ABSTRACT

The police killing of George Floyd added fuel to the simmering flames of racial injustice in America following a string of similarly violent executions during a global pandemic that disproportionately ravaged the health and economic security of Black families and communities. The confluence of these painful realities exposed deep vulnerabilities and renewed a reckoning with the long unfulfilled promise of racial equality, inspiring large-scale protests around the country and across the globe. As with prior movements for racial justice, from slavery abolition to the civil rights movement’s demand to end Jim Crow, protests have been met with extreme force, either state-led or state-sanctioned. Historically, and currently, these aggressive responses to frustrate and limit the effectiveness of racial justice movements have been aided by targeted surveillance strategies. Most recently, these surveillance tactics have grown in sophistication and capability, as seen with state and national police forces using an array of advancing technologies that capture biometric data, deploy artificial intelligence (A.I.), and visually track and record personal movements over wide distances and time periods. The ability to surveil and disrupt protests has profound implications for political expression, democratic governance, and the possibilities of achieving racial justice. This Article argues that while the Fourth Amendment is presumed to check the state’s power to surveil, it often facilitates the very practices it should limit. Fourth Amendment jurisprudence on surveillance and the legal norms that have developed around police monitoring present significant barriers to challenges of the contemporary surveillance technologies utilized against Black Lives Matter movements. Given the limits of traditional privacy frameworks to account for the historical realities and threats of racialized surveillance practices, the Article promotes a race justice lens as necessary in understanding and navigating police surveillance technology discourse and fashioning appropriate responses. It concludes that local and federal advocacy, a reckoning with constitutional interpretation, and legislative action may be necessary to counter police power to surveil, including concerted efforts to meet the demands of the movement. Those demands call for shifting the dominant narrative on what safety entails and requires and limiting the reach of and reliance on law enforcement.
I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.¹

INTRODUCTION

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

² Adrienne Green, The Room Where It Happened, N.Y. Mag. (May 25, 2021), https://nymag.com/intelligencer/2021/05/derrick-ingram-nypd-standoff.html [CME: Please add perma as there is no symposium folder to add to].
³ Id.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
This intensification of surveillance using advanced technologies and the corresponding militarized response are indicative of the law enforcement activity at the local, state, and federal level that took place in the wake of George Floyd’s murder and the global uprising. That moment and the ensuing years after have become known as a long overdue period of racial reckoning. This racial reckoning has raised tough questions about racial equality and exposed the disproportionate harms of policing and contact with the criminal legal system. Legal scholars have only now just begun wrestling with the significant impact and legacy of this defining moment on criminal policy, jurisprudence, and legal theory. Examining the reckoning is important for interrogating the relationship between social protest and big data policing. It is also necessary for highlighting the profound sociopolitical implications for an increasingly powerful and voracious policing surveillance apparatus, built upon a foundation of institutionalized discriminatory policing. In previous work I have made historical connections between discriminatory policing and racialized surveillance practices, noting that “race- and class-targeted policing does more than generate animosity or legitimacy gaps between law enforcement and Black communities, it also actively facilitates . . . underdevelopment and subordination . . .”\(^9\) Racializing surveillance is important in the context of the racial reckoning because it acts to determine who is within and without the body politic—limiting the free exercise of rights along racial lines and signaling what social causes are just.

The Fourth Amendment is widely understood as providing some protections against police surveillance. Yet, for decades, criminal law scholars have highlighted a disconnect between these professed protections and the reality of contemporary policing. As Professor Tracey Maclin has noted, “The Fourth Amendment protects rights that Americans like to brag about in the abstract. Too many, however, are reluctant to enforce these rights in the real world.”\(^10\) This disconnect is even more pronounced in the instance of policing Black people, communities, and causes. More recently, scholars have argued that conservative conceptions and applications of unreasonable search and seizure standards have weakened the Fourth Amendment’s protections against unconstitutional


\(^10\) Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 72 (1994).
policing of protests. This Article contributes to this body of literature by examining the rapidly changing technological dimensions of police surveillance of social protest, using the Black Lives Matter demonstrations as the focal point. It argues that Fourth Amendment law and norms are unresponsive to racialized surveillance and further police efforts to intimidate, delegitimize, and frustrate protest movements for racial justice. The Article suggests that in addition to a racial reckoning with policing and prisons, there must be a racial reckoning with criminal legal jurisprudence which 1) challenges historically limited conceptions of privacy, 2) interprets the Fourth Amendment to protect against new modes of policing in an increasingly digitally surveilled and automated society, and 3) recognizes the growing overlap between government and private action, where big data processes take precedence in the emerging datafied state. Ultimately, the Article stresses that such a reckoning cannot be achieved without complementary transformations in law and social policy guided by a racial justice lens informed by Critical Digital Studies. A critical race, tech, and law approach is not only recommended, but also necessary to navigate this fraught terrain.

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

I. PROTESTING WHILE BLACK

"Stay Black and Live" was the sobering yet powerful title and theme of the 2020 Juneteenth celebration organized by members of Austin's Black community.\(^\text{12}\) Held just weeks after the horrifying execution of George Floyd by Minneapolis police officer Derek Chauvin,\(^\text{13}\) on the heels of news of the killings of Breonna Taylor\(^\text{14}\) and Ahmaud Arbery,\(^\text{15}\) and during the early days of a pandemic which had already begun to show signs of disproportionate harms on Black communities,\(^\text{16}\) the need to affirm the right and desire to "Live" was obvious. Yet the call to both "Stay Black" and "Live" hinted at an even more depressing tension. The reality is that, in America, staying Black and alive is more often a leveled demand than a given. But this did not spoil the joys of the day as community members observed film screenings, led art auctions, listened to live music and poetry, and participated in raffles.\(^\text{17}\) Unbeknownst to the participants, however, the Austin Regional Intelligence Center (ARIC) was actively surveilling the event.\(^\text{18}\) ARIC is a part of a nationwide network of fusion centers\(^\text{19}\) developed after 9/11 with the purported aim of gathering and


sharing intelligence with local, state, and federal law enforcement concerning presumed threats to the nation.20

This form of extensive surveillance mirrored a militarized national response by law enforcement agencies in the weeks and months after the video of George Floyd’s killing went viral and people flooded the streets to demand justice.21 Thus, as armored vehicles and law enforcement officers collided with protestors, police utilized a series of surveillance strategies alongside the physical encounters.22 These surveillance practices were deeply racialized and divorced from genuine claims of public safety, as demonstrated by the monitoring of the Austin Juneteenth celebration, which did not involve protests and was held online.23 The racial dimensions were further belied by the sharp contrast in law enforcement response witnessed in the preceding weeks to the gathering of overwhelmingly White protestors at state capitols across the country.24 As the largely White groups of protestors defiantly stood in opposition to COVID-19 face mask mandates and stay-at-home orders, many were equipped with high-powered firearms and bulletproof armor.25 In Michigan, a group of White men even plotted

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20. See id.
kidnapping of Governor Gretchen Whitmer as a means to stop the coronavirus lockdown.\textsuperscript{26} It is no coincidence that these armed demonstrations and open resistance efforts occurred as data emerged showing that COVID-19 was having a particularly harmful impact on Black communities.\textsuperscript{27}

Not only were lockdown protests unencumbered by aggressively militarized shows and uses of force, law enforcement often appeared to be wholly absent. This stark reality was highlighted when state representative Sarah Anthony was escorted to the Michigan capitol under the protection of a collective band of citizen volunteers.\textsuperscript{28} It must be said that in no way is the opposition to public health regulations during a pandemic, or more recently the challenging of presidential election results on overwhelmingly false pretenses, comparable to the righteous demands for justice with unlawful police killings. But when primarily White protestors effectuated an attempted coup at the U.S. Capitol and were initially met with "little resistance,"\textsuperscript{29} just six months after a Black Lives Matter (BLM) protest on the other side of the National Mall was greeted by rows of armed National


Guard troops, the message was clear: aggressive and armed White protesters and insurrectionists are patriots while demonstrators of color, with only symbolic fists to raise, are threats to the country. The sad irony is that these same “patriots,” that supposedly champion “law and order,” threatened the seat of power in this country with such dedicated and unrestrained violence that five people were left dead as a result.

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

31. Tommy Beer, Trump Called BLM Protesters ‘Thugs’ but Capital-Storming Supporters ‘Very Special’, Forbes (Jan. 6, 2020, 6:53 PM) https://www.forbes.com/sites/tommybeer/2021/01/06/trump-called-blm-protesters-thugs-but-capitol-storming-supporters-very-special/?sh=49d3f6a43465 [CME: Please add perma as there is no symposium folder to add to]. Former President Donald Trump articulated this message when describing BLM protestors as “thugs,” “terrorists,” and “anarchists” and Capitol rioters as “very special” and “great patriots.” Id.
36. Id.
real or purported as rhetorical fodder\textsuperscript{38} and “dog whistling,”\textsuperscript{39} were attributed to the BLM movement not only as a way to undermine efforts to hold law enforcement accountable for unlawful killings but also as a means to legitimate aggressive responses, restrictive curfews, disproportionate prosecutions\textsuperscript{40}, and surveillance practices.\textsuperscript{41} Rumors spread with claims that undercover law enforcement and other right-wing infiltrators\textsuperscript{42} were

\begin{footnotesize}


\textsuperscript{39} See generally \textit{Ian Haney López}, \textit{Dog Whistle Politics: How Coded RACIAL APPEALS HAVE Reinvented RACISM and Wrecked the Middle Class} (2014) (explaining the concept of “dog whistling” as racial coding).


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engaging in property destruction with the hopes of tying their actions to BLM, in addition to stories of White protestors with little connection to the larger movement vandalizing property.

Some of these suspicions were proven true. A member of the White supremacist group, Boogaloo Boys, pled guilty to a federal rioting charge in which he admitted to firing thirteen rounds from an assault rifle into a Minneapolis police precinct. One of the Boogaloo Movement’s primary aims is to incite a second civil war. They were not, however, the only group attempting to incite violence toward and within the demonstrations. Body camera footage released over a year after the initial demonstrations shows Minneapolis officers engaging in violent provocation through “hunting” peaceful protestors with rubber bullets. These episodes helped contribute to the dominant narrative that Black demonstrators were dangerous and unjustifiably angry at the law enforcement that showed up to the protests. They also demonstrate


the power of the racialization of crime as a means to accept the use of violence as an instrument for public safety.\textsuperscript{48}

This contemporary leveraging of racial tropes should be unsurprising considering the continuing legacy of the white supremacist aims woven into the very fabric of America, enabling centuries of economic exploitation and inequitable distribution of wealth and resources.\textsuperscript{49} Movements for racial justice challenge the United States’ hubris on the world stage by pulling back the proverbial curtain and exposing the country’s disingenuous commitment to democracy.\textsuperscript{50} Thus, repressive state response to racial justice movements through criminalization and extensive surveillance is nothing new: it has happened in every push for recognition of Black life, from enslavement to Jim Crow\textsuperscript{51} to the current BLM movement in which racial justice activists are labeled “Black Identity Extremists.”\textsuperscript{52} Today’s racial justice movement is subjected to hyper-surveillance practices facilitated through advancing technology.\textsuperscript{53} In particular, at the height of the racial reckoning in

\textsuperscript{48} M\textsc{uhammad}, supra note 34, at 4.

\textsuperscript{49} See, e.g., D\textsc{oigus}, A. B\textsc{lackm\textsc{on}}, S\textsc{lavery By Another Name: The Re-Enslavement Of Black Americans From The Civil War To World War II (2009); F\textsc{our Hundred Souls: A Community History Of African America 1619–2019} (I\textsc{brahim} X. K\textsc{endii} & K\textsc{eisha N. B\textsc{laim} eds., 2021); M\textsc{uhammad}, supra note 34 (2010).

\textsuperscript{50} See, e.g., E\textsc{rik S. M\textsc{cDulle}, B\textsc{lack and Red: Black Liberation, the Cold War, and the Horne Thesis}, 96 J. A\textsc{fr. A\textsc{m. H\textsc{ist}}. 236 (2011). The relationship between the Civil Rights and Black Power movements and the Cold War is a good example of this point. “Locked in a Manichean struggle with the Soviet Union for global supremacy, U.S. cold warriors, he argues, realized that legal or Jim Crow segregation was the “Achilles heel” for Washington’s propaganda campaign to win the “hearts and minds” of people throughout the emerging Third World.” As a result, U.S. government officials brutally suppressed W. E. B. Du Bois, Shirley Graham Du Bois, Claudia Jones, Paul Robeson, William L. Patterson, Ferdinand Smith, and other African American leftists who pursued an anti-racist, anti-imperialist, proletarian internationalist agenda. Simultaneously, the U.S. ruling class acquiesced to civil rights reforms for African Americans and other people of color out of fear that legal racial segregation would invalidate the U.S. claim to being the leader of the “democratic free world.”

\textsuperscript{51} See generally C\textsc{haz A\textsc{met}, R\textsc{ace, S\textsc{urveillance, R\textsc{esistance}, 81 O\textsc{t. St. L\textsc{.} 1103 (2020) (tracing the intersections of race, police surveillance, and resistance).


\textsuperscript{53} See, e.g., A\textsc{nju R. K. S\text{here} & J\text{ason N\text{urse, Police Surveillance of Black Lives Matter Shows the Danger Technology Poses to Democracy, Conversation}} (July 24, 2020, 10:38 AM),
the summer of 2020, BLM protesters’ demands for justice were not met with transformational changes to how we approach safety and policing, but rather spy planes, facial recognition software, and social media monitoring technologies.

### A. Aerial Surveillance

On the night of June 1, 2020, and for several days after, the Federal Bureau of Investigation (FBI) launched its Cessna Citation plane over the skies of Washington, D.C. in an effort to monitor BLM protests. One of a few elite aircrafts of its kind, the FBI spy plane is equipped with military-grade long range cameras built for persistent video surveillance capability during both day and night. Hovering above the city on flight paths that last hours, it can collect vast amounts of visual data and create a detailed picture of movement in public and private locations. Its use is typically reserved for the most serious criminal investigations, yet records indicate that it was not only used to surveil D.C. protests in 2020 but also Freddie Gray protests in Baltimore in 2015. For years, however, the FBI has denied claims that it engages in surveillance of First

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57. Aldhous, supra note 54.

58. Id, Simpson, supra note 54.

59. Aldhous, supra note 54.
Amendment activities and released statements expressing respect for peaceful protests.  
Meanwhile, in Baltimore, identical aerial surveillance was utilized during BLM protests in the weeks after Floyd’s killing.  
By the summer of 2020, the city had commissioned its own privately operated Cessna plane fleet through a partnership funded by philanthropists at the cost of nearly four million dollars. Even more, spy planes were flown by Minnesota State Police over protests in Minneapolis. After being pushed by Freedom of Information Act requests regarding aerial surveillance activities during the Minneapolis protests, state police released limited footage that revealed the use of a Cirrus aircraft with powerful thermal imaging technology. These aerial surveillance activities in the early summer were later revealed to be only a small part of a larger national effort to use aircraft to monitor protestors, which even included the Department of Homeland Security deploying helicopters, planes, and drones in over fifteen cities.

B. Facial Recognition Technologies

Law enforcement’s use of facial recognition technologies during the protests was extensive. In early June 2020, in a now infamous political stunt by former President Donald Trump, U.S. Park Police pushed and pepper-sprayed protestors gathered in Washington, D.C.’s Lafayette Square to make way for a facemask-less Trump to have a Bible-toting


61. Simpson, supra note 54.

62. Id.


64. Id.

65. Kanno-Youngs, supra note 22.

66. Selinger & Cahn, supra note 55; Vincent, supra note 55.
photo op in front of St. John’s Episcopal Church. This episode unfolded while the rest of the country reeled from the lack of an adequate response to COVID-19 and police killings. The aggressive move against protestors was a direct affront to the right to peacefully assemble. Following the incident, a protestor was alleged to have assaulted a police officer but could not be identified. Officers scoured social media to find an image to link to the purported face of the protestor. They ultimately found an image and inputted it into a facial recognition system that identified a match and led officers to make an arrest. Similar uses of the technology took place in Miami to identify a young woman accused of throwing a rock toward law enforcement, in Philadelphia to find a man alleged to have vandalized a police cruiser during a demonstration, in Columbia, South Carolina to arrest more than eighty people for a range of offenses, including curfew violation, and in New York City in the arrest of Derrick Ingram.

Before the racial reckoning of 2020, facial recognition had already been extensively criticized by scholars and advocates for its ineffectiveness at identifying people of color, particularly Black people. By 2020, the calls to reimagine public safety and defund police

68. Id.
69. Id.
70. Id.
71. Id.
75. Vincent, supra note 55.
also included calls to get rid of facial recognition tools, which are emblematic of this country’s deeply biased and defunct criminal legal system. For instance, two of the first documented wrongful arrests and prosecutions of Black men in Michigan and New Jersey were made on the basis of faulty facial recognition identification. Beyond accuracy concerns, however, is the troubling fact that facial recognition tools can only work with access to massive databases. So, the use of facial recognition does not just pose a threat for those accused of an offense at a demonstration, but anyone who attends a protest where law enforcement utilizes the technology because officers constantly capture vast amounts of images and feed them into databases.

C. Social Media Monitoring

Social media has played a tremendous role in the BLM movement, from providing a platform to share digital images of police violence to establishing a supportive space to collectively grieve, celebrate, and build community, to organizing and capturing the attention of companies,
persons, or authorities in efforts to demand change.\textsuperscript{83} Yet, the use of social media platforms also comes with a cost.\textsuperscript{84} Although social media is the primary reason that the video of George Floyd’s murder became viral, galvanizing millions across the globe to take action, it also exposed protesting citizens to greater law enforcement surveillance.\textsuperscript{85} During the protests, social media became a prime resource for law enforcement to mine and collect data on identity, social networks, and location.\textsuperscript{86} This data mining was conducted with the paid assistance of A.I. companies like Dataminr.\textsuperscript{97} Dataminr leveraged its status as an official “Twitter Partner”\textsuperscript{98}—meaning they paid Twitter for access to large streams of data content—to profit off of BLM demonstrations and accompanying racialized fears.\textsuperscript{89} Using algorithms that pulled content supposedly relevant to public safety from Twitter, Dataminr conducted social media monitoring and location tracking of protestors in cities across America and delivered the data to local and state law enforcement.\textsuperscript{90} Police departments, who paid Dataminr a premium for this service, used the information to effectively conduct further surveillance, anticipate meeting locations, and intercept marches.\textsuperscript{91}

Dataminr’s A.I. platform has been pitched as a neutral tool that gathers publicly available data, which it then subjects to a process of scoring, classifying, tagging, and clustering before a final evaluation.\textsuperscript{92} The company has said that upwards of 97 percent of the alerts it provides through its First Alert software are generated solely by A.I. without human

\textsuperscript{83} See, e.g., Sarah J. Jackson, Moya Bailey & Brooke Foucault Welles, #HashtagActivism: Networks of Race and Gender Justice 85–91 (2020).

\textsuperscript{84} Arnett, supra note 10 at 1128.

\textsuperscript{85} Id. at 1129.

\textsuperscript{86} Id. at 1130.

\textsuperscript{87} Dataminr, https://www.dataminr.com/about [last visited Apr. 30, 2021] [https://perma.cc/99N7-PYPJ].


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

\textsuperscript{90} Biddle, supra note 56.

\textsuperscript{91} Id.

involvement. Yet, investigations have revealed that Dataminr relies heavily on biased human input in processing social media content—such as which neighborhoods, activities, and organizations to focus on—in developing the crime alerts it sells to public sector clients. Presumably, these same biases were at play in surveilling social media content related to BLM demonstrations.

D. Equal Surveillance?

Targeted surveillance reifies perceptions of the Black protestor as criminal while signaling the BLM movement as at best worthy of skepticism and at worse deserving of dismissal. Other recent large protest movements and public demonstrations have been spared such intensive surveillance measures. This discrepancy raises the question of whether all protest movements should be subjected to identical levels of police surveillance, for parity or fairness, or whether surveillance should be selectively used for demonstrations deemed most offensive and dangerous. This line of questioning may be particularly interesting to those contemplating the law enforcement failures leading up to the Capitol building riots and asking why the event did not prompt the same level of invasive state surveillance as the BLM movement. While understandable, such questioning overlooks several important points. As previously noted, when considering the aims of the demonstrations, comparing the two is neither fair nor justified. Even more, the central tenet of leveling the surveillance playing field trifles in neoliberal logics of equality at the expense of equity. If one of the cherished values of American freedom is the “right to be let alone,” then it makes more

94. Biddle, supra note 56.
95. See Purnell, supra note 29.
97. Pub. Utilities Comm’n of D.C. v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting) (“Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of
sense that the solution should be for BLM demonstrations, like other movements, to occur unmolested by state disruptive interference.

Furthermore, suggesting that the surveillance state must expand to keep white supremacists in check overlooks the degree to which law enforcement arose as a tool of white supremacy and the fact that it remains deeply captured. In some ways, seeking law enforcement surveillance of white supremacists would ask police to police themselves. One of the reasons the January coup attempt was so successful in allowing hundreds of rioters to destructively stroll through the halls of the Capitol and come within feet of sitting Congress members was because some officers let it happen. Current investigations have led to at least four police officers and three former officers facing federal charges. Additionally, out of 324 arrests made in the Capitol riot thus far, “43 are current or former first responders or military veterans.”

freedom. The right to be let alone is indeed the beginning of all freedom. Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures.”), Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 193 [1890] (“[N]ow the right to life has come to mean the right to enjoy life,— the right to be let alone ….”). See, e.g., Arnett, supra note 9, at 1111–16.


102. Id.
Even some National Guard troops deployed to D.C. after the Capitol attack were relieved of duty after an F.B.I. probe.103

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

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

His concerns emanate from a clear recognition of times where state responses to White violence have harmed Blacks. For example, in the years following the Columbine High School shooting, executed by White students at a primarily White high school, there was a strong push for zero tolerance school policies and greater security measures.106 These policies

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

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

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

https://b3dn.net/advancement/d05cb21814545db07r2im6aqe.pdf
[https://perma.cc/FW97-U0X1L]

107. Id.


109. Id.


II. LIMITS OF FOURTH AMENDMENT PROTECTIONS

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

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


118. Thomas K. Clancy, The Framers’ Intent: John Adams, His Era, and the Fourth Amendment, 86 IND. L.J. 799, 1006–12 (2011) (John Adam’s thinking on rights and liberties that would be reflected in the Fourth Amendment was deeply influenced by cases where the English crown used writs to disrupt the creation and distribution of political organizing and protest pamphlets). The irony here is that America was
In recent years, American media has become obsessed with how those liberties are threatened in countries like China by extensive digital tracking and surveillance measures. Curiously absent from much of the coverage are our struggles to tame the rise of a data hungry surveillance state in our own country. The omission presumes that our legal systems are better equipped to respond to those expanding threats. Yet, questions remain about how effective the Fourth Amendment is in responding to surveillance measures in the digital age, particularly in the instance of racialized surveillance practices.

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

A. Doctrinal Barriers

The Fourth Amendment’s ability to act as an adequate guardian of rights is beleaguered by doctrinal limitations, namely the distinctions between government and private action and public and private locations. Fourth Amendment protections are limited to spaces where there is a reasonable expectation of privacy. Thus, generally, the more

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already beginning as a fundamentally unjust society, as millions were enslaved and there were clear sex and class barriers to political participation.


120. “The United States and other countries use some of the same techniques to track terrorists or drug lords. Chinese cities want to use them to track everybody.” See, e.g., Mozur & Krolik, supra note 1.08 (describing the United States’s hyper focus on China’s surveillance instead of focusing on the former’s own surveillance measures). Alexandra Ma & Katie Canales May, China’s ‘Social Credit’ System Ranks Citizens and Punishes Them with Throttled Internet Speeds and Flight Bans if the Communist Party Deems Them Untrustworthy, BUS. INSIDER (May 9, 2021), https://www.businessinsider.com/china-social-credit-system-punishments-and-rewards-explained-2018-4 [https://perma.cc/USFV-G5XK].

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

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

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

124. *Id.* at 281–85.
125. *Id.*
127. *Ciraolo*, 476 U.S. at 209 (peering into a fenced yard from a private plane flying at 1000 feet); *Riley*, 488 U.S. at 447–48 (peering into a greenhouse from a helicopter flying at 400 feet).
The case law in this area makes it exceedingly hard for BLM protest participants to challenge the constitutionality of being subjected to aerial surveillance and facial recognition while knowingly exposing themselves at public protests and subsequently lacking constitutional standing. Although it may make sense to draw some lines to triggering Fourth Amendment scrutiny in public places, where law enforcement surveillance measures bear on fundamental values of political organizing and expression, such distinctions are less defensible.

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


132. For more on facial recognition technology and the Fourth Amendment, see Andrew Guthrie Ferguson, Facial Recognition and the Fourth Amendment, 105 Minn. L. Rev. 1105 (2021). For more on Fourth Amendment and standing issues, see David Gray, Collective Standing Under the Fourth Amendment, 55 Am. Crim. L. Rev. 77 (2018); Richard B. Kuhns, The Concept of Personal Aggrievement in Fourth Amendment Standing Cases, 65 Iowa L. Rev. 493 (1979); David G. Trager & Eric J. Lobenfeld, The Law of Standing under the Fourth Amendment, 41 Brook. L. Rev. 421 (1974); Eulis Simien Jr., The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches, 41 Am. L. Rev. 487 (1968).

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


down on data collection mandates, with devastating impacts on the ability to organize movements for racial justice.

But all may not be lost. Over the past decade, a series of Fourth Amendment cases show that complete or total surveillance ventures into the area of constitutional unreasonableness. In United States v. Jones, the Court ruled that use of a GPS tracking device on a car without a warrant was a Fourth Amendment violation. The Court distinguished Jones from Knotts by noting that in Knotts the government installed the beeper with consent of the original owner, so there was no intrusion on the owner’s reasonable expectation of privacy, whereas in Jones, the government installed the GPS tracking device without the defendant’s consent. In the D.C. Circuit decision affirmed in Jones, the majority opinion also ruled that the defendant’s expectation of privacy had been violated. However, the Circuit Court ruling also mentions “mosaic theory” as an important frame for understanding why the police surveillance was particularly offensive to the Fourth Amendment. According to the Circuit Court, mosaic theory rests on the notion that “[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene.” This logic was used to distinguish prolonged surveillance from short-term surveillance, in that knowing what a person does repeatedly over time can “reveal more about a person than does any individual trip viewed in isolation.” This was particularly compelling because the defendant in Jones had been surveilled for over a month.

Justice Sotomayor relied on a similar rationale in her concurrence in Jones when she noted that “GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.” She argues that exposure of this sensitive

139. Id. at 408–09.
140. Maynard, 615 F.3d at 558–62 (D.C. Cir. 2010).
141. Id. at 562.
142. Id. (citing CIA v. Sims, 471 U.S. 159, 178 (1985)).
143. Id.
144. Id. at 558.
information may act to "chill[] associational and expressive freedoms."146 This connection between monitoring and political suppression was also espoused in Riley v. California, where the Court ruled that police officers violated the Fourth Amendment when they searched a cell phone without a warrant incident to an arrest.147 Again, the danger presented was the state’s ability to pull large amounts of data spanning vast time periods and reconstruct the most intimate details of a person’s life.148 Most recently in Carpenter v. United States, the Court found unconstitutional law enforcement’s gathering of location data from cell phone service providers without a warrant.149 At the heart of the opinion is a refutation of the idea that there is no reasonable expectation of privacy when citizens knowingly expose their location data to the third-party phone companies.150 The Court describes cell phones as indispensable parts of our daily lives, rendering the choice of whether or not to use them a false one.151

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

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146. Id. at 416.
148. Id. at 394–97.
150. Id. at 2219–20. This was an issue that was presented in Smith v. Maryland, 442 U.S. 735 (1979).
151. Id. at 2220.
society.\textsuperscript{153} People are not more knowingly or voluntarily giving location data to Twitter than they are to AT&T.

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

The importance of such varying interpretations is illustrated in the recent Fourth Circuit Court of Appeals ruling in Leaders of a Beautiful Struggle \textit{v.} Baltimore Police Department.\textsuperscript{155} The federal case was brought by a group of Black citizens and community based organizations challenging Baltimore’s aerial surveillance program.\textsuperscript{156} The plaintiffs argued that the high tech surveillance interfered with their political organizing and community work involving travel on Baltimore streets, and in the case of “cease fire” activity, being near or at the locations of shootings.\textsuperscript{157} They stressed that Baltimore City Police Department’s ability to ascertain the individuals and communities with whom they work could subject members to potential retaliation “based on their vocal dissent or criticism” of policing and law enforcement policy in the city.\textsuperscript{158} Most importantly, their complaint identified the program as a violation of the Fourth Amendment’s protection of the reasonable expectation of privacy in the whole of one’s movement in public.\textsuperscript{159} As they noted, the program “would put into place the most wide-

\begin{thebibliography}{159}
\bibitem{153} See, e.g., \textit{Jackson, Bailey & Foucault Welles, supra} note 83, at xvi-xxxiv.; \textit{Allissa V. Richardson, Bearing Witness While Black: African Americans, Smartphones, \& the New Protest #Journalism 1–20 (2020)}.
\bibitem{156} \textit{Id.} at 333.
\bibitem{158} See Decl. Dayvon Love, \textit{supra} note 157.
\bibitem{159} See Compl. Declaratory \& Injunctive Relief, \textit{supra} note 157.
\end{thebibliography}
reaching surveillance dragnet ever employed in an American city, giving the BPD a virtual, visual time machine whose grasp no person can escape."\(^{160}\)

However, the lower district court disagreed and stated that the surveillance cameras were not as sophisticated as to be unconstitutionally invasive because they only "register[] individuals as a single pixel" and are unable to record at night.\(^{161}\) The Fourth Circuit Court of Appeals subsequently took a different approach, reasoning that "perfect tracking of all individuals" is not required for a Fourth Amendment violation.\(^{162}\) The Court argued that the point of analysis with surveillance that transpires over days and weeks at different intervals, must center on the question of whether it "is enough to yield 'a wealth of detail,' greater than the sum of the individual trips," which even the tracking of unfocused pinpoints during the day could provide.\(^{163}\) These distinct interpretations of the same data and technology evince not only disparate understandings of the power of advancing police surveillance technology, but also beliefs on the degree of collective harm. Historically, such perceptions are further complicated when they concern targets who are overwhelming Black and poor.\(^{164}\) The inconsistency in legal reception of these complaints makes it hard to depend on Fourth Amendment litigation as a viable safeguard. In fact, the *Leaders of a Beautiful Struggle* ruling came months after local organizing had already help usher in a new mayoral administration committed to discontinuing the aerial surveillance program.\(^{165}\)

\(^{160}\) Id.


\(^{162}\) *Leaders of a Beautiful Struggle*, 2 F.4th 330 at 342.

\(^{163}\) Id.

\(^{164}\) *Elizabeth Hinton, An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* (Vera Inst. J. 2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [Md.: Please add perma as there is no symposium folder to add to] (stating that the criminal justice system disproportionately targets black Americans as a result of a history of oppression and discriminatory decision-making dating back to slavery).

B. Reciprocal Tech & Legal Norms

The use of advancing technology by law enforcement also presents significant normative challenges. As a society we have entrenched deep assumptions about the power and promise of technology.166 The belief that technology evolves on its own progressive historical arc, developed outside of political and social contexts for which laws and norms play catch up, is a particularly virulent strain of technological determinism.167 These assumptions allow for the mainstream positioning of technology as fair, neutral, and efficient, and any glitches and “hiccups” along the way as aberrations that can be fixed.168 This acts to obfuscate the reality that technology designers often encode judgements into technical systems and dismiss negative racial outcomes as extraneous to the encoding process.169 Thus the operation of racism in technological development and deployment simultaneously heightens behind the scenes while also outwardly “being buried under layers of digital denial” and amnesia.170

These colorblind logics also manifest in the defense of police surveillance technologies. For instance, when the CEO of Persistent Surveillance Systems, the Ohio-based surveillance company that operated spy planes in Baltimore, was questioned about the company’s monitoring focusing on Black residents, he noted that aerial surveillance is fair and balanced because it can monitor law enforcement as well.171 Additionally, executives at Dataminr have defended their algorithmic monitoring of BLM protests as not amounting to government surveillance, but rather private “ideologically neutral newsgathering.”172 The RAND Corporation, a proponent of the use of predictive analytics in policing,173 has used its media arm to defend the power and efficiency of facial recognition

167. Id. at 40–41.
169. Benjamin, supra note 166, at 11.
170. Id.
172. Biddle, supra note 56.
technology even in the face of race-based deficiencies.\footnote{See Carbado, supra note 33, at 141; Daniel Harawa, Whitewashing the Fourth Amendment, 111 Geo. L.J. __ (2023). [All: Do you have a copy of this on file that you can share with us? – Not one that I have been given permission to share. I could reach out to the author. It seems as if it has not been published or posted just. Is there a way to simply note that author has a copy of a draft and that it is forthcoming?]}

In early June 2020, when companies like IBM, Microsoft, and Amazon were reconsidering their commitments to facial recognition technology in the midst of the racial justice uprising, two Pardee Rand School\footnote{Id. at 1129.} faculty members penned an article arguing that although "there’s little question that … flaws exist…. We do not blind ourselves just because our eyes are imperfect. We learn to calibrate our trust in our vision—or we buy glasses."\footnote{See Terry, 392 U.S. at 21–22.} Here, it is not the technology to blame but rather the power imbalance between citizens and police, which can be accounted for by independent reviews and evaluations.\footnote{Terry v. Ohio, 392 U.S. 1 (1968).} The irony is, however, that this "trust in our vision" significantly impacts our ability to determine what is just.

Similarly, colorblind norms have played a significant role in Fourth Amendment jurisprudence.\footnote{United States v. Mendenhall, 446 U.S. 544 (1980).} These norms manifest in significantly harmful ways in police monitoring and profiling.\footnote{See id.} In cases like Terry v. Ohio\footnote{See id.} and United States v. Mendenhall,\footnote{See id.} the Court began paving a path for the constitutional legitimation of racial surveillance and profiling through race neutral seizure doctrine. In Terry, the Court determined that a stop and frisk was a constitutional detention only necessitating a reasonable suspicion standard.\footnote{See id.} The Court reasoned that the “brief” investigative detention was a necessary exception to the warrant requirement because it is reasonable when weighing the state’s great interest in preventing crime.


\footnote{Thessaloniki Symposium on Computers, Law, and Society, 2023, https://www.pardee.rand.edu/about/rand-partnership.html [CME: Please add perma as there is no symposium folder to add to]}
against the supposed limited nature of intrusion in the momentary stop. 183 What the opinion does not discuss is how the case arose from a White officer interpreting the behavior of two Black men as suspicious. In Mendenhall, a case where the Court further contemplates the parameters of a Fourth Amendment seizure, the opinion puts forth a test that examines whether a reasonable person would have felt that they were free to leave when approached by law enforcement. 184 While the Court acknowledges that race could impact whether a reasonable person would have felt free to walk away from two White male police officers, as the defendant was a young Black woman, it quickly dismisses race as nondeterminative in the case. 185

Unsurprisingly, this jurisprudential trajectory culminated in Whren v. United States, a case in which the defendant argued that he and his passenger were stopped by police simply because they were Black. 186 In Whren, the Court bluntly notes that subjective intentions, even racially motivated ones, “play no role in ordinary, probable-cause Fourth Amendment analysis.” 187 After rendering this decision, the Court has not taken race into account in determining whether a person has been seized. 188 Not only have these cases made way for expressly legalized racial surveillance and profiling, but law and legal regulation have continually influenced and shaped their larger societal normalization. 189 It is in this normality where purportedly race neutral technologies that encode inequity find ways to work hand in hand with supposedly race neutral laws and policies, masking their role as powerful tools for the maintenance of racial hierarchy. 190

III. SURVEILLANCE AND THE FUTURE FOR RACIAL JUSTICE MOVEMENTS

On March 3, 2018, a billboard designed by the artist Alisha Wormsley was erected in the East Liberty neighborhood of Pittsburgh. 191 The

183. See id. at 26–27.
184. See Mendenhall, 446 U.S. at 551–54.
185. Id. at 558.
187. Id. at 813.
188. See Carbado, supra note 33, at 141.
189. Id. at 129.
190. Benjamin, supra note 166, at 35.
billboard’s message was simple: “THERE ARE BLACK PEOPLE IN THE FUTURE.”  They words caused a significant controversy and led to the building owner demanding that it be removed just weeks later. The message was particularly poignant in the East Liberty neighborhood that was once predominantly Black and has experienced significant forced removals and hyper-gentrification. When asked about the project, Wormsley said that the work was in the spirit of Afrofuturism. Afrofuturism challenges mainstream depictions of sci fi futures devoid of Black life not only declaring the presence of Black people but also situating them as beautiful architects and visionary developers of the future. Thus, on one hand, the message can be viewed as a powerful declaration about the fortitude of Black people throughout history to persevere in continual struggles to have their lives valued and seen. And in those efforts one truth has remained clear: that Black communities have always desired to be seen, not watched.

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

A. Challenging Law Enforcement Power

The future of racial justice movements depends on Black life being seen, not monitored. How do we facilitate this? We must impose greater regulation on both law enforcement and private companies that collect, store, and analyze important data. Much of what we have learned over the past few years about the depth of law enforcement surveillance practices

436763/aisha-wormsley-the-last-billboard-pittsburgh-there-are-black-people-in-the-future [https://perma.cc/2WFP-BV96].
192. Id.
193. Id.
194. See id.
195. Id.
has come as a result of fierce Freedom of Information Act battles or outright leaks by anonymous insiders or activist hackers. The BlueLeaks collection, which is a hacked megatrove of data posted by anonymous hackers in the weeks and months after Floyd’s killing, has provided some of the most insightful information on police behavior. However, our ability to know, understand, and govern police conduct should not be dependent on social justice hackers frustrated at police denial and secrecy. Local, state, and federal legislation is needed for more transparency in how law enforcement personnel are currently using surveillance technologies. The public should be aware of what technology is being used, the contracts law enforcement has with private vendors, the type of data being gathered and how they are being used. A group of cities and states across the country have begun implementing similar requirements under Community Control Over Police Surveillance (CCOPS) ordinances. The campaign's principal objective is to pass CCOPS laws that ensure residents, through local city councils, are empowered to decide if and how surveillance technologies are used through a process that maximizes the public's influence over those decisions. The ACLU provides model CCOPS ordinances from which communities may tailor their legislation. Just how effective these ordinances are has yet to be determined. Additionally, there must be frontend regulation before policies and programs are implemented. In Maryland, the state legislature recently enacted a racial equity pilot program. Under the pilot program,


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

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

200. Id.


state legislation introduced in the General Assembly will go through a racial equity audit which will evaluate the potential impact the law would have on racial equity and justice. A similar requirement could be implemented to govern the development of policing policies and laws.

Researchers at Columbia University’s SAFE Lab have referred to police use of social media monitoring as a form of “21st Century Online ‘Stop and Frisk’ Policing.” They suggest centering community involvement in the analysis of online activity and mandating that data collected have a shelf life. Policy analysts at the Brookings Institute similarly call for policy changes in response to the expanded scope of law enforcement surveillance of social media. They promote the requiring of public hearings and local government approval before police engage in social media monitoring, establishing publicly accessible policies governing police use of social media data, banning police from impersonating other people on social media, and enacting regular audit procedures. However, attempts to regulate policing have continually proved daunting. Such efforts to regulate must be viewed as short-term, immediate responses. In order for there to be effective long term impact on law enforcement surveillance of racial justice movements, the policy demands of the movement must be taken seriously. The most powerful policy emanating from the movement has been the call to defund policing. The phrase articulates the idea that given the obvious

203. See Gaskill, supra note 202; see also Wood, supra note 202.
205. See id.
207. Id.
208. See Anna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 COLUM. L. REV. 1781, 1802–14 (2020) (arguing that attempts to regulate police falls into a persistent cycle of “repair, reform, re-legitimize” and highlighting four key efforts that continually prove ineffective: (1) more democracy, (2) more bureaucracy, (3) more procedural justice, and (4) more technology).
harms and dangers of policing, and that much of policing is composed of services outside of investigating or responding to violent offenses, enormous policing budgets are better spent focusing on what truly leads to safe, healthy, thriving communities: healthcare, education, employment, and other social supports. The call to defund has already had some impact, with cities making symbolic reductions in law enforcement budgets, while others have ended policing in schools. The Breathe Act Federal Bill Proposal is a great example of targeted legislation that would shift focus away from perpetual police regulation to investments in new approaches to community safety.

The key will be maintaining the social pressure for further commitments and also ensuring that our conception of “defund” includes removing monies used for the acquisition and deployment of surveillance technologies. Because it will not matter much if police officers are physically removed from schools, and more officers are physically prevented from responding to nonviolent emergency calls, if their virtual eyes are still present. Some may argue that police departments are turning to surveillance technologies as a result of contemporary constraints on budgets that limit the hiring of police officers. However, such an argument requires one to ignore the history of racialized surveillance practices. Every racial justice movement has been subjected to the most advanced state led or sanctioned surveillance technologies of their time, regardless of the expense. This was seen during the Civil Rights Movement with the use of sophisticated wiretaps and other electronic audio devices. It was also seen during slavery with the earliest form of police utilizing

211. See Akbar, supra note 208, at 1784-85; see also id. at 1820.
214. See Arnett, supra note 9, at 1111–16.
"information technologies" of the written slave pass, wanted posters and advertisements for runaway slaves and servants, and organized slave patrols. At each of these points, it was neither budgetary concerns nor crime fighting dictating surveillance technology decisions, but rather social control.

B. Holding Tech Companies Accountable

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

219. See, e.g., Zohoff; supra note 135.
is led in large part by economic interests that look to data as the new oil or gold.222

In many ways, the need to regulate private companies resonates beyond police surveillance. The rapid growth of datafication has put large tech and media companies in the driver’s seat to surveil, collect data, make digital profiles, sort, and discriminate against us, using what we buy, where we live, how and where we get news, credit and employment profiles, and social media content.223 Not only are private companies seeking to influence our daily lives for capital exploits, but they encroach on the very bedrock of a free society: free will and thought.224 While local and state efforts to rein in large technology companies and data brokers are valiant and necessary, there also needs to be strong overarching federal protections.225 The United States stands alone from its European Union counterpart in failing to take serious steps to enhance data protections in the digital age.226 However, we must move toward something akin to a Digital Bill of Rights, with guidelines to enhance enforcement.227

Mandated transparency is crucial for private companies as well. A powerful tool in bringing companies to the bargaining table in the wake of the racial justice uprising has been the ability to shine light on the

contracts and relationships that they have with law enforcement.\textsuperscript{228} Companies like Amazon have only agreed to temporarily halt selling their facial recognition technology once it was exposed in the media and the company was backed into a corner.\textsuperscript{229} Social rebuke has been and will remain a powerful tool alongside other advocacy and organizing efforts, particularly when it is connected to reduced patronage and profit.\textsuperscript{230} However, even this form of “digital discursive accountability praxis” has been demonized and written off as “cancel culture.”\textsuperscript{231} Yet, “canceling” originates from Black oral tradition as a powerful expression of agency.\textsuperscript{232} The ability to cancel through digital amplification and organizing challenges hierarchies of power and privilege.\textsuperscript{233} Thus, when powerful elites\textsuperscript{234} and corporations bemoan the rise of “cancel culture,” they wield the term as a tool to “marginalize[] people who have adapted earlier resistance strategies for effectiveness in the digital space.”\textsuperscript{235} Despite this, “cancelling” seems poised to remain a valuable strategy to collectively share harms and push for accountability, even while

\textsuperscript{228} See Birnbaum & Lapowsky, supra note 217.  
\textsuperscript{230} See Allyn, supra note 229; Birnbaum & Lapowsky, supra note 217.  
\textsuperscript{231} Meredith D. Clark, DRAG THEM: A Brief Etymology of So-Called “Cancel Culture,” 5 COMM. & PUB. 88, 88 (2020).  
\textsuperscript{232} See id.  
\textsuperscript{233} See id. at 90–91.  
\textsuperscript{234} One of “cancel culture’s” most vocal opponents, Elon Musk, has purchased and taken over Twitter. Musk has stated that one of his goals is to promote free speech. It is no coincidence that use of racial slurs and hate speech increased dramatically after his takeover. See Karen Ruiz and Sophie Tanno, “More Fun, Less Sh*t! Elon Musk Calls For The End Of ‘Cancel Culture’ After Grimes’ Mother Slams Him For Tweeting ‘Right Wing Bulls**t’,” Daily Mail (May 19, 2020), https://www.dailymail.co.uk/news/article-8337539/Elon-Musk-tweets-cancel-culture-amid-Twitter-feud-Grimes-mom.html [CME: Please add perma as there is no symposium folder to add to]; Kate Conger and Lauren Hirsch, Elon Musk Completes $44 Billion Deal to Own Twitter, N.Y. TIMES (Oct. 27, 2022), https://www.nytimes.com/2022/10/27/technology/elon-musk-twitter-deal-complete.html [CME: Please add perma as there is no symposium folder to add to]; Joshua Zcit and Sam Tabahriti, Use of N-word on Twitter Jumped by Almost 500% After Elon Musk’s Takeover as Trolls Test Limits on Free Speech, Report Says, BUS. INSIDER (Oct. 2022), https://www.businessinsider.com/elon-musk-twitter-takeover-sparked-n-word-use-jump-2022-10 [CME: Please add perma as there is no symposium folder to add to].  
\textsuperscript{235} Id. at 99.
advocates of using social media for this purpose remain cognizant that it is not always enough by itself to transform those power relations.

C. Legislative Avenues to Protect Digital Privacy

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


237. Id.

238. See e.g. California Consumer Privacy Rights Act (CPRA) Proposition 24, Sec. 2(H), “[Consumers need stronger laws to place them on a more equal footing when negotiating with businesses in order to protect their rights. Consumers should be entitled to a clear explanation of the uses of their personal information, including how it is used for advertising, and to control, correct, or delete it ...]”; Colorado Privacy Act, 6-1-102(2)(c)(Y), https://vigcdn.sos.ca.gov/2020/general/pdf/top1-prop24.pdf, “[... Colorado will among the States that empower consumers to protect their privacy and require companies to be responsible custodians of data ...]”; The Illinois Biometric Information Privacy Act, 740 ILCS 14/5 (g), “[The public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information ...]; Virginia Consumer Data Protection Act, § 59.1-504(A) & (C), “[The Attorney General shall have exclusive authority to enforce the provisions of this chapter ...] ... the Attorney General may initiate an action in the name of the Commonwealth and may seek an injunction to restrain any violations of this chapter and civil penalties of up to $7,500 for each violation under this chapter ...].” [CME: Can you assist with this footnote? I was having a lot of trouble]
However, many of the bills emerging out of this state-led digital privacy movement have been criticized for being too weak. For example, Utah’s Consumer Privacy Act has been criticized for lacking a private right of action for citizens who want to sue tech companies, and Connecticut’s Data Privacy Act has been attacked for lacking “the necessary rulemaking authority, private right of action, strong enforcement, and data minimization requirements” needed to respond to unchecked data capitalism. These weaknesses have been connected to lobbying efforts by tech companies to water down the substance and strength of new privacy laws. Indeed, even current efforts at the federal level to pass the American Data Privacy and Protection Act are seen as attempts to preempt stronger privacy bills such as California’s Consumer Privacy Act. Thus, questions remain about how effective these legislative acts


244. Cristiano Lima, Federal Privacy Bill Trumps California’s Law, Advocates Say, WASH. POST (July 15, 2022, 8:58 AM)
may be and, more importantly, whether they will act as a baseline floor on which greater protections in the future could build, or as a ceiling limiting more aggressive protections.

Furthermore, state and federal privacy bills may be limited in their ability to respond to racially disparate harms without the guidance of racial equity goals or the inclusion of language directly addressing the impacts of race. In *Dismantling the "Black Opticon": Privacy, Race, Equity, and Online Data-Protection Reform*, Professor Anita Allen argues that with data privacy, Black Americans suffer from three compounding vulnerabilities that constitute a “Black Opticon”: oversurveillance, exclusion, and predation. Allen stresses that these issues may only be addressed through policymaking that is “explicitly antiracist.” In using a racial lens to evaluate Virginia’s Consumer Data Protection Act, she concludes that “it is unlikely that the VCDPA on its own will do much to help dismantle the Black Opticon.” Indeed, current and future legislation would be of little benefit to challenges against the oversurveillance of movements for racial justice like BLM without acknowledging and targeting racialized surveillance practices. Such acknowledgement and focus is particularly needed to end the legislative shielding of police practices. Every privacy bill that has passed in recent years encompasses carve outs for law enforcement purposes, likely protecting the types of excessive police surveillance tactics witnessed in 2020.


246. Id. at 911.
247. Id. at 943.
248. See e.g. California Privacy Rights Act, Sec. 15(a)(2) (“Law enforcement agencies, including police and sheriff’s departments, may direct a business pursuant to a law enforcement agency approved investigation with an active case number not to delete a consumer’s personal information, and upon receipt of that direction, a business shall not delete the personal information for 90 days . . . “); Colorado 6-1-1304 (3)(a)(III)(“The obligations imposed on controllers or processors under this Part 13 do not . . . restrict a controller’s or processor’s ability to . . . cooperate with law enforcement agencies concerning conduct or activity that the controller or processor reasonably and in good faith believes may violate federal, state, or local law . . . “); Utah Consumer Privacy Act 13-61-304 (1)(c) (“The requirements described in this chapter do not restrict a controller’s or processor’s ability to . . . cooperate with a law enforcement agency concerning activity that the controller or processor reasonably and in good faith believes may violate federal, state, or local law . . . “).
D. Doctrinal Transformations

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

believes may violate federal, state, or local laws, rules, or regulations...”]; Washington, Biometric Identifiers, RCW 19.375.040 (3) “[Nothing in this chapter expands or limits the authority of a law enforcement officer acting within the scope of his or her authority in executing lawful searches and seizures.”]; Texas, Biometric Identifiers, Sec. 503.001 (c)(1)(d) “[A person who possesses a biometric identifier of an individual that is captured for a commercial purpose... may not sell, lease, or otherwise disclose the biometric identifier to another person unless... disclosure is made before a law enforcement agency for a law enforcement purpose in response to a warrant...”].

[CME: Can you assist with this footnote? I was having a lot of trouble.]

249. See Solomon Oliver Jr., Race and Policing: Some Thoughts and Suggestions for Reform, 89 Fordham L. Rev. 2597, 2598–99 (2021) (discussing how, in the aftermath of the Floyd killing, the “Black Lives Matter” movement sparked a calling for police reform by a myriad of individuals to achieve racial equity and inclusion in society); T. Andrew Brown, Imagining a Bright Future Where Everyone Is Treated Equally, 92 N.Y. St. B.J. 8, 10 (2020) (“The recent killing of George Floyd and the growing access to video has expanded the conversation and prioritized the need for action. Video capturing police mistreatment of blacks, and the extent that it is portrayed in social media, makes racial injustice hard to dismiss.”).

250. See Irene Oritsewuyinmi Joe, Probable Cause and Performing “For the People”, 70 Duke L.J. 139, 138 (2021) (“Most clearly, the difference in outcome and public perceptions of the criminal investigations into the deaths of Breonna Taylor and George Floyd brings to the forefront the extent to which the grand jury process allows a prosecutor to “perform” the prosecutorial function without actually engaging in what the public would consider a good-faith examination of the evidence”); see also Olywyn Conway, Are There Stories Prosecutors Shouldn’t Tell?: The Duty to Avoid Racialized Trial Narratives, 98 Denver L. Rev. 457 (2021) (discussing how prosecutors can advance the cause of racial justice by eliminating racialized trial narratives that perpetuate racial stereotypes and stock stories).

251. See Yu Du, Racial Bias Still Exists in Criminal Justice System? A Review of Recent Empirical Research, 37 Touro L. Rev. 79 (2021) (examining a research study among 133 judges, revealing that judges are susceptible to implicit racial bias which affects their judgments. The findings suggest that white judges have pro-white bias, while Black judges were found to not have a clear preference); see also Briana M. Clark, Social Dominance Orientation: Detecting Racial Bias in Prospective Jurors, 39 Yale L. & Pol’y Rev. 614, 624 (2021) (“Racial bias does not only impact a jurors’ view of Black defendants but also their view of victims of different races.”).

252. Amy Forliti, 8 Minority Jail Officers Allegedly Kept Off Chauvin’s Guard, ABC News (Feb. 9, 2021, 4:40 PM), https://abcnews.go.com/US/wireStory/minority-jail-officers-allegedly-off-chauvins-guard-75787517 [https://perma.cc/L9AN-NA8S] (reporting allegations that correction officers at Ramsey County Adult Detention Center were segregated and prevented from performing their occupational duties around Derek
toward racial equity. This renewed attention has led to moves to ban chokeholds, and qualified immunity for law enforcement officers, require special prosecutors in cases of police killings, and discontinue the use of no-knock warrants, among other policy and legislative actions. Yet, this reckoning with the criminal legal system will ultimately be ineffective without radical challenge to the constitutional frameworks that give license to the stalking, profiling, and surveilling of Black citizens.

In The Second Founding and the First Amendment, Professor William Carter, Jr. argues that with the passing of the Reconstruction amendments, the Thirteenth, Fourteenth, and Fifteenth amendments, the United States

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253. See Paul Butler, The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform, 104 Geo. L.J. 1419, 1425 (2016) ("Successful reform efforts substantially improve community perceptions about the police without substantially improving police practices.").


256. Kate Levine, Police Prosecutions and Punitive Instincts, 98 WASH. U. L. REV. 997, 1012 (2021) ("... a new wave of ‘progressive prosecutors’ has swept into offices throughout the country. Many of these new prosecutors ran on a promise to bring ‘accountability’ to police by aggressively charging and prosecuting the ‘bad apples’ who harm civilians or by promising special prosecutors in all police violence cases.").


embarked on a “Second Founding.” He notes that this Second Founding is often credited with aiming to bestow citizenship and remediate the lingering effects of bondage for those who were formally enslaved. Carter stresses, however, that the post Civil War constitutional transformation also responded to “the systemic legacy of the system of enslavement upon our constitutional order,” mandating a new constitutional interpretation for all of the amendments. That new interpretation was necessitated by the inescapable paradox of the drafting of a constitution that purportedly committed to ideals of liberty and freedom while also legitimizing a slaveocracy. Accordingly, he turns to the voices of those who were enslaved for valuable insight into what that new interpretation should involve.

While Carter focuses on the First Amendment, I have made similar arguments in previous work with respect to the Fourth Amendment. The experiences of people who were formerly enslaved provide critical understandings of how our laws should be interpreted to best protect privacy and regulate surveillance practices that act to maintain racial subordination. Thus, the Second Founding has meaning for the Fourth Amendment as well, as it has never reckoned with the legacy of racialized surveillance. This is evident in the hyper focus on demonstrating state action and reasonable expectation of privacy, particularly in public locations. While the constitutional Framers were concerned about the British monarchy issuing writs of assistance, enslaved and free Black people were concerned about the threat posed by the Framers, who either held people in bondage, were complicit in the strengthening of enslavement, or turned a blind eye to the many horrors of racial subjugation. It was the

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260. See id.
261. Id.
262. See id. at 1066.
263. See Arnett, supra note 9, at 1140.
264. Id.
265. See id.
individual citizen that proved to be just as dangerous as the state. Additionally, those who suffered the pains of plantation life and other forms of racial terror like lynching in the years after the ending of enslavement understood privacy quite differently than the original Framers. To not have any control over one’s body, to be subjected to the indignities of nudity and pseudo-scientific experimentation, and to be required to have documentation to appear in public are simply inconceivable realities for the Framers to have ever fully understood, let alone incorporated into the Fourth Amendment.

The current racial uprising and reckoning harkens to that perpetually unpaid constitutional debt of the Second Founding. The use of surveillance measures to disrupt movements for racial justice must be understood as a legacy of enslavement for which the Fourth Amendment has to be able to respond. This will require racial justice-informed interpretations that govern what actors and locations are subject to Fourth Amendment protections. Expanding Fourth Amendment scrutiny beyond state action in the instance where surveillance practices of private citizens or companies

("Throughout Jefferson’s plantation records there runs a thread of indicators—some direct, some oblique, some euphemistic—that the Monticello machine operated on carefully calibrated brutality.")

267. David H. Gans, We Do Not Want to Be Hunted, 11 Colum. J. Race & L. 239, 243–45 (2021) ("...in the wake of a bloody civil war fought over slavery, the Fourteenth Amendment demanded that states respect Fourth Amendment rights and ensure equal protection of the laws for all persons, vindicating the newly freed slaves’ demand that ‘now we are free we do not want to be hunted,’ we want to be ‘treated like human beings.’"); Jeffrey J. Polakow, Rape As A Badge Of Slavery: The Legal History Of, And Remedies For, Prosecutorial Race-Of-Victim Charging Disparities, 7 Nev. L.J. 1, 8 (2006) ("Raping a Black woman was not a crime for the majority of this Nation’s history... The Court reasoned that slaves were not protected by the common law or statutes because they were under the legal dominion of their masters as required by their status as property.").

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

269. See Browne, supra note 216, at 52.
270. See Arnett, supra note 9, at 1139–41.
bear on efforts to redress racial violence is an example of the bold new direction that such interpretations would call for. This would also have the benefit of making the Fourth Amendment more responsive to the current challenges of the digital age, where technology companies serve and partner with government entities in ways that muddy the question of state action.271

Finally, reading the Fourth Amendment as providing great protections from targeted surveillance that impacts racial equity, even with open movements in public, would be in line with new interpretations aimed at addressing the legacies of enslavement. This would require the educating, training, and placement of criminal legal system actors at the highest levels willing to push a new constitutional era alongside the work of local communities. This moment demands new vision and efforts that break from the mold of old beaten, ineffectual pathways.272 They will be necessary to meet the enormous task of achieving anything close to resembling racial justice in this country.

CONCLUSION

It did not take long for the street murals brightly painted in vivid colors in city centers during the summer of 2020 to fade.273 The bold art that spelled ”Black Lives Matter” along prominent boulevards has all but vanished in places like Kansas City, Charlotte, Brooklyn, and Tulsa.274 The erasure of these symbolic gestures has corresponded with what some scholars have referred to as “Whitelash,”275 a fierce and swift response by

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


274. Id.

White Americans to hold onto power when faced with greater demands for diversity and growing calls for racial equity.276 Only a few years removed from George Floyd’s killing, much of the hope and promise of the moment has grown stale. While the call to move more resources from policing to social services resulted in some temporary shifts in local budgets, many major cities have returned to increasing policing budgets at even higher rates.277 For example, law enforcement funding in Los Angeles has increased by 250 million since 2019.278 Furthermore, the number of people killed by police remains relatively steady.279 During the first seven months of 2022, police killed more people than they have in any other recorded year.280 Even efforts to rein in police surveillance measures have proved fleeting. At the height of the racial reckoning in 2020, the city of New Orleans banned the use of facial recognition software.281 Yet, by the summer of 2022, the city council voted to lift the ban while preparing for the rollout of a more expansive surveillance network across the city.282 Although it would be misguided to claim that there were no meaningful gains as a result of the uprising, it is clear that continual relief from even the most basic grievances levied, during the largest protest movement witnessed in a generation, is not a guarantee.

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