NOTES

SURVEILLANCE OF BLACK LIVES AS INJURY-IN-FACT

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Black communities have been surveilled by governmental institutions and law enforcement agencies throughout the history of the United States. Most recently, law enforcement has turned to monitoring social media, devoting an increasing number of resources and time to surveilling various social media platforms. Yet this rapid increase in law enforcement monitoring of social media has not been accompanied by a corresponding development in legal protections. Many legal challenges to government surveillance programs are thwarted before courts reach the merits because of a necessary threshold requirement: standing.

This Note proposes a framework geared toward meeting and overcoming the threshold requirement for standing in government surveillance cases. It argues that by couching social media surveillance of Black communities in the historical context of other forms of government surveillance, litigants may be able to demonstrate the "injury-in-fact" requirement of Article III standing. Case law in the wake of two surveillance-related Supreme Court cases, Laird v. Tatum *and* Clapper v. Amnesty International, *suggests that demonstration of a substantial likelihood of harm from a government surveillance program may amount to injury-in-fact. This Note focuses on a particular form of surveillance—social media surveillance—and illustrates how law enforcement's effectively unregulated and uninhibited capacity to surveil social media inflicts harm on Black communities amounting to a legally cognizable level. It contemplates a future without surveillance, with an eye toward abolishing the surveillance and punishment regime.*

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INTRODUCTION

"The police state isn't coming—it's here, glaring and threatening."
— George L. Jackson[1]

In June 2016, a Facebook profile under the name "Bob Smith" messaged several accounts belonging to political activists in the Memphis area.[2] Posing as a person of color, Bob Smith "liked" pages related to social justice—such as Black Lives Matter and Mid-South Peace and Justice—and "friended" several Black leaders and professionals in the Memphis area.[3] In actuality, "Bob Smith" was an account created and managed by Sergeant Timothy Reynolds, a white detective in the Memphis Police

1. Blood in My Eye 176 (1990).

2. George Joseph, Meet 'Bob Smith,' The Fake Facebook Profile Memphis Police Allegedly Used to Spy On Black Activists, Appeal (Aug. 2, 2018), https://theappeal.org/memphis-police-surveillance-black-lives-matter-facebook-profile-exclusive/#.W2MTod8Zqjo.twitter [https://perma.cc/ZP9M-3WSS]; see also ACLU of Tenn., Inc. v. City of Memphis, No. 2:17-cv-02120-JPM-jay, 2020 WL 5630418, at *2 (W.D. Tenn. Sept. 21, 2020); Brentin Mock, Memphis Police Spying On Activists Is Worse Than We Thought, Bloomberg CityLab (July 27, 2018), https://www.bloomberg.com/news/articles/2018-07-27/memphis-police-spying-on-black-lives-matter-runs-deep [https://perma.cc/SY56-JZ82].

3. Antonia Noori Farzan, Memphis Police Used Fake Facebook Account to Monitor Black Lives Matter, Trial Reveals, Wash. Post (Aug. 23, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/08/23/memphis-police-used-fake-facebook-account-to-monitor-black-lives-matter-trial-reveals (on file with the *Columbia Law Review*).

Department's Office of Homeland Security.[4] The account was but one component of a large surveillance network that flagged and collected information on Black activists and their associates.[5] The Memphis Police Department shared the intelligence it collected with federal, city, and private-sector entities, including the U.S. DOJ; the Memphis Light, Gas and Water Division; and FedEx.[6] Undercover and plainclothes police officers used the information to monitor innocuous events hosted by Black Memphians, including a Black-owned food truck festival and a memorial service for Darrius Stewart, a Black teenager killed by Memphis Police in 2015.[7]

Memphis is just one example of an experience far too common in Black communities. Indeed, for Black Americans, mass surveillance predates globalization and digitization by centuries, reaching back to the transatlantic slave trade.[8] Surveillance, particularly surveillance conducted by law enforcement, has important consequences, namely overcriminalization and suppressed political mobilization.[9] These consequences illustrate how mass surveillance reifies Western racial hierarchies and acts as a tool in maintaining social control.[10]

A groundswell of activists and community leaders are leading a movement to shift resources away from police and prisons,[11] while legal scholars

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4. Id.

5. See Mock, supra note 2.

6. Id.

7. See Plaintiff's Undisputed Statement of Material Facts at 4, 7, 8, *ACLU of Tenn.*, No. 2:17-cv-02120-jpm-DKV (W.D. Tenn. filed July 24, 2018), ECF No. 107-2; Wendi C. Thomas, The Police Have Been Spying On Black Reporters and Activists for Years. I Know Because I'm One of Them., ProPublica (June 9, 2020), https://www.propublica.org/article/the-police-have-been-spying-on-black-reporters-and-activists-for-years-i-know-because-im-one-of-them (on file with the *Columbia Law Review*).

8. See Simone Browne, Dark Matters: On the Surveillance of Blackness 6–9 (2015) (arguing that Blackness is a key site [location in the sociopolitical landscape] through which surveillance is practiced and is informed by the history of surveillance of Black life during slavery); Andrea Dennis, Mass Surveillance and Black Legal History, Am. Const. Soc'y (Feb. 18, 2020), https://www.acslaw.org/expertforum/mass-surveillance-and-black-legal-history [https://perma.cc/JC4X-B85D] ("Government monitoring . . . of Black speech and conduct has been an essential feature of American society far before the public at large realized the potential dangers of widespread surveillance.").

9. See infra notes 132–169 and accompanying text.

10. See Browne, supra note 8, at 8 (arguing that surveillance reifies "boundaries along racial lines, thereby reifying race"); Stephanie E. Smallwood, African Guardians, European Slave Ships, and the Changing Dynamics of Power in the Early Modern Atlantic, 64 Wm. & Mary Q. 679, 700 (2007) (describing how surveillance practices on slave ships were a matter of social control); Michelle Alexander, Opinion, The Newest Jim Crow, N.Y. Times (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html (on file with the *Columbia Law Review*) (noting that new systems of electronic surveillance "contain the seeds of the next generation of racial and social control").

11. See Mariame Kaba, Opinion, Yes, We Mean Literally Abolish the Police, N.Y. Times (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-

are beginning to imagine a radically different future for public safety and rehabilitation.[12] Within the discourse on abolition, however, some have suggested replacing the role of prisons and police with a larger and more complex surveillance apparatus.[13] Yet surveillance technology—in the hands of law enforcement or otherwise—may create and exacerbate the same problems generated by traditional surveillance and policing methods.[14]

Surveillance of Black Americans is not simply a byproduct of the carceral state but a tool designed to facilitate the subjugation of Black people.[15] Much attention has been devoted to the state's largely uninhibited ability to monitor the digital sphere[16] and to disparities

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defund-police.html (on file with the *Columbia Law Review*); Rachel Kushner, Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind, N.Y. Times Mag. (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html (on file with the *Columbia Law Review*); The Time Has Come to Defund the Police, M4BL, https://m4bl.org/defund-the-police [https://perma.cc/WM6A-3M6X] (last visited Jan. 14, 2021) (outlining the goals of the Movement for Black Lives, including defunding the police).

12. See Amna A. Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. L. Rev. 405, 429–34 (2018); Brandon Hasbrouck, Abolishing Racist Policing With the Thirteenth Amendment, 67 UCLA L. Rev. 1108, 1125–29 (2020); Allegra M. McLeod, Prison Abolition and Grounded Justice, 62 UCLA L. Rev. 1156, 1224–31 (2015).

13. See, e.g., Mirko Bagaric, Dan Hunter & Jennifer Svilar, Prison Abolition: From Naïve Idealism to Technological Pragmatism, 111 J. Crim. L. & Criminology 351, 355 (2021) ("We advance a viable alternative to prison that involves the use and adaptation of existing monitoring and censoring technology . . . ."); I. Bennett Capers, Race, Policing, and Technology, 95 N.C. L. Rev. 1241, 1244 (2017) [hereinafter Capers, Race, Policing, and Tech] (discussing "technology and how harnessing technology can help deracialize policing").

14. See Alexander, supra note 10 ("Even if you're lucky enough to be set 'free' from a brick-and-mortar jail . . . an expensive monitoring device likely will be shackled to your ankle . . . . You're effectively sentenced to an open-air digital prison . . . ."); see also Kevin E. Jason, Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice, 23 CUNY L. Rev. 139, 171 n.150 (2020) (discussing how police employ surveillance equipment to stop predominantly Black and Latinx community members and noting that future technologies based on predictive algorithms may replicate similar results).

15. Paul Butler, Chokehold: Policing Black Men 61 (2017) ("African American men are arrested mainly so that they can be officially placed under government surveillance."); see also Browne, supra note 8, at 9 (noting that "racism and antiblackness undergird and sustain the intersecting surveillances of our present order").

16. See, e.g., Gregory Brazeal, Mass Seizure and Mass Search, 22 U. Pa. J. Const. L. 1001, 1008 (2020) ("[T]he Fourth Amendment has not yet come to terms with the government's historically unprecedented ability to conduct digital surveillance on a mass scale."); Steven I. Friedland, Of Clouds and Clocks: Police Location Tracking in the Digital Age, 48 Tex. Tech L. Rev. 165, 166–70 (2015) (questioning whether sufficient boundaries exist to limit a largely invisible mass surveillance and tracking regime); Rachel Levinson-Waldman, Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public, 66 Emory L.J. 527, 529–30 (2017) [hereinafter Levinson-Waldman, Hiding in Plain Sight] (proposing a framework for applying the Fourth Amendment to increasingly sophisticated government digital surveillance technologies).

between the surveillance of Black and non-Black communities.[17] Less attention has been devoted to the connection between rapidly expanding digital surveillance and its place in the history of racialized surveillance.[18] In particular, what is missing is an approach that pulls from the legacy of racialized surveillance to catalyze new ideas regarding how to limit the state's digital surveillance capacity.[19] Courts struggle to prescribe legal limits to the government's power to conduct digital surveillance.[20] An approach grounded in a racial–historical framework may create solutions capable of overcoming the hurdles associated with challenging the scope and exercise of law enforcement's surveillance capacity. This Note homes in on a particular form of digital surveillance—social media surveillance—and focuses on a community particularly susceptible to the surveillance regime's most detrimental consequences: Black Americans.

This Note argues that contextualizing social media surveillance in a larger racial–historical framework—what this Note characterizes as the Critical Race Theory (CRT) lens—provides a path to address gaps in the legal framework concerning digital government surveillance. This framework proves useful not only by centering groups that bear the heaviest consequences of government surveillance, but also by providing a pathway to overcoming a recurring legal impediment to challenging government surveillance programs: judicial standing.[21]

A plaintiff must possess standing to sue in federal court. In other words, the plaintiff must demonstrate that the defendant caused a

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17. See Sahar F. Aziz & Khaled A. Beydoun, Fear of a Black and Brown Internet: Policing Online Activism, 100 B.U. L. Rev. 1151, 1153 (2020) (arguing that government agencies disproportionally police the political activities of communities of color and that disproportionate policing is reflected in law enforcement's surveillance practices); Matt Cagle, Communities Under Surveillance in California, ACLU N. Cal. (Nov. 21, 2014), https://www.aclunc.org/blog/communities-under-surveillance-california [https:// perma.cc/K8JC-LT4E] ("[S]urveillance technology is frequently and disproportionately used on minority communities without their knowledge or consent.").

18. Malkia Amala Cyril, Black America's State of Surveillance, Progressive Mag. (Mar. 30, 2015), https://progressive.org/magazine/black-america-s-state-surveillance-cyril [https://perma.cc/JPJ9-6MGD] ("As surveillance technologies are increasingly adopted and integrated by law enforcement agencies today, racial disparities are being made invisible by a media environment that has failed to tell the story of surveillance in the context of structural racism.").

19. See Browne, supra note 8, at 16 (defining racialized surveillance as "a technology of social control where surveillance practices, policies, and performances concern the production of norms pertaining to race").

20. Susan Freiwald, Cell Phone Location Data and the Fourth Amendment: A Question of Law, Not Fact, 70 Md. L. Rev. 681, 681–82 (2011) (explaining several reasons courts consider so few challenges to online surveillance, including lack of precedent and a weak statutory regime).

21. Scott Michelman, Who Can Sue Over Government Surveillance?, 57 UCLA L. Rev. 71, 74 (2009) ("Unfortunately, the law of standing in the context of secretive government surveillance is in disarray, with serious consequences for the substance of constitutional adjudication and the separation of powers.").

concrete injury and establish that a judicial decree can provide redress.[22] Standing requirements, however, have been unclear in the surveillance and data breach contexts, leaving some to wonder if anyone can meaningfully challenge the constitutionality of a government surveillance program before harm has been inflicted.[23] The CRT approach helps resolve this ambiguity by demonstrating the likelihood that unchecked surveillance will inflict harm on Black communities, akin to how litigants have established standing in other contexts.[24]

This Note deploys the CRT approach—integrating historical context into constitutional challenges—as a new way of addressing government surveillance through courts. Part I lays out the landscape of the social media surveillance regime and explicates current standing doctrine in the surveillance context. Part II discusses how social media surveillance fits into the larger narrative of racialized surveillance—framing social media surveillance as the latest iteration of a larger legacy—and outlines in greater detail two particular consequences Black communities face vis-à-vis government surveillance: overcriminalization and political suppression. It also shows how recent case law may leave the door open to challenging government surveillance through the courts. Part III lays out the CRT approach, drawing on recent cases exemplifying its ability to

22. Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 101 (7th ed. 2015); see also infra section I.B.1.

23. Brandon Ferrick, Comment, No Harm, No Foul: The Fourth Circuit Struggles With the "Injury-in-Fact" Requirement to Article III Standing in Data Breach Class Actions, 59 B.C. L. Rev. E. Supp. 462, 481 (2018) ("Until the Supreme Court clarifies the requirements for injury-in-fact within the data breach context, plaintiffs will be continuously rolling the dice on whether they actually are harmed before they ever approach the merits of their claims."); see also Michelman, supra note 21, at 77–84 (explaining the background of the law of standing in the surveillance context and arguing that courts hold surveillance plaintiffs to a higher standard of showing harm than in other contexts and in some cases do not recognize harm at all).

24. For example, in *Pennell v. City of San Jose*, a landlord and a homeowner's association challenged a city rent control ordinance. 485 U.S. 1, 6–7 (1998). The Court found that although the challenged ordinance provisions had not yet been enforced against the plaintiffs, "[t]he likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what [they] would otherwise be able to obtain" constituted sufficient threat of direct injury to establish standing. Id. at 8. Similarly, in *Monsanto Co. v. Geertson Seed Farms*, the Court found that a party demonstrated sufficient risk of harm to establish standing in the regulatory context. 561 U.S. 139, 155 (2010). The case involved a district court's vacatur of a decision by the Animal and Plant Health Inspection Service to deregulate a variety of alfalfa (RRA). Id. at 144. The respondents, environmental groups and conventional alfalfa growers, sought injunctive relief from the deregulation order. Id. The petitioners, owners, and license holders of the property rights to RRA claimed that the respondents lacked standing because they failed to show they suffered a legally cognizable harm, since the deregulation order had not actually been put in effect. Id. at 153. The Court, relying on the district court's record, held that the respondents did have standing because they established a "reasonable probability" that their crops would be infected if RRA were deregulated and that the substantial risk of infection itself was a cognizable legal injury sufficient to establish standing. Id. at 153–55.

resolve problems associated with legal challenges to government surveillance. It concludes by elaborating on the future of surveillance imagined from a CRT ethic.

I. SOCIAL MEDIA SURVEILLANCE REGIME

Tools like the internet and social media play a major role in the everyday lives of Americans[25] and are crucial in the sociopolitical[26] and organizing[27] contexts. Technology is "a feature of political and civic engagement,"[28] stimulating social discourse and democratizing the political sphere.[29] But the benefits of digital tools are not without consequence: The same technology that has democratized information has created new methods of surveillance.[30]

Social media platforms play a central role in highlighting the Black experience, which in turn is reflected in how Black people think about social media. In a world of increasingly centralized mass media channels, "social media has become a vital platform for free expression for Blacks in the United States, especially on matters of social justice."[31] Social media

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25. Social Media Fact Sheet, Pew Rsch. Ctr. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media [https://perma.cc/J5XD-QV9D] (finding that "72% of the public uses some type of social media" and noting that, "[f]or many users, social media is part of their daily routine").

26. See Corinthia A. Carter, Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism, 20 CUNY L. Rev. 521, 522–23 (2017) ("[S]ocial media has become the venue in which the world has begun to see the human rights violations against Blacks. This has led to much public outcry and has been the catalyst for today's social justice movements." (footnote omitted)).

27. See Deen Freelon, Charlton D. McIlwain & Meredith D. Clark, Beyond the Hashtags: #Ferguson, #Blacklivesmatter, and the Online Struggle for Offline Justice 7–8 (2016), https://cmsimpact.org/wp-content/uploads/2016/03/beyond_the_hashtags_2016.pdf [https://perma.cc/CA5P-BQU6] (discussing social media's role in the Black Lives Matter movement). See generally Jennifer Earl & Katrina Kimport, Digitally Enabled Social Change: Activism in the Internet Age 19 (2011) (acknowledging social media's potential to "transform protest[s]," rather than supplement them, through innovative approaches).

28. Lee Rainie, Aaron Smith, Kay Lehman Schlozman, Henry Brady & Sidney Verba, Social Media and Political Engagement, Pew Rsch. Ctr. (Oct. 19, 2012), https://www.pewresearch.org/internet/2012/10/19/social-media-and-political-engagement [https://perma.cc/EM8D-FSCY] (finding that "66% of . . . social media users—or 39% of all American adults—have done at least one of eight civic or political activities with social media").

29. See Maria Petrova, Ananya Sen & Pinar Yildirim, Social Media and Political Contributions: The Impact of New Technology on Political Competition, 67 Mgmt. Sci. 2997, 2999 (2021) (finding that social media may reduce barriers to entry in politics by lowering the cost of disseminating information to constituents).

30. Jack M. Balkin, Old-School/New-School Speech Regulation, 127 Harv. L. Rev. 2296, 2297 (2014) ("The very forces that have democratized and decentralized the production and transmission of information in the digital era have also led to new techniques and tools of speech regulation and surveillance that use the same infrastructure.").

31. Jeffrey Layne Blevins, Social Media and Social Justice Movements After the Diminution of Black-Owned Media in the United States, *in* Media Across the African

has been instrumental in bringing Black issues, Black social movements, and Black voices to the national conversation.[32] In a 2018 survey, the Pew Research Center found that "[c]ertain groups of social media users — most notably, those who are black or Hispanic — view these platforms as an especially important tool for their own political engagement."[33] The importance of social media within the Black community is reflected in the large presence Black people have on social media platforms.[34]

This Part describes the social media surveillance regime, detailing the prevalence and practice of social media surveillance within law enforcement agencies. Next, it discusses rationales for monitoring social media, homing in on its increased prominence in criminal investigations and its widespread use as an intelligence-gathering tool. This Part concludes by discussing how social media surveillance is situated in the legal landscape and how standing doctrine may thwart attempts to challenge government surveillance.

A. *Law Enforcement and Social Media*

1. *The Rise of Social Media Surveillance.* — The digital space is routinely policed and surveilled.[35] Social media is "a wellspring of information for law enforcement."[36] The ease with which law enforcement accesses

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Diaspora: Content, Audiences, and Global Influence 191, 192 (Omotayo O. Banjo ed., 2019) (discussing how dwindling Black ownership of radio and television channels heightens the significance of social media channels within Black communities).

32. See Aziz & Beydoun, supra note 17, at 1163–64.

33. Monica Anderson, Skye Toor, Lee Rainie & Aaron Smith, Pew Rsch. Ctr., Activism in the Social Media Age 4 (2018), https://www.pewresearch.org/internet/2018/07/11/activism-in-the-social-media-age [https://perma.cc/65H4-V7MB] (finding that "larger majorities of black Americans say these sites promote important issues or give voice to underrepresented groups, while smaller shares of blacks feel that political engagement on social media produces significant downsides").

34. See Aaron Smith, Pew Rsch. Ctr., African Americans and Technology Use: A Demographic Portrait 11 (2014), https://www.pewresearch.org/internet/2014/01/06/african-americans-and-technology-use/ [https://perma.cc/H7JJ-9VGG] ("African Americans have higher levels of Twitter use than whites (22% of online blacks are Twitter users, compared with 16% of online whites)."); see also Ki Mae Heussner, Is Twitter Disproportionately Popular Among Black Users?, ABC News (May 5, 2010), https://abcnews.go.com/Technology/twitter-disproportionately-popular-black-users/story?id=10561451 [https://perma.cc/M36W-FV8J] (citing Twitter usage report showing that "African-Americans make up about 24 percent of Twitter users, which is nearly double their representation in the U.S. population").

35. See LexisNexis, Social Media Use in Law Enforcement: Crime Prevention and Investigative Activities Continue to Drive Usage. 2 (2014), https://risk.lexisnexis.com/insights-resources/infographic/law-enforcement-usage-of-social-media-for-investigations-infographic [https://perma.cc/CSL8-NU7M] (conducting a survey of federal, state, and local law enforcement professionals finding that "[e]ight out of every 10 law enforcement professionals (81%) actively use social media as a tool in investigations").

36. Rachel Levinson-Waldman, Government Access to and Manipulation of Social Media: Legal and Policy Challenges, 61 How. L.J. 523, 527 (2018) [hereinafter Levinson-Waldman, Access to and Manipulation of Social Media].

information using digital tools eliminates practical considerations like time and cost that are normally associated with monitoring people.[37] The low-cost, high-reward nature of social media surveillance makes it an attractive tool to law enforcement personnel.[38] After all, a police officer, like any other user, can access a group or individual's public profile via simple search.[39] The "visibility on social media and communication of everyday experiences, practices, and activities provides the perfect platform for covert criminal surveillance by the police."[40]

Federal law enforcement agencies like DHS[41] and the FBI[42] have well-documented social-media-surveillance capacities that have been the subject of litigation.[43] For example, in *ACLU v. DOJ*, the ACLU sought information from several federal agencies pertaining to their social-media-monitoring capacity by way of a Freedom of Information Act (FOIA) request.[44] The ACLU alleged that defendant federal agencies were "taking steps to monitor social media users and their speech, activities, and

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37. Id. at 525.

38. Daniel Trottier, A Research Agenda for Social Media Surveillance, 8 Fast Capitalism 59, 63 (2011) ("When starting an investigation, it is increasingly common for police to first turn to Facebook and other social media. . . . [I]t [is] a low-cost and low-risk option . . . ."); see also Friedland, supra note 16, at 167 (noting that digital surveillance systems allow the government to track people at relatively little cost).

39. Levinson-Waldman, Access to and Manipulation of Social Media, supra note 36, at 526; Trottier, supra note 38, at 63 ("A lot of information on social media can be obtained simply by logging on to these sites.").

40. Desmond Upton Patton, Douglas-Wade Brunton, Andrea Dixon, Reuben Jonathan Miller, Patrick Leonard & Rose Hackman, Stop and Frisk Online: Theorizing Everyday Racism in Digital Policing in the Use of Social Media for Identification of Criminal Conduct and Associations, Soc. Media & Soc'y, July–Sept. 2017, at 1, 2.

41. See DHS, Analyst's Desktop Binder: National Operations Center Media Monitoring Capability Desktop Reference Binder 4 (2011) ("At the same time, Social Media outlets provide instant feedback and alert capabilities to rapidly changing or newly occurring situations. The MMC works to summarize the extensive information from these resources to provide a well rounded operational picture for the Department of Homeland Security."); see also George Joseph, Exclusive: Feds Regularly Monitored Black Lives Matter Since Ferguson, Intercept (July 24, 2015), https://theintercept.com/2015/07/24/documents-show-department-homeland-security-monitoring-black-lives-matter-since-ferguson [https://perma.cc/F3QF-Z87C] [hereinafter Joseph, Feds Regularly Monitored BLM] (discussing FOIA requests revealing that DHS frequently collected information via social media surveillance on numerous activists participating in nonviolent protests).

42. See Jeff Horwitz & Dustin Volz, FBI Surveillance Proposal Sets Up Clash With Facebook, Wall St. J., https://www.wsj.com/articles/fbi-and-facebook-potentially-at-odds-over-social-media-monitoring-11565277021 (on file with the *Columbia Law Review*) (last updated Aug. 8, 2019).

43. See, e.g., Complaint for Injunctive Relief at 2–3, Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec., 999 F. Supp. 2d 61 (D.D.C. 2013) (No. 1:11CV02261), 2011 WL 9372833 (complaint for FOIA request in relation to DHS' solicitation for "Media Monitoring Services").

44. 418 F. Supp. 3d 466, 468 (N.D. Cal. 2019) ("Plaintiffs seek information about 'Defendant federal agencies' surveillance of social media users and speech.'" (quoting Complaint for Injunctive Relief for Violation of the Freedom of Information Act at 2)).

associations," and that such surveillance "raises serious free speech and privacy concerns[,] . . . risks chilling expressive activity[,] and can lead to the disproportionate targeting of racial and religious minority communities."[45] The ACLU's FOIA request specifically sought records on the agencies' policies, practices, technology, and communications pertaining to social media surveillance.[46] One of the defendants, the FBI, invoked the protections of FOIA exemption (b)(7)(E)[47] and "'refused to confirm or deny' the existence" of the requested records.[48] The ACLU challenged this refusal, arguing that the agency did not provide a legitimate basis for invoking the exception, and the defendants moved for partial summary judgment.[49]

In denying the defendants' motion for partial summary judgment, the court found that the ACLU had presented "extensive evidence" that several federal law enforcement agencies like DHS, CBP, ICE, and State Department engage in social media monitoring.[50] Such evidence included a DHS task force that screened the social media profiles of immigrants applying for benefits; several designated CBP personnel that used social media to "monitor potential threats of dangers to CBP personnel and facility operators"; and the existence of a "Social Media Working Group," an interagency effort to coordinate and share the information yielded by DHS social media screening efforts with other federal agencies.[51] The court ultimately concluded that while the FBI need not disclose the specific ways in which it conducted surveillance, it was not exempted from disclosing its general capacity to monitor social media.[52] Ultimately, it is evident that local, state, and federal law enforcement routinely monitor social media and have developed, or are in the process of developing, increasingly powerful capacities to do so.[53]

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45. Complaint for Injunctive Relief for Violation of the Freedom of Information Act at 2, *ACLU*, 418 F. Supp. 3d 466 (No. 3:19-cv-00290-SK), 2019 WL 247324.

46. *ACLU*, 418 F. Supp. 3d at 469 (noting that the plaintiffs sought five categories of records: (1) social media surveillance policies, (2) records concerning the purchase of surveillance technologies, (3) communications with third parties about surveillance products, (4) communications with social media platforms, and (5) records concerning the use of social media in predictive analytic programs).

47. See 5 U.S.C. § 552(b)(7)(E) (2018) (exempting records and information complied for law enforcement purposes from FOIA disclosure requirements where compliance with a FOIA request "would disclose techniques and procedures for law enforcement investigations or prosecutions, or . . . if such disclosure could reasonably be expected to risk circumvention of the law").

48. *ACLU*, 418 F. Supp. 3d at 470.

49. Id.

50. Id. at 474.

51. Id. at 474–77; see also id. at 479 ("[T]he FBI 'acknowledged generally [that] it monitors social media as a law enforcement technique.'" (second alteration in original)).

52. See id. at 480–81.

53. See supra notes 35–40 and accompanying text; infra section I.A.2.

2. *Law Enforcement Surveillance Practices*. — Law enforcement monitors social media to track individuals, groups, and even specific geographic areas.[54] Scholarship has divided digital surveillance into three broad categories: "(1) following or watching online an identified individual, group of individuals, or affiliation (e.g., an online hashtag); (2) using an informant, a friend of the target, or an undercover account to obtain information; and (3) using analytical software to generate data about individuals, groups, associations, or locations."[55] While social media surveillance is widely used as an information-gathering tactic, many law enforcement officials monitor social media without any training or supervision.[56] In fact, many law enforcement agencies have no guidelines whatsoever for personnel that outline how to collect information on social media.[57] Many law enforcement agencies also do not have publicly available policies on how their personnel use social media for investigative or intelligence-gathering purposes.[58]

Police departments may reach out directly to social media companies when conducting criminal investigations.[59] Additionally, law enforcement agencies contract with private companies that comb through social media

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54. Levinson-Waldman, Access to and Manipulation of Social Media, supra note 36, at 525–26; see also George Joseph, How Police Are Watching You on Social Media, Bloomberg CityLab (Dec. 14, 2016), https://www.bloomberg.com/news/articles/2016-12-14/how-police-spy-on-social-media (on file with the *Columbia Law Review*) [hereinafter Joseph, How Police Are Watching] (discussing Cook County Sheriff's Office records pointing personnel to "sites such as Statigram and Instamap, which can help law enforcement analyze photo trends or collect photos on individuals in targeted areas").

55. Levinson-Waldman, Access to and Manipulation of Social Media, supra note 36, at 526.

56. LexisNexis, supra note 35, at 7 ("Law enforcement professionals are predominantly self-taught in using social media for investigations and secondarily seek out colleagues.").

57. Id. at 2 (finding that over half of the survey respondent agencies don't have a formal process for using social media for investigations); see also Joseph, How Police Are Watching, supra note 54 (quoting Joseph Giacolone, retired NYPD detective and professor at John Jay College, noting that most officers conducting social media surveillance are "self-taught and . . . half of the departments don't even have a policy or procedure on how to use it").

58. See Map: Social Media Monitoring by Police Departments, Cities, and Counties, Brennan Ctr. for Just. (July 10, 2019), https://www.brennancenter.org/our-work/research-reports/map-social-media-monitoring-police-departments-cities-and-counties [https://perma.cc/9NP7-EXFE] (collecting data on law enforcement expenditures on social media monitoring from over 158 jurisdictions and finding that only eighteen jurisdictions had publicly available policies on their use of social media for investigative and intelligence-gathering purposes).

59. KiDeuk Kim, Ashlin Oglesby-Neal & Edward Mohr, Urb. Inst., 2016 Law Enforcement Use of Social Media Survey 4 (2017), http://www.urban.org/sites/default/files/publication/88661/2016-law-enforcement-use-of-social-media-survey.pdf [https://perma.cc/2TQZ-SBX9] ("The majority of law enforcement agencies across the United States have contacted a social media company, such as Facebook or Twitter, to request online information to use as evidence in a legal setting . . . .").

to synthesize, package, and deliver social media data.[60] Federal agencies openly solicit these types of services; for example, in 2019 the FBI requested proposals from outside parties for a contract to pull large amounts of data from Facebook, Twitter, and other social media to "proactively identify and reactively monitor threats to the United States and its interests."[61] Third-party companies also provide technology that increases the ease with which law enforcement can monitor social media content.[62] For example, Echosec Systems provides tools to police officers that allow them to "track and collect users' posts as soon as they are disseminated within a bounded area."[63]

3. *Social Media Surveillance Justifications.* — Law enforcement's purported reasons for engaging in social media surveillance include gauging public sentiment, soliciting tips on crime, and intelligence gathering.[64] Law enforcement officials justify social media monitoring as a tool that helps solve crimes[65] and—perhaps alarmingly—an increasing number also believe it is a useful tool in "anticipating crime."[66] In recent years, civil liberties organizations have alleged that police departments are developing robust social media surveillance systems to compile and retain information associated with "persons of interest."[67]

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60. See Joseph, How Police Are Watching, supra note 54 (discussing various private entities that work with law enforcement to collect, document, and analyze social media data).

61. Horwitz & Volz, supra note 42; see also DHS, Statement of Work (SOW) for Media Monitoring Services 1 (2018), https://epic.org/wp-content/uploads/foia/dhs/media-monitoring-services/EPIC-v-DHS-18-1268-draft-sow.pdf [https://perma.cc/WNX9-9MMJ] (documenting DHS' request to solicit a contractor to develop tools that would allow the agency to track and store large volumes of information on social media users).

62. See Joseph, How Police Are Watching, supra note 54 (highlighting that social media monitoring companies provide data and surveillance tools to law enforcement agencies).

63. Id.; see also Echosec Sys. Ltd., https://www.echosec.net [https://perma.cc/9JM4-AHGP] (last visited Jan. 6, 2022) ("Security and intelligence teams trust Echosec Systems to deliver streamlined access to social media, deep web, and dark web networks, so they can catch early risk indicators, identify and prioritize actual threats, and respond faster.").

64. See Kim et al., supra note 59, at 3 fig.2. For an example, see Oakland Police Dep't (@oaklandpoliceca), Twitter (Mar. 12, 2014), https://twitter.com/oaklandpoliceca/status/443748841255215105 [https://perma.cc/YH5E-TFYY] ("Police need help identifying two robbery suspects. Reply with [tip] . . . .").

65. See LexisNexis, supra note 35, at 3 ("73% [of law enforcement officers] believe using social media helps solve crimes faster . . . ."); see also Kim et al., supra note 59, at 3 fig.2 (finding that 70% of responding agencies used social media for intelligence gathering during investigations).

66. LexisNexis, supra note 35, at 2, 4 (noting that "67% of respondents indicate that social media monitoring is a valuable process in anticipating crimes" and finding that in 2014, 51% of respondents used social media in crime anticipation, up from 41% in 2012).

67. Joseph, How Police Are Watching, supra note 54 (discussing police department records yielded from a FOIA request that "suggest . . . intelligence analysts are also compiling information on persons of interest for longer term retention"); see, e.g., Nicole Ozer, Police Use of Social Media Surveillance Software Is Escalating, and Activists Are in the

Furthermore, while the ostensible rationale for surveillance powers is rooted in the general safekeeping duties of officials, the bounds of social media surveillance tend to transcend the everyday functions of law enforcement because "[e]vents ranging from house parties to political protests are also made visible through social media" and thus are swept into the digital policing regime.[68] Commentators have raised alarm over the policing of innocuous social media activity, noting it may result in overcriminalization and chilling of free speech.[69] The rapid expansion—and active use—of state-backed digital surveillance has made it a priority for police reformists and abolitionists alike.[70]

B. *Legal Landscape of Government Surveillance*

Although the judiciary has shied away from examining government surveillance practices,[71] the courts may be the most promising arena to regulate social media surveillance practices. The policies of social media sites themselves may have little to no effect on law enforcement behavior[72] and the current statutory regime provides few meaningful protections to social media users.[73] Unfortunately, past attempts to address surveillance

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Digital Crosshairs, ACLU (Sept. 22, 2016), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/police-use-social-media-surveillance-software [https://perma.cc/U76P-QP3L] ("The ACLU of California has received thousands of pages of public records revealing that law enforcement agencies across the state are secretly acquiring social media spying software that can sweep activists into a web of digital surveillance.").

68. Trottier, supra note 38, at 63.

69. See generally Alexandra Mateescu, Douglas Brunton, Alex Rosenblat, Desmond Patton, Zachary Gold & Danah Boyd, Social Media Surveillance and Law Enforcement 1 (2015), http://www.datacivilrights.org/pubs/2015-1027/Social_Media_Surveillance_and_Law_Enforcement.pdf [https://perma.cc/5426-AEUE] ("Debates so far have focused on instances where law enforcement have . . . assembled potentially innocuous social media activity as evidence for criminal conspiracy charges . . . . [T]here is increasing scrutiny over how social media surveillance affects First Amendment rights . . . ."); see also Capers, Race, Policing, and Tech, supra note 13, at 1290 (describing how police surveil people of color even when they are engaged in everyday activities).

70. See James P. Walsh & Christopher O'Connor, Social Media and Policing: A Review of Recent Research, 13 Socio. Compass 1 (2019); Chad Marlow & Gillian Ganesan, Stop the Police Surveillance State Too, ACLU (Aug. 19, 2020), https://www.aclu.org/news/criminal-law-reform/stop-the-police-surveillance-state-too/ [https://perma.cc/6L4X-8LG5] (arguing that abolishing the surveillance powers of the police is an essential step toward police reform and eventual abolition).

71. See Ric Simmons, The New Reality of Search Analysis: Four Trends Created by New Surveillance Technologies, 81 Miss. L.J. 991, 1008 (2012) ("[C]ourts have slowly abdicated their authority with regard to regulating new surveillance technologies.").

72. See Joseph, How Police Are Watching, supra note 54 (quoting Professor Giacolone, noting that, while "undercover social media accounts may violate the terms of Facebook and Twitter, that doesn't make them illegal").

73. See US Should Create Laws to Protect Social Media Users' Data, Hum. Rts. Watch (Apr. 5, 2018), https://www.hrw.org/news/2018/04/05/us-should-create-laws-protect-social-media-users-data [https://perma.cc/Z5HL-X2V5] ("[P]rivacy laws in the US are currently

through the court system have run into a consistent procedural hurdle: judicial standing.

1. *Judicial Standing Generally.* — Judicial standing refers to how a litigant is situated in respect to their claim and the court.[74] The focus is on the party rather than the nature of the claim, although many times that inquiry turns on the "nature and source of the claim asserted."[75] Standing requirements emerge "from two sources: constitutional and prudential."[76] Over the years, the Court has distilled the minimum constitutional requirements for standing into three components. First, the plaintiff must have suffered an injury-in-fact—that is, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'"[77] Second, there must be a causal link that is fairly traceable between the injury and the complained-of conduct.[78] Finally, it must be likely—not speculative—that a favorable decision will remedy the injury.[79] In addition, "[t]he party invoking federal jurisdiction bears the burden of establishing these elements" at the start of litigation and at each subsequent stage of litigation.[80] These requirements have evolved over the years, but in the words of then-Justice Rehnquist, "[T]he concept of 'Art. III standing' has not been defined with complete consistency."[81]

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too weak to prevent abuses of social media data by intelligence agencies, law enforcement . . . or others who may violate rights.").

74. 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531 (3d ed. 2008).

75. Raines v. Byrd, 521 U.S. 811, 818 (1997) (internal quotation marks omitted) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)); see also Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 77 (1991) ("[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents. 'Typically, . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted*.'" (alteration in original) (emphasis added by the Court) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984))).

76. Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F. Supp 838, 842 (D. Mass. 1986); see also United States v. Windsor, 570 U.S. 744, 757 (2013) ("The Court has kept these two strands separate: 'Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction."'" (citation omitted) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 1, 10 (2004)). In Spokeo, Inc. v. Robins, 578 U.S. 330, 337–38 (2016), the Court noted that Article III standing is "a doctrine rooted in the traditional understanding of a case or controversy." See U.S. Const. art. III, § 2, cl. 1 (explaining that "[t]he judicial Power . . . extend[s]" to various "Cases" and "Controversies").

77. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 156 (1990)).

78. Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976).

79. Id. at 38.

80. See *Lujan*, 504 U.S. at 561.

81. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982).

2. *Standing as an Impediment to Legal Challenge.* — Standing is particularly troublesome when challenging the constitutionality of government surveillance programs.[82] Several scholars note that the lack of clarity pertaining to standing doctrine, specifically the injury-in-fact requirement, may prevent courts from even considering the merits of surveillance-related claims.[83] Recent legal scholarship has advocated for different ways to draw boundaries on the evolving landscape of law enforcement surveillance, invoking First Amendment,[84] Fourth Amendment,[85] and equal protection rights.[86] Yet few of these ideas materialize in practice, because finding the right litigant to bring surveillance-based challenges can be difficult with respect to standing.

The lodestar case for government surveillance challenges is *Laird v. Tatum*.[87] In *Laird*, the Court addressed whether citizens in a class action suit had standing to bring a claim based on an allegedly unconstitutional surveillance program.[88] The Court concluded that, though government

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82. See Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("[O]ur standing inquiry has been especially rigorous when reaching the merits of [a] dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." (quoting Raines v. Byrd, 521 U.S. 811, 819–20 (1997))).

83. See Ferrick, supra note 23, at 481 ("Until the Supreme Court clarifies the requirements for injury-in-fact[,] . . . plaintiffs will be continuously rolling the dice on whether they actually are harmed before they ever approach the merits of their claims."); see also The Supreme Court—Leading Cases: Standing—Challenges to Government Surveillance—*Clapper v. Amnesty International USA*, 127 Harv. L. Rev. 298, 303 (2013) ("Language in *Clapper* leaves the scope of future applicability of 'certainly impending' unclear."). See generally Bradford C. Mank, *Clapper v. Amnesty International*: Two or Three Competing Philosophies of Standing Law?, 81 Tenn. L. Rev. 211 (2014) (discussing three different approaches to standing decisions evident in judicial precedent).

84. See Hannah Fuson, Note, Fourth Amendment Searches in First Amendment Spaces: Balancing Free Association With Law and Order in the Age of the Surveillance State, 50 U. Mem. L. Rev. 231, 269–71 (2019) (discussing how current police surveillance practices may violate First Amendment freedoms); see also Amna Toor, Note, "Our Identity Is Often What's Triggering Surveillance": How Government Surveillance of #BlackLivesMatter Violates the First Amendment Freedom of Association, 44 Rutgers Comput. & Tech. L.J. 286, 293 (2018) (arguing that "monitoring the Black Lives Matter Movement via social media accounts and tracking individuals based on what they say and express and with whom they associate with online runs afoul of the freedom of association rooted in the First Amendment").

85. See Matthew Tokson, The Normative Fourth Amendment, 104 Minn. L. Rev. 741, 758–62 (2019) (arguing for a new Fourth Amendment calculus that takes into account how surveillance harms create self-censorship and "chilling" effects); see also Levinson-Waldman, Hiding in Plain Sight, supra note 16, at 530 ("Existing case law, seen through a new lens, provides the blueprint for a workable, comprehensive mechanism for applying the Fourth Amendment to digital age public surveillance technologies.").

86. See Aziz & Beydoun, supra note 17, at 1188 (noting that legal challenges pertaining to social media surveillance may turn on Fourteenth Amendment protections).

87. 408 U.S. 1 (1972).

88. Id. at 2 ("Respondents brought this class action . . . seeking declaratory and injunctive relief on their claim that their rights were being invaded by the Department of the Army's alleged 'surveillance of lawful and peaceful civilian political activity.'").

action that has an indirect "chilling" effect on First Amendment rights may be subject to constitutional attack, an individual or group claiming that surveillance "chilled" their freedom of speech is not "an adequate substitute for a claim of specific present objective harm or a threat of specific future harm," as required by Article III.[89] That is, the plaintiffs did not demonstrate a direct or certainly impending injury to justify judicial intervention.[90] It was unclear in the aftermath of *Laird* whether legal challenges to public government surveillance programs had been foreclosed.[91]

The Court has pointed to judicial standing and avoided reaching the merits of claims in other government surveillance challenges. In a more recent case, *Clapper v. Amnesty International*, the Court addressed a claim brought by human rights, labor, media, and legal organizations, arguing that a provision of the Foreign Intelligence Surveillance Act (FISA)—which permits government surveillance of individuals who are not "United States persons"—was unconstitutional.[92] FISA was enacted by Congress to "authorize and regulate certain governmental electronic surveillance of communications for foreign intelligence purposes."[93] The challenged provision, § 1881a, allowed the government to target electronic communications from "persons reasonably believed to be located outside the United States to acquire foreign intelligence information."[94] Respondents, the challengers, alleged that their work required them to engage in communications with foreigners who were likely to be targeted by surveillance under the FISA provision.[95] They claimed this meant the provision allowed the government to monitor their own communications and therefore violated their First and Fourth Amendment rights.[96]

The Court held that the respondents did not establish injury-in-fact and thus lacked Article III standing to bring a claim.[97] Critically, while the respondents believed that the parties they engaged with were likely targets of the surveillance, they did not have independent evidence that their

89. Id. at 13–14.

90. See id. at 13.

91. Compare Michelman, supra note 21, at 75 ("[M]any courts have interpreted *Laird* too broadly, reading its narrow, context-specific holding as a nearly categorical barrier to standing for plaintiffs who allege that government surveillance has chilled their speech, association, or other activities."), with Hassan v. City of New York, 804 F.3d 277, 292 (3d Cir. 2015) ("*Laird* doesn't stand for the proposition that public surveillance is either *per se* immune from constitutional attack or subject to a heightened requirement of injury . . . .").

92. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013).

93. Id. at 401–02; see also Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered titles of the U.S.C.).

94. *Clapper*, 568 U.S. at 404–05 (internal quotation marks omitted) (quoting 50 U.S.C. § 1881a(a)).

95. Id. at 406.

96. Id. at 406–07.

97. Id. at 402.

communications had in fact been intercepted.[98] The Court concluded that they did not have standing because, inter alia, their "theory of future injury [was] too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'"[99] Put differently, the Court found that because there was no alleged injury or "threat of certainly impending [harm]," the case warranted dismissal without reaching the merits of the constitutional claims.[100] The legacy of *Laird* and *Clapper* has clouded standing doctrine in the realm of surveillance.[101]

Social media is a critical tool for Americans—especially Black Americans—to organize and mobilize around sociopolitical movements.[102] Law enforcement purports to use social media as a tool for information gathering and to easily and invasively track and document information on whomever they deem a person of interest. Scholarship has created legal solutions to law enforcement's uninhibited ability to surveil social media,[103] but these solutions cannot materialize in practice if plaintiffs cannot demonstrate some form of injury-in-fact. If the surveillance powers of law enforcement continue to grow unchecked, dire consequences are in store, particularly for Black communities. There is no better teacher of the dangers of unchecked surveillance powers than the history of Black Americans and state-sponsored surveillance.

II. RACIALIZED SURVEILLANCE

While surveillance is sometimes framed as a relatively recent issue, it has long been a pressing concern for communities of color.[104] The term "racialized surveillance" refers to the historical surveillance practices of government entities and predominantly white structures that target Black and Brown people.[105] Scholars are beginning to conceptualize social

98. Id. at 406–07, 411.

99. Id. at 401 (emphasis omitted) (citing Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

100. See id. at 417.

101. See Mank, supra note 83, at 215 (noting that *Clapper* seems to present a new "potentially groundbreaking approach" to standing); see also Michelman, supra note 21, at 74 ("The U.S. Supreme Court's 1972 decision in *Laird v. Tatum* purported to decide who can sue to enjoin a government surveillance program, but in practice that opinion ended up raising as many questions as it answered . . . .") (footnote omitted).

102. See supra notes 31–34 and accompanying text.

103. See supra notes 84–86 and accompanying text.

104. See Cyril, supra note 18 ("[B]lack people and other people of color have lived for centuries with surveillance practices aimed at maintaining a racial hierarchy.").

105. See Browne, supra note 8, at 16 ("Racializing surveillance is a technology of social control where surveillance practices, policies, and performances concern the production of norms pertaining to race . . . ."); see also Gino Canella, Racialized Surveillance: Activist Media and the Policing of Black Bodies, 11 Commc'n Culture & Critique 378, 379–81 (2018) (characterizing the history of state surveillance targeting Black activists and Black people as racialized surveillance).

media surveillance as part of the racialized surveillance regime.[106] This form of digital surveillance creates consequences harkening back to other points throughout history, buttressing the assertion that it is the latest manifestation of racialized surveillance and providing a new way of understanding how best to attack the current regime.[107]

This Part traces the history of state surveillance of Black people and places social media surveillance squarely in this context. It describes the consequences Black communities have suffered due to racialized surveillance. First, it traces the history of racialized surveillance in America, beginning with the transatlantic slave trade to the present day. Next, it situates social media surveillance as the latest manifestation of racialized surveillance by connecting the impact of social media surveillance to similar consequences seen throughout history.[108]

The discussion is animated by two phenomena that run throughout the legacy of racialized surveillance: overcriminalization and political suppression. It returns to previous attempts at limiting law enforcement's surveillance capacities, focusing on efforts to change the interaction between the law and surveillance through the courts. It concludes by arguing that attempts to address illegal forms of surveillance will continue to struggle to meet standing requirements absent a change in how surveillance harms are conceptualized. Such a framework for understanding social media surveillance and the harm it creates must be embraced to meet the needs of the current moment.

A. *Racialized Surveillance: A Long Road*

Racialized surveillance dates as far back as the transatlantic slave trade; constant surveillance of enslaved people was an essential component of slavery.[109] Surveillance in the slavery era was largely designed to

106. See, e.g., Aziz & Beydoun, supra note 17, at 1183–84 (discussing social media surveillance as the new forum for policing Black and Brown activism and connecting the new phenomenon with a larger history of surveilling Black and Brown activists).

107. See infra Part III.

108. See Canella, supra note 105, at 379 (highlighting that a "historical account of the tactics used to surveil the black community [is] essential . . . because the ways in which the state surveils black activists today are not necessarily new, they have simply taken new forms").

109. See J. David Knottnerus, David L. Monk & Edward Jones, The Slave Plantation System From a Total Institution Perspective, *in* Plantation Society and Race Relations: The Origins of Inequality 17, 22 (Thomas J. Durant, Jr. & J. David Knottnerus eds., 1999) (discussing that slaveholders held a significant economic interest in monitoring enslaved people "whose labor was so essential to the successful operation of their enterprises"); see also Browne, supra note 8, at 8 (discussing "the role of surveillance in the archive of slavery and the transatlantic slave trade in particular").

detect and prevent slave insurrections and rebellions.[110] Communities collectively facilitated a surveillance regime through practices like slave notices and "runaway ads."[111] Slave patrols, the predecessor of modern American police departments, were deputized to conduct surveillance of Black lives.[112] Governments also directly participated in perpetuating surveillance over enslaved people with ordinances such as "lantern laws," which were enacted to ensure no Black person could walk through a city without being subject to interrogation and monitoring.[113] The New York City Council passed such a measure, which read in part:

> And that if any such Negro, Mulatto or Indian Slave or Slaves . . . shall be found in any of the Streets of this City, or in any other Place, on the South side of the Fresh-Water, in the Night-time . . . without a Lanthorn and lighted Candle in it[,] . . . it shall and may be lawful for any of his Majesty's Subjects within the said City to apprehend such Slave or Slaves . . . .[114]

Violent surveillance of Black bodies did not cease when slavery ended; the criminal legal system became the key site for the expansion of surveillance of Black lives.[115] Within months of the South's defeat in the Civil War, states passed laws—later called Black Codes—which outlined a "system of forced labor, constant surveillance, and a biased court system."[116]

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110. See Jason T. Sharples, The World that Fear Made: Slave Revolts and Conspiracy Scares in Early America 84–86 (2020) (discussing how fear of slave rebellions created a surveillance state throughout the South).

111. See Freedom on the Move, https://app.freedomonthemove.org/ [https://perma.cc/5K2N-W3KX] (last visited Oct. 15, 2020) (providing an archival database of newspaper runaway ads created to control the movement of enslaved people).

112. Chaz Arnett, Race, Surveillance, Resistance, 81 Ohio St. L.J. 1103, 1111 (2020) ("The relationship between policing and racialized surveillance can be traced back to the first iterations of policing through slave patrols."); see also Throughline, American Police, NPR, at 11:51 (June 4, 2020), https://www.npr.org/transcripts/869046127 [https://perma.cc/RG5W-L8N4] ("So the tying together early on, the surveillance, the deputization essentially of all white men to be police officers or, in this case, slave patrollers and then to dispense corporal punishment on the scene are all baked in from the very beginning.").

113. See Dorothy Roberts & Jeffrey Vagle, Opinion, Racial Surveillance Has a Long History, Hill (Jan. 4, 2016), https://thehill.com/opinion/op-ed/264710-racial-surveillance-has-a-long-history [https://perma.cc/AVW2-E3Z4] (mentioning the use of lantern laws as part of the history of racialized surveillance).

114. Will Sharpas, N.Y.C. Common Council, A Law for Regulating Negroes and Slaves in the Night Time (1731), https://digitalcollections.nypl.org/items/8ebdde86-d7f2-c140-e040-e00a18060af7 [https://perma.cc/88D6-BZP7].

115. Throughline, supra note 112, at 15:45; see also Natalie P. Byfield, Race Science and Surveillance: Police as the New Race Scientists, 25 J. for Study Race Nation & Culture 91, 98 (2019) ("The Black Codes instituted after slavery operated as a surveillance mechanism."); Gary Stewart, Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions, 107 Yale L.J. 2249, 2257–61 (1998) (discussing how "Black Codes" were passed in response to control a newly freed Black population through incarceration and broad police discretion).

116. Excerpts From the South Carolina Black Codes, 1865, Oxford Afr. Am. Stud. Ctr. (Feb. 28, 2013) (on file with the *Columbia Law Review*); see also Throughline, supra note

These codes controlled the movement of newly freed Black people so as to keep them under constant watch and prevent them from escaping the sight of former white slaveholders.[117]

When the Black Codes became susceptible to legal challenges via the passage of the Reconstruction Amendments, hypervigilance for maintaining racial lines and punishing nonsubmissive Black people "became the primary engine that drove racial surveillance."[118] The goal of monitoring Black communities created an emerging surveillance apparatus between political actors and law enforcement.[119]

This apparatus manifested in a new form during the civil rights era, where the full surveillance powers of local and federal law enforcement emerged with the FBI's infamous counterintelligence program (COINTELPRO).[120] From 1967 to 1971, the covert program operated to "expose, disrupt, misdirect, discredit, [or] otherwise neutralize the activities of black nationalist, hate-type organizations and groupings."[121] The program used numerous techniques to target Black leaders like Martin Luther King, Jr. and Stokely Carmichael.[122] Over time, the Black Panther Party became the chief organizational target of COINTELPRO.[123] The surveillance program escalated when the FBI used information gleaned from COINTELPRO to raid the Black Panther Party headquarters in Chicago and kill Fred Hampton and Mark Clark, two youth activists and emerging leaders in the party.[124] COINTELPRO has been characterized by courts as

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112, at 16:28. See generally Stewart, supra note 115, at 2258–61 (discussing the history of the Black Codes).

117. See, e.g., Senate Doc. No. 39-6, at 194 (1867) (documenting a Mississippi law stating that "every civil officer shall, and every person may, arrest and carry back to his . . . legal employer any freedman, free negro, or mulatto who shall have quit the service of his . . . employer before the expiration of his . . . term of service without good cause"); id. at 212 (documenting a South Carolina law mandating that "[s]ervants shall not be absent from the premises without the permission of the master").

118. Stephen A. Berrey, The Jim Crow Routine: Everyday Performances of Race, Civil Rights, and Segregation in Mississippi 104 (2015).

119. Id. at 106 ("[A] network of state police, high-level politicians, and other prominent segregationists, took the lead in creating and defining this emerging surveillance network.").

120. See Aleena Aspervil, Comment, If the Feds Watching: The FBI's Use of a "Black Identity Extremist" Domestic Terrorism Designation to Target Black Activists & Violate Equal Protection, 62 How. L.J. 907, 910 (2019).

121. Id. at 914 (internal quotation marks omitted) (quoting S. Rep. No. 94-755, bk. III, at 20 (1976)).

122. Id. at 914–15 (citing one of the goals of the program as "prevent[ing] the rise of a 'messiah' who could 'unify, and electrify,' the movement, naming specifically Martin Luther King, Stokely Carmichael, and Elijah Muhammed").

123. Id. at 915; see also Eric W. Buetzow, Note, The Powers that Be: The American Endeavor to Suppress Black Political Voices, 1 Law & Soc'y Rev. UCSB 89, 91 (2002) (noting that the Black Panther Party became the "most targeted and sought after by the FBI through COINTELPRO operations").

124. Buetzow, supra note 123, at 92.

an illegal and unconstitutional surveillance program that expanded the racialized surveillance regime.[125] Moreover, research has drawn parallels between COINTELPRO—particularly its goal of maintaining control over social activists—and the contemporary surveillance state.[126]

Following the end of COINTELPRO, the war on drugs ushered in the next evolution in the racialized surveillance regime. The war on drugs justified the criminalization of everyday life in Black communities and had a devastating effect on Black lives across the country.[127] Law enforcement monitoring and control of Black individuals intensified during this period due to rapidly increasing incarceration and probation rates among Black people.[128] The war on drugs also gave birth to early versions of "gang databases," which operate as mechanisms of surveillance and control over Black youth.[129] Gang databases exist in numerous municipalities to this day and have been the subject of hotly contested debate regarding their racist application.[130] Gang databases are usually updated and collected by city police departments who use the databases as a basis for conducting criminal investigations and monitoring "persons of interest," who overwhelmingly tend to be Black youth.[131]

B. *Familiar Consequences of Racialized Surveillance*

While social media surveillance may impact all social media users, its most troubling consequences are disproportionately borne by the Black

125. See Memorandum Opinion and Order at *7, United States v. Shakur, 723 F. Supp. 925 (S.D.N.Y. 1988) (Nos. SSS 82 Cr. 312 (CSH), 84 Cr. 220 (CSH)), 1988 WL 34828 (noting that records obtained by the plaintiff from the FBI "demonstrate that for a considerable time Shakur and the Republic of New Afrika . . . have been the subject of illegal surveillance, harassment, and disinformation by the FBI as part of that lamented, unconstitutional project known as COINTELPRO").

126. See Carlos Torres, Azadeh Shahshahani & Tye Tavaras, Indiscriminate Power: Racial Profiling and Surveillance Since 9/11, 18 U. Pa. J.L. & Soc. Change 283, 309 (2015) ("The cultural and political motives of control and maintenance of the status quo exhibited during COINTELPRO are also part of the modern surveillance culture . . . .").

127. Donna Murch, Crack in Los Angeles: Crisis, Militarization, and Black Response to the Late Twentieth-Century War on Drugs, 102 J. Am. Hist. 162, 167 (2015); see also Kenneth B. Nunn, Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks", 6 J. Gender Race & Just. 381, 381 (2002).

128. Byfield, supra note 115, at 98.

129. Murch, supra note 127, at 167.

130. See Joshua D. Wright, The Constitutional Failure of Gang Databases, 2 Stan. J.C.R. & C.L. 115, 125 (2005) ("The subjective criteria used to document gang members also reinforce the suspicion that databases, even if properly managed and administered, are excessively over inclusive and overstate minority participation rates."); Vaidya Gullapalli, Spotlight: The Dangers of Gang Databases and Gang Policing, Appeal (July 3, 2019), https://theappeal.org/spotlight-the-dangers-of-gang-databases-and-gang-policing [https://perma.cc/J8LB-8LCV].

131. See infra section II.B.1.

community.[132] Black people are over-policed in their own communities, a pattern which rolls over to the digital sphere.[133] Two salient consequences emerge from the history of racialized surveillance: overcriminalization and suppression of political activism. Racial surveillance emerged as a way to suppress slave insurrections and rebellions and a weapon to prevent political leadership and mobilization in the civil rights era, illustrating a focus on suppressing social activism. It also emerged as a way to control Black life by subjugating free Black people to the criminal system via Black Codes and the war on drugs.[134] These emergent themes characterize a legacy of surveillance spanning centuries and provide a compelling reason to examine how they are recreated in the modern racialized surveillance regime. Importantly, these consequences give rise to both economic and noneconomic harms for Black communities.

1. *Overcriminalization.* — Black people have been subjected to surveillance throughout history in large part due to racist tropes that attribute a badge of criminality to Blackness.[135] This badge of criminality is used to justify intrusion into Black life and cultivates a cycle of surveillance and incarceration.[136] In contemporary times, an increasing number of criminal indictments rely on information gleaned from social media.[137]

Any form of police contact, including digital surveillance, brings individuals within the reach of the criminal legal system, which in turn has significant consequences. An alarming outgrowth of digital surveillance

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132. See Levinson-Waldman, Access to and Manipulation of Social Media, supra note 36, at 525; see also Aziz & Beydoun, supra note 17, at 1153; Kristin Henning, The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment, 67 Am. U. L. Rev. 1513, 1541 (2018) ("Police engage with youth on the streets, in malls, in schools, in their homes, and by perusing youths' activities on social media.").

133. See Mateescu, supra note 69, at 2–3 (noting a high risk that the disproportionate surveillance of people of color translates to the digital context, including social media); see also Aziz & Beydoun, supra note 17, at 1153 ("Government agencies still disproportionately police minority communities' collective political action . . . [b]ut instead of just physically following and listening in on these Black and Brown activists, law enforcement now also surveil their social media accounts, virtual footprints, and online lives.").

134. See supra section II.A.

135. See Browne, supra note 8, at 20 ("[T]hese are ways of seeing and conceptualizing blackness through stereotypes, abnormalization, and other means that impose limitations . . . . [S]ome acts and even the mere presence of blackness gets coded as criminal.").

136. See, e.g., Butler, supra note 15, at 61 (arguing that Black men are arrested mainly so they can be placed under government surveillance); see also Byfield, supra note 115, at 98 (discussing how the institution of the convict-leasing system under the Black Codes "created within the system of administrative surveillance high rates of incarceration for blacks").

137. See, e.g., Rose Hackman, Is the Online Surveillance of Black Teenagers the New Stop-and-Frisk?, Guardian (Apr. 23, 2015), https://www.theguardian.com/us-news/2015/apr/23/online-surveillance-black-teenagers-new-stop-and-frisk [https://perma.cc/7GHL-CSPT] (noting that "48% of evidence used in seven separate gang indictments between February 2011 and June 2014 in Harlem related to online social media activity collected through police online surveillance").

has been the creation of gang databases. These databases are overwhelmingly populated by people of color, specifically Black youth.[138] Black youth pulled into gang databases face "'adverse consequences' . . . including . . . obstacles to job hiring and eligibility for public benefits."[139] Perhaps the most alarming problem as it relates to gang databases is that "[i]f your name is entered into the database, you have no way of knowing about it and no way of contesting it."[140] These databases cast widened nets in the social media space—catching more individuals than they could in other contexts—which in turn creates severe consequences.[141]

Take, for example, the story of Jelani Henry, a nineteen-year-old Black teenager from Harlem.[142] Jelani was added to a gang database because of social media connections to people in his neighborhood who were labeled as gang members.[143] Police arrested Jelani for two counts of attempted murder, even though he continually protested his innocence.[144] Though he had never been convicted of a crime, the district attorney's office at the arraignment proceeding described Jelani as a "known member of a violent gang," pointing to Facebook posts about a neighborhood gang called the "Goodfellas" that Jelani had "liked."[145] The judge denied him bail, and Jelani was held in Rikers Island for two years, including nine months of solitary confinement, during the entirety of which he maintained his innocence.[146] Eventually, Jelani's lawyer filed a speedy trial motion and he was granted bail; subsequently, two years after it began, his case was finally dismissed—with no explanation, no apology, and no civil remedy.[147]

In another case, Jamal, a Black high schooler in Philadelphia, was arrested on a gun charge by the Philadelphia Police Department's Gang Task Force in 2017.[148] An officer from the task force testified in court that

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138. Gullapalli, supra note 130 (noting that of an active NYPD database labeling people in New York City as active gang members, "[n]early 99 percent . . . are people of color" and "[n]early 88 percent are Black or Latinx").

139. Jacqueline Serrato, Watchdog: Seriously Flawed Chicago Gang Database Undermines Public Trust in Police, Chi. Rep. (Apr. 12, 2019), https://www.chicagoreporter.com/watchdog-seriously-flawed-chicago-gang-database-undermines-public-trust-in-police/ [https://perma.cc/3C22-BGGZ] (quoting Off. of Inspector Gen., City of Chi., Review of the Chicago Police Department's "Gang Database" 3 (2019)).

140. Gullapalli, supra note 130.

141. Ben Popper, How the NYPD Is Using Social Media to Put Harlem Teens Behind Bars, Verge (Dec. 10, 2014), https://www.theverge.com/2014/12/10/7341077/nypd-harlem-crews-social-media-rikers-prison [https://perma.cc/8ZWC-6S4J] (quoting Andrew Laufer, a New York City Attorney who works on wrongful arrest cases, claiming that "[t]he mix of social media and conspiracy statutes creates a dragnet that can bring almost anybody in").

142. Id.

143. Id.

144. Id.

145. Id.

146. Id.

147. Id.

148. Max Rivlin-Nadler, How Philadelphia's Social Media-Driven Gang Policing Is Stealing Years From Young People, Medium (Jan. 19, 2018), https://medium.com/in-

the team determined Jamal was in a gang largely based off of "photos and tweets that appeared on Jamal's social media and which [the officer] believed associated him with a gang."[149] Prior to the arrest, Jamal had no criminal record, but he was nonetheless kept in jail for two months and eventually placed on house arrest.[150] Nearly a year later, a judge threw out the charges for lack of evidence, at which point Jamal had lost a year of his life due to legal challenges.[151] Additional stories similar to Jelani's and Jamal's span the nation.[152]

The harms created by racialized surveillance go beyond incarceration;[153] research suggests that individuals with any contact with the criminal legal system—for instance, being stopped and questioned, arrested, or convicted—are less likely to participate in institutions that keep formal records such as banks, hospitals, schools, and places of employment.[154] This "system avoidance" stems from fear that engaging with these institutions will "heighten the risk of surveillance and apprehension by authorities."[155] Consequences from system avoidance include impeded financial security, decreased upward mobility, and detrimental health outcomes.[156] Crucially, "the negative consequences of system avoidance will be similarly disproportionately distributed, thus exacerbating preexisting inequalities for an expanding group of already disadvantaged individuals."[157] Black youth who are questioned about their social media content or discover they are in a police database because of

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justice-today/how-philadelphias-social-media-driven-gang-policing-is-stealing-years-from-young-people-fa6a8dacead9 [https://perma.cc/YJD4-7XGF].

149. Id.

150. Id.

151. Id.

152. See, e.g., Rachel Levinson-Waldman & Sahil Singhvi, Opinion, Law Enforcement Social Media Monitoring Is Invasive and Opaque, Brennan Ctr. for Just. (Nov. 6, 2019), https://www.brennancenter.org/our-work/analysis-opinion/law-enforcement-social-media-monitoring-invasive-and-opaque [https://perma.cc/8RDA-Y6VS] (mentioning how a Black man in Delaware "was sentenced to 15 years in prison after his girlfriend posted a photo of a gun (registered in her name) to his Facebook account; an undercover police officer had been periodically checking the account for more than two years with no specific basis"); id. (discussing a 2017 incident in which Long Island police officers falsely accused a Honduran student of being a gang member after he posted Facebook pictures of himself and other Latinx students dressed in the color of their home countries' flags).

153. See Sarah Brayne, Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment, 79 Am. Socio. Rev. 367, 368 (2014) ("[P]olice contact and criminal justice sanctions short of incarceration have led a growing swath of individuals—who previously would not have been involved in the criminal justice system for their minor offenses—to be placed under criminal justice supervision, a phenomenon termed 'net widening.'" (quoting Stanley Cohen, Visions of Social Control 41–42 (1985)).

154. Id.

155. Id.

156. Id. at 369.

157. Id. at 385.

social media content may tend toward system avoidance and experience the consequences.[158]

2. *Political Suppression.* — Law enforcement's efforts to gather information on Black Lives Matter activists are infamous and serve as one of the many examples of law enforcement using social media surveillance to target Black people and communities.[159] For example, news organizations have uncovered documents from law enforcement evincing a wide disparity in the information retained—and resources expended—on Black activists as opposed to on the activities of white supremacist groups.[160] When it comes to monitoring by law enforcement, "it is Black protesters, not white supremacists, who are the targets of a campaign of surveillance and intimidation that's gaining strength in the federal government."[161]

One such example of social media surveillance wielded against Black activists and political leaders is the infamous DHS "Race Paper."[162] The document was almost completely redacted—apart from its title—and was released in connection with other records as part of a FOIA request from civil liberty groups pertaining to government monitoring of Black Lives Matter activists.[163] Advocates argued that the existence of a "Race Paper" confirmed the suspicions of Black political organizers and activists across the country that they were the targets of government surveillance.[164]

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158. Aaron Leibowitz & Sarah Karp, Chicago Public Schools Monitored Social Media for Signs of Violence, Gang Membership, ProPublica (Feb. 11, 2019), https://www.propublica.org/article/chicago-public-schools-social-media-monitoring-violence-gangs (on file with the *Columbia Law Review*) (discussing how police officers worked with the Chicago Public School system to monitor social media, and as a result, "more than 700 CPS students [were] called into interventions . . . based on social media activity that point[ed] to their possible gang involvement").

159. See Farzan, supra note 3; Joseph, Feds Regularly Monitored BLM, supra note 41; see also Chris Brooks, After Barr Ordered FBI to "Identify Criminal Organizers," Activists Were Intimidated at Home and at Work, Intercept (June 12, 2020), https://theintercept.com/2020/06/12/fbi-jttf-protests-activists-cookeville-tennessee (on file with the *Columbia Law Review*).

160. Albert Samaha, Jason Leopold & Rosalind Adams, We Received Documents Showing How the Feds Monitored BLM Protests. There Was Only One Mention of White Supremacists., Buzzfeed News (Aug. 13, 2020), https://www.buzzfeednews.com/article/albertsamaha/newly-released-documents-reveal-how-the-feds-were [https://perma.cc/G7ZV-84C6] ("In the hundreds of pages of emails and intelligence reports, there is only a single explicit mention of white supremacist groups or other far-right extremists . . . .").

161. Rashad Robinson, The Federal Government's Secret War on Black Activists, Am. Prospect (Apr. 4, 2018), https://prospect.org/justice/federal-government-s-secret-war-black-activists/ [https://perma.cc/9S4Z-8ML6].

162. See Racial Justice Groups Sue DHS to Release Contents of Fully Redacted "Race Paper", Ctr. for Const. Rts. (Mar. 19, 2018), https://ccrjustice.org/home/press-center/press-releases/racial-justice-groups-sue-dhs-release-contents-fully-redacted-race [https://perma.cc/XGR3-P4JF].

163. Id.

164. Id.

The document substantiated fears many Black activists possess: that they are monitored on the basis of their political activities.[165] For example, April Goggans, a Black woman and Black Lives Matter organizer in the Washington, D.C. area, alleged she was targeted by police surveillance on account of her political activities.[166] She detailed being followed by police officers in stores and said that, for a span of weeks in 2015, a police cruiser parked outside of her home every other night.[167] Her experiences had a significant impact on her political activities, as she reported avoiding attending events out of fear of additional intimidation and surveillance.[168] Goggans is not alone in her experience, as recent research indicates that individuals may censor themselves or avoid posting dissenting views when they are aware they are being monitored by a government agency.[169]

C. *Surveillance Litigation*

One of the most significant obstacles to challenging the constitutionality of government surveillance activities is meeting the threshold for judicial standing. In particular, demonstrating an injury-in-fact can be difficult for parties who cannot prove that they have been individually surveilled, regardless of the harm that such surveillance might have caused.[170] However, a line of cases in the wake of *Laird* and *Clapper* suggests the possibility of challenging government surveillance.

Writing for the dissent in *Clapper*, Justice Breyer noted, "[T]he word 'certainly' in the phrase 'certainly impending' does not refer to absolute certainty. As our case law demonstrates, what the Constitution requires is something more akin to 'reasonable probability' or 'high probability.'"[171]

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165. See Robinson, supra note 161 (discussing stories of Black activists being followed around in grocery stores and identified and arrested before political events).

166. Id.

167. Id.; see also Natalie Delgadillo, A Prominent Black Lives Matter Leader Is Suing D.C. Police to Prove She's Been Under Surveillance, DCist (Feb. 11, 2019), https://dcist.com/story/19/02/11/this-black-lives-matter-leader-is-suing-d-c-police-for-documents-to-prove-shes-been-under-surveillance/ [https://perma.cc/6VEN-Q9UY].

168. See Robinson, supra note 161.

169. See Elizabeth Stoycheff, Under Surveillance: Examining Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring, 93 Journalism & Mass Commc'n Q. 296, 307 (2016) (finding that "government surveillance significantly reduce[s] the likelihood of speaking out in hostile opinion climates" and "that the government's online surveillance programs may threaten the disclosure of minority views and contribute to the reinforcement of majority opinion"); see also Rafi Goldberg, Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities, Nat'l Telecomms. & Info. Admin. (May 13, 2016), https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities [https://perma.cc/VWS8-9K5H] (administering a survey and finding that one in five people avoided online activity due to concerns about government surveillance).

170. See generally Michelman, supra note 21 (discussing the injury-in-fact requirement as a barrier to challenging government surveillance practices through the courts).

171. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 440–41 (2013) (Breyer, J., dissenting).

Despite the majority's ruling, one footnote in the case raised questions about the standard for injury-in-fact. In footnote five, the Court wrote:

> Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a "substantial risk" that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.[172]

This caveat opened the possibility that a party might still possess standing when they have not yet suffered a legally cognizable harm but there is a substantial risk one will occur. For example, in *Krottner v. Starbucks Corp.*, the Ninth Circuit addressed whether employees could sue a corporation for negligence in the context of stolen personal information.[173] In 2008, an unknown person stole a laptop containing unsecured names, addresses, and Social Security numbers of thousands of Starbucks employees.[174] Several employees filed a class action suit, claiming an increased risk of identity theft; Starbucks countered that the employees lacked standing because they did not allege any identity theft had actually occurred.[175]

The Ninth Circuit disagreed, concluding that "the injury-in-fact requirement can be satisfied by a threat of future harm or by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant's actions."[176] Based on credible threats of real harm, the Ninth Circuit therefore concluded that the employees had "sufficiently alleged an injury-in-fact for purposes of Article III standing."[177]

The articulation of the "threat of future harm" standard for Article III standing suggests that, if a claimant can plead facts that demonstrate a substantial future likelihood of harm that results in current economic harm, they may meet the necessary threshold for standing. This reasoning is exemplified in *In re Adobe Systems, Inc. Privacy Litigation*, where the Northern District of California addressed a Customer Records Act claim from Adobe licensees following a data breach.[178] The plaintiffs contended that they were all at increased risk of future harm as a result of the data breach; unsurprisingly, Adobe responded that "such 'increased risk' is not a cognizable injury for Article III standing."[179] The court rejected Adobe's

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172. Id. at 414 n.5 (majority opinion) (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 153 (2010)).

173. 628 F.3d 1139 (9th Cir. 2010).

174. Id. at 1140.

175. Id. at 1141–42.

176. Id. at 1143 (quoting Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 634 (7th Cir. 2007)).

177. Id. at 1143.

178. 66 F. Supp. 3d 1197 (N.D. Cal. 2014).

179. Id. at 1211.

position, citing footnote five in *Clapper* as indicating that Article III standing does not demand certainty that harms will come about, but rather only some "substantial risk" if it results in economic harms.[180]

According to at least one legal scholar, *Adobe* "may be a sign that future surveillance harms will soon be recognized as an 'injury in fact,' and will free courts from the flawed legacy of *Laird* and *Clapper*."[181] The CRT approach is uniquely situated to usher in surveillance harms as injury-in-fact. As underscored by the historical lens, surveillance harms on Black communities are real, legally cognizable, and have a substantial likelihood of occurring. Furthermore, as illustrated by gang databases and suppression of Black political groups, even before law enforcement uses surveillance to make an arrest or commence an investigation, there are economic and noneconomic harms inflicted on Black communities.

III. CRITICALLY THEORIZING

This Part proposes a new way of addressing social media surveillance harms via what this Note terms the CRT lens. First, it provides a brief description of CRT and lays out common themes in CRT perspectives on surveillance. Next, this Part argues that a CRT approach—by engaging with historical context and focusing on people of color as the narrators—provides a meaningful way forward to challenging government surveillance. Specifically, by arguing that discriminatory and racist practices are baked into the institutional design of policing, a CRT approach views uninhibited law enforcement activity like monitoring social media as presenting a substantial likelihood of abusive and illegal behavior. This framework creates a compelling injury-in-fact narrative necessary to establish judicial standing and launch legal challenges. Next, this Part discusses recent examples of litigants employing a CRT approach to challenge other government surveillance practices, demonstrating the utility of the approach in the social media surveillance context. Then, this Part homes in on what a CRT approach looks like in practice, highlighting contemporary lawsuits that embrace the CRT perspective in the social media surveillance space. Finally, this Part concludes by describing the CRT-envisioned future that shrinks and replaces the immensity of the state surveillance apparatus.

A. *CRT Background*

CRT emerged as an intellectual movement in the early 1990s, oriented as a confrontation of "the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender,

180. Id. at 1213 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 n.5 (2013)).

181. Jeffrey Vagle, *Clapper*, *Adobe*, and Article III Standing for Surveillance Harms, Just Sec. (Oct. 9, 2014), https://www.justsecurity.org/16114/clapper-adobe-article-iii-standing-surveillance-harms [https://perma.cc/5MZ8-H6P6].

class, and sexual orientation)."[182] CRT poses the question: "What would the legal landscape look like today if people of color were the decision-makers?"[183] While there is no single agenda among CRT scholars, many conceive of the law as a vehicle for social change, particularly racial justice.[184] CRT adheres to both a radical critique of, and emancipation by, the law.[185] This uniquely situates CRT as a legal philosophy to catalyze innovative legal and policy solutions to persistent problems.[186]

CRT's utility as a legal philosophy that provides new ways to address law enforcement's surveillance practices can be traced to two of its recurring themes: the "notion of a unique voice of color"[187] and interest convergence. The unique voice of color posits that people of color are uniquely situated to speak on matters of race and the law on account of their experiences. The distinct perspective of people of color fosters reassessment of the law's "master narratives."[188] In what has been termed "looking to the bottom," CRT scholars adopt the perspective of marginalized groups who experience firsthand the consequences of a malfunctioning liberal democracy.[189] Interest convergence refers to the proposition that legal reforms that benefit people of color are only

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182. Cornel West, Foreword to Critical Race Theory: The Key Writings that Formed the Movement, at xi (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); see also I. Bennett Capers, Afrofuturism, Critical Race Theory, and Policing in the Year 2044, 94 N.Y.U. L. Rev. 1, 20–30 (2019) [hereinafter Capers, Afrofuturism] (describing the development and history of CRT); Kimberlé Williams Crenshaw, Twenty Years of Critical Race Theory: Looking Back to Move Forward, 43 Conn. L. Rev. 1253, 1262–98 (2011) (discussing the origins and formation of the CRT movement); Angela Onwuachi-Willig, Celebrating Critical Race Theory at 20, 94 Iowa L. Rev. 1497, 1497–502 (2009) (describing the development of CRT since the first CRT workshop in 1989).

183. Roy L. Brooks, Critical Race Theory: A Proposed Structure and Application to Federal Pleading, 11 Harv. Blackletter L.J. 85, 85–86 (1994).

184. Id. at 87 ("Recognizing that there is a symbiotic relationship between law and society, [proponents of CRT] conceptualize the law instrumentally. They maintain that law has several social purposes, one of which should be to effectuate racial equality.").

185. See Derrick A. Bell, Who's Afraid of Critical Race Theory?, 1995 U. Ill. L. Rev. 893, 899 [hereinafter Bell, Who's Afraid of CRT?] ("There is . . . a good deal of tension in critical race theory scholarship, a tension that Angela Harris characterizes as between its commitment to radical critique of the law . . . and its commitment to radical emancipation by the law . . . ." (citing Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 Calif. L. Rev. 741, 743 (1994))).

186. Capers, Afrofuturism, supra note 182, at 29 ("There is one more thing to be said about Critical Race Theory . . . [I]t has always imagined traveling across time, in both the past and the future, and has always been at once both specular and speculative.").

187. Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 9 (2001).

188. Id. ("The 'legal storytelling' movement urges black and brown writers to recount their experiences with racism and the legal system and to apply their own unique perspectives to assess law's master narratives.").

189. Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987). See generally Derrick A. Bell, Jr., Faces at the Bottom of the Well: The Permanence of Racism (1992) (describing the permanence of racism and the position of Black people at the bottom of a societal racial hierarchy).

realized when they also advance the interests of the white majority.[190] Presently, because increasing mass surveillance—what one scholar calls "democratic surveillance"—affects middle- and upper-class whites, there is now an opportunity to address a regime historically wielded against people of color.[191] In short, "[n]ow that everyone's interests are affected by surveillance, everyone's interests must be considered in resisting surveillance."[192] Together, these core precepts of CRT create an approach uniquely suited to create new perspectives on the procedural barrier of standing in government surveillance cases. As previously discussed, challenging surveillance is difficult for parties and litigants who cannot demonstrate a certainly impending harm.[193] But the CRT approach, by imploring civil liberty groups, legal academics, and potential litigants to "look to the bottom," taps into a class of individuals who have experienced surveillance harms both historically and presently. The approach does not frame the issue as whether an individual can prove that they were personally surveilled, but rather centers the substantial likelihood of harm faced if a law enforcement agency does not possess limits or guidance on its social media surveillance practices. The upshot is that this may provide a basis for demonstrating sufficiently impending harm to constitute injury-in-fact, thus opening the courthouse doors and allowing parties to bring constitutional claims as starting points to curtail law enforcement's capacity to surveil social media.

B. *Past Examples of the CRT Approach*

Two cases in particular, *Floyd v. City of New York*[194] and *Hassan v. City of New York*,[195] are illustrative of how a CRT lens or framing provides a basis for injury-in-fact. *Floyd* was one of the noteworthy cases related to New York City's use of *Terry* stops, more widely known as stop and frisk.[196] In *Floyd*, twelve Black and Hispanic New Yorkers filed a § 1983 suit, alleging that the New York Police Department's (NYPD) use of stop and frisk violated their Fourth and Fourteenth Amendment rights.[197] Specifically, they alleged that they had been stopped without a legal basis and that they were targeted for the stops because of their race.[198] Language in the opinion

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190. Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523 (1980).

191. Mary Anne Franks, Democratic Surveillance, 30 Harv. J.L. & Tech. 425, 427 (2017) ("Surveillance and other privacy violations that were largely tolerated so long as they burdened marginalized groups are challenged now that they affect privileged interests.").

192. Id. at 430.

193. See supra section I.B.2.

194. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

195. 804 F.3d 277 (3d Cir. 2015).

196. *Floyd*, 959 F. Supp. 2d at 565 (citing Terry v. Ohio, 392 U.S. 1 (1968)).

197. Id. at 556–57.

198. Id.

illustrates how a CRT approach is plausible and appropriate for challenging how law enforcement monitors social media.

Much of the opinion describes a regime disturbingly similar to how law enforcement uses social media surveillance. For example, the court noted that "evidence at trial revealed that the NYPD has an unwritten policy of targeting 'the right people' for stops" and, "[i]n practice, the policy encourages the targeting of young black and Hispanic men."[199] Similar to how police officers are largely untrained in how to monitor social media,[200] the court found that there was poor training and supervision of officers when it came to stop and frisk.[201] The court found alarming disparities in how often Black and Hispanic people were stopped and frisked compared to their white counterparts and in relation to their makeup of the city's population.[202]

Especially relevant in *Floyd* is the court's discussion of the NPYD's practices and how they violated the Fourteenth Amendment. The court succinctly noted that "[t]he Equal Protection Clause does not permit the police to target a racially defined group as a whole,"[203] and that "the City adopted a policy of indirect racial profiling by targeting racially defined groups for stops."[204] As it pertains to social media surveillance, one line stands out: "In their zeal to defend a policy that they believe to be effective, they have willfully ignored overwhelming proof that the policy of targeting 'the right people' is racially discriminatory and therefore violates the United States Constitution."[205]

Social media surveillance practices within police departments may be so broad and target racially defined groups in a manner that such practices constitute an impermissible policy of racial profiling. This may include, for example, frequently searching the social media accounts of individuals in predominantly Black communities or undercover "friending" of Black residents. The takeaway is simple: Widespread use of social media surveillance in police departments, along with an increasing number of resources dedicated to this operation, reframes surveillance activities as a practice "sufficiently widespread as to have the force of law."[206] The CRT approach invites this framing by connecting social media surveillance with the larger history of law enforcement tactics designed to track the movement of Black and Brown people.[207] In fact, some have already explicitly called social media surveillance the stop and frisk of the digital

199. Id. at 561.

200. See supra notes 56–58 and accompanying text.

201. *Floyd*, 959 F. Supp. 2d at 561.

202. Id. at 558–59 (finding that in 52% of 4.4 million *Terry* stops the person stopped was Black, even though New York City's residential population was roughly 23% Black).

203. Id. at 563.

204. Id. at 562.

205. Id.

206. Id.

207. See supra section II.A.

age,[208] underscoring the parallels between the two and how the legal theory of unequal treatment used to attack physical stop and frisk might have merit in the social media sphere.

The other case, *Hassan v. City of New York*, was an appeal from the denial of a motion to dismiss a § 1983 suit alleging the unconstitutionality of a NYPD surveillance program targeted at the Muslim community.[209] Plaintiffs associated with the Islamic faith claimed that the NYPD was conducting a surveillance program to "monitor the lives of Muslims" in the wake of 9/11.[210] The plaintiffs specifically claimed the program violated their First and Fourteenth Amendment rights, since the operation was based on false and negative stereotypes pertaining to the Muslim community.[211]

The lower court dismissed the plaintiffs' complaint on the grounds that they lacked standing; specifically, the plaintiffs failed to identify any cognizable injury-in-fact.[212] The Third Circuit, however, rejected the lower court's reliance on *Laird* to support its conclusion that the plaintiffs did not have standing.[213] The Third Circuit noted that *Laird* concerned plaintiffs whose only alleged injury was a "chilling effect" on their freedom of speech, but that the *Hassan* plaintiffs, in contrast, "allege[d] that the discriminatory manner by which the Program [was] administered itself cause[d] them direct, ongoing, and immediate harm."[214] The court also took pains to state that, "in several post-*Laird* cases we have recognized that, while surveillance in public places may not of itself violate any privacy right, it can still violate other rights that give rise to cognizable harms."[215]

Finally, the court addressed the NYPD's argument that the plaintiffs lacked standing because they did not know they were being surveilled, and when they did discover this, it was only because of a third party.[216] The court rejected that argument, comparing discrimination to a dignitary tort and stating, "the affront to the other's dignity . . . is as keenly felt by one who only knows after the event that an indignity has been perpetrated upon him as by one who is conscious of it while it is being perpetrated."[217] The court ultimately held that the plaintiffs demonstrated sufficient harm

208. See Patton et al., supra note 40; see also Hackman, supra note 137.

209. 804 F.3d 277, 284 (3d Cir. 2015).

210. Id. at 285.

211. Id. at 284.

212. Id. at 288–89.

213. Id. at 292.

214. Id.

215. Id. (footnote omitted).

216. Id. at 292–93.

217. Id. at 293 (alteration in original) (quoting Restatement (First) of Torts § 18 cmt. e (Am. L. Inst. 1931)).

to meet the threshold standing requirement and that the surveillance program amounted to "selective investigation," on account of their faith, violating the First and Fourteenth Amendments.[218]

Floyd and *Hassan* demonstrate how injury-in-fact in the surveillance context could be satisfied by a claim of unequal treatment alone.[219] Taken together, these cases show the merits of a CRT approach over other approaches as a vehicle for recognizing surveillance harms. Situating social media monitoring in the long history of racialized surveillance demonstrates that there is a substantial likelihood that Black communities and other communities of color will be, if they are not already, subject to social media surveillance and that such surveillance may amount to unequal treatment, a legally cognizable harm.

C. *Digital Surveillance Cases*

Recent legal challenges have embraced aspects of the CRT approach in the digital surveillance context. In a criminal case in Massachusetts, *Commonwealth v. Dilworth*, the defendant, Richard Dilworth, a Black man, was indicted on firearm and ammunitions charges.[220] Boston police officers "friended" Dilworth on Snapchat—without identifying themselves as police officers—and viewed videos of Dilworth holding what appeared to be a firearm.[221] Officers arrested Dilworth and found a firearm in his waistband, for which Dilworth was charged and released on bail.[222] Officers again returned to Snapchat and viewed Dilworth with what appeared to be a firearm, arrested him, found a firearm in his possession, and charged him again as result.[223] In response, Dilworth filed a discovery motion seeking Boston Police Department records concerning social media surveillance on Snapchat.[224] Dilworth claimed that the department used Snapchat as an intelligence tool almost exclusively against Black men, in a potentially racially discriminatory manner.[225] The superior court judge granted the discovery motion, and the Supreme Judicial Court of Massachusetts affirmed on appeal.[226] Relevant to the CRT approach is the

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218. See id. at 289–90, 294–309.

219. Id. at 289 (noting that a claim of unequal treatment alone is sufficient to get in the courthouse door) (citing Heckler v. Matthews, 465 U.S. 728, 738 (1984)); see also Floyd v. City of New York, 959 F. Supp. 2d 540, 667 n.782 (S.D.N.Y. 2013) ("[A]pplying law enforcement tactics unequally between various racial groups is a recipe for abuse.").

220. 147 N.E.3d 445, 447 (Mass. 2020).

221. Id.; see also Elizabeth Weill-Greenberg, Massachusetts Court Won't Block Access to Reports on Who Boston Police May Have Targeted on Social Media, Appeal (June 16, 2020), https://theappeal.org/massachusetts-court-wont-block-access-to-reports-on-who-boston-police-may-have-targeted-on-social-media [https://perma.cc/86D4-WKE6].

222. *Dilworth*, 147 N.E.3d at 447.

223. Id.

224. Id.

225. Id. at 447–48.

226. Id. at 448.

court's discussion in a footnote addressing the tension in government surveillance challenges.[227] The court explained that the Commonwealth framed the legal issue as whether "an undercover police officer's 'friending' of an individual on Snapchat implicates the Fourth Amendment."[228] Dilworth argued that such framing put the "cart before the horse" and that such characterization of the challenged activity obfuscated the real claim at stake: whether the police department selectively targeted Black males in its criminal investigations.[229] The court expressed no view on the merits of either side's position, only noting that the lower court judge did not abuse her discretion in granting the discovery motion.[230]

On its face, surveillance activities like "Snapchat friending" would not seem to implicate any constitutional rights and therefore may not be said to cause a constitutionally cognizable harm. However, when those surveillance practices emanate from a discriminatory regime, one can imagine the potential for unconstitutional conduct such as selective prosecution. The CRT approach, by "looking to the bottom" for narratives of surveillance practices, provides an alternative frame to challenge the bounds of law enforcement's surveillance capacity.

As another example, in a recently filed class action suit, *Belle v. City of New York*,[231] seven Black and Latino New Yorkers challenged NYPD's practice of detaining individuals in order to give them enough time to conduct searches of the individuals in NYPD databases for warrants, summons, or other data.[232] The plaintiffs alleged that the NYPD was engaging in practices that disproportionately targeted people of color and sought remedies via constitutional theories.[233] Especially important—in terms of its applicability to the social media context—is the complaint's use of history to buttress the claims. The plaintiffs alleged that "the NYPD has replaced traditional—and largely discredited—police practices such as stop and frisk with invasive digital searches."[234] The complaint goes on to describe the history of stop and frisk in the NYPD, characterizing the digital searches as the latest iteration of unlawful surveillance techniques.[235] Historical context plays a crucial role in foregrounding the claims and shows that surveillance harms may most effectively be framed through a CRT lens.

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227. Id. at 449 n.5.

228. Id.

229. Id.

230. Id.

231. First Amended Class Complaint, Belle v. City of New York, No. 19 cv 2673 (VEC) (S.D.N.Y. filed Jan. 3, 2020).

232. Id. at 1–2.

233. Id. at 2.

234. Id. at 1–2.

235. Id. at 2.

D. *CRT Future*

Still left to imagine is what sort of infrastructure should replace the current regime. Put another way, one can imagine how law enforcement's surveillance practices should change. First, at minimum, a CRT future entails transparency.[236] This may manifest in methods such as requiring government agencies to publicly disclose social media policies[237] and ensuring that these policies explicitly prohibit surveillance based on protected characteristics.[238] There may be outlined procedures for acquiring data directly from social media companies.[239] Additionally, there would be strict control over the use of undercover account techniques and requirements for constant disclosure of social-media-monitoring activities.[240]

Second, some envision the possibility of community control over the acquisition, funding, and use of surveillance technology and practices.[241] Implementing regulatory controls before police engage in social media monitoring, specifically by requiring local government approval of any and all social media surveillance activities are additional procedural requirements that may take shape.[242] An example of community control is exemplified in the "The Community Control Over Police Surveillance" effort.[243] Sponsored by over a dozen civil liberty and grassroots organizations, the effort provides a set of guiding principles for future legislation to create mechanisms of community control over police surveillance activities.[244] Some principles include regular auditing and disclosure of surveillance

236. See Rachel Levinson-Waldman & Ángel Díaz, 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/2C8U-ZKKK]; see also Hugh Handeyside, We're Demanding the Government Come Clean on Surveillance of Social Media, ACLU (May 24, 2018), https://www.aclu.org/blog/privacy-technology/internet-privacy/were-demanding-government-come-clean-surveillance-social [https://perma.cc/J9SF-V3ZG] ("It's time for a fuller public conversation about imposing limits on government social media surveillance . . . To have that conversation, we need to know exactly what the government is doing.").

237. See Levinson-Waldman & Diaz, supra note 236.

238. See, e.g., End the Surveillance on Black Communities, M4BL, https://m4bl.org/policy-platforms/end-surveillance/ [https://perma.cc/S4XR-LZ26] (last visited Jan. 7, 2022) (listing as one of the demands for police surveillance reform the "[e]limination of surveillance of targeted communities").

239. Levinson-Waldman & Diaz, supra note 236.

240. Id.

241. See Aziz & Beydoun, supra note 17, at 1189–90 (describing grassroots efforts to pass local legislation limiting scope of police surveillance powers). See generally End the Surveillance on Black Communities, supra note 238 (calling for the "[d]iversion of public funds used for surveillance to meeting community needs").

242. See Levinson-Waldman & Diaz, supra note 236.

243. Community Control Over Police Surveillance—Guiding Principles, ACLU, https://www.aclu.org/fact-sheet/community-control-over-police-surveillance-guiding-principles [https://perma.cc/6A9K-KGFM] (last visited Jan. 19, 2021).

244. Id.

data and public hearings on the use of any and all surveillance technology.[245]

Importantly, these are only interim steps to the ultimate realization of a future animated by the CRT approach, displacing surveillance-oriented policing entirely. Such a goal is intricately tied to the rejection of "the assumption that millions of people require policing, surveillance, containment, prison," and instead embracing an orientation focused on changing people's material conditions.[246] CRT scholars espouse "a mandate to dismantle the hyper-militaristic, racist functions of the police."[247] Subsumed within this vision is that defunding and abolishing the police would "reduce the racial disparity of police surveillance and arrest policies."[248] By reimagining public safety and investigatory institutions, surveillance-oriented policing gives way to the emancipation by law conceived of by CRT thought leaders.[249]

CONCLUSION

Communities of color, and Black communities in particular, have endured conditions of perpetual surveillance, oppression, and confinement throughout American history. A future free from the vestiges of past oppression requires dismantling apparatuses, such as the expansive surveillance capacity of law enforcement, that exist free of legal limits. The persistent watching, policing, and patrolling of Black youth, activists, and leaders, on the digital plane—in a world increasingly dependent on the digital sphere to facilitate political mobilization—creates a substantial likelihood of harm in myriad forms. These circumstances lay the groundwork for individuals and communities susceptible to these harms to demonstrate injury-in-fact and establish standing. Grounding modern approaches in historical context may resolve issues of standing vis-à-vis challenging government surveillance and clear a pathway not only to remedying the legal harm currently inflicted on Black communities, but for all potential victims of the harms of government surveillance.

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245. Id.

246. Keeanga-Yamahtta Taylor, The Emerging Movement for Police and Prison Abolition, New Yorker (May 7, 2021), https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition [https://perma.cc/742N-R9GT].

247. Kimberlé Crenshaw (@sandylocks), Twitter (Sept. 16, 2020), https://twitter.com/sandylocks/status/1306271685625049089 [https://perma.cc/B7ME-4Q2L].

248. Note, Prosecuting in the Police-less City: Police Abolition's Impact on Local Prosecutors, 134 Harv. L. Rev. 1859, 1867 (2021).

249. See Bell, Who's Afraid of CRT?, supra note 185, at 899.