy.com/further-thoughts-on-adppa-the-federal-comprehensive-privacy-bill/> [<https://perma.cc/9HLG-JKUQ>]; Todd Feathers, *Big Tech Is Pushing States to Pass Privacy Laws, and Yes, You Should Be Suspicious*, THE MARKUP (Apr. 15, 2021, 8:00 AM) <https://themarkup.org/privacy/2021/04/15/big-tech-is-pushing-states-to-pass-privacy-laws-and-yes-you-should-be-suspicious> [<https://perma.cc/N7XS-ND7M>].
240. Jake Holland, *Utah Privacy Bill Lacking Right to Sue May Pave GOP States’ Way*, BLOOMBERG L. (Mar. 8, 2022, 9:41 AM) <https://news.bloomberglaw.com/privacy-and-data-security/utah-privacy-bill-lacking-right-to-sue-may-pave-gop-states-way> [<https://perma.cc/HBU6-4CG5>]; Hayley Tsukayama, *Utah: Urge Governor Cox to Veto This Weak Data Privacy Bill*, EFF (Mar. 10, 2022) <https://www.eff.org/deeplinks/2022/03/utah-urge-governor-cox-veto-weak-data-privacy-bill> [<https://perma.cc/4JTC-JL46>].
241. *Connecticut Enacts Privacy Law*, EPIC (May 11, 2022) <https://epic.org/connecticut-enacts-privacy-law/> [<https://perma.cc/4NDD-S5CE>].
242. Benjamin Powers, *How Big Tech Is Quietly Pushing for Watered-down State Privacy Laws*, GRID (Apr. 11, 2022) <https://www.grid.news/story/technology/2022/04/11/big-tech-turns-to-an-old-industry-playbook-when-passing-state-privacy-legislation/> [<https://perma.cc/629L-AHSZ>]; Todd Feathers & Alfred Ng, *Tech Industry Groups Are Watering Down Attempts at Privacy Regulation, One State at a Time*, THE MARKUP (May 26, 2022, 8:00 AM) <https://themarkup.org/privacy/2022/05/26/tech-industry-groups-are-watering-down-attempts-at-privacy-regulation-one-state-at-a-time> [<https://perma.cc/A2DR-T8GF>]; Thomas Claburn, *Big Tech Loves Talking up Privacy – While Trying to Kill Privacy Legislation*, THE REGISTER (May 27, 2022) https://www.theregister.com/2022/05/27/big_tech_privacy [<https://perma.cc/U3ZE-DLEY>].
243. The ADPPA was introduced in the U.S. House of Representatives in June 2022 but has not been voted on. H.R.8152, <https://www.congress.gov/bill/117th-congress/house-bill/8152/actions>.
244. Cristiano Lima, *Federal Privacy Bill Trumps California’s Law, Advocates Say*, WASH. POST (July 15, 2022, 8:58 AM) <https://www.washingtonpost.com/politics/2022/07/15/federal-privacy-bill-trumps-californias-law-advocates-say/> [<https://perma.cc/EZ8T-J4TD>]; Maria Curi,

effective these legislative acts may be and, more importantly, whether they will act as a baseline floor on which greater protections in the future could build, or as a ceiling limiting more aggressive protections.

Furthermore, state and federal privacy bills may be limited in their ability to respond to racially disparate harms without the guidance of racial equity goals or the inclusion of language directly addressing the impacts of race. In *Dismantling the “Black Opticon”: Privacy, Race, Equity, and Online Data-Protection Reform*, Professor Anita Allen argues that with data privacy, Black Americans suffer from three compounding vulnerabilities that constitute a “Black Opticon”: oversurveillance, exclusion, and predation.²⁴⁵ Allen stresses that these issues may only be addressed through policymaking that is “explicitly antiracist.”²⁴⁶ In using a racial lens to evaluate Virginia’s Consumer Data Protection Act, she concludes that “it is unlikely that the VCDPA on its own will do much to help dismantle the Black Opticon.”²⁴⁷ Indeed, current and future legislation would be of little benefit to challenges against the oversurveillance of movements for racial justice like BLM without acknowledging and targeting racialized surveillance practices. Such acknowledgement and focus is particularly needed to end the legislative shielding of police practices. Every privacy bill that has passed in recent years encompasses carve outs for law enforcement purposes, likely protecting the types of excessive police surveillance tactics witnessed in 2020.²⁴⁸

California Democrats Demand Stronger Privacy Protection Bill, BLOOMBERG GOV. (July 13, 2022, 7:31 PM) <https://about.bgov.com/news/california-democrats-push-for-stronger-privacy-protection-bill/> [<https://perma.cc/ACP4-H9KX>].

245. Anita Allen, *Dismantling the “Black Opticon”: Privacy, Race, Equity, and Online Data-Protection Reform*, 131 *YALE L.J. F.* 907, 910 (2022).

246. *Id.* at 931.

247. *Id.* at 943.

248. See e.g. Text of Proposed California Consumer Privacy Rights Act of 2020(CPRA) Proposition 24, Sec. 15(a)(2), available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop24.pdf> [<https://perma.cc/4EB7-4MFC>] [“Law enforcement agencies, including police and sheriff’s departments, may direct a business pursuant to a law enforcement agency approved investigation with an active case number not to delete a consumer’s personal information, and upon receipt of that direction, a business shall not delete the personal information for 90 days . . .”]; Colorado Privacy Act, Colo. Rev. Stat. § 6–1–1304 (3)(a)(III) (2003) [“The obligations imposed on controllers or processors under this Part 13 do not . . . restrict a controller’s or processor’s ability to . . . cooperate with law enforcement agencies concerning conduct or activity that the controller or processor reasonably and in good faith believes may violate federal, state, or local law . . .”]; Utah Consumer Privacy Act 13–61–304 (1)(c) (2022) [“The requirements described in this chapter do not restrict a controller’s or processor’s ability to . . . cooperate with a law enforcement agency concerning activity that the controller or processor reasonably and in good faith believes may violate federal, state, or local laws, rules, or regulations . . .”]; Washington, Biometric Identifiers, RCW 19.375.040 (3)[“Nothing in this chapter expands or limits the authority of a law enforcement officer

D. Doctrinal Transformations

Finally, there must be a racial justice reckoning with criminal procedure and how it shapes conceptions of privacy and the limits of constitutional protection. The reckoning of 2020 involved serious reflection on what the role of policing,²⁴⁹ the unchecked power of prosecutors,²⁵⁰ and the biased operation of courts²⁵¹ and corrections²⁵² has meant for efforts toward racial equity.²⁵³ This renewed

acting within the scope of his or her authority including, but not limited to, the authority of a state law enforcement officer in executing lawful searches and seizures.”]; Texas, Biometric Identifiers, Sec. 503.001 (c)(1)(d) [“A person who possesses a biometric identifier of an individual that is captured for a commercial purpose . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the disclosure is made by or to a law enforcement agency for a law enforcement purpose in response to a warrant . . .”].

249. See Solomon Oliver Jr., *Race and Policing: Some Thoughts and Suggestions for Reform*, 89 *FORDHAM L. REV.* 2597, 2598–99 (2021) (discussing how, in the aftermath of the Floyd killing, the “Black Lives Matter” movement sparked a calling for police reform by a myriad of individuals to achieve racial equity and inclusion in society); T. Andrew Brown, *Imagining a Bright Future Where Everyone Is Treated Equally*, 92 *N.Y. ST. B.J.* 8, 10 (2020) (“The recent killing of George Floyd and the growing access to video has expanded the conversation and prioritized the need for action. Video capturing police mistreatment of blacks, and the extent that it is portrayed in social media, makes racial injustice hard to dismiss.”).
250. See Irene Oritseweyinmi Joe, *Probable Cause and Performing “For the People”*, 70 *DUKE L.J.* 138, 138 (2021) (“Most clearly, the difference in outcome and public perceptions of the criminal investigations into the deaths of Breonna Taylor and George Floyd brings to the forefront the extent to which the grand jury process allows a prosecutor to “perform” the prosecutorial function without actually engaging in what the public would consider a good-faith examination of the evidence”); see also Olywyn Conway, *Are There Stories Prosecutors Shouldn’t Tell?: The Duty to Avoid Racialized Trial Narratives*, 98 *DENVER L. REV.* 457 (2021) (discussing how prosecutors can advance the cause of racial justice by eliminating racialized trial narratives that perpetuate racial stereotypes and stock stories).
251. See Yu Du, *Racial Bias Still Exists in Criminal Justice System? A Review of Recent Empirical Research*, 37 *TOURO L. REV.* 79 (2021) (examining a research study among 133 judges, revealing that judges are susceptible to implicit racial bias which affects their judgments. The findings suggest that White judges have pro-White bias, while Black judges were found to not have a clear preference.); see also Briana M. Clark, *Social Dominance Orientation: Detecting Racial Bias in Prospective Jurors*, 39 *YALE L. & POL’Y REV.* 614, 624 (2021) (“Racial bias does not only impact a juror’s view of Black defendants but also their view of victims of different races.”).
252. Amy Forliti, *8 Minority Jail Officers Allegedly Kept Off Chauvin’s Guard*, *ABC NEWS* (Feb. 9, 2021, 4:40 PM), <https://abcnews.go.com/US/wireStory/minority-jail-officers-allegedly-off-chauvins-guard-75787517> [<https://perma.cc/L9AN-NA8S>] (reporting allegations that correction officers at Ramsey County Adult Detention Center were segregated and prevented from performing their occupational duties around Derek Chauvin, the White Minneapolis officer who pressed his knee on the neck of George Floyd, a handcuffed Black man, because of their minority status).
253. See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 *GEO. L.J.* 1419, 1425 (2016) (“‘Successful’ reform efforts substantially

attention has led to moves to ban chokeholds,²⁵⁴ end qualified immunity for law enforcement officers,²⁵⁵ require special prosecutors in cases of police killings,²⁵⁶ and discontinue the use of no-knock warrants,²⁵⁷ among other policy and legislative actions.²⁵⁸ Yet, this reckoning with the criminal legal system will ultimately be ineffective without radical challenge to the constitutional frameworks that give license to the stalking, profiling, and surveilling of Black citizens.

In *The Second Founding and the First Amendment*, Professor William Carter, Jr. argues that with the passing of the Reconstruction amendments, the Thirteenth, Fourteenth, and Fifteenth amendments, the United States embarked on a “Second Founding.”²⁵⁹ He notes that this Second Founding is often credited with aiming to bestow citizenship and remediate the lingering effects of bondage for those who were formally enslaved.²⁶⁰ Carter stresses, however, that the post Civil War constitutional transformation also responded to “the systemic

improve community perceptions about the police without substantially improving police practices.”).

254. See Trevor George Gardner & Esam Al-Shareffi, *Regulating Police Chokeholds*, 112 J. CRIM. L. & CRIMINOLOGY ONLINE 111, 111 (2022); Jon Kamp & Scott Calvert, *More Cities Ban Chokeholds, Similar Restraints in Wake of George Floyd Protests*, WALL ST. J. (June 10, 2020, 6:37 PM), <https://www.wsj.com/articles/more-cities-ban-chokeholds-similar-restraints-in-wake-of-george-floyd-protests-11591821021> [<https://perma.cc/76MN-ECRX>].
255. See Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 239 n.37 (2020) (discussing how lower courts sometimes misapply qualified immunity, leading to grievous results that undermine government accountability); see also Ed Yohnka, et al., *Ending Qualified Immunity Once and for All is the Next Step in Holding Police Accountable*, ACLU: NEWS & COMMENT. (Mar. 23, 2021), <https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable> [<https://perma.cc/65TA-PVBE>].
256. Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1012 (2021) (“ . . . a new wave of ‘progressive prosecutors’ has swept into offices throughout the country. Many of these new prosecutors ran on a promise to bring ‘accountability’ to police by aggressively charging and prosecuting the ‘bad apples’ who harm civilians or by promising special prosecutors in all police violence cases.”).
257. See Arian Campo-Flores & Sabrina Siddiqui, *Police Killing of Breonna Taylor Fuels Calls to End No-Knock Warrants*, WALL ST. J. (May 24, 2020), <https://www.wsj.com/articles/police-killing-of-breonna-taylor-fuels-calls-to-end-no-knock-warrants-11590332400> [<https://perma.cc/DMS2-TUPK>].
258. Matt Reynolds, *Data on Police Deadly Force Should Be Tracked, ABA House Urges*, AM. BAR. ASS’N. J. (Aug. 4, 2020, 8:15AM), <https://www.abajournal.com/news/article/aba-house-adopts-resolution-to-collect-deadly-force-data> [<https://perma.cc/L2SB-M39U>] (Resolution 116A asks federal, state, and local governments to increase data collection and mandate independent investigations in each instance of lethal force by law enforcement).
259. See William M. Carter, Jr., *The Second Founding and the Second Amendment*, 99 TEX. L. REV. 1065, 1065 (2020).
260. See *id.*

legacy of the system of enslavement upon our constitutional order,” mandating a new constitutional interpretation for all of the amendments.²⁶¹ That new interpretation was necessitated by the inescapable paradox of the drafting of a constitution that purportedly committed to ideals of liberty and freedom while also legitimizing a slaveocracy. Accordingly, he turns to the voices of those who were enslaved for valuable insight into what that new interpretation should involve.²⁶²

While Carter focuses on the First Amendment, I have made similar arguments in previous work with respect to the Fourth Amendment.²⁶³ The experiences of people who were formerly enslaved provide critical understandings of how our laws should be interpreted to best protect privacy and regulate surveillance practices that act to maintain racial subordination. Thus, the Second Founding has meaning for the Fourth Amendment as well, as it has never reckoned with the legacy of racialized surveillance.²⁶⁴ This is evident in the hyper focus on demonstrating state action and reasonable expectation of privacy, particularly in public locations.²⁶⁵ While the constitutional Framers were concerned about the British monarchy issuing writs of assistance, enslaved and free Black people were concerned about the threat posed by the Framers, who either held people in bondage, were complicit in the strengthening of enslavement, or turned a blind eye to the many horrors of racial subjugation.²⁶⁶ It was the individual citizen that proved to be just as dangerous as the state. Additionally, those who suffered the pains of plantation life and other forms of racial terror like lynching in the years after the ending of enslavement understood privacy quite differently than the original Framers. To not have any control over one’s body,²⁶⁷ to be subjected to the indignities of nudity and

261. *Id.*

262. *See id.* at 1066.

263. *See Arnett, supra* note 9, at 1140.

264. *Arnett, supra* note 9, at 1140.

265. *See Arnett, supra* note 9, at 1140.

266. *See Paul Finkelman, The Founders and Slavery: Little Ventured, Little Gained*, 13 *YALE J.L. & HUMAN.* 413, 414 (2001) (“Some Framers from the North – what would become free states – were uncomfortable with slavery, and a few protested a bit at the demands of the friends of slavery. But in the end they gave the slave owners at the Convention virtually everything they asked for.”); Henry Wiencek, *The Dark Side of Thomas Jefferson*, *SMITHSONIAN MAG.* (Oct. 2012), <https://www.smithsonianmag.com/history/the-dark-side-of-thomas-jefferson-35976004/> [https://perma.cc/G9VJ-T8WG] (“Throughout Jefferson’s plantation records there runs a thread of indicators—some direct, some oblique, some euphemistic—that the Monticello machine operated on carefully calibrated brutality.”)

267. David H. Gans, *We Do Not Want to Be Hunted*, 11 *COLUM. J. RACE & L.* 239, 243–45 (2021) (“[I]n the wake of a bloody civil war fought over slavery, the Fourteenth Amendment

pseudo-scientific experimentation,²⁶⁸ and to be required to have documentation to appear in public²⁶⁹ are simply inconceivable realities for the Framers to have ever fully understood, let alone incorporated into the Fourth Amendment.

The current racial uprising and reckoning harkens to that perpetually unpaid constitutional debt of the Second Founding. The use of surveillance measures to disrupt movements for racial justice must be understood as a legacy of enslavement for which the Fourth Amendment has to be able to respond.²⁷⁰ This will require racial justice-informed interpretations that govern what actors and locations are subject to Fourth Amendment protections. Expanding Fourth Amendment scrutiny beyond state action in the instance where surveillance practices of private citizens or companies bear on efforts to redress racial violence is an example of the bold new direction that such interpretations would call for. This would also have the benefit of making the Fourth Amendment more responsive to the current challenges of the digital age, where technology companies serve and partner with government entities in ways that muddy the question of state action.²⁷¹

Finally, reading the Fourth Amendment as providing great protections from targeted surveillance that impacts racial equity, even with open movements in public, would be in line with new interpretations aimed at

demanding that states respect Fourth Amendment rights and ensure equal protection of the laws for all persons, vindicating the newly freed slaves' demand that 'now we are free we do not want to be hunted,' we want to be 'treated like human beings.'"); Jeffrey J. Pokorak, *Rape As A Badge Of Slavery: The Legal History Of, And Remedies For, Prosecutorial Race-Of-Victim Charging Disparities*, 7 NEV. L.J. 1, 8 (2006) ("Raping a Black woman was not a crime for the majority of this Nation's history . . . The Court reasoned that slaves were not protected by the common law or statutes because they were under the legal dominion of their masters as required by their status as property.").

268. See Anemona Hartocollis, *Images of Slaves Are Property of Harvard, Not a Descendant, Judge Rules*, N.Y. TIMES (Mar. 4, 2021), <https://www.nytimes.com/2021/03/04/us/harvard-slave-photos-renty.html> [<https://perma.cc/9CJJ-8J5W>] (discussing a case where a Massachusetts judge dismissed a lawsuit by a woman that sued Harvard University claiming ownership of daguerreotypes of her enslaved ancestors. The daguerreotypes were taken in 1850 and were treated as scientific evidence of a discredited theory that Blacks were inferior to Whites.); Sarah Lynch, *Fact Check: Father of Modern Gynecology Performed Experiments on Enslaved Black Women*, USA TODAY (June 19, 2020, 1:46PM), <https://www.usatoday.com/story/news/factcheck/2020/06/19/fact-check-j-marion-sims-did-medical-experiments-black-female-slaves/3202541001> [<https://perma.cc/F8DD-N69U>].

269. See BROWNE, *supra* note 216, at 52.

270. See Arnett, *supra* note 9, at 1138–41.

271. Grace Egger, *Ring, Amazon Calling: The State Action Doctrine & the Fourth Amendment*, 95 WASH. L. REV. ONLINE 245 (2020) (arguing that Ring, a video doorbell company, exceeds their traditional role as a private company by helping law enforcement circumvent the protections of the Fourth Amendment by accessing users' data and footage).

addressing the legacies of enslavement. This would require the educating, training, and placement of criminal legal system actors at the highest levels willing to push a new constitutional era alongside the work of local communities. This moment demands new vision and efforts that break from the mold of old beaten, ineffectual pathways.²⁷² They will be necessary to meet the enormous task of achieving anything close to resembling racial justice in this country.

CONCLUSION

It did not take long for the street murals brightly painted in vivid colors in city centers during the summer of 2020 to fade.²⁷³ The bold art that spelled “Black Lives Matter” along prominent boulevards has all but vanished in places like Kansas City, Charlotte, Brooklyn, and Tulsa.²⁷⁴ The erasure of these symbolic gestures has corresponded with what some scholars have referred to as “Whitelash,”²⁷⁵ a fierce and swift response by White Americans to hold onto power when faced with greater demands for diversity and growing calls for racial equity.²⁷⁶ Only a few years removed from George Floyd’s killing, much of the hope and promise of the moment has grown stale. While the call to move more resources from policing to social services resulted in some temporary shifts in local budgets, many major cities have returned to increasing policing budgets at even higher rates.²⁷⁷ For example, law enforcement funding in Los Angeles has

272. Joshua L. Wagner, *The Qualitative Fourth Amendment: The Case for a Refined, Information-Focused Approach to Fourth Amendment Involving Non-Trespassory Government Surveillance*, 62 WILLIAM & MARY L. REV. 1727, 1730 (2021) (explaining that the courts have “yet to outline an all-encompassing approach to Fourth Amendment cases of unwarranted government surveillance that do not involve physical trespass”).

273. Charles M. Blow, *The Great Erasure*, N.Y. TIMES (May 20, 2022) <https://www.nytimes.com/interactive/2022/05/20/opinion/blm-george-floyd-mural.html> [https://perma.cc/65HP-5V6W].

274. *Id.*

275. See generally Deena A. Isom Scott & Tia Stevens Andersen, “Whitelash?” *Status Threat, Anger, And White America: A General Strain Theory Approach*, 43 J. CRIME & JUST. 414 (2019); Nikhil K. Sengupta, Danny Osborne & Chris G. Sibley, *On the Psychological Function of Nationalistic “Whitelash”*, 40 POL. PSYCH. 759 (2019).

276. PROTECTING WHITENESS: WHITELASH AND THE REJECTION OF RACIAL EQUALITY 6 (Cameron D. Lippard, J. Scott Carter & David G. Embrick eds., 2020).

277. Grace Manthey, *Despite ‘Defunding’ Claims, Police Funding Has Increased in Many US Cities*, ABC NEWS (Oct. 16, 2022, 5:34 AM) <https://abcnews.go.com/US/defunding-claims-police-funding-increased-us-cities/story?id=91511971> [https://abcnews.go.com/US/defunding-claims-police-funding-increased-us-cities/story?id=91511971].

increased by 250 million since 2019.²⁷⁸ Furthermore, the number of people killed by police remains relatively steady.²⁷⁹ During the first seven months of 2022, police killed more people than they have in any other recorded year.²⁸⁰ Even efforts to rein in police surveillance measures have proved fleeting. At the height of the racial reckoning in 2020, the city of New Orleans banned the use of facial recognition software.²⁸¹ Yet, by the summer of 2022, the city council voted to lift the ban while preparing for the rollout of a more expansive surveillance network across the city.²⁸² Although it would be misguided to claim that there were no meaningful gains as a result of the uprising, it is clear that continual relief from even the most basic grievances levied, during the largest protest movement witnessed in a generation, is not a guarantee.

With a problem as oppressive and old as state sanctioned surveillance and disruption of racial justice movements, there is no magic bullet solution. No single, clever reimagining of legal doctrine or crafty policy recommendation will alone provide a neat, comforting answer. I do not pretend to provide one here. There is still much work to be done in examining the ways that police surveillance practices work to both render Blackness hyper visible and Black life invisible and valueless, as a necessity for discipline and control. And it is that aim that must be continually confronted. Advocates cannot be lured and tempted with quick technocratic solutions and shortsighted litigation and reform efforts that trade one form of surveillance for another or place faith in law enforcement and private industry to do what is right. Each step proposed and taken should be made with an eye toward ultimately dismantling systems that identify justice activists as dangerous provocateurs and racial equity as a threat. Such thoughtful steps will not guarantee perfect outcomes for shielding racial justice movements from the types of surveillance that undermine efforts to create a better country for us all, but they will assist in generating stronger defenses and advocacy for the many battles ahead.

278. *Id.*

279. Abe Asher, *US Police Have Already Killed Over 700 People In 2022, On Track to Break Record*, INDEPENDENT (Aug. 4, 2022), <https://www.independent.co.uk/news/world/americas/police-killing-record-2022-b2137757.html> [<https://perma.cc/HHU6-GAT5>].

280. *Id.*

281. Bobbi-Jeanne Misick, *City Council Bans Police From Using Facial Recognition Technology*, WWNO (Dec. 18, 2020), <https://www.wwno.org/latest-news/2020-12-18/city-council-bans-police-from-using-facial-recognition-technology> [<https://perma.cc/7HCF-KR8V>].

282. Cassie Schirm, *New Orleans City Council Votes to Reinstate Use of Facial Recognition Technology*, WDSU (July 21, 2022), <https://www.wdsu.com/article/new-orleans-facial-recognition-technology/40678217> [<https://perma.cc/T9UL-3YNK>].