

# Race, Surveillance, Resistance

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*The increasing capability of surveillance technology in the hands of law enforcement is radically changing the power, size, and depth of the surveillance state. More daily activities are being captured and scrutinized, larger quantities of personal and biometric data are being extracted and analyzed, in what is becoming a deeply intensified and pervasive surveillance society. This reality is particularly troubling for Black communities, as they shoulder a disproportionate share of the burden and harm associated with these powerful surveillance measures, at a time when traditional mechanisms for accountability have grown weaker. These harms include the maintenance of legacies of state sponsored, racialized surveillance that uphold systemic criminalization, dispossession, and exploitation of Black communities. This Article highlights Baltimore City, Maryland as an example of an urban area facing extraordinary challenges posed by an expanding police surveillance apparatus, fueled in part by corruption and limited channels of formal constraint. As Black residents experience the creep of total surveillance and its attendant aims of control and subordination, the need for avenues of effective resistance becomes apparent. This Article argues that these communities may draw hope and inspiration from another period in American history where Black people were subjected to seemingly complete surveillance with limited legal recourse: chattel slavery. People enslaved in or passing through Maryland used a variety of means to resist surveillance practices, demonstrating creativity, bravery, and resourcefulness as they escaped to freedom on the Underground Railroad. Internalizing and building upon these lessons of agency and resistance will be critical for Black communities in Baltimore and other similarly situated places across America that are seeking relief from the repressive effects of pervasive police surveillance.*

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*“Freeing yourself was one thing; claiming ownership of that freed self was another.”*<sup>1</sup>

## I. INTRODUCTION

From January through August of 2016, a small Cessna plane retrofitted with repurposed military-grade wide-angle cameras flew the skies above Baltimore, up to ten hours at a time, recording everything on the streets below within an area of roughly thirty square miles.<sup>2</sup> The Baltimore City Police Department, unbeknownst to the public and local governance, had contracted with a private surveillance company with the help of generous donations from a Texas billionaire couple, John and Laura Arnold.<sup>3</sup> The images and data captured by the company during these flights were stored and often provided to law enforcement with the purported aim of assisting in the investigation and prosecution of crimes.<sup>4</sup> For many other major cities, such secretive actions by law enforcement would seem brazen, even strange. Yet, for Baltimore, both the experimentation with advancing surveillance technology and the deep commitment to engage in policing tactics without the support of the citizenry, particularly the Black community, have been longstanding.<sup>5</sup> In fact, Baltimore

<sup>1</sup> TONI MORRISON, *BELOVED* 95 (1987).

<sup>2</sup> Monte Reel, *Secret Cameras Record Baltimore’s Every Move from Above*, BLOOMBERG BUSINESSWEEK (Aug. 23, 2016), <https://www.bloomberg.com/features/2016-baltimore-secret-surveillance/> [<https://perma.cc/LNR9-RV9U>].

<sup>3</sup> Doug Donovan, *Billionaire Donors Laura and John Arnold Support Far More in Maryland than Police Surveillance*, BALTIMORE SUN (Aug. 26, 2016), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-arnolds-20160826-story.html> (on file with the *Ohio State Law Journal*).

<sup>4</sup> Conor Friedersdorf, *The Sneaky Program to Spy on Baltimore from Above*, ATLANTIC (Aug. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/08/the-sneaky-program-to-spy-on-baltimore-from-above/497588/> [<https://perma.cc/Y88W-3CKM>]; Kevin Rector & Luke Broadwater, *Report of Secret Aerial Surveillance by Baltimore Police Prompts Questions, Outrage*, BALTIMORE SUN (Aug. 24, 2016), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-secret-surveillance-20160824-story.html> (on file with the *Ohio State Law Journal*).

<sup>5</sup> See 1966-1976: *After the Unrest*, BALTIMORE C.R. HERITAGE, <https://baltimoreheritage.github.io/civil-rights-heritage/1966-1976/> [<https://perma.cc/J2FM-E7M4>] [hereinafter *After the Unrest*]; Michael Olesker, *Pomerleau Took Ill-Gotten Secrets to the Grave*, BALTIMORE SUN (Jan. 21, 1992), <https://www.baltimoresun.com/news/bs-xpm-1992-01-21-1992021065-story.html> [<https://perma.cc/Y479-5A8K>].

has been a leading experimentation lab for police surveillance technologies, being one of the first cities to deploy video, digital, and aerial surveillance measures.<sup>6</sup>

The widespread use of these tactics has been fueled in part by lax accountability measures<sup>7</sup> over law enforcement and significant levels of corruption, paving the way for Baltimore police to engage in practices that frustrate constitutional rights and liberties.<sup>8</sup> Even more, recent advances in surveillance technology are increasing the power of police, at the exact time that avenues for regulating police misconduct and overreach are becoming weaker.<sup>9</sup> These realities in policing have caused great harm to the city's effort to move forward in tackling many other related problems, like the struggling housing and labor markets, and have laid the foundation for unconstitutional, racialized policing to continue into the foreseeable future.<sup>10</sup>

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<sup>6</sup> Benjamin Powers, *Eyes Over Baltimore: How Police Use Military Technology to Secretly Track You*, ROLLING STONE (Jan. 6, 2017), <https://www.rollingstone.com/culture/culture-features/eyes-over-baltimore-how-police-use-military-technology-to-secretly-track-you-126885/> (on file with the *Ohio State Law Journal*).

<sup>7</sup> Kevin Rector, *Supreme Court Denies Baltimore Officers' Appeal in Case Against Marilyn Mosby*, BALT. SUN (Nov. 13, 2018), <https://www.baltimoresun.com/news/crime/bs-md-ci-scotus-denial-20181113-story.html> (on file with the *Ohio State Law Journal*).

<sup>8</sup> Monique Dixon, Commentary, *NAACP Legal Defense Fund: Spy Plane Planned for Baltimore Is Unconstitutional*, BALT. SUN (Apr. 23, 2020), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0424-baltimore-surveillance-plane-naacp-legal-20200423-ix4bvm2r2jctbjpj7udk5ufhz4-story.html> (on file with the *Ohio State Law Journal*).

<sup>9</sup> Jillian Aldebron, Roland N. Patterson, Jr., & Marvin L. Cheatham, Sr., Commentary, *Baltimore Stifles Review Board that Investigates Police Misconduct Cases*, BALT. SUN (Mar. 13, 2020), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0315-baltimore-civilian-police-board-oversight-20200313-qkmsqmsuqbbrdb66goepzs6p5a-story.html> (on file with the *Ohio State Law Journal*); Jessica Anderson, *A Member of the Baltimore Police Civilian Review Board Quits, Citing 'Ineffective' and 'Opaque' System*, BALT. SUN (Feb. 25, 2020), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-crb-member-resigns-20200225-yrdw7mdz5fadlio4s3c3zf5uty-story.html> (on file with the *Ohio State Law Journal*); Josh Girskey, Taylor Romine, & Jean Casarez, *Baltimore Prosecutor Seeks to Throw out Nearly 800 Criminal Convictions*, CNN (Oct. 4, 2019), <https://www.cnn.com/2019/10/04/us/baltimore-police-corruption-cases/index.html> [<https://perma.cc/9REZ-3WNY>]; Powers, *supra* note 6; see Christine Boynton, *BPD Accused of Failing to Forward Complaints to the Civilian Review Board*, FOX 45 NEWS (Aug. 16, 2016), <https://www.fox45.com/news/local/bpd-accused-of-failing-to-forward-complaints-to-the-civilian-review-board> [<https://perma.cc/W4H2-FJZ5>]; J.F. Meils, *Civilian Review Board Says It Has Little Power to Police the Police*, CAP. NEWS SERV., <https://cnsmaryland.org/baltimore-civilian/> [<https://perma.cc/WUU5-KXQY>]; Barry Simms, *Civilian Review Board Suing Baltimore Police Department*, WBALTV11 (Nov. 5, 2018), <https://www.wbalte.com/article/civilian-review-board-suing-baltimore-police-department/24671602> [<https://perma.cc/PJ9F-TAWY>]; Timothy Williams, *In Baltimore, Brazen Officers Took Every Chance to Rob and Cheat*, N.Y. TIMES (Feb. 6, 2018), <https://www.nytimes.com/2018/02/06/us/baltimore-police-corruption.html> [<https://perma.cc/9VNL-K6LS>].

<sup>10</sup> Del Quentin Wilber & Kevin Rector, *Justice Department Report: Baltimore Police Routinely Violated Civil Rights*, BALT. SUN (Aug. 9, 2016), <https://www.baltimoresun.com/>

The challenges faced by Baltimore are representative of many urban areas across America. It stands as an example of how race- and class-targeted policing does more than generate animosity or legitimacy gaps between law enforcement and Black communities,<sup>11</sup> it also actively facilitates the continued underdevelopment and subordination of these neighborhoods. Surveillance tactics, as tools of control,<sup>12</sup> have been instrumental in this process. Yet, throughout history, with each iteration of racialized surveillance,<sup>13</sup> Black communities have forged channels of resistance when legal systems have not only failed them but have been complicit in the maintenance of racial hierarchy. One of the most daring and precarious periods of surveillance resistance was during slavery, when people who were enslaved took grave risks and made sacrifices to escape via the Underground Railroad. Their stories illuminate courage, perseverance, and resolve in ways that should be inspiring today for community activists, advocacy organizations, and scholars wrestling with the reality of deeply intensified state surveillance. While some legal scholarship has examined the role of lawyers in formal resistance attempts during slavery, there is a glaring gap in scholarship that recognizes the agency of those enslaved in their own liberation, whose organized efforts laid the foundation for the ultimate dismantling of chattel slavery.<sup>14</sup> Understanding the historical trajectory of surveillance resistance through these narratives is important today for both community organizing against racialized surveillance practices and informing legal and policy responses.

This Article contextualizes some of these narratives with a particular focus on the intersection of race, surveillance, and resistance, as a means through which to provide useful lessons for current advocacy in cities like Baltimore.

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maryland/baltimore-city/bs-md-ci-doj-report-20160809-story.html (on file with the *Ohio State Law Journal*).

<sup>11</sup> This has been the focus of those who promote the concept of “procedural justice.” At the center of this is the idea that one of the primary barriers and concerns with policing is legitimacy and fairness in interactions between law enforcement and community members, particularly people of color. Greater public safety is presented as achievable through more polite and respectful interactions and treating people with dignity. See U.S. DEP’T OF JUSTICE, COMMUNITY ORIENTED TRUST AND JUSTICE BRIEFS: PROCEDURAL JUSTICE (2016), <https://cops.usdoj.gov/RIC/Publications/cops-w0795-pub.pdf> [<https://perma.cc/9ZCG-GDY9>]. However, the true concern is the role that policing plays in upholding the racial status quo and legacies of racial subordination. See generally Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020).

<sup>12</sup> Christian Fuchs, Commentary, *Surveillance and Critical Theory*, 3 MEDIA & COMM. 6, 6–8 (2015).

<sup>13</sup> Simone Browne describes racializing surveillance as “a technology of social control where surveillance practices, policies, and performances concern the production of norms pertaining to race and exercise a ‘power to define what is in or out of place,’” that also acts to “reify boundaries, borders, and bodies along racial lines . . . where the outcome is often discriminatory treatment of those who are negatively racialized by such surveillance.” SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 16 (2015).

<sup>14</sup> See Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1901–04 (2019).

Part II situates the Baltimore Police Department as an innovator and leader in surveillance measures primarily targeted at poor Black communities. Part III highlights how weak accountability structures over policing in Baltimore have led to corruption and wide latitude in the deployment of surveillance technologies. Part IV discusses the role of community-led anti-surveillance strategies when formal pathways of resistance prove insufficient. It highlights the narratives of enslaved persons on the Underground Railroad as a call to reimagine what effective anti-surveillance measures could look like in the age of expansive digital surveillance.

## II. POLICE SURVEILLANCE EPICENTER

### A. Contemporary Surveillance

The city of Baltimore is often referred to as the “southernmost northern city” and the “northernmost southern city,”<sup>15</sup> depending upon what side of the Mason Dixon one finds herself. It certainly has unique and distinct characteristics, both as one of the oldest cities in the United States and the city with the most designated historical buildings.<sup>16</sup> Yet, despite the nuances of its history, like many urban cities across the country the city has been plagued by a number of contemporary issues, such as the shrinkage of affordable housing stock,<sup>17</sup> an underfunded school system,<sup>18</sup> significant levels of “white flight” and undervaluing of property,<sup>19</sup> poor health outcomes,<sup>20</sup> limited employment

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<sup>15</sup> SCIENCE FOR THE SUSTAINABLE CITY: EMPIRICAL INSIGHTS FROM THE BALTIMORE SCHOOL OF URBAN ECOLOGY 51 (Stewart T. A. Pickett et al. eds., 2019).

<sup>16</sup> The city of Baltimore has over one-third of its buildings recognized on the National Register of Historic Places. See *Factsheets*, PRESERVATION LEADERSHIP F., <https://forum.savingplaces.org/act/research-policy-lab/atlas/atlas-factsheet> [<https://perma.cc/2289-D8CR>] (click on Baltimore).

<sup>17</sup> Balt. Sun Editorial Bd., *Forget the Luxury Apartments, Baltimore Needs More Affordable Housing*, BALT. SUN (Nov. 15, 2019), <https://www.baltimoresun.com/opinion/editorial/bs-ed-1117-affordable-housing-20191115-5ksbeujgwranjbehs552hdqzt4-story.html> (on file with the *Ohio State Law Journal*).

<sup>18</sup> Ajmel Quereshi & Cara McClellan, Commentary, *State Continues to Ignore Court Order to Properly Fund Baltimore Schools*, BALT. SUN (Feb. 20, 2020), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0221-baltimore-school-underfunding-court-20200220-ajza7idpkzfodfudf44icwlw4y-story.html> (on file with the *Ohio State Law Journal*).

<sup>19</sup> Nick Wallace, *The Most Undervalued Cities in America*, CBS NEWS (Apr. 26, 2016), <https://www.cbsnews.com/media/the-most-undervalued-cities-in-america/> [<https://perma.cc/GP8G-73PS>]; see David McFadden, *Baltimore Trying to Stem Decades-Long Disappearing Act*, AP (Dec. 29, 2018), <https://apnews.com/c852e9751cd744b7a27fa9333c14d1a0> (on file with the *Ohio State Law Journal*).

<sup>20</sup> Meredith Cohn, *Baltimore Has Some of the Country's Worst Health Outcomes, Disparities*, BALT. SUN (Sept. 3, 2016), <https://www.baltimoresun.com/news/investigations/bs-md-sun-investigates-disparities-20160903-story.html> (on file with the *Ohio State Law Journal*).

opportunities,<sup>21</sup> restricted public services,<sup>22</sup> and a destructive criminal justice system.<sup>23</sup> With its deep blue-collar-worker roots, the city was hit hard by the post-industrial decline in factory work, as the shuttered Bethlehem Steel Mill was one of the largest employers through most of the 20<sup>th</sup> century.<sup>24</sup> Today the leading industry is medicine, with Johns Hopkins Health System and University being the largest employers.<sup>25</sup> The war on drugs has been equally damaging on the city, as specific segments of the city were targeted with heavy police deployment and surveillance zones, in response to perceived threats and *high-crime areas*.<sup>26</sup> Extensive surveillance has been a leading strategy touted by law enforcement as a way to fight crime and position the city on the cutting edge of policing innovation.<sup>27</sup> Baltimore Police Commissioner Michael Harrison has proudly boasted about the use of aerial surveillance, noting that “[Baltimore] will be the first American city to use this technology in an attempt to solve and deter violent crime.”<sup>28</sup>

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<sup>21</sup> Mara Braverman & Martha Holleman, Commentary, *Baltimore's Unemployment Problem*, BALT. SUN (Jan. 15, 2020), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0115-baltimore-unemployment-20200115-urcqmi467vcqnlw4usgtonzwja-story.html> (on file with the *Ohio State Law Journal*).

<sup>22</sup> Jessica Anderson, *Baltimore Public Works Officials Announce Restrictions amid Coronavirus Outbreak*, BALT. SUN (Mar. 21, 2020), <https://www.baltimoresun.com/coronavirus/bs-md-dpw-coronavirus-restrictions-20200321-w2qsxak55bhf5g7rpk2hw5barq-story.html> (on file with the *Ohio State Law Journal*).

<sup>23</sup> See JUSTICE POLICY INST., RETHINKING APPROACHES TO OVER INCARCERATION OF BLACK YOUNG ADULTS IN MARYLAND 3 (Nov. 2019), [http://www.justicepolicy.org/uploads/justicepolicy/documents/Rethinking\\_Approaches\\_to\\_Over\\_Incarceration\\_MD.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/Rethinking_Approaches_to_Over_Incarceration_MD.pdf) [<https://perma.cc/2PHQ-WZNA>]; Kevin Rector, *Baltimore State's Attorney Mosby: Flawed Criminal Justice System Is Black Americans' Biggest Civil Rights Issue*, BALT. SUN (Nov. 16, 2019), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-racial-injustice-20191116-gy7qqpp55zeihaddfkkgdgr23ji-story.html> (on file with the *Ohio State Law Journal*).

<sup>24</sup> See Deborah Rudacille, *In Baltimore, Visions of Life After Steel*, BLOOMBERG CITYLAB (May 15, 2019), <https://www.citylab.com/life/2019/05/bethlehem-steel-mill-photos-sparrows-point-dundalk-baltimore/589465/> (on file with the *Ohio State Law Journal*).

<sup>25</sup> Maria Sieron, *The 10 Largest Private-Sector Employers in Greater Baltimore*, BALT. BUS. J. (July 26, 2019), <https://www.bizjournals.com/baltimore/news/2019/07/26/the-10-largest-private-sector-employers-in-greater.html> (on file with the *Ohio State Law Journal*).

<sup>26</sup> See Dan Rodricks, *Rodricks: Baltimore Should Call Off the War on Drugs*, BALT. SUN (Feb. 20, 2018), <https://www.baltimoresun.com/opinion/columnists/dan-rodricks/bs-md-rodricks-0221-story.html> (on file with the *Ohio State Law Journal*).

<sup>27</sup> Justin Fenton & Talia Richman, *Baltimore Police Back Pilot Program for Surveillance Planes, Reviving Controversial Program*, BALT. SUN (Dec. 20, 2019), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-baltimore-police-support-surveillance-plane-20191220-zfhd5ndtlbdurlj5xfr6xhoe2i-story.html> (on file with the *Ohio State Law Journal*).

<sup>28</sup> Regina Garcia Cano, *Police Surveillance Planes to Fly Above Baltimore in 2020*, ABC NEWS (Dec. 21, 2019), <https://abcnews.go.com/Technology/wireStory/police-surveillance-planes-fly-baltimore-2020-67856670> [<https://perma.cc/BG47-S5CT>].

Heavy deployment of targeted police surveillance is part and parcel with Baltimore. Within the past decade, the city has received increasing attention and reverence in pop culture as a result of HBO's "The Wire" television series and its attendant "Wire Gaze."<sup>29</sup> A central theme and plot metaphor of the show is the use of wiretaps and electronic surveillance, and the title, according to creator David Simon, is a call to the frequent real-life use of such surveillance measures in the city.<sup>30</sup> Indeed, Baltimore invested heavily in building an extensive network of crime cameras at the turn of the 21<sup>st</sup> century, with the help of homeland security funding made available after the September 11, 2001 tragedy.<sup>31</sup> I vividly recall on a trip home while in law school first noticing the surveillance camera that had been erected at the corner of our street on Edmondson Avenue. The street corner is located in Edmondson Village, an all-Black neighborhood in West Baltimore.<sup>32</sup> The camera immediately stood out to me not only because of large lettering noting "Baltimore City Police" on the wide boxy unit that sat atop of a light pole, but also because of the bright blue

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<sup>29</sup>The author coins the term "Wire Gaze" as a descriptor for the narrow view of Baltimore often held by those whose only connection to and understanding of the city has come through watching the TV series. This narrow perspective, where danger and drug activity are ubiquitous, creates real harms for the city struggling to shake off a reputation as a place holding little value beyond being a subject for criminological examination of urban violence and drug infestation. "The Wire" was only one of a string of shows that depicted drugs and crime, including "The Corner" and "Homicide." Whereas other cities, like New York, are also the frequent set of shows focused on crime and violence, Baltimore's redeeming qualities are less known nationally and globally, making violence and drug use its most popular association and reputation. See David Smith, 'Progress Is Painfully Uneven': Baltimore, 15 Years After The Wire, GUARDIAN (May 27, 2017), <https://www.theguardian.com/tv-and-radio/2017/may/27/baltimore-15-years-after-the-wire> [<https://perma.cc/38ZA-9XKG>].

<sup>30</sup>See Margaret Talbot, *Stealing Life: The Crusader Behind "The Wire."*, NEW YORKER (Oct. 15, 2007), <https://www.newyorker.com/magazine/2007/10/22/stealing-life> (on file with the *Ohio State Law Journal*).

<sup>31</sup>See Brian Ways & Brooks C. Pearson, *Evaluating the Effectiveness of CCTV in Baltimore, Maryland*, in SPATIAL ANALYSIS, MODELLING AND PLANNING 79, 80 (Jorge Rocha & José António Tenedório eds., 2018); Greg Barrett, *9/11 Brings a Windfall for State's Spending*, BALT. SUN (Mar. 20, 2005), <https://www.baltimoresun.com/news/bs-xpm-2005-03-20-0503200036-story.html> [<https://perma.cc/63NQ-YFFX>]; Doug Donovan, *24-Hour Camera Surveillance in City Is Part of Bigger Plan*, BALT. SUN (June 10, 2004), <https://www.baltimoresun.com/news/bs-xpm-2004-06-10-0406100112-story.html> [<https://perma.cc/GMZA-B428>].

<sup>32</sup>When the community was built in the first half of the turn of the 20th century, it was entirely White. Through a strategy known as blockbusting, that relied upon racial stigma and betting on "White flight," a home would be sold by a real estate agent to a Black family. This would reliably lead to panic by White residents and a wave of moving and home sales, typically at a loss. The same real estate agents would buy the homes and resell them at a marked-up price to Black families. Edmondson Village was the site of one of the country's most rapid blockbusting and white flight episodes, in a decade between 1955 and 1965. See generally W. EDWARD ORSER, *BLOCKBUSTING IN BALTIMORE: THE EDMONDSON VILLAGE STORY* (1994).

flashing lights that accompanied the camera. It was a clear indicator to citizens in the neighborhood that Baltimore police were a constant, unmovable force that was always watching. Alarmed and angered by the erection of this camera in my neighborhood and equipped with the new Lexis Nexis and Westlaw access my law school tuition afforded, I spent my entire winter break researching the legality of this practice, ultimately using it as a driver for a term paper. It also prompted me to drive around the city to see where the other cameras had been installed, as I observed that in neighborhoods like Roland Park, a wealthy White neighborhood, there were no flashing blue lights to be seen. Through my research I discovered that at the time, the city had mounted 200 cameras, mostly in Black neighborhoods.<sup>33</sup> The message from the mayor, Martin O'Malley, and the Baltimore Police Department was that the cameras were needed in high-crime areas, as they would act as crime deterrents and valuable tools in solving crimes.<sup>34</sup> In subsequent years the cameras were not shown to be much effective at either preventing or helping to solve crimes.<sup>35</sup>

Over the past twenty-five years the United States has witnessed a significant reduction in crime rates.<sup>36</sup> Baltimore has been no exception, experiencing a similarly diminished number of arrests.<sup>37</sup> Where the city has struggled in recent years is with violent crime, particularly homicide.<sup>38</sup> However, from 2005 to 2014 the number of surveillance cameras in the city ballooned from 200 to nearly 700.<sup>39</sup> The city has also sought to further expand its public surveillance network to encompass private security cameras, including legislation passed by the Baltimore City Council creating a rebate program for residents that purchase doorbell cameras and register them with the city.<sup>40</sup>

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<sup>33</sup> Luke Broadwater & Justin George, *City Expands Surveillance System to Include Private Cameras of Residents, Businesses*, BALT. SUN (Oct. 30, 2014), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-citiwatch-20141029-story.html> (on file with the *Ohio State Law Journal*); *No Spy Planes Over Baltimore*, ACLU MD., <https://www.aclu-md.org/en/campaigns/no-spy-planes-over-baltimore> [<https://perma.cc/BGN6-JPBC>].

<sup>34</sup> Broadwater & George, *supra* note 33.

<sup>35</sup> Ways & Pearson, *supra* note 31, at 93 (“Cameras may make some difference, but this cannot be confidently stated. Ideally, this tool should be used as part of a process with all other law enforcement strategies. This technology is only as effective as the police program running it.”).

<sup>36</sup> John Gramlich, *5 Facts About Crime in the U.S.*, PEW RES. CTR. (Oct. 17, 2019), <https://www.pewresearch.org/fact-tank/2019/10/17/facts-about-crime-in-the-u-s/> [<https://perma.cc/QT5E-F95L>].

<sup>37</sup> Luke Broadwater, *Arrests by Baltimore Police Continue Years-Long Decline*, BALT. SUN (Feb. 8, 2018), <https://www.baltimoresun.com/news/investigations/bs-md-ci-arrest-decline-20180208-story.html> (on file with the *Ohio State Law Journal*).

<sup>38</sup> *Id.*

<sup>39</sup> Broadwater & George, *supra* note 33.

<sup>40</sup> Rachel Menitoff, *Doorbell Camera Rebate Program Legislation Passes Baltimore City Council*, CBS BALT. (Mar. 10, 2020), <https://baltimore.cbslocal.com/2020/03/10/doorbell-camera-rebate-program-baltimore-city/> (on file with the *Ohio State Law Journal*).



A newer version of the camera on the corner by my mother's home still sits there today. This expansion has had no appreciable benefit to the murder rate, yet it has had tremendous impact on how people within these highly surveilled neighborhoods perceive themselves and understand their relationship with the government and law enforcement institutions.<sup>41</sup> Even more, the statistics on crime cameras seldom include the widespread use of red-light and speed cameras across the city, which have come under heavy criticism for ineffectiveness as well for the disproportionate burden that infractions, fines, and associated collateral consequences, such as driver's license suspensions, levy upon low-income communities of color.<sup>42</sup> Somehow Baltimore has managed to be an intensely criminally surveilled city, while maintaining some of the highest unsolved crime rates.<sup>43</sup> Thus this targeted form of surveillance should be understood for what it is beyond the veneer of public safety, as mostly a tool of exploitation and social control.

### B. Legacies of Surveillance

To truly understand the role of law enforcement in Baltimore today, police surveillance must be placed in historical context. The relationship between policing and racialized surveillance can be traced back to the first iterations of policing through slave patrols.<sup>44</sup> Famed abolitionist Frederick Douglass, who

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<sup>41</sup> See Broadwater, *supra* note 37; *What's Wrong with Public Video Surveillance*, ACLU (Mar. 2002), <https://www.aclu.org/other/whats-wrong-public-video-surveillance> [<https://perma.cc/XB8L-6HU2>].

<sup>42</sup> See Scott Calvert & Luke Broadwater, *City's Lucrative Speed Camera Program Dogged by Problems*, BALT. SUN (Nov. 18, 2012), <https://www.baltimoresun.com/news/investigations/bs-md-speed-cameras-mainbar-20121117-story.html> (on file with the *Ohio State Law Journal*); Maura Ewing, *Should States Charge Low-Income Residents Less for Traffic Tickets?*, ATLANTIC (May 13, 2017), <https://www.theatlantic.com/politics/archive/2017/05/traffic-debt-california-brown/526491/> [<https://perma.cc/MJ3D-B8WG>]; William Farrell, *Predominately Black Neighborhoods in D.C. Bear the Brunt of Automated Traffic Enforcement*, D.C. POL'Y CTR. (June 28, 2018), <https://www.dcpolicycenter.org/publications/predominately-black-neighborhoods-in-d-c-bear-the-brunt-of-automated-traffic-enforcement/> [<https://perma.cc/2X4K-M6KL>]; Lisa Fletcher, *Notorious 295 Speed Camera Rakes in \$26M, While DC Residents Question Its Legitimacy*, WJLA ABC7 NEWS (Nov. 18, 2019), <http://wjla.com/features/7-on-your-side/notorious-295-speed-camera> [<https://perma.cc/27J7-B7RJ>].

<sup>43</sup> Wesley Lowery, Steven Rich, & Salwan Georges, *As Police Struggle to Solve Homicides, Baltimore Residents See an 'Open Season for Killing'*, WASH. POST (Dec. 27, 2018), [https://www.washingtonpost.com/investigations/as-police-struggle-to-solve-homicides-baltimore-residents-see-an-open-season-for-killing/2018/12/26/7ee561e4-fb24-11e8-8c9a-860ce2a8148f\\_story.html?utm\\_term=.a9b4222c59af](https://www.washingtonpost.com/investigations/as-police-struggle-to-solve-homicides-baltimore-residents-see-an-open-season-for-killing/2018/12/26/7ee561e4-fb24-11e8-8c9a-860ce2a8148f_story.html?utm_term=.a9b4222c59af) [<https://perma.cc/X7LD-TEZG>]; see also Powers, *supra* note 6.

<sup>44</sup> See generally SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2001); Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51 (1988); Larry H. Spruill, *Slave Patrols, "Packs of Negro Dogs" and Policing Black Communities*, 53 PHYLON 42 (2016).

was born into enslavement on Maryland's Eastern Shore and spent much of his childhood in Baltimore,<sup>45</sup> described the sheer terror caused by roving slave-catching units engaged in surveillance efforts to determine runaways or free Blacks that were vulnerable to kidnapping into enslavement.<sup>46</sup> These slave-catchers operated within and without the color of law, utilized sophisticated strategies for surveilling the daily undertakings by Blacks in the city, and placed free Black communities under constant monitoring.<sup>47</sup> Even in the instance where free Blacks were intentionally kidnapped and sold back into slavery, there was little recourse for the devastated families and communities.<sup>48</sup> Abolitionist posters often captured this reality. As a poster in 1851 noted:

CAUTION!! COLORED PEOPLE . . . You are hereby respectfully CAUTIONED and advised, to avoid conversing with the Watchmen and Police Officers . . . For since the recent ORDER OF THE MAYOR & ALDERMAN, they are empowered to act as KIDNAPPERS AND Slave Catchers . . . Therefore, if you value your LIBERTY, and the Welfare of the Fugitives among you, Shun them in every possible manner, as so many HOUNDS on the track of the most unfortunate of your race.<sup>49</sup>

Such warnings were common at the time, particularly after the passage of the Fugitive Slave Acts.<sup>50</sup> Harriet Tubman, the fearless abolitionist, skilled organizer and strategist, prolific orator and storyteller, and Civil War heroine, was also born into enslavement upon a plantation on Maryland's eastern shore and risked her life countless times traveling through Baltimore and other parts of Maryland to free family members, friends, and other enslaved persons.<sup>51</sup> Harriet Tubman recognized the importance of eluding surveillance efforts and is infamous for her genius in developing and executing strategy to avoid

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<sup>45</sup> *Frederick Douglass*, NAT'L PARK SERV. (Feb. 2, 2018), <https://www.nps.gov/frdo/learn/historyculture/frederickdouglass.htm> [<https://perma.cc/3K3D-G5EQ>].

<sup>46</sup> FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS* 42, 84–85 (Dover Publications 1995) (1845) (“At every gate through which we were to pass, we saw a watchman—at every ferry, a guard—on every bridge, a sentinel—and in every wood, a patrol. We were hemmed in upon every side.”).

<sup>47</sup> See generally SOLOMON NORTHROP, *TWELVE YEARS A SLAVE* (Penguin Classics 2012) (1853); CAROL WILSON, *FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780-1865* (1994); Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J. SOUTHERN HIST. 397 (1990); Peter P. Hinks, “Frequently Plunged Into Slavery”: *Free Blacks and Kidnapping in Antebellum Boston*, 20 HIST. J. MASSACHUSETTS 16 (1992).

<sup>48</sup> Hinks, *supra* note 47, at 19–21.

<sup>49</sup> *Caution, Colored People of Boston*, LOST MUSEUM ARCHIVE, <https://lostmuseum.cuny.edu/archive/caution-colored-people-of-boston> [<https://perma.cc/D9MD-RCZR>].

<sup>50</sup> Farbman, *supra* note 14, at 1907.

<sup>51</sup> See JAMES A. MCGOWAN & WILLIAM C. KASHATUS, *HARRIET TUBMAN: A BIOGRAPHY* 35–53 (2011); Vivian M. May, *Under-Theorized and Under-Taught: Re-Examining Harriet Tubman's Place in Women's Studies*, 12 MERIDIANS 28, 35 (2014).

detection.<sup>52</sup> Even the Underground Railroad name itself harkens to the need to be out of sight, in order to facilitate bold resistance,<sup>53</sup> which often included counter-surveillance measures, such as tracking the movements of enslavers and slave catchers.<sup>54</sup>

During the last days of enslavement and immediately after formal emancipation in Baltimore, state surveillance of Black communities had already begun to shift to new forms of policing and subjugation through the use of corrections, in ways eerily similar to today.<sup>55</sup> In 1861, Blacks made up 17% of arrests in the city, only slightly higher than their percentage of the population.<sup>56</sup> By 1870, Blacks accounted for over 34% of arrests,<sup>57</sup> while only comprising 20% of the city's population,<sup>58</sup> and seven out of every ten prisoners were Black.<sup>59</sup> This increase mirrored similar rises in arrests post-emancipation in southern states laying the early foundations for what would become known as convict leasing.<sup>60</sup> The convict-leasing system thrived on fostering dubious connections between race and criminality to continue the exploitation of unpaid Black labor well beyond the ending of slavery.<sup>61</sup> These efforts not only had profound impacts on the development of late nineteenth and early twentieth century criminal justice policies, practices, and institutions in the Deep South, but also in other parts of the south and northern cities.<sup>62</sup> Thus, to presume a

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<sup>52</sup> May, *supra* note 51, at 43.

<sup>53</sup> *Id.*

<sup>54</sup> MCGOWAN & KASHATUS, *supra* note 51, at 36.

<sup>55</sup> See ADAM MALKA, *THE MEN OF MOBTOWN: POLICING BALTIMORE IN THE AGE OF SLAVERY AND EMANCIPATION 1* (2018).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 2.

<sup>60</sup> In the years following the ending of slavery, Blacks were subjected to schemes that yet again sought to exploit their labor for free. Many states passed Black Codes that criminalized vague offenses such as "vagrancy" to target and fine Black men who were alleged not to be employed and idle. When these men were unable to pay the associated fines, they were jailed and made to work in many of the same coal mines and plantation fields they and their parents were forced to work prior to emancipation. These men spent years attempting to pay off the fines through dangerous and harsh labor, with many dying before ever being able to do so. A number of major American companies utilized this labor and provided money to the sheriffs and districts that continually found ways to round men up. It was a boon for both private and state coffers. By 1898, nearly 75% of Alabama's state revenue came from convict leasing. See DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 20 (Free Press Paperbacks 1997); *Convict Lease System*, DIGITAL HISTORY, [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?psid=3179&smtid=2#:~:text=In%201883%2C%20about%2010%20percent,came%20from%20this%20same%20source](http://www.digitalhistory.uh.edu/disp_textbook.cfm?psid=3179&smtid=2#:~:text=In%201883%2C%20about%2010%20percent,came%20from%20this%20same%20source) [https://perma.cc/7EM6-4BWP]. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (Anchor Books 2008).

<sup>61</sup> OSHINSKY, *supra* note 60, at 20.

<sup>62</sup> See KHALIL GIRBAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 16–21* (2010).

relationship between emancipation and criminality as a justification for these statistics would require a significant level of willful blindness not only to the centuries of dehumanizing and condemning of Blackness to criminal savagery in science, art, religion, history, literature, music, and more, as a necessity of maintaining a race-based human enslavement system, but also the fact that many of those who participated in drafting a new constitution for Maryland and enforcing its criminal laws were former enslavers.<sup>63</sup> Yet, for years much of the general public has done just that. American enslavement's role in the development and shaping of aims of contemporary policing is only now just beginning to be reckoned with in popular debate.<sup>64</sup> These early connections between surveillance, violence, and subordination reveal practices sanctioned by state architects that would only deepen and reverberate through the ensuing century and a half, with such fierce institutionalization that they continue to operate regardless of whether there is a Black president, governor, mayor, police chief, or officer.

Another pivotal moment in policing and surveillance in Baltimore came in the wake of the assassination of Dr. Martin Luther King, Jr. in 1968. Like many other cities around the country, Baltimore was set ablaze in the midst of pained protest and unrest, exposing generational frustration with national and local treatment of Black people and the unfulfilled promise of democracy, equality, and racial justice.<sup>65</sup> Over three days and four nights, more than 1,000 businesses suffered damage or were destroyed, over 5,000 arrests were made, and millions

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<sup>63</sup> OSHINSKY, *supra* note 60, at 20; *see also* MUHAMMAD, *supra* note 62, at 21.

<sup>64</sup> *See* Jonah Goldberg, Opinion, *History of Policing Gets Unfairly Twisted*, BOS. HERALD (June 20, 2020), <https://www.bostonherald.com/2020/06/20/history-of-policing-gets-unfairly-twisted/> [<https://perma.cc/776N-H2A4>]; Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, NAT'L L. ENFORCEMENT MUSEUM: ON THE BEAT (July 10, 2019), <https://lawenforcementmuseum.org/2019/07/10/slave-patrols-an-early-form-of-american-policing/> [<https://perma.cc/BX4M-8WYW>]; Connie Hassett-Walker, *The Racist Roots of American Policing: From Slave Patrols to Traffic Stops*, CONVERSATION (June 4, 2019), <https://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816> [<https://perma.cc/YC3Z-G64C>]; Tracey L. Meares & Tom R. Tyler, *The First Step Is Figuring Out What Police Are For*, ATLANTIC (June 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/first-step-figuring-out-what-police-are/612793/> [<https://perma.cc/PGP8-JQ5E>]; Wenei Philimon, *Not Just George Floyd: Police Departments Have 400-Year History of Racism*, USA TODAY (June 7, 2020), <https://www.usatoday.com/story/news/nation/2020/06/07/black-lives-matters-police-departments-have-long-history-racism/3128167001/> [<https://perma.cc/V7G9-UPQC>]; Emily Tamkin, *The History of America's Racist Police, from Slave Patrols to Present*, NEWSTATESMAN (June 13, 2020), <https://www.newstatesman.com/world/north-america/2020/06/history-america-s-racist-police-slave-patrols-present> [<https://perma.cc/Q82N-FPYY>]; Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017), <https://time.com/4779112/police-history-origins/> (on file with the *Ohio State Law Journal*).

<sup>65</sup> Michael Yockel, *100 Years: The Riots of 1968*, BALTIMORE MAG. (May 2007), <https://www.baltimoremagazine.com/2007/5/1/100-years-the-riots-of-1968> [<https://perma.cc/LVA2-VYDP>].

of dollars' worth of insurance claims were filed.<sup>66</sup> It was the first time that federal troops were called into the city since the Civil War.<sup>67</sup> Two months later the Maryland Crime Investigating Commission issued a report documenting what happened during the "civil disturbance," speculating on the historical causes of animosity, and making recommendations.<sup>68</sup> The report identifies one of the main problems as being that "we have not worked diligently, either the black community or the white community, to change those conditions which bred the recent civil disorders," including "ignorance, apathy, almost complete discrimination, slums, poverty, disease, and lack of opportunity for decent jobs."<sup>69</sup> Yet, despite this feigned recognition, the report goes on to blame the "Negro militant[s]" who "commanded the scene from beginning to end" and "hoodlums, who neither knew nor cared about the Rev. Dr. Martin Luther King, or have interest in the fate of an opposed minority."<sup>70</sup> Accordingly, the recommendations do not focus on dismantling the structural barriers driving racial, economic, and educational stratification, but rather promote increasing police patrols in "the ghetto areas," developing programs that help generate widespread support for law enforcement, and training police officers for "riot control."<sup>71</sup> Most importantly, at the heart of the report is a belief that a lack of state intelligence left the city unprepared.<sup>72</sup> Unsurprisingly, one of the recommendations stresses the importance of furthering surveillance, noting the need to "[e]stablish an intelligence system to provide police and other public officials with reliable information that may help to prevent the outbreak of a disorder and to institute effective control procedures in the event a riot erupts."<sup>73</sup> In the years that followed, the city witnessed a shift from policing the boundaries and borders between designated Black and White neighborhoods, to also actively policing and surveilling within Black communities as a means through which to neutralize threats and preserve the racial status quo.

The recommendation for greater monitoring was heard and immediately heeded. Surveillance of Black communities, organizations, reporters, and leaders intensified in the years after the 1968 unrest.<sup>74</sup> Baltimore's police commissioner at the time, Donald Pomerleau, was infamous for establishing the Inspectional Services Division (ISD), a spying unit within the police department that took on targeted espionage activities locally and assisted with national efforts with the Federal Bureau of Investigation.<sup>75</sup> ISD was known to deploy

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<sup>66</sup>THE MD. CRIME INVESTIGATING COMM'N, A REPORT OF THE BALTIMORE CIVIL DISTURBANCE OF APRIL, 1968, at 1 (June 1968).

<sup>67</sup>*Id.*

<sup>68</sup>*Id.* at i.

<sup>69</sup>*Id.* at 2.

<sup>70</sup>*Id.* at 4.

<sup>71</sup>*Id.* at 2–3.

<sup>72</sup>THE MD. CRIME INVESTIGATING COMM'N, *supra* note 66, at 6, 8.

<sup>73</sup>*Id.* at 3.

<sup>74</sup>*After the Unrest*, *supra* note 5; Olesker, *supra* note 5.

<sup>75</sup>*After the Unrest*, *supra* note 5.

covert and often illegal surveillance tactics, including use of electronic eavesdropping equipment, against Black politicians, civil rights leaders in groups like the NAACP, and activists in the local chapter of the Black Panther Party.<sup>76</sup> Once, when questioned about whether he was secretly collecting personal information on politicians, Pomerleau responded, “We’re not doing that.”<sup>77</sup> When questioned further, he clarified, “Just the blacks . . . .”<sup>78</sup> ISD most notoriously surveilled educator, civil rights activist, and later U.S. congressman Parren Mitchell, placing his home under constant monitoring, illegally wiretapping his home and office phones for long periods, acquiring credit reports, and even having paid informants infiltrate his congressional campaign.<sup>79</sup> Every year from 1971 to 1978, Congressman Mitchell called for the resignation of Pomerleau for orchestrating unconstitutional spying activities, and in 1976 the Maryland Senate issued a report stating that the commissioner had indeed utilized illegal surveillance methods.<sup>80</sup>

### C. Future Surveillance

In the 21<sup>st</sup> century, the Baltimore City Police Department relies heavily upon advancing technologies to facilitate its surveillance efforts, and has solidified its reputation as a leading experimenter in this field.<sup>81</sup> The technologies used in recent years have included stingrays,<sup>82</sup> social media monitoring,<sup>83</sup> facial recognition software,<sup>84</sup> and aerial surveillance.<sup>85</sup> Stingray devices were originally designed for use by the military in foreign countries to

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<sup>76</sup> *Id.*; Olesker, *supra* note 5.

<sup>77</sup> Olesker, *supra* note 5.

<sup>78</sup> *Id.*

<sup>79</sup> *After the Unrest*, *supra* note 5; Balt. Police Historical Soc’y, *Commissioner Donald D. Pomerleau*, BALT. CITY POLICE HIST. (June 14, 2013), <https://www.baltimorepolice-museum.com/en/bpd-heroes/psob-benefits/item/106-donald-d-pomerleau.html> [<https://perma.cc/6RR8-5XSL>].

<sup>80</sup> Balt. Police Historical Soc’y, *supra* note 79.

<sup>81</sup> Lily Hay Newman, *How Baltimore Became America’s Laboratory for Spy Tech*, WIRED (Sept. 4, 2016), <https://www.wired.com/2016/09/baltimore-became-americas-testbed-surveillance-tech/> (on file with the *Ohio State Law Journal*).

<sup>82</sup> Ian Duncan, *FCC Complaint: Baltimore Police Breaking Law with Use of Stingray Phone Trackers*, BALT. SUN (Aug. 16, 2016), <https://www.baltimoresun.com/news/crime/bs-md-ci-stingray-fcc-complaint-20160816-story.html> (on file with the *Ohio State Law Journal*).

<sup>83</sup> Kate Amara, *ACLU Report: Baltimore Police Used Social Media Aggregator During Unrest*, WBAL-TV11 (Oct. 13, 2016), <https://www.wbaltv.com/article/aclu-report-baltimore-police-used-social-media-aggregator-during-unrest/7148628#> [<https://perma.cc/VVC9-T496>]; Alison Knezevich, *Police in Baltimore, Surrounding Communities Using Geofeedia to Monitor Social Media Posts*, BALT. SUN (Sept. 5, 2016), <https://www.baltimore-sun.com/news/investigations/bs-md-geofeedia-police-20160902-story.html> (on file with the *Ohio State Law Journal*).

<sup>84</sup> Powers, *supra* note 6.

<sup>85</sup> Reel, *supra* note 2.

intercept and disrupt enemy combatants in the “war on terror.”<sup>86</sup> The technology works by allowing the devices to imitate cell phone towers, enabling police officers to force cell phones in the immediate vicinity to connect to the stingray instead of the typical tower within their cell service provider network.<sup>87</sup> This connection allows officers to gather information on the cell phone user, such as location data.<sup>88</sup> In 2015, media reports revealed that Baltimore police had secretly used stingrays thousands of times, and were able to effectively withhold information about their capability and use, as a result of extensive nondisclosure agreements with the Federal Bureau of Investigation.<sup>89</sup> Social media monitoring technology has been used by Baltimore police to track protestors who organize and take to the streets to demand an end to abusive and violent police practices.<sup>90</sup> The technology operates by accessing and scrapping data across multiple social media applications and platforms, allowing for big data analysis and the ability to search for certain phrases or users, the pulling of images to be used with facial recognition, and the construction of location data.<sup>91</sup> The police department has contracted in the past with Geofeedia, a company that was paying social media giants like Facebook, Instagram, and Twitter to quietly provide data that it fed to over 500 police departments in their efforts to surveil local social justice movements.<sup>92</sup> Facial recognition technology, which allows for verifying identity using a person’s face from a still or live image as the mark of analysis,<sup>93</sup> has been used to monitor protest activists as well.<sup>94</sup> And despite a brief period of removal, after discovery of their secret use, the aerial surveillance planes

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<sup>86</sup> Adam Bates, *Stingray: A New Frontier in Police Surveillance*, CATO INST. (Jan. 25, 2017), <https://www.cato.org/publications/policy-analysis/stingray-new-frontier-police-surveillance> [https://perma.cc/M3PH-RG8S].

<sup>87</sup> Duncan, *supra* note 82.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; see also Bates, *supra* note 86.

<sup>90</sup> See Knezevich, *supra* note 83.

<sup>91</sup> See Matt Cagle, *Facebook, Instagram, and Twitter Provided Data Access for a Surveillance Product Marketed to Target Activists of Color*, ACLU NORTHERN CAL. (Oct. 11, 2016), <https://www.aclunc.org/blog/facebook-instagram-and-twitter-provided-data-access-surveillance-product-marketed-target> [https://perma.cc/J2QX-G385]; *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/9W3J-5PMU]. See generally ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* (2017).

<sup>92</sup> Cagle, *supra* note 91.

<sup>93</sup> See Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 365 (2015).

<sup>94</sup> Jameson Spivack, *Maryland’s Face Recognition System Is One of the Most Invasive in the Nation*, BALT. SUN (Mar. 9, 2020), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0310-face-recognition-20200309-hg6jkgfav2fdz3ccs55bvqjtnmu-story.html> (on file with the *Ohio State Law Journal*).

returned and hovered openly above Baltimore streets.<sup>95</sup> On April 1, 2020 the Board of Estimates voted to allow a six month “pilot program” for the technology which began in May 2020, again through the hefty donations of the Arnold’s charitable foundation.<sup>96</sup>

Each of these newer technologies have been criticized for their current or potential negative impacts on Black communities.<sup>97</sup> For example, CityLab mapped stingray use by police in Baltimore and noted that 90% of stingray incidents occurred in majority non-white Census block groups, where residents are overwhelmingly Black.<sup>98</sup> Both social media monitoring and facial recognition technologies have been derided for their use in efforts to suppress the Black Lives Matter movement and for imbedded racial biases within the

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<sup>95</sup> Ethan McLeod, *Aerial Surveillance Planes to Begin Flying over Baltimore Friday*, BALT. BUS. J. (Apr. 30, 2020), <https://www.bizjournals.com/baltimore/news/2020/04/30/aerial-surveillance-planes-to-begin-flying-over.html> (on file with the *Ohio State Law Journal*); Talia Richman, *Baltimore Aerial Surveillance Agreement: \$3.7 Million Price Tag, Privacy Protections, Evaluation Plan*, BALT. SUN (Mar. 25, 2020), <https://www.baltimore.sun.com/politics/bs-md-pol-aerial-surveillance-agreement-boe-20200324-lvpjbsvqs5catntaeva2532a2a-story.html> (on file with the *Ohio State Law Journal*).

<sup>96</sup> Joanne Cavanaugh Simpson & Ron Cassie, *Baltimore ‘Spy Plane’ Initiative Gets Okay from Federal Court*, PULITZER CTR. (Apr. 28, 2020), <https://www.pulitzercenter.org/reporting/baltimore-spy-plane-initiative-gets-okay-federal-court> [https://perma.cc/C8DW-7CNJ]; see also McLeod, *supra* note 95.

<sup>97</sup> See Letter from Sherrilyn A. Ifill, President & Dir. Counsel, NAACP Legal Def. & Educ. Fund, to Bernard C. Young, Mayor, City of Balt., and Michael Harrison, Police Comm’r., Balt. Police Dep’t. (Mar. 19, 2020), <https://www.naacpldf.org/press-release/ldf-comment-letter-on-baltimore-aerial-surveillance-pilot-program/> [https://perma.cc/9T37-U8LB] [hereinafter Letter from Ifill]; Khaled A. Beydoun & Justin Hansford, Opinion, *The F.B.I.’s Dangerous Crackdown on ‘Black Identity Extremists’*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/opinion/black-identity-extremism-fbi-trump.html> [https://perma.cc/BQ4X-3R4Z]; Michael German, *The FBI Targets a New Generation of Black Activists*, BRENNAN CTR. FOR JUST. (June 26, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/fbi-targets-new-generation-black-activists> [https://perma.cc/U22J-R9PP]; George Joseph, *Racial Disparities in Police ‘Stingray’ Surveillance, Mapped*, BLOOMBERG CITYLAB (Oct. 18, 2016), <https://www.citylab.com/equity/2016/10/racial-disparities-in-police-stingray-surveillance-mapped/502715/> (on file with the *Ohio State Law Journal*); Shira Ovide, *A Case for Banning Facial Recognition*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/technology/facial-recognition-software.html> [https://perma.cc/G9WE-6PKG]; Brandon E. Patterson, *Police Spied on New York Black Lives Matter Group, Internal Police Documents Show*, MOTHER JONES (Oct. 19, 2017), <https://www.motherjones.com/crime-justice/2017/10/police-spied-on-new-york-black-lives-matter-group-internal-police-documents-show/> [https://perma.cc/9JJ6-A2TU]; Alice Speri, *Fear of a Black Homeland: The Strange Tale of the FBI’s Fictional “Black Identity Extremism” Movement*, INTERCEPT (Mar. 23, 2019), <https://theintercept.com/2019/03/23/black-identity-extremist-fbi-domestic-terrorism/> [https://perma.cc/8J4Z-UTLT]; Aviva Stahl, *What Real Radicals Think About the FBI Hunting ‘Black Identity Extremists’*, VICE (Sept. 27, 2018), [https://www.vice.com/en\\_us/article/yw4bdb/what-real-radicals-think-about-the-fbi-hunting-black-identity-extremists](https://www.vice.com/en_us/article/yw4bdb/what-real-radicals-think-about-the-fbi-hunting-black-identity-extremists) [https://perma.cc/F4G4-VYSU].

<sup>98</sup> Joseph, *supra* note 97.



software,<sup>99</sup> while the NAACP Legal Defense and Education Fund has questioned the presumed nondiscriminatory use of aerial surveillance planes in a city like Baltimore with such a long systemic history of racially targeted surveillance.<sup>100</sup> Thus, just as fifty years prior, the demands and cries from movements for racial justice have not been met with serious conversations about how to address systemic barriers but rather the entrenchment of surveillance tactics aimed at fragmenting and neutralizing those movements.

### III. POLICE ABUSE AND THE STRUGGLE FOR ACCOUNTABILITY

The murder of George Floyd under the knee of former Minneapolis police officer, Derek Chauvin, who choked the life out of him for nearly nine minutes, was one of the most painful episodes of police violence witnessed.<sup>101</sup> The public airing of his last breaths revived lingering questions about the necessity of policing as an institution.<sup>102</sup> For months, people of all backgrounds engaged in protest in big cities, small towns, and suburbs across America.<sup>103</sup> These protests even fed into global solidarity demonstrations in countries like Ghana,<sup>104</sup> Japan,<sup>105</sup> Germany, South Africa, France, South Korea, England, and Brazil.<sup>106</sup> International protestors linked American cries for racial justice and recognition of Black life mattering to their own struggles to fight U.S. imperialism's harmful impact on Black lives abroad, global racism, and neocolonialism, and the impact that they have on making true the false promise of democracy in their respective

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<sup>99</sup> See Spivack, *supra* note 94.

<sup>100</sup> Letter from Ifill, *supra* note 97.

<sup>101</sup> Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/QN37-B54W>].

<sup>102</sup> Amna A. Akbar, Opinion, *The Left Is Remaking the World*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-rent.html> [<https://perma.cc/HKC6-DF9A>].

<sup>103</sup> Elliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning That Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> [<https://perma.cc/H95B-4LAN>]; see also Jiachaun Wu, Nigel Chiwaya, & Savannah Smith, *Map: Protests and Rallies for George Floyd Spread Across the Country*, NBC NEWS (June 1, 2020), <https://www.nbcnews.com/news/us-news/map-protests-rallies-george-floyd-spread-across-country-n1220976> [<https://perma.cc/24TW-6GHL>].

<sup>104</sup> Zaina Adamu, *How Ghana's Black Lives Matter Solidarity Protest Ended with Clashes with the Police*, CNN (June 15, 2020), <https://www.cnn.com/2020/06/15/africa/ghana-protests-black-lives-matter/index.html> [<https://perma.cc/TYGG-JTNW>].

<sup>105</sup> Ryusei Takahashi, *Black Lives Matter Spreads to Tokyo as 3,500 People March to Protest Racism*, JAPAN TIMES (June 14, 2020), <https://www.japantimes.co.jp/news/2020/06/14/national/black-lives-matter-spreads-tokyo-2000-people-march-protest-racism/#.XwtOIChKg2w> [<https://perma.cc/KH28-6VVW>].

<sup>106</sup> See *Protests Across the Globe After George Floyd's Death*, CNN (June 13, 2020), <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html> [<https://perma.cc/H3JL-682K>].

countries.<sup>107</sup> A core component at the center of this movement has been a distinct acknowledgement that policing in America may be beyond cosmetic fixtures and reforms that preserve deregulation and unaccountability, and that policing as currently understood and constituted is inherently problematic.<sup>108</sup> This has paved the way for calls to defund police departments and shift resources toward supporting social services and safety nets,<sup>109</sup> to abolish policing as we know it and institute new practices,<sup>110</sup> to utilize social worker and services instead of police officers for most response needs,<sup>111</sup> and to end

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<sup>107</sup> Asli Bâli, *Defund America's Endless Wars*, JUST SECURITY (July 29, 2020), <https://www.justsecurity.org/71723/defund-americas-endless-wars/> [<https://perma.cc/6FT5-Q6RM>]; Samuel Brannen, Habiba Ahmed, Henry Newton, & Christian Stirling Haig, Commentary, *The George Floyd Protests: A Global Rallying Cry for Democracy*, CTR. FOR STRATEGIC & INT'L STUD. (June 11, 2020), <https://www.csis.org/analysis/george-floyd-protests-global-rallying-cry-democracy> [<https://perma.cc/BS4M-DD4X>]; Noura Erakat, *Extrajudicial Executions from the United States to Palestine*, JUST SECURITY (Aug. 7, 2020), <https://www.justsecurity.org/71901/extrajudicial-executions-from-the-united-states-to-palestine/> [<https://perma.cc/CWW4-44SZ>]; see *Protests Across the Globe After George Floyd's Death*, *supra* note 106; see also Robtel Neajai Pailey & Amy Niang, *The US Government Kills Black People with Impunity Both at Home and Abroad*, NATION (June 16, 2020), <https://www.thenation.com/article/world/antiblack-racism-africa-us/> (on file with the *Ohio State Law Journal*) (connecting unjust U.S. police violence to U.S. military violence abroad).

<sup>108</sup> Spencer Bokak-Lindell, Opinion, *What Is to Be Done About American Policing?*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/opinion/george-floyd-police-abolition.html> [<https://perma.cc/MQ4A-RRCS>]; see also Ruairi Arrieta-Kenna, *The Deep Roots—and New Offshoots—of 'Abolish the Police'*, POLITICO (June 12, 2020), <https://www.politico.com/news/magazine/2020/06/12/abolish-defund-police-explainer-316185> [<https://perma.cc/E8SJ-4UEK>].

<sup>109</sup> Alexis Okeowo, *How to Defund the Police*, NEW YORKER (June 26, 2020), <https://www.newyorker.com/news/news-desk/how-the-police-could-be-defunded> [<https://perma.cc/J7PJ-QZLD>]; Giovanni Russonello, *Have Americans Warmed to Calls to 'Defund the Police'?*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/07/03/us/politics/polling-defund-the-police.html> [<https://perma.cc/LT6E-EX6Y>]; see e.g., Sarah Holder, *The Cities Taking Up Calls to Defund the Police*, BLOOMBERG CITYLAB (June 9, 2020), <https://www.bloomberg.com/news/articles/2020-06-09/the-cities-taking-up-calls-to-defund-the-police> [<https://perma.cc/3KHB-3UJ9>].

<sup>110</sup> 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-defund-police.html> [<https://perma.cc/XGL2-X9K5>]; see also Arrieta-Kenna, *supra* note 108.

<sup>111</sup> See AP, *Proposal Would Use Social Workers, Not LAPD, for Some Calls*, CBS NEWS (June 17, 2020), <https://www.cbsnews.com/news/proposal-would-use-social-workers-not-lapd-for-some-calls/> [<https://perma.cc/8W5H-QRAJ>]; Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), <https://chronicleofsocialchange.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/8W5H-QRAJ>].

qualified immunity,<sup>112</sup> amongst other proposed transformations.<sup>113</sup> All of this has taken place in the midst of a pandemic in which, although some of the worst policing occurred, with officers targeting enforcement of face masks and social distancing more forcefully and frequently on Black people,<sup>114</sup> some ground was made with calls for releasing people who were incarcerated.<sup>115</sup> Those who have been working for years and writing on issues of criminal justice system transformation could never have imagined the pace in which the country moved from discussing the need to release those incarcerated who were minors, sick, held on nonviolent offenses, or elderly, to a few months later having national debates on defunding and abolishing police.

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<sup>112</sup> Eric Schnurer, *Congress Is Going to Have to Repeal Qualified Immunity*, ATLANTIC (June 17, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/congress-going-have-repeal-qualified-immunity/613123/> [<https://perma.cc/WT2K-FBXN>].

<sup>113</sup> Frank Rudy Cooper, Suzette Malveaux & Catherine E. Smith, *How Allowing Civil Lawsuits Against Bystander Cops Could Change Police Culture*, WASH. POST (June 17, 2020), <https://www.washingtonpost.com/opinions/2020/06/17/we-must-tear-down-blue-wall-silence-heres-how-civil-lawsuits-could-help/> [<https://perma.cc/362J-EXVU>]; Rebecca Rainey & Holly Otterbein, *Local Unions Defy AFL-CIO in Push to Oust Police Unions*, POLITICO (June 30, 2020), <https://www.politico.com/news/2020/06/30/police-union-ouster-346249> [<https://perma.cc/7KW8-XGDY>].

<sup>114</sup> Fabiola Cineas, *Senators Are Demanding a Solution to Police Stopping Black Men for Wearing—and Not Wearing—Masks*, VOX (April 22, 2020), <https://www.vox.com/2020/4/22/21230999/black-men-wearing-masks-police-bias-harris-booker-senate> (on file with the *Ohio State Law Journal*); Joe Concha, *ABC's Hostin Warns Masks Could Result in Racial Profiling, Arrests: 'A Real Concern'*, HILL (April 17, 2020), <https://thehill.com/homenews/media/493336-abcs-hostin-warns-masks-could-result-in-racial-profiling-arrests-a-real> [<https://perma.cc/DWE5-6TEL>]; ABC 7 Chi. Digital Team, *Illinois State Representative Kam Buckner Stopped by Police After Leaving Store While Wearing Mask*, ABC 7 (May 6, 2020), <https://abc7chicago.com/face-mask-masks-kam-buckner-illinois-state-representative/6156129/> [<https://perma.cc/7CAC-3L76>]; Joshua Kaplan & Benjamin Hardy, *Early Data Shows Black People Are Being Disproportionally Arrested for Social Distancing Violations*, PROPUBLICA (May 8, 2020), <https://www.propublica.org/article/in-some-of-ohios-most-populous-areas-black-people-were-at-least-4-times-as-likely-to-be-charged-with-stay-at-home-violations-as-whites> [<https://perma.cc/EAA4-78A6>]; Poppy Noor, *A Tale of Two Cities: How New York Police Enforce Social Distancing by the Color of Your Skin*, GUARDIAN (May 4, 2020), <https://amp.theguardian.com/world/2020/may/04/coronavirus-new-york-police-enforce-social-distancing> [<https://perma.cc/TV4R-DYHM>]; Derrick Bryson Taylor, *For Black Men, Fear That Masks Will Invite Racial Profiling*, N.Y. TIMES (April 14, 2020), <https://www.nytimes.com/2020/04/14/us/coronavirus-masks-racism-african-americans.html> [<https://perma.cc/9M2Q-VL3G>]; see Ashley Southall, *Scrutiny of Social-Distance Policing as 35 of 40 Arrested are Black*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/nyregion/nypd-social-distancing-race-coronavirus.html> [<https://perma.cc/AB9G-7DYU>].

<sup>115</sup> Bill Chappell, *California Will Release Up To 8,000 Prisoners Due To Coronavirus*, NPR (July 10, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/10/889861014/california-will-release-up-to-8-000-prisoners-due-to-coronavirus> [<https://perma.cc/2PP3-H2ZS>]; *Responses to the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (Aug. 3, 2020), <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/V24A-6SY7>].

Indeed, it is a precarious time unlike any other seen in a generation, that holds both the equal potential for greater liberation from traditional models of the criminal legal system and the deeper entrenchment of recycled reforms that do little to challenge underlying inequitable systems.<sup>116</sup> Thus, although the Minneapolis City Council has committed to exploring other models for responding to those in need and ensuring public safety, and several cities have explored reductions in their law enforcement budgets, as of now, structural changes have not manifested. The majority of the immediate responses to the movement have revolved around a series of businesses and organizations making statements of support in media promotions,<sup>117</sup> and cities commissioning the spray-painting of “Black Lives Matter” prominently on city streets.<sup>118</sup> Though, even these surface level responses have drawn challenges and repressive efforts.<sup>119</sup> Even more, street protests over abusive policing have been met with an intensely militarized police response,<sup>120</sup> guided by social media surveillance data revealing the exact whereabouts and plans of demonstrators.<sup>121</sup> During these encounters peaceful protestors, journalists,<sup>122</sup>

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<sup>116</sup>Randall Kennedy, *The George Floyd Moment: Promise and Peril*, AM. PROSPECT (June 19, 2020), <https://prospect.org/civil-rights/george-floyd-moment-promise-and-peril/> [<https://perma.cc/5ZUT-NH7N>].

<sup>117</sup>Tracey Jan et al., *As Big Corporations Say ‘Black Lives Matter,’ Their Track Records Raise Skepticism*, WASH. POST (June 13, 2020), <https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/> [<https://perma.cc/UR36-F4UE>].

<sup>118</sup>Taylor Dafoe, *Cities Across the US Are Painting Massive Black Lives Matter Slogans on Their Streets, Following in the Footsteps of Washington, DC*, ARTNET NEWS (June 8, 2020), <https://news.artnet.com/art-world/painting-streets-black-lives-matter-1881429> [<https://perma.cc/R57X-U2UP>].

<sup>119</sup>Tommy Beer, *Black Lives Matter Murals are Being Defaced in Cities Throughout the Country*, FORBES (July 9, 2020), <https://www.forbes.com/sites/tommybeer/2020/07/09/black-lives-matter-murals-are-being-defaced-in-cities-throughout-the-country> [<https://perma.cc/DNH8-GGXX>]; Tatiana Sanchez & Anna Bauman, *Martinez Residents Rattled by Racism Revealed in Destruction of Black Lives Matter Mural*, S.F. CHRON. (July 12, 2020), <https://www.sfchronicle.com/bayarea/article/Martinez-residents-rattled-by-hidden-racism-15401202.php> [<https://perma.cc/2PDY-TZ9Q>].

<sup>120</sup>Molly Redden, *The Militarization of Local Police Has Been Decades in the Making*, HUFFPOST (June 2, 2020), [https://www.huffpost.com/entry/the-militarization-of-local-police-has-been-decades-in-themaking\\_n\\_5ed6d003c5b6a4e38f6a4fd6](https://www.huffpost.com/entry/the-militarization-of-local-police-has-been-decades-in-themaking_n_5ed6d003c5b6a4e38f6a4fd6) [<https://perma.cc/XN4T-B9E6>].

<sup>121</sup>Sam Biddle, *Police Surveilled George Floyd Protests With Help From Twitter-Affiliated Startup Dataminr*, INTERCEPT (July 9, 2020), <https://theintercept.com/2020/07/09/twitter-dataminr-police-spy-surveillance-black-lives-matter-protests/> [<https://perma.cc/6U8Y-6KA5>].

<sup>122</sup>Paul Farhi & Elahe Izadi, *‘The Norms Have Broken Down’: Shock as Journalists Are Arrested, Injured by Police While Trying to Cover the Story*, WASH. POST (May 31, 2020), [https://www.washingtonpost.com/lifestyle/media/journalists-at-several-protests-were-injured-arrested-by-police-while-trying-to-cover-the-story/2020/05/31/bfbc322a-a342-11ea-b619-3f9133bbb482\\_story.html](https://www.washingtonpost.com/lifestyle/media/journalists-at-several-protests-were-injured-arrested-by-police-while-trying-to-cover-the-story/2020/05/31/bfbc322a-a342-11ea-b619-3f9133bbb482_story.html) [<https://perma.cc/9774-4UQX>].

and politicians<sup>123</sup> have been beaten, shot with rubber bullets, pepper sprayed, and hit with police vehicles.<sup>124</sup> Experiencing and watching such responses on a large scale has opened the eyes of many Americans to what Black and Brown communities experience on a consistent basis.<sup>125</sup>

Five years before George Floyd's killing, Freddie Gray suffered a similar fate at the hands of Baltimore City Police, when, after an illegal arrest, Gray was found with a severed spine in the back of a police van.<sup>126</sup> Gray's ultimate death one week later set off a firestorm of protest and uprising unseen since the unrest in 1968.<sup>127</sup> In a rare move,<sup>128</sup> State's Attorney Marilyn Mosby filed criminal charges against the officers for Gray's death.<sup>129</sup> However, no officer was convicted.<sup>130</sup> In fact, the officers attempted to sue Mosby for even daring to bring charges against them.<sup>131</sup> This is representative of the steep challenges presented in contemplating the regulation of police conduct and the fierce reprisal that accompanies most efforts to do so.<sup>132</sup> What the future holds for police killings is unknown, but while conversations are taking place about what true public safety entails and looks like, we must also be cognizant of everyday indignities, like being placed under constant surveillance and subjected to discriminatory stops and excessive uses of force that do not end in death. Following the Freddie Gray uprising, the United States Department of Justice

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<sup>123</sup> Andrew Solender, *All the Times Police Arrested or Attacked Politicians at Protests*, FORBES (June 3, 2020), <https://www.forbes.com/sites/andrewsolender/2020/06/03/all-the-times-police-arrested-or-attacked-politicians-at-protests> [<https://perma.cc/5XLP-6CQY>].

<sup>124</sup> Farhi & Izadi *supra* note 122; Alec Snyder, *Video Appears to Show Detroit Police Car Driving into Protesters*, CNN (June 30, 2020), <https://www.cnn.com/2020/06/29/us/detroit-police-car-plows-protesters-trnd/index.html> [<https://perma.cc/A5EJ-XF3Y>]; Solender, *supra* note 123.

<sup>125</sup> Kennedy, *supra* note 116; see Minyvonne Burke, *Breonna Taylor's Death Ignites Debate on No-Knock Warrants as Louisville Becomes Latest City to Ban Them*, NBC NEWS (June 13, 2020), <https://www.nbcnews.com/news/us-news/breonna-taylor-s-death-ignites-debate-no-knock-warrants-louisville-n1208156> (on file with the *Ohio State Law Journal*).

<sup>126</sup> German Lopez, *The Baltimore Protests Over Freddie Gray's Death, Explained*, VOX (Aug. 18, 2016), <https://www.vox.com/2016/7/27/18089352/freddie-gray-baltimore-riots-police-violence> [<https://perma.cc/2QYQ-ZWNK>].

<sup>127</sup> See Brakkton Booker, *50 Years Ago Baltimore Burned. The Same Issues Set it Aflame in 2015*, NPR (Apr. 7, 2018), <https://www.npr.org/2018/04/07/600114134/50-years-ago-baltimore-burned-the-same-issues-set-it-aflame-in-2015> [<https://perma.cc/PE5X-QQYL>]; Lopez, *supra* note 126.

<sup>128</sup> Melissa Chan, *A Police Officer Killed Their Mother, and Her Sons Want to Know Why He Hasn't Faced Trial*, TIME (July 18, 2019), <https://time.com/5628206/police-shooting-trial-knowlton-garner/> [<https://perma.cc/NRE4-RB9T>].

<sup>129</sup> Lopez, *supra* note 126.

<sup>130</sup> *Id.*

<sup>131</sup> Kevin Rector, *Supreme Court Denies Baltimore Officers' Appeal in Case Against Marilyn Mosby*, BALT. SUN (Nov. 13, 2018), <https://www.baltimoresun.com/news/crime/bs-md-ci-scotus-denial-20181113-story.html> (on file with the *Ohio State Law Journal*).

<sup>132</sup> Marilyn Mosby, Opinion, *Prosecutors, Please Stand Up to the Police*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/george-floyd-protests-prosecutors.html> [<https://perma.cc/V7AK-SKAU>].

(DOJ) spent a year investigating the Baltimore Police Department, finding that it engaged in a pattern of 1) unconstitutional searches and arrests, 2) using practices that produce severe and unjustified racial disparities in law enforcement, 3) utilizing excessive force, and 4) retaliating against citizens engaged in constitutionally-protected expression.<sup>133</sup> Most importantly, the DOJ highlighted that this pattern is facilitated in part by the failure of accountability structures.<sup>134</sup>

Baltimore Police Department's willingness to secretly experiment with and deploy surveillance technologies in discriminatory ways is a byproduct of those unstable accountability structures, including a Civilian Review Board with limited powers to discipline police officers and a city hall that has weathered a series of scandals that removed two sitting mayors from office.<sup>135</sup> These failures are not without connection to Baltimore's police department making national news in recent years for its infamous Gun Trace Task Force (GTTF), an elite police unit that operated for years without oversight, in which officers robbed citizens, carried BB guns to plant as evidence, illegally used GPS trackers to surveil residents, stole and sold drugs, and registered overtime hours even when they were not working or on vacation.<sup>136</sup> Criminal law scholar Michael Pinard poignantly describes how the race of the victims allowed these practices to flourish for so long, noting that:

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<sup>133</sup> U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (Aug. 2016), <https://www.justice.gov/crt/file/883296/download> [<https://perma.cc/5PVQ-2SJC>].

<sup>134</sup> *Id.*

<sup>135</sup> Aldebron et al., *supra* note 9; Ian Millhiser, *Trump's Justice Department Has a Powerful Tool to Fight Police Abuse. It Refuses to Use It.*, VOX (June 30, 2020), <https://www.vox.com/2020/6/30/21281041/trump-justice-department-consent-decrees-jeff-sessions-police-violence-abuse> [<https://perma.cc/QZ69-WGM5>]; Ian Urbina, *Baltimore's Mayor Is Convicted*, N.Y. TIMES (Dec. 1, 2009), <https://www.nytimes.com/2009/12/02/us/02baltimore.html> [<https://perma.cc/5K7B-BSUH>] (reliance upon voting for a mayor whose campaign promotes police corruption reforms, undoubtedly proves ineffectual when such executives fail to remain in office due to their own corrupt activities); see Press Release, U.S. Dep't of Justice, U.S. Att'y's Office Dist. of Md., Former Baltimore Mayor Catherine Pugh Pleads Guilty To Federal Conspiracy And Tax Charges (Nov. 21, 2019), <https://www.justice.gov/usao-md/pr/former-baltimore-mayor-catherine-pugh-pleads-guilty-federal-conspiracy-and-tax-charges> [<https://perma.cc/5VVP-3FWM>] (again, reliance upon voting for a mayor whose campaign promotes police corruption reforms, undoubtedly proves ineffectual when such executives fail to remain in office due to their own corrupt activities); Meils, *supra* note 9; Richard A. Oppel Jr., *In Baltimore, a Revolving Door at Police Chief*, N.Y. TIMES (Jan. 9, 2019), <https://www.nytimes.com/2019/01/09/us/baltimore-police-chief-michael-harrison.html> [<https://perma.cc/3PL6-MM28>].

<sup>136</sup> Justin Fenton, *Baltimore Police Officer Charged in BB Gun Planting Incident as Gun Trace Task Force Fallout Continues*, BALT. SUN (Jan. 15, 2020), <https://www.baltimore-sun.com/news/crime/bs-md-ci-cr-gttf-officer-charged-20200115-m3gf7nfx5venzlmxyj7duqxbjm-story.html> (on file with the *Ohio State Law Journal*); German Lopez, *8 Cops Allegedly Used an Elite Baltimore Police Team to Plunder the City and Its Residents*, VOX (Feb. 13, 2018), <https://www.vox.com/policy-and-politics/2018/2/2/16961146/baltimore-gun-trace-task-force-trial> (on file with the *Ohio State Law Journal*).

The GTTF preyed upon and victimized black residents, some of whom were engaged in criminal activity and some of whom had nothing to do with any type of criminal activity. The bottom line is this: These officers *knew* that all of these individuals were vulnerable. At an even deeper level, though, they knew that they were all *disposable*. They knew that these individuals were disposable to the BPD, disposable to the criminal justice system that churns black bodies relentlessly and disposable to the various institutions that connect poor black men, women and children to the criminal justice system day and night.<sup>137</sup>

Holding top law enforcement administrators accountable is often frustrated, due to quick turnover in the police commissioner position.<sup>138</sup> Within the past decade the city has had six different police commissioners.<sup>139</sup> At the federal level, there has been little interest in using the power of the DOJ to enforce the consent decree in Baltimore.<sup>140</sup> This leaves a tremendous vacuum in leadership and oversight of police actions. It also allows fear and political anxieties to be the drivers of how the city approaches public safety, where crime is presented as the result of personal failings and individual or specific group transgressions and flaws, solved only by aggressive tactics and strategic monitoring, instead of a collective acquiesce to the deep social inequalities that engender crime.

#### IV. SURVEILLANCE RESISTANCE

##### A. *The Possibilities of Sousveillance*

Innovative strategies being used around the world reflect a growing resistance to the expansion of state forced or sponsored digital surveillance measures and the new threats they pose to freedom and justice. For example, in June 2019, hundreds of thousands of citizens in Hong Kong marched in the streets to protest a proposed law that would allow extraditions to mainland China.<sup>141</sup> With each day, the protests grew larger, some estimating that over one million participants marched.<sup>142</sup> While local Hong Kong police predictably responded in clashes with protestors,<sup>143</sup> the Chinese government sought to use

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<sup>137</sup> Michael Pinard, *UM Law Professor: Gun Trace Task Force Preyed on African Americans Because They're 'Disposable' to Baltimore Police*, BALT. SUN (Feb. 22, 2019), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0224-gttf-disposable-20190221-story.html> (on file with the *Ohio State Law Journal*).

<sup>138</sup> Oppel Jr., *supra* note 135.

<sup>139</sup> *Id.*

<sup>140</sup> Millhiser, *supra* note 135.

<sup>141</sup> Austin Ramzy & Mike Ives, *Hong Kong Protests, One Year Later*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/world/asia/hong-kong-protests-one-year-later.html> [<https://perma.cc/9GSU-4MDK>].

<sup>142</sup> *Id.*

<sup>143</sup> Ben Westcott, Julia Hollingsworth, & Tara John, *Hong Kong Police Clash with Protesters in Chaotic Scenes at Airport*, CNN (Aug. 13, 2019), <https://www.cnn.com/>

its sophisticated domestic surveillance system to control and disrupt the movement.<sup>144</sup> As the world watched the political crisis unfold, we caught glimpses of impressive, organized anti-surveillance strategies born out of the necessity of resistance even in a complex digitally surveilled society.<sup>145</sup> Some of the tactics included the use of umbrellas to shield protesters' faces and activities from mounted cameras and cell phones, spray painting over the lenses of installed cameras across the city, pulling down smart lampposts, placing reflective mylar on goggles to make it more difficult for filming, wearing masks, shining laser pointers at police cameras, locking social media accounts and using pseudonyms online to avoid monitoring, using cheap cell phones that can be discarded, and paying for public transit with cash instead of debit or credit cards that leave traces.<sup>146</sup> Meanwhile in London, a group of artists called the Dazzle Club use make-up to create intricate patterns on their faces that act to confuse facial recognition technology and prevent identification.<sup>147</sup> The group holds a silent walk once a month as a protest against the rise of facial recognition police cameras in London.<sup>148</sup>

These efforts to observe and document the ways in which the state is monitoring you and collectively resist may be understood as forms of sousveillance. Steve Mann defines sousveillance as means through which people can examine and understand their surveillance and through which they can contest and neutralize surveillance.<sup>149</sup> This framework finds congruence in the canon of critical surveillance theory, where surveillance, or overwatching, is defined as a form of control that helps maintain systems of domination and exploitation.<sup>150</sup> Sousveillance is the hierarchical counterpoint to surveillance, translated loosely as "watching from beneath."<sup>151</sup> Sometimes sousveillance may

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2019/08/13/asia/hong-kong-airport-chaos-intl-hnk/index.html [https://perma.cc/5Q8M-X92Y].

<sup>144</sup> Greg Austin, *Hong Kong Protests Unmask the Limits of China's Surveillance State*, IISS (Oct. 4, 2019), <https://www.iiss.org/blogs/analysis/2019/10/easia-hong-kong-protests-unmask-the-limits-of-chinas-surveillance-state> [https://perma.cc/L87H-SB2N].

<sup>145</sup> See Paul Mozur & Lin Qiqing, *Hong Kong Takes Symbolic Stand Against China's High-Tech Controls*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/technology/hong-kong-china-tech-surveillance.html> [https://perma.cc/XA6N-KFXM].

<sup>146</sup> *Id.*

<sup>147</sup> James Tapper, *Hiding in Plain Sight: Activists Don Camouflage to Beat Met Surveillance*, GUARDIAN (Feb. 1, 2020), <https://www.theguardian.com/world/2020/feb/01/privacy-campaigners-dazzle-camouflage-met-police-surveillance> [https://perma.cc/WL8V-QQ5C].

<sup>148</sup> *Id.*

<sup>149</sup> Steve Mann, Jason Nolan, & Barry Wellman, *Sousveillance: Inventing and Using Wearable Computing Devices for Data Collection in Surveillance Environments*, 1 SURVEILLANCE & SOC'Y 331, 333 (2003).

<sup>150</sup> Christian Fuchs, Commentary, *Surveillance and Critical Theory*, 3 MEDIA & COMM. 6, 6-7 (2015).

<sup>151</sup> *Id.*; Steve Mann, *Veillance and Reciprocal Transparency: Surveillance Versus Sousveillance, AR Glass, Lifeglogging, and Wearable Computing*, 2013 INT'L SYMP. ON



present as an “[o]bservation or recording by an entity not in a position of power or authority over the subject of the veillance.”<sup>152</sup> Whereas those empowered in a society may engage in surveillance, often with the authority to prohibit other forms of watching or veillance,<sup>153</sup> those without such power leverage whatever they can from their vantage point through sousveillance.<sup>154</sup> It is well understood that a police officer utilizing digital monitoring tactics is engaged in surveillance, given the power dynamics between citizens and law enforcement bestowed with state power, including lethal force. Thus, sousveillance occurs in these encounters when the cameras are turned around upon law enforcement by those less empowered. Darnella Frazier’s, the seventeen-year-old who used her smart phone to record George Floyd’s last moments, quick reaction was a form of sousveillance that would ultimately reignite a global justice movement.<sup>155</sup> It is in this potential force for change and activism that Mann views sousveillance as a type of survival tactic that could help upend societal power imbalances or level the surveillance playing field, achieving a form of equiveillance.<sup>156</sup>

In recent years, sousveillance as a means through which to resist police violence has been enhanced by the use of cell phone cameras. Many of the pivotal moments of activism against police abuse have been spurred by media posts of cell phone recordings going viral, from the killings of Eric Garner<sup>157</sup> and Antwon Rose,<sup>158</sup> to the paralyzing shooting in the back of Jacob Blake.<sup>159</sup> These images have challenged conventional perceptions of law enforcement as

TECH. AND SOC’Y 1, 3 (2013), <http://wearcam.org/veillance/part1.pdf> [<https://perma.cc/WL8V-QQ5C>] [hereinafter Mann, *Veillance*].

<sup>152</sup> Mann, *Veillance*, *supra* note 151, at 3.

<sup>153</sup> Steve Mann, *Wearables and Sur(over)-Veillance, Sous(under)-Veillance, Co(So)-Veillance, and MetaVeillance (Veillance of Veillance) for Health and Well-Being*, 18 SURVEILLANCE & SOC’Y 262, 264–65 (2020) [hereinafter Mann, *Wearables*].

<sup>154</sup> *See id.* at 265.

<sup>155</sup> Paul Walsh, *Teen Who Recorded George Floyd Video Wasn’t Looking to Be a Hero, Her Lawyer Says*, STAR TRIB. (June 11, 2020), <https://www.startribune.com/teen-who-shot-video-of-george-floyd-wasn-t-looking-to-be-a-hero-her-lawyer-says/571192352/> [<https://perma.cc/822K-MR2K>].

<sup>156</sup> Mann, *Wearables*, *supra* note 153, at 266; David Bollier, *Sousveillance as a Response to Surveillance*, DAVID BOLLIER (Nov. 24, 2013), <http://www.bollier.org/blog/sousveillance-response-surveillance> [<https://perma.cc/G4NX-RBAW>].

<sup>157</sup> Al Baker, J. David Goodman, & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/VHX5-89KW>].

<sup>158</sup> Alex Horton, *When Police Kill Unarmed Black Males, What Seems Obvious on Video Rarely Leads to Convictions*, WASH. POST (Mar. 30, 2019), <https://www.washingtonpost.com/nation/2019/03/30/when-police-kill-unarmed-black-males-what-seems-obvious-video-rarely-leads-convictions/> [<https://perma.cc/X3K9-W7VE>].

<sup>159</sup> John Diedrich et al., *What We Know -- and Don’t Know -- So Far About the Kenosha Police Shooting of Jacob Blake*, MILWAUKEE J. SENTINEL (Aug. 27, 2020), <https://www.jsonline.com/story/news/2020/08/27/questions-police-use-force-after-kenosha-shooting-answered/5645186002/> [<https://perma.cc/RBT6-H6HG>].

inherently good and blameless, and galvanized mass demonstrations.<sup>160</sup> Yet, the liberatory potential of digital sousveillance against racialized police surveillance and violence is not without its own challenges. Those who record and help document police abuse often become targets of intense police harassment.<sup>161</sup> Even more, body cameras, originally championed as potential sousveillance tools for police accountability, have come under criticism after drawn out battles with police departments and unions for the limits placed on public access to footage.<sup>162</sup> In the case of Daniel Prude in Rochester, New York, another Black man suffocated at the hands of police after having a hood placed over his head, the police department was effectively able to suppress body camera footage for six months.<sup>163</sup> While public access is curtailed, police departments still manage to use the devices to surveil and gather evidence against civilians, making them more aptly described as “counter-sousveillance devices.”<sup>164</sup>

Additionally, the reliance upon this type of digitized sousveillance for resistance and self-empowerment often comes with several trade-offs. First, the dependence upon select grisly videos of violence in order for there to be public attention and some rebuke of policing helps propagate the framing of police misconduct as the result of “a few bad apples.”<sup>165</sup> Such framing obscures the fuller picture of systemic police abuse in Black communities, and renders invisible ubiquitous harms that do not result in death or happen to elude digital capture. Second, constant exposure to images of violence against Blacks may have the unintended consequence of widespread desensitization in the general public and perpetual traumatization of Black communities bombarded with triggering visuals.<sup>166</sup> Even more, such desensitization is often coupled with an

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<sup>160</sup> Rebecca Morin, *Americans’ Perceptions of Police Drop Significantly in One Week as Protests Continue, Survey Finds*, USA TODAY (June 6, 2020), <https://www.usatoday.com/story/news/politics/2020/06/06/americans-views-police-drop-significantly-amid-protests-survey/3159072001/> [<https://perma.cc/NQ78-5TWC>].

<sup>161</sup> Chloé Cooper Jones, *Fearing For His Life*, VERGE (March 13, 2019), <https://www.theverge.com/2019/3/13/18253848/eric-garner-footage-ramsey-orta-police-brutality-killing-safety> (on file with the *Ohio State Law Journal*).

<sup>162</sup> Kimberly Kindy & Julie Tate, *Police Withhold Videos Despite Vows of Transparency*, WASH. POST (Oct. 8, 2015), <https://www.washingtonpost.com/sf/national/2015/10/08/police-withhold-videos-despite-vows-of-transparency/> [<https://perma.cc/DP3N-AJD7>]; Mitch Mitchell, *Body Cam Videos Were Supposed to Build Trust. But Public Has No Power in Their Release*, FORT WORTH STAR-TELEGRAM (June 14, 2019), <https://www.star-telegram.com/news/local/article231511363.html> (on file with the *Ohio State Law Journal*).

<sup>163</sup> Michael Wilson and Edgar Sandoval, *Documents Reveal How the Police Kept Daniel Prude’s Death Quiet*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/nyregion/rochester-police-daniel-prude.html> [<https://perma.cc/3RU8-47C6>].

<sup>164</sup> Ben Brucato, *Policing Made Visible: Mobile Technologies and the Importance of Point of View*, 13 SURVEILLANCE & SOC’Y 455, 468 (2015).

<sup>165</sup> Sean Illing, *Why the Policing Problem Isn’t About “A Few Bad Apples”*, VOX (June 6, 2020), <https://www.vox.com/identities/2020/6/2/21276799/george-floyd-protest-criminal-justice-paul-butler> (on file with the *Ohio State Law Journal*).

<sup>166</sup> See Modesta Alobawone, *Publicizing Police Killings of Unarmed Black People Causes Emotional Trauma, Rutgers Study Finds*, RUTGERS TODAY (July 15, 2020),

apathetic curiosity that has made Black trauma a popular genre for consumption.<sup>167</sup> It is no surprise then that narratives of those who were enslaved were best sellers during slavery.<sup>168</sup> Lastly, video recordings typically go viral through the use of social media, which helps to empower private companies that reap the benefits of surveillance capitalism.<sup>169</sup> For example, in the aftermath of the police killing of George Floyd and the organized demonstrations that followed, Dataminr, an artificial intelligence company, conducted social media monitoring and location tracking of protestors in cities across America and delivered the data to local police departments.<sup>170</sup> So as peaceful demonstrators organized and collaborated via Twitter to amplify their demands for racial justice, carrying their cell phones as a line of defense in case they needed to

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<https://www.rutgers.edu/news/publicizing-police-killings-unarmed-black-people-causes-emotional-trauma-rutgers-study-finds> [<https://perma.cc/K778-UJG4>]; John Eligon, *Police Killings Have Harmed Mental Health in Black Communities, Study Finds*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/us/police-shootings-black-mental-health.html> [<https://perma.cc/K5JS-HBJQ>]; Miles Holder, *Police Brutality Videos Are Giving Black People Vicarious Trauma*, TEEN VOGUE (July 1, 2020), <https://www.teenvogue.com/story/black-people-experience-vicarious-trauma> (on file with the *Ohio State Law Journal*); George M. Johnson, *Images of Racial Violence on Social Media Are Affecting My Body and Mind*, VICE (Jan. 18, 2019), [https://www.vice.com/en\\_us/article/9kp9g3/what-constant-images-of-racial-violence-on-social-media-are-doing-to-my-body-and-mind](https://www.vice.com/en_us/article/9kp9g3/what-constant-images-of-racial-violence-on-social-media-are-doing-to-my-body-and-mind) [<https://perma.cc/2FDF-FLEZ>]; A.T. McWilliams, *For Black Americans, Using Social Media Means Risking PTSD*, SLATE (June 3, 2020), <https://slate.com/news-and-politics/2020/06/social-media-george-floyd-racial-trauma-dsm.html> [<https://perma.cc/TF43-EQ8F>]; Noreen Nasir, *Images of Brutality Against Black People Spur Racial Trauma*, AP NEWS (June 29, 2020), <https://apnews.com/e0f960ecf3b1059a8daa50309be8d6f1> (on file with the *Ohio State Law Journal*).

<sup>167</sup> See Zeba Blay, *When White People Profit Off of Black Pain*, HUFFPOST (Mar. 22, 2017), [https://www.huffpost.com/entry/when-white-people-profit-off-of-black-pain\\_n\\_58d2a435e4b0b22b0d18ee3d](https://www.huffpost.com/entry/when-white-people-profit-off-of-black-pain_n_58d2a435e4b0b22b0d18ee3d) [<https://perma.cc/TN6S-T7M2>]; George Johnson, *OpEd: Protest Against Hollywood's Profit From Black Pain: #NoConfederate*, NBC NEWS (July 31, 2017), <https://www.nbcnews.com/news/nbcblk/noconfederate-campaign-n788086> [<https://perma.cc/N3UR-B22K>]; Melissa Kimble, *OP-ED: Is Our Pain For Profit? How TV Documentaries Are Showcasing Black Tragedies*, ESSENCE (Dec. 4, 2018), <https://www.essence.com/entertainment/op-ed-is-our-pain-for-profit-how-tv-documentaries-are-showcasing-black-tragedies/> [<https://perma.cc/64V6-QK8R>]; L.L. McKinney, *The Role Publishing Plays in the Commodification of Black Pain*, TOR.COM (June 17, 2020), <https://www.tor.com/2020/06/17/the-role-publishing-plays-in-the-commodification-of-black-pain/> [<https://perma.cc/UJ8A-DFRG>]; Niela Orr, *Black Trauma Remixed For Your Clicks*, BUZZFEED NEWS (Apr. 14, 2016), <https://www.buzzfeednews.com/article/nielaorr/black-trauma-remixed-for-your-clicks> [<https://perma.cc/W3JL-U7K7>].

<sup>168</sup> Henry Louis Gates, Jr., *How Many Slave Narratives Were There?*, ROOT (Feb. 24, 2014), <https://www.theroot.com/how-many-slave-narratives-were-there-1790874721> (on file with the *Ohio State Law Journal*); *Slave Narratives and Uncle Tom's Cabin*, PBS, <https://www.pbs.org/wgbh/aia/part4/4p2958.html> [<https://perma.cc/L9H9-JE2K>].

<sup>169</sup> See Glencora Borradaile & Joshua Reeves, *Sousveillance Capitalism*, 18 SURVEILLANCE & SOC'Y 272, 272–75 (2020).

<sup>170</sup> Biddle, *supra* note 121.

record aggressive responses by law enforcement, Twitter was allowing Dataminr full access to content streams.<sup>171</sup> This access enabled the company to determine the precise location and activity of protestors.<sup>172</sup> Police departments, who paid Dataminr a premium for this surveillance service, used this information to effectively conduct surveillance, anticipate meeting locations, and intercept marches.<sup>173</sup> Executives at Dataminr have defended these practices as not amounting to government surveillance, but rather private “ideologically neutral newsgathering,” obfuscating the dangers presented by these for-profit partnerships that blur the lines between public and private surveillance.<sup>174</sup> What is clear, however, is that the commodification of the data emittance from cell phones in this way has helped generate new economies grounded upon sousveillance capitalism.<sup>175</sup> This threat from the tradeoff with the use of new technologies to organize and resist also presents obvious concerns about the private sector cheapening the organic nature of activism with commercialization, like the “Hey Siri, I’m getting pulled over” Apple iPhone shortcut.<sup>176</sup> Yet, similar concerns have arisen with alarming nonprofit ventures that both rely upon resources and platforms of private companies invested in surveillance capitalism<sup>177</sup> and seek to “professionalize” sousveillance practices.<sup>178</sup>

Despite these challenges, of which current community advocates must remain mindful, sousveillance still holds promise as a collective tool for organization and protection. Simone Browne has further built upon the concept by introducing the idea of “dark sousveillance,” capturing the historical relevance of surveillance resistance practices.<sup>179</sup> Browne describes dark sousveillance “as a way to situate the tactics employed to render one’s self out of sight” and the “strategies used in flight to freedom from slavery as necessarily ones of undersight.”<sup>180</sup> Even more, she imagines it as a space from which to marshal a critical examination of racialized surveillance and galvanize “antisurveillance, countersurveillance, and other freedom practices.”<sup>181</sup> Thus,

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Borradaile & Reeves, *supra* note 169, at 273.

<sup>176</sup> James Vincent, ‘Hey Siri, I’m Getting Pulled Over’ Shortcut Makes It Easy to Record Police, VERGE (June 17, 2020), <https://www.theverge.com/2020/6/17/21293996/siri-iphone-shortcut-pulled-over-police-starts-recording-video> (on file with the *Ohio State Law Journal*).

<sup>177</sup> Borradaile & Reeves, *supra* note 169, at 273–74 (discussing how ACLU’s Mobile Justice app received resources and support from Google, one of the most notorious companies seeking to exploit and capitalize off of surveillance data).

<sup>178</sup> See Joseph Brandim Howson, *The Visuality of Professionalised Sousveillance*, 18 SURVEILLANCE & SOC’Y 276, 276 (2020).

<sup>179</sup> BROWNE, *supra* note 13, at 21.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

the Underground Railroad can be understood as one of the most sophisticated anti-surveillance movements this country has ever witnessed. The narratives of those enslaved who escaped upon the Underground Railroad during one of the most intense periods of racialized surveillance may act as a launching point for Black communities to further imagine the possibilities for resistance today in times of uncertainty and despair at the enormity of an ever-growing police surveillance repertoire.

### B. *Resistance From The Underground*

Those enslaved who utilized dark sousveillance demonstrated imaginative perseverance, fearlessness, and resourcefulness. Take, for example, enslaved persons who shipped themselves to freedom. Late in the winter of 1857, a young woman who was enslaved in Maryland devised a plan to escape to freedom by concealing herself within a box that would be shipped from Baltimore to Philadelphia.<sup>182</sup> The great dangers presented by such a plan were obvious. The travel time would test her access to air, the box could be turned upside down, tossed, or mishandled in some harmful way, the arrival could be delayed, and most worryingly, she could be discovered. To this end, she convinced a young man to assist her.<sup>183</sup> He sealed her in the box and took it to the depot in Baltimore.<sup>184</sup> However, the box was not shipped that day and sat overnight, being turned over more than once.<sup>185</sup> By the time the box reached Philadelphia the next day, and members of the Underground Railroad were alerted to its arrival, the presumption was that the woman could not have survived and an undertaker was alerted to be present.<sup>186</sup> When the box was opened, miraculously, she was still alive, but could barely move and was unable to speak.<sup>187</sup> Fortunately, after a few days of rest, she recovered and continued traveling north to Canada.<sup>188</sup>

The great concern about survival in this practice emanated from the grave dangers presented in a similar escape several years prior by Henry “Box” Brown.<sup>189</sup> Brown was enslaved in Virginia, and was one of the first to attempt to escape by being shipped in a box.<sup>190</sup> He too planned to reach Philadelphia, but from Richmond, a much further and arduous trip.<sup>191</sup> Brown did all that he could to strategize and prepare for the journey, selecting the precise measurements for the box so as to not be too suspicious (“two feet eight inches

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<sup>182</sup> WILLIAM STILL, *STILL’S UNDERGROUND RAILROAD RECORDS* 608 (1886).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 609.

<sup>187</sup> *Id.*

<sup>188</sup> STILL, *supra* note 182, at 610.

<sup>189</sup> *Id.* at 81–86.

<sup>190</sup> *Id.* at 81.

<sup>191</sup> *Id.*

deep, two feet wide, and three feet long”), planning to carry a small pouch of water and a few biscuits for sustenance, as well as a large gimlet in case he needed to make holes to breathe.<sup>192</sup> All together it would take him twenty six hours to reach Philadelphia, barely alive, but after some time he was able to continue on to Boston.<sup>193</sup> Immediately after Brown’s incredible escape, two enslaved men from the same area in Virginia attempted to escape in boxes but had their plans exposed.<sup>194</sup>

Although several additional box escapes proved unsuccessful, William “Box” Peel managed to escape wrapped in straw and boxed up on a steamship from Baltimore.<sup>195</sup> However, he suffered terribly with cramps, excessive fainting, and body chills, and almost had to spend an extra day boxed away when he arrived in Philadelphia on Sunday, before his liaison desperately begged to retrieve the box despite freight not being delivered on Sundays.<sup>196</sup> Even more, a young woman was able to escape from Baltimore in a chest traveling upon a steamboat with her future husband’s mother.<sup>197</sup> The chest was filled with a quilt, a pillow, and a small amount of food and water.<sup>198</sup> Her mother-in-law stood near the chest for the entire journey, and since Black passengers were restricted to the deck for steamboat travel, she was able to untie the rope and peak into the chest a few times in the middle of the night to check on her daughter-in-law.<sup>199</sup>

Other creative methods of evading surveillance efforts involved the use of elaborate disguises.<sup>200</sup> In 1854, Clarissa Davis sought to flee enslavement along with her two brothers from Portsmouth, Virginia.<sup>201</sup> Her brothers were successful in getting away, however she failed to do so.<sup>202</sup> For seventy-five days she hid in a coop with minimal light and air, eluding detection, while being helped by others to remain hidden.<sup>203</sup> When she received word that a steamship had arrived from Philadelphia, with a steward on board that was willing to assist her escape as long as she found a way to the ship, she prayed for a strong rain to come that could limit the amount of police officers on the street observing and provide her some cover.<sup>204</sup> When the pouring rain that she hoped for finally came, she made her way to the steamship dressed as a male.<sup>205</sup> She ultimately reached New Bedford and immediately took on a new name.<sup>206</sup> In another clever

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 81, 84.

<sup>194</sup> STILL, *supra* note 182, at 84.

<sup>195</sup> *Id.* at 47.

<sup>196</sup> *Id.* at 46.

<sup>197</sup> *Id.* at 282.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 282–83.

<sup>200</sup> See STILL, *supra* note 182, at 60–61.

<sup>201</sup> *Id.* at 60.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> STILL, *supra* note 182, at 61.

escape, hiding in plain sight, Ellen and William Craft fled enslavement in the deep south, from Georgia.<sup>207</sup> Ellen was very fair-skinned, so much so that she could pass for White.<sup>208</sup> The couple devised a plan to have Ellen act as a White male enslaver, and William play her dutiful servant.<sup>209</sup> In the midst of executing the strategic ruse, Ellen worried that they may be found out because she did not have facial hair.<sup>210</sup> So they decided that they would wrap her face up as if she had an injury to conceal her lack of a beard.<sup>211</sup> Additionally, they created a sling for her arm and she carried a cane, as a way to avoid having to write and register.<sup>212</sup> They traveled discretely, managing to stop at first class hotels in Charleston and Richmond along the way.<sup>213</sup> However, danger presented when they came to pass through Baltimore.<sup>214</sup> When attempting to purchase train tickets, William was told by the ticket master that the office had a rule that “require[s] bonds for all negroes applying for tickets to go North.”<sup>215</sup> Acting quickly on his feet, William replied that he did not know anything about it and that he was simply traveling with his “young master” who was in a very delicate state of health and in great need of receiving medical treatment in Philadelphia.<sup>216</sup> William’s performance under dire pressure paid off and they eventually reached Philadelphia safely.<sup>217</sup>

Such cloaked movements were not limited to women, with girls using the tactic, too. In one particularly sophisticated operation, a White member of the Underground Railroad, J. Bigelow,<sup>218</sup> agreed to assist with the rescue of Ann Maria Weems, a fifteen-year-old girl enslaved in Rockville, Maryland.<sup>219</sup> It was known that her enslavers took pleasure in torturing some children they enslaved.<sup>220</sup> The Underground Railroad collective, known as the Vigilance Committee, raised money to purchase her mother and sister, however, offers to purchase Ann Maria were refused.<sup>221</sup> Her best hope was to be secreted away on the Underground Railroad.<sup>222</sup> Bigelow made arrangements for Ann Maria to be ferried by boat to Philadelphia, however, those plans never materialized and instead she was forced to travel by horse and carriage, a longer, more

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<sup>207</sup> *Id.* at 368.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> STILL, *supra* note 182, at 369.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 369–70.

<sup>218</sup> STILL, *supra* note 182, at 177, 180, 182.

<sup>219</sup> *Id.* at 185.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 186.

<sup>222</sup> *Id.*

treacherous journey through Maryland to Pennsylvania.<sup>223</sup> To make this possible, Ann Maria was dressed as a young boy and used the name “Joe Wright.”<sup>224</sup> Apparently, she was so good at “wearing pantaloons, and all other male rig,” that when she was finally presented in Philadelphia, “neither of the individuals present for a moment entertained the slightest doubt but that she was a ‘lad.’”<sup>225</sup>

Although it may be said that any form of resistance or escape took tremendous courage, given the repressive depths of the peculiar institution, those who enacted countersurveillance and sabotage and physically fought off enslavers certainly demonstrated immense fearlessness. In an interview with Perry Lewis at his home in Baltimore in the 1930s, he recalled his experiences being born on Kent Island, Maryland to an enslaved family.<sup>226</sup> He reflected on poor Whites in the Community being employed in large numbers as overseers and slave patrollers, making it hard to escape from constant observation.<sup>227</sup> He noted that enslaved people developed strategies for neutralizing surveillance efforts.<sup>228</sup> Enslaved persons would go out into the countryside and create a loud disturbance to intentionally attract the attention of slave patrollers.<sup>229</sup> They would create a trap by tying rope and grape vines across the road, so that when the slave patrollers came rushing to respond to the commotion, “they would be caught, throwing those who would come in contact with the rope or vine off the horse, sometimes badly injuring the riders.”<sup>230</sup> These collective acts of resistance not only show high levels of organizing but also the commitment to risk one’s life for human dignity and freedom.

Acts of bravery in fighting off enslavers often came at times when there were clear options to continue running, and Black communities chose to defend themselves.<sup>231</sup> One of the more famous episodes of formerly enslaved people fighting back occurred in Christiana, Pennsylvania in 1851, not long after the passage of the Fugitive Slave Act of 1850.<sup>232</sup> Message had spread that there was a community in Christiana consisting of fugitive slaves.<sup>233</sup> In the early morning hours a group of slave catchers from Baltimore and Philadelphia travelled to Christiana.<sup>234</sup> The men waited outside the home of William Parker, who they

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<sup>223</sup> *Id.* at 179, 183.

<sup>224</sup> STILL, *supra* note 182, at 182.

<sup>225</sup> *Id.* at 182, 185.

<sup>226</sup> Perry Lewis, *Ex-Slave*, in 8 SLAVE NARRATIVES: A FOLK HISTORY OF SLAVERY IN THE UNITED STATES FROM INTERVIEWS WITH FORMER SLAVES 49 (The Federal Writers’ Project ed., 1941) (story from Perry Lewis).

<sup>227</sup> *See id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 49–50.

<sup>231</sup> *See* STILL, *supra* note 182, at 125, 349.

<sup>232</sup> *Id.* at 349.

<sup>233</sup> *See id.*

<sup>234</sup> *Id.* at 349–50.



attempted to ambush as he was leaving to do some work.<sup>235</sup> However, William was able to avoid their attempts to grab him and fled back into the home.<sup>236</sup> The men gave chase but were unable to get to the second floor of the home, where the family had retreated.<sup>237</sup> Shortly thereafter, a horn was blown by the family from an upper window.<sup>238</sup> The men began to fire shots into the home and make demands that their slaves be returned.<sup>239</sup> Then the men inside presented themselves at the window, asking if they were who they were seeking, to which the slave-catchers answered no.<sup>240</sup> By this time, the horn had alerted other Black community members, both free and formerly enslaved, who began to show up and surround the men. Armed with guns, axes, corn-cutters, and clubs, they made it clear that they would all rather die than to return to enslavement in Maryland.<sup>241</sup> Arguments and a stand still raged on for some time, as two White neighbors arrived on the scene and attempted to convince the slave catchers that what they were attempting was futile.<sup>242</sup> But before the situation could be diffused, one of the men came out from the home, tired of the stand-off, and told one of the slave catchers that he better go away or he would get hurt.<sup>243</sup> This was taken as an insult and led to one of the slave catchers firing more shots.<sup>244</sup> This time, however, the gunfire was returned.<sup>245</sup> By the end, one of the slave catchers was dead, another one wounded, and several Black men had flesh wounds.<sup>246</sup> In the aftermath, several community members were able to flee to Canada, including William Parker.<sup>247</sup> Those who could not were indicted and tried for treason, including the two White neighbors who attempted to intervene.<sup>248</sup> Surprisingly, in one of the most interesting and important incidents relative to former enslaved persons defending their own liberty, all of the cases resulted in “not guilty” verdicts.<sup>249</sup>

It must also be noted that without the resources connected to free Black communities, and allyship from White abolitionists committed to the cause, the efficacy of the underground networks of dark sousveillance would have been severely limited. Take, for example, the story of Captain F. and his assistance of twenty one persons hid within his boat.<sup>250</sup> By the mid-nineteenth century

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<sup>235</sup> *Id.* at 350.

<sup>236</sup> *Id.*

<sup>237</sup> STILL, *supra* note 182, at 350.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> STILL, *supra* note 182, at 351.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 357.

<sup>248</sup> *Id.* at 357, 366–67.

<sup>249</sup> STILL, *supra* note 182, at 368.

<sup>250</sup> *Id.* at 165.

Captain F., a White man, had gained a reputation within abolitionist circles as daring and heroic, willing to risk his life on multiple voyages into areas of enslavement to help free people.<sup>251</sup> In November of 1855, he set out on a mission to transport those enslaved seeking to flee from Virginia.<sup>252</sup> Travel by boat was often an effective means of escape, particularly the deeper south one was traveling from, and especially if the captain sanctioned it and was skilled in hiding passengers from detection.<sup>253</sup> When Captain F. docked his schooner at the wharf at Norfolk, in addition to loading wheat, he ushered on twenty one people seeking to escape.<sup>254</sup> However, while the boat was still docked, rumors had begun circulating that a large number of slaves had escaped.<sup>255</sup> Not much time had passed before the mayor and a group of officers arrived at the boat with axes and long spears, demanding to conduct an inspection.<sup>256</sup> The captain gave the mayor and the officers the permission to search, which began with the officers using spears to slice through wheat stacks.<sup>257</sup> When the spearing did not produce the desired results, the mayor ordered the officers to begin chopping the deck and other parts of the boat with axes.<sup>258</sup> Still not discovering fugitives, the officers became confused, as they were confident that stowaways would be discovered.<sup>259</sup> Captain F. took the opportunity to add greater confusion to the situation by grabbing an axe and stating that he was tired of them chopping up his boat, and if they wanted it done properly, they could point to a spot and he would do it for them.<sup>260</sup> And that he did, with such velocity, force, and craze that the mayor and the officers quickly retired.<sup>261</sup>

A similar incident occurred in 1857 on a vessel carrying Abram Galloway and Richard Eden, who were hid within a boat seeking to escape North Carolina for Philadelphia.<sup>262</sup> Trying to secure passage on a boat was extremely risky, because if enslaved persons gave too much information to the wrong captain,

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<sup>251</sup> *Id.* at 165–66.

<sup>252</sup> *Id.*

<sup>253</sup> See generally David S. Cecelski, *The Shores of Freedom: The Maritime Underground Railroad in North Carolina, 1800-1861*, 71 N. C. HIST. REV. 174 (1994); Cate Lineberry, *The Thrilling Tale of How Robert Smalls Seized a Confederate Ship and Sailed It to Freedom*, SMITHSONIAN MAG. (June 13, 2017), <https://www.smithsonianmag.com/history/thrilling-tale-how-robert-smalls-heroically-sailed-stolen-confederate-ship-freedom-180963689/> [<https://perma.cc/376L-LW2K>]; Dorothea Crosbie-Taylor, *From Slaves to Seamen: Seeking Freedom (Part 1 of 2)*, NAT'L PARK SERV. (Feb. 7, 2018), <https://www.nps.gov/safr/blogs/from-slaves-to-seamen-seeking-freedom-part-1-of-2.htm> [<https://perma.cc/K5DZ-MA4D>].

<sup>254</sup> STILL, *supra* note 182, at 166.

<sup>255</sup> *Id.* at 166–67.

<sup>256</sup> *Id.* at 167.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> STILL, *supra* note 182, at 167.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 151.

they would be in immediate danger without an alternative escape plan.<sup>263</sup> Luckily for Abram and Richard, the captain was open to providing assistance and agreed to take them.<sup>264</sup> At the time, North Carolina had passed a new surveillance mandate requiring all boats heading north to be “smoked.”<sup>265</sup> The process involved the blowing of smoke in the lower levels of a ship as a way to drive out and reveal people who may be hiding.<sup>266</sup> To safe-guard against this practice, Abram and Richard devised a technique of making large silk oil cloths with drawstrings to tie tight around their heads, lessening the impact of the smoke.<sup>267</sup>

### C. *Enduring Resistance*

So, what do the lessons from these stories hold for today and the future? When faced with one of the most suffocating systems of racialized surveillance, Black communities developed modes of survival and forged paths of resistance that were instrumental in dismantling one of the most heinously destructive forms of subordination the world has seen. Yet, anti-Black surveillance still exists as a tool to continue those legacies of racial hierarchy through control and disruption of any efforts, demands, or movements toward racial justice. These stories, and many similar ones untold, demonstrate the importance of liberatory imagination. When seeking freedom, those enslaved created pathways from the rubble of impossibility, willing to risk the physical dangers of contorting their bodies in small boxes for shipping to avoid detection. No one but those enslaved would have imagined surviving such journeys, because they had been forced to watch their humanity boxed in the smallest of cages most of their lives, with the knowledge that they could still survive. When placed under extreme pressure, they responded with a fearlessness and readiness to fight. When isolated in silos, divided by plantations, states, and regions, they built complex networks of resource-sharing, allyship, and community. These are all valuable lessons for future and current movements seeking to challenge racialized surveillance in all its myriad forms.

The resistance referred to here, necessary for transformation, is not simply reactionary, but rather built upon a radical imagining of something different, the something we catch glimpses of when attempting to envision the type of society and world we want to live in. It has, and must continue to, take shape in both formal and informal ways: formal, like the American Civil Liberties Union of Maryland’s lawsuit against Baltimore’s aerial surveillance program,<sup>268</sup> the

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<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 152.

<sup>266</sup> See STILL, *supra* note 182, at 152.

<sup>267</sup> *Id.*

<sup>268</sup> *Leaders of a Beautiful Struggle v. Baltimore City Police Department*, ACLU MD., <https://www.aclu-md.org/en/cases/leaders-beautiful-struggle-v-baltimore-city-police-department> [<https://perma.cc/MHY8-3HZP>].

United Nations Special Rapporteur on Contemporary Forms of Racism presenting findings to the United Nation Human Rights Council in a report detailing how emerging technologies are entrenching racial inequality,<sup>269</sup> or local legislative efforts to ban specific forms of surveillance technology;<sup>270</sup> informal, like collaborating to use publicly accessible traffic cameras to track police brutality,<sup>271</sup> tenants organizing against the forced installation of facial recognition cameras in a majority-Black neighborhood,<sup>272</sup> or the use of digital counternarratives to challenge dominant frames that depict Black life as less than, and forming both domestic and international coalitions through such work.<sup>273</sup> These efforts only stand to grow from understanding the stories of surveillance resistance that preceded them, and incorporating the lessons learned.

Histories of racialized surveillance also hold significant lessons for law and policy, particularly challenging traditional understandings and framing of privacy and avenues to protect against surveillance measures. The Fourth Amendment is most often looked to as one of the primary legal vehicles for protection against unwarranted surveillance.<sup>274</sup> Essential to Fourth Amendment jurisprudence are the distinctions between government and private action and public and private locations.<sup>275</sup> The Fourth Amendment only provides protection against surveillance conducted by state actors,<sup>276</sup> with a few exceptions like when a private party acts pursuant to a government policy or

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<sup>269</sup> *Emerging Digital Technologies Entrench Racial Inequality, UN Expert Warns*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER (July 15, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26101&LangID=E> [<https://perma.cc/834N-ALRT>].

<sup>270</sup> Ally Jarmanning, *Boston Bans Use of Facial Recognition Technology. It's the 2nd-Largest City To Do So*, WBUR NEWS (June 24, 2020), <https://www.wbur.org/news/2020/06/23/boston-facial-recognition-ban> [<https://perma.cc/2JP4-CX4B>].

<sup>271</sup> Lorenzo Franceschi-Bicchierai, *Activists Are Using Traffic Cameras to Track Police Brutality*, VICE (June 15, 2020), [https://www.vice.com/en\\_us/article/y3zp55/activists-are-using-traffic-cameras-to-track-police-brutality](https://www.vice.com/en_us/article/y3zp55/activists-are-using-traffic-cameras-to-track-police-brutality) [<https://perma.cc/A8XA-DHU2>].

<sup>272</sup> See generally Mutale Nkonde, *Automated Anti-Blackness: Facial Recognition in Brooklyn, New York*, 2019–20 HARV. KENNEDY SCH. J. AFR. AM. POL'Y 30 (2020).

<sup>273</sup> See uncsils, *2019 Kilgour Lecture by Meredith D. Clark*, YOUTUBE (Apr. 30, 2019), <https://www.youtube.com/watch?v=zl9jLPr8mQ> [<https://perma.cc/3DJV-CTM7>] (presenting her lecture entitled “*Black Women Tried to Tell Y'all: Race, Representation, and Self-Preservation through Digital Counternarratives*”).

<sup>274</sup> RUSSELL L. WEAVER, JOHN M. BURKOFF, & CATHERINE HANCOCK, *CRIMINAL PROCEDURE: INVESTIGATIVE, A CONTEMPORARY APPROACH* 207–08 (2d ed. 2018).

<sup>275</sup> See *Carpenter v. United States*, 138 S.Ct. 2206, 2221–23 (2018) (deciding that a search warrant was necessary when law enforcement seeks location data from cell service providers so, despite cell phone companies being private, their turning over location data to the state triggers Fourth Amendment protections); *California v. Ciraolo*, 476 U.S. 207, 212–15 (1986) (holding that the naked-eye surveillance of defendant's backyard from an aircraft flying 1,000 feet above the ground was not a search under the Fourth Amendment because what a person knowingly exposes to the public is not protected).

<sup>276</sup> See WEAVER ET AL., *supra* note 274, at 207.

regulation<sup>277</sup> or when a private party acts as an instrument or agent of the government.<sup>278</sup> However, these limiting distinctions often hold little value for legal protection against racialized surveillance. As noted, with both free Blacks and those enslaved who escaped, the concern was not just with state surveillance, in fact, often the most harmful and dangerous forms of surveillance came from White private citizens.<sup>279</sup> Indeed, similar dangers present today in instances where White persons summon law enforcement to respond to Black people engaged in normal everyday activities, like birdwatching, studying, entering apartment buildings, and barbecuing.<sup>280</sup> These episodes have been shared on social media under “#livingwhileblack” hashtags.<sup>281</sup> Although these surveillance measures are not state action, they draw upon and are fortified by threat of or outright state force through police intervention, which often acts to legitimize and enforce racialized beliefs of criminality and unworthiness. Additionally, new surveillance technologies developed and run by private companies make it difficult to find a line between government and private action. For example, if a private citizen receives a free or discounted Ring doorbell camera from local law enforcement in exchange for allowing police officers direct access to stored and live video feeds, would that amount to state surveillance?<sup>282</sup> Would it make a difference to the Black teenager who is flagged to police officers by the private owner for looking “suspicious?”<sup>283</sup>

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<sup>277</sup> See *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 616–22 (1989) (upholding Federal Railroad Administration regulations mandating blood and urine tests of railroad employees involved in “major” train accidents, and deeming such tests as searches recognizable under the Fourth Amendment).

<sup>278</sup> See *United States v. White*, where the informant wore a wire with a radio transmitter that allowed agents to both monitor and record his conversations with the defendant. 401 U.S. 745, 747 (1971). Although the informant was a private party, and the Court held that the defendant did not have reasonable expectation of privacy in his conversations, the informant’s surveillance efforts at the behest of law enforcement triggered Fourth Amendment scrutiny as state action. *Id.* at 751–54.

<sup>279</sup> See *supra* Part IV.B.

<sup>280</sup> See Brandon Griggs, *Living While Black*, CNN (Dec. 28, 2018) <https://www.cnn.com/2018/12/20/us/living-while-black-police-calls-trnd/index.html> [<https://perma.cc/4THT-4RFL>]; Joan Walsh, *Birding While Black: Just the Latest Bad Reason for White People to Call Police*, NATION (May 26, 2020), <https://www.the-nation.com/article/society/amy-cooper-birding-police/> (on file with the *Ohio State Law Journal*).

<sup>281</sup> See Griggs, *supra* note 280

<sup>282</sup> See Jon Schuppe & Bracey Harris, *Police in Jackson, Mississippi, Want Access to Live Home Security Video, Alarming Privacy Advocates*, NBC NEWS (Dec. 2, 2020), <https://www.nbcnews.com/news/us-news/police-jackson-mississippi-want-access-live-home-security-video-alarming-n1249566> [<https://perma.cc/MD3T-SW3M>].

<sup>283</sup> See Caroline Haskins, *Amazon’s Home Security Company Is Turning Everyone into Cops*, VICE (Feb. 7, 2019), [https://www.vice.com/en\\_us/article/qvyvzd/amazons-home-security-company-is-turning-everyone-into-cops](https://www.vice.com/en_us/article/qvyvzd/amazons-home-security-company-is-turning-everyone-into-cops) [<https://perma.cc/H2PT-87WV>].

Even more, Fourth Amendment protections are limited to spaces where there is a reasonable expectation of privacy.<sup>284</sup> Thus, generally, the more public the location, the less there is of an expectation of privacy. This distinction rests in part on a privileged concept of privacy, one much divorced from the realities of freedom and safety which also impact privacy. Public locations are just as much deleterious spaces as are private spaces with racialized surveillance practices. During the nineteenth century in Baltimore and Philadelphia, both free and enslaved Black people were watched by law enforcement and White citizens then subjected to beatings and killings on public streets and public squares when racial tensions flared.<sup>285</sup> Freedom and safety often relied on avoiding and being protected against watchful eyes. That same freedom today is compromised when movements for racial justice lead public demonstrations that are heavily surveilled by state, federal, and private entities.

The narratives of those enslaved also reveal the need to understand and respond to racialized surveillance as harm inflicted upon and experienced by communities and groups. Much of the law and policy governing surveillance prioritizes examining and demonstrating individual harm and impacts.<sup>286</sup> The individualistic frame presents barriers to adequately addressing collective grievances.<sup>287</sup> This is particularly important in resisting advanced surveillance technologies that capture significant amounts of data, including biometric data. Data privacy is the dominant framework relied upon in crafting law and policy solutions.<sup>288</sup> Yet data privacy, as a framework to respond to racialized surveillance, may be limited not only because of its grounding on individual harms but also the sparse emphasis on social, political, and economic justice concerns. A stronger framework for shaping law and policy is data justice, which highlights and foregrounds the place of data-driven surveillance, and related Big Data decision-making and governance, in conceptions of social justice.<sup>289</sup> Such a framework may recognize the importance of analyzing and

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<sup>284</sup> WEAVER ET AL., *supra* note 274, at 212.

<sup>285</sup> DOUGLASS, *supra* note 46 at 94–97. See generally also John Runcie, “Hunting the Nigs” in *Philadelphia: The Race Riot of August 1834*, 39 PA. HIST. 187, 189–91 (1972).

<sup>286</sup> See Nicole B. Casarez, *The Synergy of Privacy and Speech*, 18 U. PA. J. CONST. L. 813, 865–70 (2016); Margaret Hu, *Cybersurveillance Intrusions and an Evolving Katz Privacy Test*, 55 AM. CRIM. L. REV. 127, 146 (2018); Mark Rumold, *Regulating Surveillance through Litigation: Some Thoughts from the Trenches*, in THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW 583–94 (David Gray & Stephen E. Henderson eds., 2017); Matthew Radler, Note, *Privacy Is the Problem: United States v. Maynard and a Case for a New Regulatory Model for Police Surveillance*, 80 GEO. WASH. L. REV. 1209, 1241–49 (2012).

<sup>287</sup> See *supra* note 286.

<sup>288</sup> Daniel J. Solove & Paul M. Schwartz, *ALI Data Privacy: Overview and Black Letter Text*, 68 UCLA L. REV. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3457563](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457563) [<https://perma.cc/2KK7-43SU>].

<sup>289</sup> Lina Dencik, Arne Hintz, & Jonathan Cable, *Towards Data Justice? The Ambiguity of Anti-Surveillance Resistance in Political Activism*, BIG DATA & SOC’Y 1, 9 (July–Dec. 2016), <https://journals.sagepub.com/doi/pdf/10.1177/2053951716679678> [<https://perma.cc/SFW2-9PFC>].

laying ground for responding to community harms and trauma and elevate the significance of the legacy of racialized surveillance.

The persistence of racialized surveillance practices also shows that one-off legislative bans on specific technologies, like placing moratoriums on facial recognition software due to racial bias and ineffectiveness,<sup>290</sup> will not be enough by itself to stop the overall drive for the development and implementation of similar technologies. This drive is led in large part by economic interests that look to data as the new oil or gold.<sup>291</sup> Perhaps it should also be said that data is the new cotton, as elements of racial capitalism can be seen in the emergence of surveillance capitalism. The stories of those enslaved and the legacy of surveillance that followed shows that efforts to watch and monitor have always been connected to buttressing systems of economic exploitation of Black bodies. It is no coincidence that one of the first residential deployments of facial recognition technology in New York City was a majority Black apartment building,<sup>292</sup> or that voice recognition companies have turned to prisons, with disproportionate numbers of Black inmates, to gather data through analyzing inmates' calls to family and friends.<sup>293</sup> Law and policy initiatives to address potential harms must be mindful of these realities. I intend to further explore these critical points in forthcoming projects.

## V. CONCLUSION

In Baltimore, the long history of racialized surveillance has profoundly impacted the development of the structural foundation of every meaningful institution, particularly in policing and corrections. That entrenchment all but guarantees that state surveillance practices will continue to work toward servicing the status quo, where poor people of color are more vulnerable and locked out of equitable distribution of resources, without fundamental challenges to those underlying structures. This will remain the case irrespective of who sits on city council, oversees executive agencies, or makes up the largest voting bloc in the city. However, Baltimore is not alone. Similar challenges are

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<sup>290</sup> See Bobby Allyn, *IBM Abandons Facial Recognition Products, Condemns Racially Biased Surveillance*, NPR (June 9, 2020), <https://www.npr.org/2020/06/09/873298837/ibm-abandons-facial-recognition-products-condemns-racially-biased-surveillance> [https://perma.cc/2BAL-D9P2]; Karen Weise & Natasha Singer, *Amazon Pauses Police Use of Its Facial Recognition Software*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/technology/amazon-facial-recognition-backlash.html> [https://perma.cc/D9AC-92A2].

<sup>291</sup> Borradaile & Reeves, *supra* note 169, at 273.

<sup>292</sup> See Nkonde, *supra* note 272, at 30; Erin Durkin, *New York Tenants Fight as Landlords Embrace Facial Recognition Cameras*, GUARDIAN (May 30, 2019), <https://www.theguardian.com/cities/2019/may/29/new-york-facial-recognition-cameras-apartment-complex> [https://perma.cc/6PAA-GX6Y].

<sup>293</sup> See George Joseph & Debbie Nathan, *Prisons Across the U.S. Are Quietly Building Databases of Incarcerated People's Voice Prints*, INTERCEPT (Jan. 30, 2019), <https://theintercept.com/2019/01/30/prison-voice-prints-databases-securus/> [https://perma.cc/2ZYY-DP2K].

also being faced and resisted by other U.S. cities, like Detroit, Los Angeles, and Chicago. In Detroit, communities and local organizations have raised alarms about Project Greenlight, the city's extensive video surveillance program with plans to utilize facial recognition software.<sup>294</sup> One of the organizations pushing back is the Detroit Community Technology Project (DCTP).<sup>295</sup> DCTP stands as a great example of community fusing the need to examine and challenge state surveillance practices that disproportionately target and burden Black residents, while also elevating the possibilities of using technology to serve different values and goals, such as strengthening community members' connection to each other and to the planet.<sup>296</sup> In Los Angeles, the Stop LAPD Spying Coalition successfully fought to end law enforcement's predictive policing program called PredPol, that was ineffective in reducing crime, relying upon algorithms that operated with racially-biased data.<sup>297</sup> In Chicago, Media Justice has been on the forefront of leading a campaign against the expanded use of electronic ankle monitors in the criminal justice system, as it likens to "a form of technological mass incarceration."<sup>298</sup>

These movements of resistance give hope for the many battles that will, and must, be waged along these planes. In this effort, it is the role of the advocate, the community member, the scholar, to challenge the positioning of surveillance as neutral or valueless. Surveillance must be understood as a powerful tool of control. With every movement for racial justice surveillance practices have been deployed to undermine efforts to make America a better country for everyone. Sadly, our current reality continuously proves that Black lives will not matter as long as Black lives are monitored. Yet, we must remember that effective resistance is possible and necessary, even in a daunting world of ubiquitous, unimaginably powerful surveillance technologies.

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<sup>294</sup> M.L. Elrick, *Detroit Protesters Take Fight Against Facial Recognition Tech to City Leaders' Homes*, DETROIT FREE PRESS (June 15, 2020), <https://www.freep.com/story/news/local/michigan/detroit/2020/06/15/facial-recognition-deal-off-agenda-protesters-target-councilmembers/3191887001/> [<https://perma.cc/3CL7-WRV4>].

<sup>295</sup> *Technology Rooted in Community Needs*, DETROIT COMMUNITY TECH. PROJECT, <https://detroitcommunitytech.org/> [<https://perma.cc/NEL3-LNUJ>].

<sup>296</sup> *Id.*

<sup>297</sup> Eva Ruth Moravec, *Do Algorithms Have a Place in Policing?*, ATLANTIC (Sept. 5, 2019), <https://www.theatlantic.com/politics/archive/2019/09/do-algorithms-have-place-policing/596851/> [<https://perma.cc/3HL6-FQWP>].

<sup>298</sup> JAMES KILGORE & MYAISHA HAYES, CTR. FOR MEDIA JUSTICE, #CHALLENGINGECARCERATION, GUIDELINES FOR RESPECTING THE RIGHTS OF INDIVIDUALS ON ELECTRONIC MONITORS 1 (Mar. 2019), <https://mediajustice.org/wp-content/uploads/2019/03/electronic-monitoring-guidelines-final.pdf> [<https://perma.cc/UDU4-3K5X>]. For more on electronic monitoring and the sociolegal challenges it poses, see generally Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641 (2019).