

## Notes

# FROM MEMPHIS, WITH LOVE: A MODEL TO PROTECT PROTESTERS IN THE AGE OF SURVEILLANCE

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### ABSTRACT

*In 1978, after two years of contentious litigation, the City of Memphis entered into a unique agreement with its citizens: it signed a consent decree, stipulating that it would halt its interference with First Amendment-protected activities. More specifically, the Consent Decree barred the City from surveilling protesters—the very conduct that triggered litigation.*

*Fast forward forty years. In 2018, narratives of police brutality dominated the nation's headlines. Consequently, protesters demonstrated from the streets of Ferguson, Missouri to Oakland, California. And in Memphis, Tennessee, those who protested were often met with an all-too-familiar response—surveillance by the Memphis Police Department. That is until the Western District of Tennessee found that the City had violated the terms of its own agreement. The court's message was undeniably clear—the Memphis Consent Decree is alive and well.*

*Memphis is by no means an outlier in police-civilian relations. After all, police departments across the country surveil protesters. But Memphis is an outlier in terms of the method it has chosen to address this issue. As the surveillance of protesters and the capacity to surveil protesters grow, the Memphis Consent Decree offers a model for future legislation that better safeguards First Amendment values. This Note accordingly narrates the story of Memphis, its successes and failures, and the lessons it holds for hundreds of cities, for decades to come.*

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“MPD has the opportunity to become one of the few, if only, metropolitan police departments in the country with a robust policy for the protection of privacy in the digital age. The Court recognizes this may be a heavy burden; being a pioneer usually is.”<sup>1</sup>

## INTRODUCTION

Two hundred protesters gathered outside FedExForum in Memphis, Tennessee on the evening of July 10, 2016.<sup>2</sup> In the wake of heightened police brutality across the country, the protesters arrived with a simple message: they were “tired of the senseless killings of black people.”<sup>3</sup> Half an hour later, the protesters marched north, climbed the ramp to Interstate 40, and shut down the I-40 bridge.<sup>4</sup> By 6:30 p.m., several hundred protesters had assembled on the bridge; at its peak, more than a thousand protesters; and by 10:45 p.m., zero.<sup>5</sup>

At some point over those four hours, Memphis Police Department (“MPD”) Interim Director Michael Rallings appeared, accompanied by a fleet of officers.<sup>6</sup> Some protesters worried that violence would tread on the heels of the officers’ arrival.<sup>7</sup> What followed was quite the opposite. In a powerful moment of solidarity, Rallings locked arms with the protesters and prayed.<sup>8</sup> “I was truly concerned about the

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1. *ACLU of Tennessee, Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-egb, slip op. at 38 (W.D. Tenn. Oct. 26, 2018) (emphasis added) (footnote and citation omitted) (citing Rachel Levinson-Waldman, *Government Access to and Manipulation of Social Media: Legal and Policy Challenges*, 61 *HOW. L.J.* 523 (2018)).

2. Jody Callahan, *Marchers Shut Down I-40 Bridge at Memphis During Black Lives Matter Rally*, *COM. APPEAL* (July 10, 2016), <http://archive.commercialappeal.com/news/tennessee-black-caucus-calls-for-calm-amid-racial-unrest-3714d93e-1078-6a7d-e053-0100007f134e-386214081.html> [<https://perma.cc/ARN9-ZKHE>].

3. *Id.* (quoting protester Porshia Scruggs).

4. *Id.*

5. *Id.*; Yolanda Jones, Katie Fretland & Yalonda M. James, *One Year Later: The Day Memphis Protesters Shut Down the I-40 Bridge*, *COM. APPEAL* (July 7, 2017, 6:23 PM), <https://www.commercialappeal.com/story/news/2017/07/07/bridge-one-year-later/431947001> [<https://perma.cc/K7K6-AUAF>] (noting that more than a thousand protesters were present at the demonstration).

6. Callahan, *supra* note 2.

7. *See* Jones, Fretland & James, *supra* note 5 (“I was in shock, actually, a state of amazement; a little disbelief that we actually shut down the highway, and then a lot of that turned into fear that dogs, water cannons and things like that was going to be used.” (quoting protester Keedran Franklin)).

8. Kelsey Ott, *Huge Crowd of Black Lives Matter Supporters Marches Through Memphis, Shuts Down I-40 Bridge*, *WREG MEMPHIS* (July 11, 2016, 12:04 AM), <https://wreg.com/>

legacy of Dr. Martin Luther King Jr.,” he later explained.<sup>9</sup> “I thought I heard his voice saying get up there and try to get this resolved.”<sup>10</sup>

That was about as wholesome as the story got. The day after the protest, Memphis Mayor Jim Strickland made this statement: “As Memphis mayor, I respect the Constitution and the right to assemble peacefully in protest. . . . [But] [l]et me be clear: you can exercise your First Amendment rights without breaking the law.”<sup>11</sup> Mayor Strickland’s professed adoration for the Constitution notwithstanding, MPD’s Office of Homeland Security (“OHS”)—originally created after 9/11 to combat terrorism—implemented a program to surveil protesters.<sup>12</sup> Officers tracked individuals who attended protests, monitored their social media activity, and recorded protesters’ names and activities on OHS spreadsheets.<sup>13</sup> Some protesters also ended up on “blacklists,” which banned them from entering City Hall unless they received police escorts.<sup>14</sup> One protester even reported being followed by the police.<sup>15</sup>

MPD is far from alone in its surveillance of protesters. Police departments across the country, from Oakland, California to Ferguson, Missouri, also monitor protesters.<sup>16</sup> In fact, the list of groups that have

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2016/07/10/interim-mpd-director-shows-up-to-black-lives-matter-rally [https://perma.cc/ZC3T-RVLU].

9. Jones, Fretland & James, *supra* note 5.

10. *Id.*

11. Ott, *supra* note 8 (quoting Mayor Jim Strickland).

12. Defendant’s Memorandum in Support of Motion for Summary Judgment on Civil Contempt at 6–7, ACLU of Tennessee, Inc. v. City of Memphis, No. 2:17-cv-02120-JPM-egb (W.D. Tenn. June 18, 2018).

13. *Id.*

14. Yolanda Jones, *Activists See Vindication in Memphis Police Surveillance Court Order*, DAILY MEMPHIAN (Oct. 31, 2018, 11:46 AM), <https://www.dailymemphian.com/article/987/Activists-see-vindication-in-Memphis-police-surveillance-court-order> [https://perma.cc/8CTW-WNJF].

15. *Id.* (discussing protester Keedran Franklin’s report of being followed by the police).

16. Matt Cagle, *Facebook, Instagram, and Twitter Provided Data Access for a Surveillance Product Marketed to Target Activists of Color*, ACLU NORCAL (Oct. 11, 2016), <https://www.aclunc.org/blog/facebook-instagram-and-twitter-provided-data-access-surveillance-product-marketed-target> [https://perma.cc/FR5G-N9PX] (“[I]n Oakland and Baltimore, law enforcement has used Geofeedia to monitor protests.”); Jessica Guynn, *ACLU: Police Used Twitter, Facebook to Track Protests*, USA TODAY (Oct. 11, 2016, 12:44 PM), <https://www.usatoday.com/story/tech/news/2016/10/11/aclu-police-used-twitter-facebook-data-track-protesters-baltimore-ferguson/91897034> [https://perma.cc/FVB4-NGMM] (“Geofeedia documents brought to light by the ACLU showed that police tracked protests in Baltimore in 2015 after the death in police custody of Freddie Gray, and protests in Ferguson, Mo., in 2014 after the police shooting of Michael Brown.”).

been targeted includes Black Lives Matter,<sup>17</sup> Muslims,<sup>18</sup> environmentalists,<sup>19</sup> the Catawba Nation,<sup>20</sup> supporters of Palestine,<sup>21</sup> animal rights organizers,<sup>22</sup> and even middle school students.<sup>23</sup> Where protest exists, surveillance lurks closely behind.

As “the rhizome of the ‘surveillant assemblage’ . . . steadily grow[s] and deepen[s],”<sup>24</sup> activists, scholars, protesters, and judges have all attempted to determine the extent of constitutional protection from surveillance. Intuitively, this kind of surveillance seems like a violation of the First Amendment’s freedom of assembly<sup>25</sup> and the Fourth Amendment’s freedom from unreasonable search and seizure.<sup>26</sup> Indeed, activists and scholars have championed those arguments.<sup>27</sup> But on the opposite end of the spectrum, several courts

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17. Sweta Vohra, *Documents Show US Monitoring of Black Lives Matter*, AL JAZEERA (Nov. 28, 2017), <https://www.aljazeera.com/news/2017/11/documents-show-monitoring-black-lives-matter-171128110538134.html> [<https://perma.cc/KM3L-KVNU>].

18. Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, ASSOCIATED PRESS (Feb. 23, 2012), <https://www.ap.org/ap-in-the-news/2012/with-cameras-informants-nypd-eyed-mosques> [<https://perma.cc/GUV2-VGER>].

19. Aileen Brown, Will Parrish & Alice Sperti, *Dakota Access Pipeline Company Paid Mercenaries to Build Conspiracy Lawsuit Against Environmentalists*, INTERCEPT (Nov. 15, 2017, 1:34 PM), <https://theintercept.com/2017/11/15/dakota-access-pipeline-dapl-tigerswan-energy-transfer-partners-rico-lawsuit> [<https://perma.cc/B5CL-X8PS>].

20. *Id.*

21. *ACLU of Tennessee, Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-egb, slip op. at 22 (W.D. Tenn. Oct. 26, 2018).

22. Glenn Greenwald, *The FBI’s Hunt for Two Missing Piglets Reveals the Federal Cover-Up of Barbaric Factory Farms*, INTERCEPT (Oct. 5, 2017, 12:05 PM), <https://theintercept.com/2017/10/05/factory-farms-fbi-missing-piglets-animal-rights-glenn-greenwald> [<https://perma.cc/5V9N-PJXK>].

23. Will Pierce, *CIA-Backed Firm Touted Social Media Surveillance of Students to Sell Services to Evanston Police*, SHADOWPROOF (Sept. 10, 2018), <https://shadowproof.com/2018/09/10/cia-backed-firm-touted-social-media-surveillance-of-students-to-sell-services-to-evanston-police> [<https://perma.cc/MH28-2MN8>] (“Skokie Police has been very successful in identifying drug related crimes as well as monitoring local middle and high schools 24/7.” (quoting Geofeedia Representative Jon Newman)).

24. Torin Monahan, *Ambiguous Ambitions with Counter-Surveillance*, MEDIUM (Sept. 24, 2018), <https://medium.com/surveillance-and-society/ambiguous-ambitions-with-counter-surveillance-e7784b2308eb> [<https://perma.cc/BTC9-68V4>].

25. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

26. See *id.* amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

27. Professor Marc Jonathan Blitz is one of those scholars, explaining:

[P]olice engage in a Fourth Amendment search, even in public space, when they are not merely observing but also recording images or sounds of people. . . . Police engage

have rejected constitutional claims, noting in part that protesters are not protected from surveillance in cases where police departments merely track their public posts and activity.<sup>28</sup> Because protests—and assemblies generally—are inherently public, it would be unreasonable for protesters to have an expectation of privacy in those public activities.<sup>29</sup>

Caught in the crosshairs of constitutional ambiguity, the protesters of Memphis may have found a solution. They sued the city—and won.<sup>30</sup> The case they brought—*ACLU of Tennessee, Inc. v. City of*

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in a search simply by using technology with the capacity to create a record of people's movements and aiming it at certain individuals. Defining searches in public spaces in this manner parallels the way that courts typically define Fourth Amendment searches in private spaces.

Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 28–29 (2013) (emphasis omitted). See, e.g., Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 747 (2008) (noting that, in addition to Fourth Amendment concerns, “[t]he potential chilling effect due to relational surveillance poses serious risks not only to individual privacy, but to the First Amendment rights to freedom of association and assembly”); Amna Toor, Note, “*Our Identity Is Often What’s Triggering Surveillance*”: *How Government Surveillance of #BlackLivesMatter Violates the First Amendment Freedom of Association*, 44 RUTGERS COMPUTER & TECH. L.J. 286, 300 (2018) (“Thus, the government’s use of surveillance technologies . . . to monitor the activities of #BLM to detect threats to national security, raises the same First Amendment associational freedom concerns as COINTELPRO’s surveillance of the Civil Rights Movement posed.”).

28. See, e.g., *Laird v. Tatum*, 408 U.S. 1, 3 (1972) (agreeing with the district court’s dismissal of a challenge by protesters against surveillance because “complaining of a ‘chilling’ effect on the exercise of their First Amendment rights where such effect is allegedly caused, not by any ‘specific action of the Army against them, (but) only (by) the existence and operation of the intelligence gathering and distributing system’” is not a justiciable constitutional claim); *Pledge of Resistance v. We the People 200, Inc.*, 665 F. Supp. 414, 418–19 (E.D. Penn. 1987) (refusing to grant a preliminary injunction against FBI photographic surveillance of protesters in public and noting that “none of this photographic surveillance activity could reasonably be considered a violation of anyone’s constitutional rights”); cf. *ACLU of Tennessee, Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-egb, slip op. at 36 (W.D. Tenn. Oct. 26, 2018) (“The Court recognizes that the City granted its residents privacy rights above and beyond those guaranteed by the Constitution . . .”). *But cf.* *Black Lives Matter v. Town of Clarkstown*, 354 F. Supp. 3d 313, 323–24 (denying in part a motion to dismiss a First Amendment claim because “[w]hen confronted with this threat of violence from the government at a peaceful Black Lives Matter rally, on top of the illegal surveillance targeted against the group and its members, any reasonable person would think twice before continuing to participate in Black Lives Matter”).

29. See *infra* Part II (discussing the constitutional limitations).

30. *City of Memphis*, slip op. at 1–3.

*Memphis*<sup>31</sup>—was not, however, a constitutional victory.<sup>32</sup> Instead, the protesters won because Memphis had violated a consent decree.<sup>33</sup> In 1978, Memphis entered into an agreement with the American Civil Liberties Union (“ACLU”) that prohibited MPD from surveilling and collecting information related to First Amendment–protected activities (speech, religion, press, and assembly).<sup>34</sup> This Decree made Memphis “the first, and perhaps only, city in the country with an established policy for the protection of its residents’ privacy in the face of ever-expanding techniques of electronic surveillance.”<sup>35</sup>

Whether protesters are aware of surveillance or not, legitimate reasons exist to curb it.<sup>36</sup> When known, surveillance can deter protesters from exercising their constitutional rights.<sup>37</sup> When unknown, “[c]overt surveillance risks equating political protest with criminal activity.”<sup>38</sup> As the surveillance of protesters accelerates parallel to the

31. *ACLU of Tennessee, Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-egb (W.D. Tenn. Oct. 26, 2018). The litigation has been referred to by two names. As originally filed, the case was called *Blanchard v. City of Memphis*, but the name of the case on which the district court eventually entered judgment was *ACLU of Tennessee, Inc. v. City of Memphis*. The name of the case changed because the original plaintiffs lacked standing to sue under the City’s Consent Decree, while the intervening plaintiff did have standing. This issue will be discussed more thoroughly in Part IV of this Note. For ease of reference, the case will be referred to as *City of Memphis*.

32. *City of Memphis*, slip op. at 15 (“[T]he City agreed to obligations above and beyond those required by the Bill of Rights.”).

33. *Id.* at 1–3. Consent decrees are similar to settlement agreements. *See infra* Part IV.A. Both parties agree to certain conditions that regulate future behavior, and the court can enforce the decree at a later time in the same way that it would enforce a contract. *See Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992) (“A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree . . .”).

34. *See infra* Part III.

35. *City of Memphis*, slip op. at 3–4. The author has only been able to identify New York City as an additional city with a consent decree that protects protesters from surveillance, but that decree was weakened by the District Court for the Southern District of New York in 2003. *See Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327, 331–34, 342 (S.D.N.Y. 2003) (discussing the contents of the *Handschu* consent decree and determining that changed circumstances warranted amendment of the decree).

36. *See, e.g., Monahan, supra* note 24 (“Data, once recorded, can be used to serve a myriad of ends, many of which are unforeseeable at the time of collection.”).

37. *Cf. Levinson-Waldman, supra* note 1, at 524 (“[I]n an era when people use social media sites ‘to engage in a wide array of protected First Amendment activity . . . [.]’ studies indicating that online surveillance produces a chilling effect and thus may suppress protected speech, association, and religious and political activity are of particular concern.” (footnote omitted) (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017))).

38. Nicholas Kusnetz, *Harsh New Anti-Protest Laws Restrict Freedom of Speech, Advocates Say*, WASH. POST (Aug. 22, 2018), <https://www.washingtonpost.com/energy-environment/2018/>

development of technology, the question remains: What happens next? While some scholars focus on the constitutionality of this surveillance, the successful protection of protesters in Memphis—made without reliance on the Constitution—indicates that other legal solutions exist, ought to be more fully examined, and provide a framework for potential legislative solutions.

This Note picks up where existing scholarship leaves off. Using the terms of Memphis’s Consent Decree as its foundation, this Note argues that the best way to effectuate the principles behind the First Amendment’s protection of assembly in the age of technology is through legislation that regulates protester surveillance. It proceeds in four parts: Part I chronicles the evolution of protester surveillance nationally, discussing the disparate impact this surveillance has had on marginalized communities; Part II provides background on why constitutional arguments fall short of protecting protesters; Part III traces the origin of the Memphis Consent Decree and discusses its application in *City of Memphis*; and Part IV outlines a legislative solution, grappling with some of the difficulties of implementation.

Having explained what this Note *is*, what follows is an explanation of what this Note is *not*. This Note does not argue that surveillance is purposeless. Nor does it claim that cops are ill-intentioned in their pursuit and collection of surveillance. Quite the opposite. One can easily imagine circumstances where surveillance is useful, needed even. And officers have tough jobs, often operating under “circumstances that are tense, uncertain, and rapidly evolving.”<sup>39</sup> But surveillance also carries serious costs, and if officers push “too aggressively[, they] may undermine community relationships that are necessary to maintaining public safety and order.”<sup>40</sup> Perhaps that is why the *City of Memphis* court noted: “The idea that police should be limited in their powers predates 2018 . . . .”<sup>41</sup> In that vein, this Note offers one such limitation.

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08/22/environmentalists-say-new-pipeline-protest-laws-restrict-their-freedom-speech/?utm\_term=.6b3d88aa0e90 [https://perma.cc/88GQ-MPRF] (citing Northwestern University historian Keith Mako Woodhouse).

39. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

40. Catherine Crump, *Surveillance Policy Making by Procurement*, 91 WASH. L. REV. 1595, 1652 (2016).

41. *ACLU of Tennessee, Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-egb, slip op. at 36 (W.D. Tenn. Oct. 26, 2018).

## I. THE EVOLUTION OF AMERICAN SURVEILLANCE

While it is difficult to pinpoint precisely when it began, the surveillance of dissidents and protesters in America is at least as old as the country itself. Leading up to the American Revolution, young patriots voiced discontent with “unrestrained searches” by British officers.<sup>42</sup> “Using ‘writs of assistance,’ the King authorized his agents to carry out wide-ranging searches of anyone, anywhere, and anytime regardless of whether they were suspected of a crime.”<sup>43</sup> This surveillance formed the basis of the Fourth Amendment<sup>44</sup>: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”<sup>45</sup>

Despite the historical underpinnings of the Fourth Amendment, America took a “page from King George’s playbook,” and surveillance crept into the country.<sup>46</sup> In 1956, for example, FBI Director J. Edgar Hoover infamously created the FBI’s Counter Intelligence Program (“COINTELPRO”), which tracked “radical” and “subversive” groups that it deemed dangerous and a threat to national security.<sup>47</sup> This notably included the Black Panthers, labor organizations, and antiwar activists.<sup>48</sup> The NSA also got involved in the program, “tapping the phones of an esteemed list of Vietnam War critics, among them

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42. See *Riley v. California*, 573 U.S. 373, 403 (2014) (“[T]he Fourth Amendment was the founding generation’s response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.”); see also Transcript of Oral Argument at 82, *Carpenter v. United States*, 138 S. Ct. 2206 (2017) (No. 16-402) (“You know, John Adams said one of the reasons for the war was the use by the government of third parties to obtain information [by] forc[ing] them to help as their snitches and snoops.” (statement of Gorsuch, J.)).

43. David Snyder, *The NSA’s “General Warrants”: How the Founding Fathers Fought an 18th Century Version of the President’s Illegal Domestic Spying*, ELEC. FRONTIER FOUND., <https://www.eff.org/files/filenode/att/generalwarrantsmemo.pdf> [<https://perma.cc/32AN-BPYP>].

44. See *Riley*, 573 U.S. at 403 (recognizing the Fourth Amendment as “the founding generation’s response” to surveillance by British officers); *Payton v. New York*, 445 U.S. 573, 583 (1980) (“It is familiar history that indiscriminate searches and seizures conducted under the authority of ‘general warrants’ were the immediate evils that motivated the framing and adoption of the Fourth Amendment.”).

45. U.S. CONST. amend. IV.

46. Snyder, *supra* note 43 (comparing American surveillance to surveillance under King George).

47. Noa Yachot, *History Shows Activists Should Fear the Surveillance State*, ACLU (Oct. 27, 2017, 3:45 PM), <https://www.aclu.org/blog/national-security/privacy-and-surveillance/history-shows-activists-should-fear-surveillance> [<https://perma.cc/2JMY-RLMZ>].

48. *Id.*

journalists, sitting senators, Muhammad Ali, and Jane Fonda.”<sup>49</sup> And perhaps most notoriously, COINTELPRO also surveilled Martin Luther King, Jr. as part of a larger effort to “[p]revent the rise of a ‘messiah’ who could unify and electrify the militant Black Nationalist movement.”<sup>50</sup>

In the modern era, surveillance has widely proliferated, with fear serving as its fire and technology its gasoline. The United States has monitored everything from suspicious foreign activity<sup>51</sup> to seemingly harmless domestic conduct.<sup>52</sup> In fact, after years of surveillance, the U.S. government has already acquired a substantial amount of information, making it so that even if a sitting president “never directs the NSA to gather one additional record, or asks the Federal Bureau of Investigation to initiate one more investigation . . . the U.S. government is sitting on top of a treasure trove of data.”<sup>53</sup> The surveillance of protesters in particular has grown in the last decade primarily for two reasons: first, technological innovation has made it easier to track protesters, and second, the government has increasingly justified surveillance as a national security issue in a post-9/11 America.

First, the sheer growth of technology allows officers to track vast quantities of information about protesters, making surveillance seamless. Social media, in particular, plays a direct role in this surveillance<sup>54</sup> because social media accounts can access an individual’s

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49. *Id.*

50. See Jeffery Robinson, *Memphis Police Surveillance of Activists is a Betrayal and a Reminder*, ACLU (Aug. 9, 2018, 5:30 PM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/memphis-police-surveillance-activists-betrayal> [<https://perma.cc/XX7X-MNEW>] (quoting Memorandum from the Director of the FBI to SAC, Albany (Mar. 3, 1968), <https://vault.fbi.gov/cointel-pro/cointel-pro-black-extremists/cointelpro-black-extremists-part-01-of/view> [<https://perma.cc/QW3P-A4VV>]) (alteration in original).

51. For example, in 2012, the government backed EMBERS, a \$22 million program, to track protesters abroad. Leah McGrath Goodman, *The EMBERS Project Can Predict the Future with Twitter*, NEWSWEEK MAG. (Mar. 7, 2015, 12:15 PM), <https://www.newsweek.com/2015/03/20/embers-project-can-predict-future-twitter-312063.html> [<https://perma.cc/W8CR-Q4CL>]. EMBERS used open-source information from social media to “give the U.S. a heads up” when protests might occur in over twenty countries across Latin America and the Middle East. *Id.*

52. See Pierce, *supra* note 23 (describing a CIA-backed firm’s sale of high school students’ social media information to local police).

53. Rachel Levinson-Waldman, *Trump’s All-Too-Powerful Surveillance Infrastructure*, AM. PROSPECT (Mar. 1, 2017), <http://prospect.org/article/trump-s-all-too-powerful-surveillance-infrastructure> [<https://perma.cc/8FN9-KWPO>].

54. See Levinson-Waldman, *supra* note 1, at 526–31 (detailing various accounts of police departments using social media to monitor individuals); see, e.g., Iqra Asghar, *Boston Police Used Social Media Surveillance for Years Without Informing City Council*, ACLU (Feb. 8, 2018, 12:45

location,<sup>55</sup> which new technologies might be able to gather and analyze.<sup>56</sup> For example, in 2017 and 2018, the federal government was granted two patents that endow it with the ability to use social media-enabled technology to predict when the next protest will occur.<sup>57</sup> And that technological capacity has trickled down to local governments as well. Take, for instance, the Fresno Police Department, which uses social media-monitoring software to track “threats to public safety” by tracing certain hashtags, including #BlackLivesMatter, #DontShoot, #ImUnarmed, #PoliceBrutality, and #ItsTimeforChange.<sup>58</sup>

As another example of technological growth, the Illinois legislature introduced a bill in 2018 that would allow cities, like Chicago, to monitor protesters through drones equipped with facial-recognition software.<sup>59</sup> The facial-recognition software used by these drones could one day be produced by tech giants like Amazon, which is currently pitching its facial-recognition system—aptly named “Rekognition”<sup>60</sup>—to Immigration and Customs Enforcement.<sup>61</sup>

PM), <https://www.aclu.org/blog/privacy-technology/internet-privacy/boston-police-used-social-media-surveillance-years-without> [<https://perma.cc/259X-MXF4>] (discussing the Boston Police Department’s request for \$1.4 million for a new social media surveillance system).

55. See, e.g., *Data Policy*, FACEBOOK, [https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy) [<https://perma.cc/9WWT-GKUG>] (“We use location-related information—such as your current location, where you live, the places you like to go, and the businesses and people you’re near . . . . Location-related information can be based on things like precise device location (if you’ve allowed us to collect it) . . . .”).

56. George Joseph, *How Police Are Watching You on Social Media*, CITYLAB (Dec. 14, 2016), <https://www.citylab.com/equity/2016/12/how-police-are-watching-on-social-media/508991> [<https://perma.cc/6N2N-N6XG>] (discussing how police are working with companies such as Geofeedia to “geolocate users” through social media).

57. U.S. Patent No. 9,892,168 B1 (filed May 24, 2016) (patenting the “tracking and prediction of societal event trends using amplified signals extracted from social media”); U.S. Patent No. 9,794,358 B1 (filed Mar. 13, 2014) (patenting technology that “infer[s] the location of users in online social media platforms using social network analysis”).

58. Nicole Ozer, *Police Use of Social Media Surveillance Software Is Escalating, and Activists Are in the Digital Crosshairs*, MEDIUM (Sept. 22, 2016), [https://medium.com/@ACLU\\_NorCal/police-use-of-social-media-surveillance-software-is-escalating-and-activists-are-in-the-digital-d29d8f89c48](https://medium.com/@ACLU_NorCal/police-use-of-social-media-surveillance-software-is-escalating-and-activists-are-in-the-digital-d29d8f89c48) [<https://perma.cc/FXS2-3K28>].

59. S.B. 2562, 100th Gen. Assemb., Reg. Sess. (Ill. 2018).

60. See Elizabeth Dwoskin, *Amazon Is Selling Facial Recognition to Law Enforcement - For a Fistful of Dollars*, CHI. TRIB. (May 22, 2018, 10:36 AM), <https://www.chicagotribune.com/business/ct-biz-amazon-facial-recognition-program-20180522-story.html> [<https://perma.cc/5BSQ-L24U>] (discussing Amazon’s sale of Rekognition “to law enforcement agencies in Oregon and Orlando”).

61. Drew Harwell, *Amazon Met with ICE Officials over Facial-Recognition System That Could Identify Immigrants*, WASH. POST (Oct. 23, 2018), [https://www.washingtonpost.com/technology/2018/10/23/amazon-met-with-ice-officials-over-facial-recognition-system-that-could-identify-immigrants/?utm\\_term=.2e1a8340f761](https://www.washingtonpost.com/technology/2018/10/23/amazon-met-with-ice-officials-over-facial-recognition-system-that-could-identify-immigrants/?utm_term=.2e1a8340f761) [<https://perma.cc/T5VW-W87F>].

Although the expansion of technology has made it easier for law enforcement to monitor protesters, it also poses its own set of problems, particularly because technology can be wildly inaccurate. In the case of Amazon's Rekognition, the ACLU Foundation of Northern California tested the program and found that the technology matched twenty-eight members of Congress with random mugshots.<sup>62</sup>

Second, the surveillance of protesters has grown as a direct response to the expansion of the national security state.<sup>63</sup> In the aftermath of 9/11, local law enforcement, in particular, became heavily integrated with counterterrorism efforts.<sup>64</sup> This integration occurred since "[l]ocal police are often believed to be better suited to perform certain counterterrorism functions because of their superior familiarity with their local communities and their rich networks of relations with other local governmental and nongovernmental actors."<sup>65</sup> Given the strategic importance of local officers on the counterterrorism front, the federal government "often in the name of combatting terrorism, funnels billions of dollars to local law enforcement agencies that can then be used to purchase surveillance equipment."<sup>66</sup> But as this surveillance network broadened after 9/11, its range of targets narrowed, disproportionately impacting minorities.<sup>67</sup>

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62. *Amazon Facial Surveillance Technology Falsely Identifies 28 Members of Congress with Mugshots*, ACLU (July 26, 2018), <https://www.aclu.org/news/amazon-facial-surveillance-technology-falsely-identifies-28-members-congress-mugshots> [<https://perma.cc/CBQ8-T7RF>].

63. For a general discussion of the national security state, see Andreas Busch, *The Changing Architecture of the National Security State*, in *THE OXFORD HANDBOOK OF TRANSFORMATIONS OF THE STATE* (Stephan Leibfried et al. eds., 2015).

64. See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 *STAN. L. REV.* 289, 303 (2012) ("After 9/11, consensus emerged across levels of government that preventing and investigating terrorism threats would require mobilizing and linking local governments.").

65. *Id.* at 304.

66. Crump, *supra* note 40, at 1595.

67. For example, in 2017, the FBI designated a new terror threat: "Black Identity Extremists." Jana Winter & Sharon Weinberger, *The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists'*, *FOREIGN POL'Y* (Oct. 6, 2017, 11:42 AM), <https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists> [<https://perma.cc/JG7S-KS4W>]. Given its racially charged nature, that designation has received its share of criticism, particularly from the Congressional Black Caucus, which held hearings on the designation in May 2018. Press Release, Office of Rep. Terri Sewell, *CBC Holds Briefing on FBI "Black Identity Extremist" Designation* (Mar. 20, 2018), <https://sewell.house.gov/media-center/press-releases/cbc-holds-briefing-fbi-black-identity-extremist-designation> [<https://perma.cc/6AKN-85V4>].

## II. THE CONSTITUTIONALITY OF SURVEILLING PROTESTERS

In July 2018, during the *City of Memphis* lawsuit, Memphis took an unexpected step: it unsealed all of its previously sealed court documents.<sup>68</sup> Noting the importance of transparency, the City prefaced its release with this message, “No one’s Constitutional rights have been violated.”<sup>69</sup> But were they right? The goal of this Part is to underscore the difficulty of answering that question. To be clear, this Note’s argument—the one fully developed in Part IV—does not rest on constitutional law, but this background is necessary. After all, if the Constitution *does* protect protesters, no legislation would be needed. Because constitutional ambiguity justifies the need for legislation, this Part will briefly walk through that ambiguity, step by step, by looking at the constitutional questions a court might consider when faced with a case involving the surveillance of protesters.

### Step 1: What is the right at issue?

The analysis begins by pinpointing which constitutional rights are at issue. Courts typically analyze surveillance under the Fourth Amendment by treating it as a search that is subject to a reasonableness requirement,<sup>70</sup> even if the surveillance also intrudes on First Amendment–protected activities.<sup>71</sup> This occurs, in part, because the First Amendment’s protections are broader than the protections of the Fourth Amendment.<sup>72</sup> And intuitively, surveillance—particularly

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68. *City Unseals Documents in Ongoing Lawsuit*, CITY OF MEMPHIS (July 24, 2018), [https://www.memphistn.gov/news/what\\_s\\_new/city\\_unseals\\_documents\\_in\\_ongoing\\_lawsuit](https://www.memphistn.gov/news/what_s_new/city_unseals_documents_in_ongoing_lawsuit) [<https://perma.cc/9DBN-LC55>].

69. *Id.*

70. *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 359 (1967) (analyzing electronic surveillance as a Fourth Amendment concern).

71. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (“Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with ‘scrupulous exactitude.’” (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965))); *United States v. Mayer*, 503 F.3d 740, 750 (9th Cir. 2007) (“The First Amendment did not create a legitimate expectation of privacy going beyond that afforded by the Fourth Amendment.”).

72. *See, e.g.*, *Pleasant v. Lovell*, 876 F.2d 787, 794 (10th Cir. 1989) (“[W]hen first amendment freedoms are involved, the first amendment may justify greater protection than mere compliance with the fourth amendment.”); *see also* Kelsey Cora Skaggs, Note, *Surveilling Speech and Association: NSA Surveillance Programs and the First Amendment*, 18 U. PA. J. CONST. L. 1479, 1487 (2016) (“First Amendment claims are unlike Fourth Amendment claims in that the former are not weakened by disclosure to a third party. The protections of the First Amendment are therefore different from, and in some ways broader than, the protections of the Fourth Amendment.” (footnote omitted)).

as it relates to protesters—often involves First Amendment–protected activity.

Because the Fourth Amendment is narrower than the First Amendment, it is not always necessary for a court to analyze the two amendments individually. A court could conduct its analysis by looking only to the more proximate violation—in the case of protester surveillance, the Fourth Amendment. Nevertheless, understanding the First Amendment’s legal framework is still crucial because, for the sake of the Fourth Amendment’s reasonableness requirement, courts “examine what is ‘unreasonable’ in the light of the values of freedom of expression.”<sup>73</sup> Thus, the right at issue is a Fourth Amendment right to be free from unreasonable searches paired with a First Amendment value to freely speak and associate. And each can be analyzed to determine the extent of constitutional protection.

### Step 2: Does surveillance violate the Fourth Amendment?

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>74</sup> This text raises two requirements, which must be met for there to be a Fourth Amendment violation: (1) there must be a search, and (2) that search must be unreasonable.

In its original interpretation of the Fourth Amendment, the Supreme Court explained that a search occurs when the government intrudes on a “constitutionally protected area,” such as one’s home.<sup>75</sup> But in *Katz v. United States*,<sup>76</sup> the Court expanded that interpretation.<sup>77</sup> It held that a Fourth Amendment right exists beyond “constitutionally protected areas”—it exists wherever there is a “reasonable expectation of privacy.”<sup>78</sup> *Katz* then explained that a person has no reasonable expectation of privacy—and thereby no Fourth Amendment

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73. *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

74. U.S. CONST. amend. IV.

75. *See Silverman v. United States*, 365 U.S. 505, 510–11 (1961) (“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home . . .”).

76. *Katz v. United States*, 389 U.S. 347 (1967).

77. *See id.* at 351 (“[T]he Fourth Amendment protects people, not places.”).

78. *Id.* at n.9 (“It is true that this Court has occasionally described its conclusions in terms of ‘constitutionally protected areas,’ but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.” (citations omitted)).

protection—to information she “knowingly exposes to the public.”<sup>79</sup> This poses a problem for protesters in particular. A protest is inherently public. In fact, “[i]t is almost a truism that social movements and protest[s] rely heavily on publicity and visibility to call attention to marginal groups and claims or unmet social problems.”<sup>80</sup>

Even if protesters can get through the “reasonable expectation of privacy” prong of Fourth Amendment analysis, another hurdle awaits: the search must be unreasonable. To that end, courts consider whether government surveillance relates to “a legitimate law enforcement purpose,” as part of their Fourth Amendment analysis.<sup>81</sup> Unfortunately, this too poses a problem for protesters because protests, even when peaceful, are frequently perceived as having the potential for violence.<sup>82</sup> The Memphis Police Director, Michael Rallings, echoed this sentiment, noting, “[m]onitoring these public social media posts is simply good police work . . . keeping everyone safe without violence.”<sup>83</sup> These public safety concerns make it difficult to find a Fourth Amendment violation because the surveillance purports to assist law enforcement.

### Step 3: Does surveillance violate the First Amendment?

The First Amendment protects “the freedom of speech” and “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>84</sup> A violation of this Amendment occurs not only where the government forbids protected

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79. *Id.* at 351–52 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” (citations omitted)).

80. Peter Ullrich & Philipp Knopp, *Protesters’ Reactions to Video Surveillance of Demonstrations: Counter-Moves, Security Cultures, and the Spiral of Surveillance and Counter-Surveillance*, 16 SURVEILLANCE & SOC’Y 183, 192 n.17 (2018).

81. *United States v. Mayer*, 503 F.3d 740, 753 (9th Cir. 2007); *accord All. to End Repression v. City of Chicago*, 237 F.3d 799, 802 (7th Cir. 2001) (explaining that the First Amendment permits the use of undercover officers “unless the motives of the police are improper or the methods forbidden by the Fourth Amendment”).

82. For example, in *City of Memphis*, the City pointed to multiple legitimate threats that it argues surveillance helped it prevent, including a potential Ku Klux Klan appearance at a Black Lives Matter protest, a hacking threat to the Memphis Zoo computer system, and a threat to ambush Shelby County law enforcement. *City Unseals Documents in Ongoing Lawsuit*, *supra* note 68.

83. *Id.* (quoting Memphis Police Director Michael W. Rallings).

84. U.S. CONST. amend. I.

activity, but also where the government deters it.<sup>85</sup> In the latter case, the government is said to have created a “chilling effect.”<sup>86</sup> As Justice Warren explained, “[T]he fear of the censor by the composer of ideas acts as a substantial deterrent to the creation of new thoughts.”<sup>87</sup>

When it comes to associational freedoms, the Supreme Court has supported a prohibition on chilling First Amendment rights in cases like *NAACP v. Alabama ex rel. Patterson*.<sup>88</sup> In *Patterson*, the Court struck down an Alabama law requiring the disclosure of the NAACP’s membership lists, explaining that privacy “may . . . be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>89</sup>

But on the other end of the spectrum lies *Laird v. Tatum*,<sup>90</sup> the leading case on whether the surveillance of protesters violates the First Amendment. There, the government surveilled Vietnam War protesters by tracking who attended and spoke at meetings and reporting that information to the Army Intelligence Headquarters.<sup>91</sup> The Supreme Court held that there was not a justiciable controversy because this surveillance did not sufficiently chill the protesters from exercising their First Amendment rights.<sup>92</sup> The *Laird* Court explained that an actionable chilling effect cannot arise “merely from the individual’s knowledge that a governmental agency was engaged in certain activities or from the individual’s concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual.”<sup>93</sup> *Laird* thereby instructs that mere surveillance does not chill speech or assembly; the First Amendment requires something more.

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85. See *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (“In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.”).

86. *Id.*

87. *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 75 (1961) (Warren, C.J., dissenting).

88. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

89. *Id.* at 462 (emphasis added); accord *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963) (“[A]n adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights.”).

90. *Laird v. Tatum*, 408 U.S. 1 (1972).

91. *Id.* at 6.

92. *Id.* at 3 (reversing the lower appellate court’s finding of a justiciable controversy in the protesters’ complaint of a “chilling effect” on the exercise of their First Amendment rights).

93. *Id.* at 11 (emphasis omitted).

But what is something more? Some principles have emerged to deal with this issue. For example, the widely accepted standard for determining a chilling effect is whether a reasonable person would be deterred.<sup>94</sup> Courts also examine a person's conduct to determine whether First Amendment activity has been chilled because when "a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech."<sup>95</sup> This analysis is especially tricky in the context of protests. The surveillance of protesters can certainly function as a prior restraint and stop individuals from protesting before the fact.<sup>96</sup> But others will continue protesting anyway.<sup>97</sup> The existence of a chilling effect and subsequent First Amendment violation in this context can therefore be difficult to find. These ambiguities demonstrate the obstacles protesters face when making constitutional arguments, highlighting the need for a legislative solution.

### III. THE MEMPHIS CONSENT DECREE

When the extent of the NSA surveillance program was first revealed by Edward Snowden in 2013, it surprised many Americans.<sup>98</sup> But for the people of Memphis, surveillance generally—and the surveillance of political dissidents particularly—is nothing new.<sup>99</sup> It is a

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94. *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 118 (D.D.C. 2005).

95. *Curley v. Vill. of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001).

96. Vohra, *supra* note 17 ("Surveillance is what chills people from mobilising and organising." (quoting Omar Farah, the lead attorney at the Center for Constitutional Rights)); *see also* Telephone Interview with Paul Garner, Original Named Plaintiff in *City of Memphis* (Oct. 26, 2018) [hereinafter Garner Interview] (on file with author).

97. *See* Lauren C. Williams, *Police Surveillance of Black Protesters Won't Stop the Movement*, THINKPROGRESS (Oct. 14, 2016, 2:12 PM), <https://thinkprogress.org/surveillance-wont-stop-black-activists-9008acb3944b> [<https://perma.cc/YF35-TDGG>] ("A lot of people are really freaked out about it, or whatever, but I can't live my life like that," she said nonchalantly. "I still live my life the way that I was. It's not changing anything." (quoting Black Lives Matter protester Johnetta "Netta" Elzie)).

98. *See* David Rieff, *Why Nobody Cares About the Surveillance State*, FOREIGN POL'Y (Aug. 22, 2013, 11:30 PM), <https://foreignpolicy.com/2013/08/22/why-nobody-cares-about-the-surveillance-state> [<https://perma.cc/4BBA-CYGQ>] ("[I]t turned out that the 'secret' he revealed appeared to be one of the most broadly shared secrets in the world. The White House knew, members of the Senate and House intelligence committees knew, and major U.S. allies [knew] . . . The only group that did not know . . . was the general public.").

99. *See* Robinson, *supra* note 50 ("A lawsuit by the ACLU of Tennessee recently produced evidence that Memphis police spied on Black activists. As Yogi Berra said, 'It's like déjà vu all over again.' This is the same city where five decades ago the police spied on Martin Luther King, Jr.").

product of Memphis's history—a history that eventually produced the Memphis Consent Decree.

Their story begins in 1965. That year, MPD created its new investigative arm, the Domestic Intelligence Unit (“DIU”).<sup>100</sup> The DIU secretly maintained files on Memphis citizens engaged in “politically controversial” activities, even when that activity was not criminal.<sup>101</sup> Between 1965 and 1976, Memphis expanded the DIU's budget,<sup>102</sup> and with that, the DIU expanded its scope of targets, actively surveilling “individuals and organizations engaged in ‘Civil Rights, Union, and Negro Coalition activities.’”<sup>103</sup> For example, on April 3, 1968, when Martin Luther King, Jr. arrived in Memphis “with one more day to live,” MPD stationed officers at the Memphis Airport to track his activities.<sup>104</sup> MPD justified the surveillance by framing it as necessary, “not only because Dr. King was a controversial public figure, but also because he had been meeting with local Black militants while in Memphis on prior visits.”<sup>105</sup>

In addition to civil rights activists, MPD monitored Vietnam War protesters.<sup>106</sup> One of the protesters that MPD tracked was Memphis State University student and member of Vietnam Veterans Against the War, Eric Carter.<sup>107</sup> In 1976, years after graduating, Carter discovered that his college roommate was an undercover MPD officer who tracked Carter's activity, specifically his attendance and activism in antiwar protests.<sup>108</sup> Carter requested the file MPD kept on him, which “was the

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100. *Blacklisted: Memphis Police Surveillance and Kendrick v. Chandler—A Timeline*, ACLU-TN (Mar. 2, 2017), <http://www.aclu-tn.org/blacklisted-memphis-police-surveillance-and-kendrick-v-chandler-a-timeline> [<https://perma.cc/LNZ3-TDBG>] [hereinafter ACLU Timeline].

101. *Id.*

102. The DIU budget was expanded to \$1 million in 1976, which is the equivalent of nearly \$4,270,000 today. *Id.*

103. *Id.* These organizations included the “ACLU, NAACP, the Southern Christian Leadership Conference, City of Memphis Hospital workers, Memphis State University Black Students' Organization, Memphis Public Schools principals and teachers, and the American Federation of State, County, and Municipal Employees (AFSCME).” *Id.*

104. Robinson, *supra* note 50.

105. *Id.*

106. Joseph Weiler, *Police Order Burning of File on Vietnam War Protester*, COM. APPEAL (Sept. 8, 1976), <http://www.aclu-tn.org/wp-content/uploads/2017/02/Kendrick-Documents-Police-Order-Burning-of-File-On-Vietnam-War-Protester-Commercial-Appeal.pdf> [<https://perma.cc/XVQ9-TQXZ>] (describing how protester Eric Carter had been monitored by an undercover cop who pretended to be Carter's friend for years and created an extensive personal file on Carter, including personal photos).

107. *Id.*

108. *Id.*; Robinson, *supra* note 50.

first [request] ever received by the department since it began keeping domestic intelligence files in about 1965.”<sup>109</sup>

Beyond merely denying the request, MPD “doused with fuel and burned” ten file cabinets containing domestic surveillance records.<sup>110</sup> One police chief described the destruction to a Memphis newspaper in 1976 as a “purge.”<sup>111</sup> The ACLU intervened, receiving a federal court order on September 10, 1976, to prevent the destruction of more files.<sup>112</sup> “[B]ut before the order could be served,”<sup>113</sup> Memphis Mayor Wyeth Chandler directed the destruction of the remaining files “by noon.”<sup>114</sup> Mayor Chandler then disbanded the DIU.<sup>115</sup> The extent of MPD’s surveillance soon emerged: “[T]he department had been spying on numerous people and organizations for years, probing their political activities and private lives.”<sup>116</sup>

On September 14, 1976, the ACLU of Tennessee (“ACLU-TN”) filed a class action suit in the District Court for the Western District of Tennessee against Mayor Chandler and various high-ranking officials in MPD.<sup>117</sup> The complaint in that case—*Kendrick v. Chandler*<sup>118</sup>—alleged that the City had violated the First, Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendments.<sup>119</sup>

But the court never reached the constitutional issues. Instead, on September 14, 1978—exactly two years after the filing of the complaint—the parties essentially settled.<sup>120</sup> The plaintiffs and the City agreed to a Consent Decree<sup>121</sup> to prevent MPD from surveilling citizens

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109. Weiler, *supra* note 106.

110. Leta McCollough Seletzky, Opinion, *The Memphis Police Spied on Activists*, N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/opinion/the-memphis-police-spied-on-activists.html> [<https://perma.cc/W48C-Q5VC>].

111. Weiler, *supra* note 106 (quoting Memphis police chief W.O. Crumby).

112. ACLU Timeline, *supra* note 100.

113. McCollough Seletzky, *supra* note 110.

114. ACLU Timeline, *supra* note 100.

115. McCollough Seletzky, *supra* note 110.

116. *Id.*

117. Complaint at 1, *Kendrick v. Chandler*, No. C76-449 (W.D. Tenn. Sept. 14, 1976).

118. *Kendrick v. Chandler*, No. 76-449 (W.D. Tenn. Sept. 14, 1978).

119. Complaint at 1, *Kendrick v. Chandler*, No. C76-449. The plaintiffs brought suit under 42 U.S.C. § 1983, which allows for the recovery of monetary damages for certain constitutional violations committed by state and local officials. *See* 42 U.S.C. § 1983 (2018).

120. Order, Judgment and Decree at 1, *Kendrick v. Chandler*, No. C76-449 (W.D. Tenn. Sept. 14, 1978) [hereinafter Consent Decree].

121. The Consent Decree is split up into thirteen subparts. *Id.* at 2–6. For reference, here is a summary of the Decree’s subparts:

(A) A statement of the general principles of the Decree

who were engaged in First Amendment–protected activities.<sup>122</sup> The Decree accomplished this by prohibiting the City from conducting “political intelligence,” defined as “the gathering, indexing, filing, maintenance, storage or dissemination of information, or any other investigative activity, relating to any person’s beliefs, opinions, associations or other exercise of First Amendment rights.”<sup>123</sup> More specifically, the City was barred from:

engag[ing] in any action for the purpose of, or reasonably having the effect of, deterring any person from exercising First Amendment rights. As an example, the City of Memphis shall not, at any lawful meeting or demonstration, for the purpose of chilling the exercise of First Amendment rights or for the purpose of maintaining a record, record the name of or photograph any person in attendance . . . .<sup>124</sup>

Several aspects of the Memphis Decree are crucial to this Note. The Decree begins with a broad prohibition: “the City of Memphis shall not engage in political intelligence.”<sup>125</sup> From that broad prohibition, the Decree establishes more specific restrictions. Importantly, the City may not operate an office for the purpose of political intelligence.<sup>126</sup> It may not “intercept, record, transcribe or otherwise interfere with any communication by means of electronic

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(B) Definitions

(C) The general prohibition against the collection of political intelligence or the maintenance of any office for this collection

(D) A prohibition against electronic surveillance for political intelligence

(E) A prohibition against covert surveillance for political intelligence

(F) A prohibition against harassment and intimidation for individuals exercising First Amendment rights

(G) An exception for criminal investigations that may interfere with the exercise of First Amendment rights and procedural guidelines for this exception

(H) A prohibition on the maintenance and dissemination of information

(I) A restriction on joint operations between Memphis and “any local, state, federal or private agency, or any person”

(J) The requirement to disseminate and post the Decree

(K) Effective date

(L) Binding effect

(M) Retention of jurisdiction

*Id.*

122. *Id.* at 2 (subpart (A)).

123. *Id.* at 2, 3 (subparts (B)(4) and (C)(1)).

124. *Id.* at 3–4 (subpart (F)(2)).

125. *Id.* at 3 (subpart (C)(1)).

126. *Id.* (subpart (C)(2)).

surveillance for the purpose of political intelligence.”<sup>127</sup> And the City may not harass or intimidate “person[s] exercising First Amendment rights.”<sup>128</sup>

But the Decree is not absolute in its prohibition of surveillance. It contains one key exemption: under certain circumstances, officers investigating criminal conduct may continue with an investigation even though it might interfere with First Amendment rights.<sup>129</sup> The officer must first report the investigation to the Memphis Director of Police for review.<sup>130</sup> Then, the Director must make four findings: (1) that the investigation does not violate the Decree; (2) that the interference with First Amendment rights is “unavoidably necessary”; (3) that “[e]very reasonable precaution has been employed” to reduce the intrusion; and (4) that “the investigation employs the least intrusive technique necessary” for gathering the information.<sup>131</sup> If the Director can make these findings, then she can provide a written authorization allowing the investigation to proceed.<sup>132</sup> The district court retained jurisdiction of the case so that it may enforce the Consent Decree, if necessary, in the future.<sup>133</sup>

Thirty-nine years later—in *City of Memphis*—the district court’s enforcement became necessary. In violation of the Consent Decree, Memphis had continued to surveil its citizens, “pairing old methods with 21st century technology.”<sup>134</sup> Paul Garner, one of the original named plaintiffs in *City of Memphis*,<sup>135</sup> explained that MPD regularly maintained documents on protesters, and—in his view—that was especially true for protesters who were critical of the police department.<sup>136</sup> MPD also converted these records into PowerPoint

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127. *Id.* (subpart (D)).

128. *Id.* (subpart (F)(1)).

129. *Id.* at 4 (subpart (G)).

130. *Id.* (subpart (G)(1)).

131. *Id.* at 4–5 (subpart (G)(2)).

132. *Id.* at 4 (subpart (G)(2)).

133. *Id.* at 6 (subpart (M)).

134. McCollough Seletzky, *supra* note 110.

135. Garner was dismissed from the suit along with Elaine Blanchard, Keedran Franklin, and Bradley Watkins because they lacked standing. This issue is explained more fully in Part IV.

136. Garner Interview, *supra* note 96; see also Plaintiff’s Memorandum in Support of its Motion for Summary Judgment at 8, *ACLU of Tennessee, Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-egb (W.D. Tenn. July 24, 2018) [hereinafter “Plaintiff’s Summary Judgment Memorandum”] (“Dir. Rallings also instructed OHS to create and maintain a database of protests, demonstrations, and flash mobs.”). Garner recalls that when individuals attended a City Hall meeting to support the reinstatement of the Civilian Law Enforcement Review Board in Memphis, MPD added them to a “blacklist.” Garner Interview, *supra* note 96.

presentations, featuring the pictures and names of people who had attended protests.<sup>137</sup> Garner alleges that MPD then distributed these PowerPoints to the Mayor and employers in Memphis.<sup>138</sup>

In another example, an MPD officer created and operated a fake Facebook account.<sup>139</sup> For three years, Detective Tim Reynolds maintained the account under the name “Bob Smith,” where he talked to local activists, kept track of upcoming protests, and pretended to support their causes.<sup>140</sup> Finally, MPD operated OHS—an office primarily dedicated to surveilling protesters, tracking trends in their protest behavior, and providing MPD with a “heads up” on upcoming protests.<sup>141</sup>

The district court found in favor of the City’s protesters.<sup>142</sup> It held that the City of Memphis violated the Consent Decree by engaging in specifically prohibited conduct.<sup>143</sup> In addition to gathering, filing, and disseminating information on protesters, “[t]he City’s other violations are traceable to the City’s failure to police itself.”<sup>144</sup> The Consent Decree required that the City familiarize its officers with the contents

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137. See Plaintiff’s Summary Judgment Memorandum, *supra* note 136, at 9–10 (discussing the PowerPoint presentations).

138. Garner Interview, *supra* note 96.

139. Jon Schuppe, *Undercover Cops Break Facebook Rules to Track Protesters, Ensnare Criminals*, NBC NEWS (Oct. 5, 2018, 6:08 AM), <https://www.nbcnews.com/news/us-news/undercover-cops-break-facebook-rules-track-protesters-ensnare-criminals-n916796> [<https://perma.cc/H3TZ-RQ66>].

140. *Id.*

141. Garner Interview, *supra* note 96; see also *ACLU of Tennessee, Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-egb, slip op. at 22 (W.D. Tenn. Oct. 26, 2018) (“The evidence clearly and convincingly shows that the Office of Homeland Security (‘OHS’) was operated for the purpose of political intelligence.”).

142. *City of Memphis*, slip op. at 2.

143. *Id.* The Court found that the City violated the Decree by conducting seven types of activities:

1. Gathering and indexing information related to lawful protests;
2. Operating an office for the purpose of political intelligence;
3. Using a fake social media account to monitor protesters;
4. Failing to familiarize officers with the content of the Consent Decree;
5. Failing to review lawful investigations of criminal conduct that could result in the gathering of political intelligence *before* conducting the investigation;
6. Providing information related to First Amendment rights to individuals unaffiliated with law enforcement; and
7. Recording the identities of protest attendees to maintain a record of these individuals.

*Id.* at 21–30.

144. *Id.* at 26.

of the Decree.<sup>145</sup> But the court found that MPD officers misunderstood the meaning of “political intelligence.”<sup>146</sup> Although these officers believed political intelligence required a partisan purpose, “the Consent Decree forbids *any* investigation into the lawful exercise of First Amendment rights; [and] bipartisan or nonpartisan political intelligence is still political intelligence.”<sup>147</sup> Moreover, the City only included a few references to the Decree in its voluminous training manuals.<sup>148</sup> When the City did mention the Decree, it failed to define “political intelligence.”<sup>149</sup> As a result, the officers that testified in *City of Memphis* only had a general knowledge of the Decree and its requirements.<sup>150</sup>

After finding that the City had violated the Decree,<sup>151</sup> the court proceeded to sanction the City for its conduct.<sup>152</sup> The court issued the following orders: (1) the City must revise departmental regulations to define political intelligence;<sup>153</sup> (2) the City must create a training program for MPD and its affiliates, the OHS and MPD’s Real Time Crime Center, to explain political intelligence;<sup>154</sup> (3) the City must create “a process for the approval of investigations into unlawful conduct that may incidentally result in political intelligence”;<sup>155</sup> (4) the City must create guidelines for the use of social media searches by officers;<sup>156</sup> and (5) the City must keep a list of all social media search terms used by MPD and submit this list to the court every three months

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145. Consent Decree, *supra* note 120, at 5–6 (subpart (J)).

146. *City of Memphis*, slip op. at 32.

147. *Id.*

148. *Id.* at 26.

149. *Id.* at 27.

150. *See id.* at 26 (citing Director Rallings’s testimony that he had only general knowledge of the Consent Decree).

151. Although the court found that the City of Memphis violated the Consent Decree in each of the seven ways listed above, the plaintiffs had alleged nine violations of the Decree. *Id.* at 21–31. The plaintiffs, thus, could not prove that the City had violated the Decree by harassing anyone. *Id.* at 30–31. The plaintiffs also failed to prove that the City had disseminated information for the purpose of political intelligence. *Id.* at 31.

152. *Id.* at 31–35.

153. *Id.* at 33.

154. *Id.*

155. *Id.* at 34. The court noted that this may require an amendment to the Consent Decree. *Id.*

156. *Id.*

until the court decides it no longer must do so.<sup>157</sup> The court instructed the City to comply with each of these orders by January 14, 2019.<sup>158</sup>

Finally, the court addressed a logistical issue: “It may be impossible for the Court to provide legal guidance on every situation that MPD will face that may implicate the Consent Decree.”<sup>159</sup> To deal with this issue, the court decided to appoint an independent monitor who would ensure compliance with the Decree.<sup>160</sup> The monitor’s job is to supervise the implementation of the court’s sanctions.<sup>161</sup> The court ordered each party to submit proposals for an independent monitor by December 10, 2018.<sup>162</sup>

#### IV. LESSONS BEYOND MEMPHIS

Though not explicitly mentioned in either the First or Fourth Amendments, the concept of privacy sits at the heart of both.<sup>163</sup> This means that even if the surveillance of protesters does not rise to the level of a constitutional violation, protecting protesters from surveillance falls right alongside the principles the Constitution codified, and the Constitution “does not prevent or advise against legislative or executive efforts to establish non-constitutional protections against possible abuses.”<sup>164</sup> In light of the widespread surveillance of protesters discussed in Part I and the constitutional limitations discussed in Part II, this Part proposes a solution built on the Memphis Decree from Part III. Section (A) discusses its form, (B) its substance, and (C) its implementation.

##### A. *Form*

The best method to effectuate the principles of the First and Fourth Amendments is through legislation that limits the surveillance of protesters by law enforcement. But an obvious question lingers: If

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157. *Id.* at 35.

158. *Id.* at 33–35.

159. *Id.* at 35.

160. *Id.*

161. *Id.*

162. *Id.*

163. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890) (“The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. . . . [A]nd even if he has chosen to give them expression, he generally retains the power to fix the limits of the[ir] publicity . . . .” (footnote omitted)).

164. *Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978).

the Memphis Consent Decree worked so well, why look to legislation at all? To frame the question differently, why are consent decrees not enough? Compared to legislation, there are several reasons why a consent decree would not be the best option to protect First and Fourth Amendment values moving forward.

First, consent decrees present standing issues that do not exist with legislation.<sup>165</sup> A consent decree is similar to a contract, only binding the parties that originally entered into the decree.<sup>166</sup> So when someone sues to enforce a consent decree, the injury they have faced is essentially breach of contract.<sup>167</sup> Because of that, an individual who was not part of the original “contract” cannot claim an injury.<sup>168</sup> Even parties that “were intended to be benefited by” the consent decree cannot launch proceedings to enforce it.<sup>169</sup>

As it turns out, standing posed a significant problem in *City of Memphis*, where the individually named protesters eventually had to be dropped from the lawsuit because they lacked standing.<sup>170</sup> The only named plaintiff in *Kendrick*—the original litigation resulting in the Consent Decree—was the ACLU-TN; *Kendrick* did not include any of the plaintiffs named in the *City of Memphis* case.<sup>171</sup> So only the ACLU-

165. A court does not have jurisdiction over cases or controversies when the plaintiff lacks standing to sue. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Three requirements must be met for a plaintiff to have standing:

- (1) The plaintiff must have sustained an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’”
- (2) There must be a causal connection between the injury and the defendant’s conduct.
- (3) It must be likely that the injury can be redressed.

*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (footnote and citations omitted) (quoting *Whitmore*, 495 U.S. at 155).

166. *See Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (“To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts.”).

167. *See Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) (“A consent decree has attributes of both a contract and of a judicial act.”).

168. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) (“The Court of Appeals recognized, and respondent concedes here, that a well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it . . .” (footnote omitted)).

169. *Id.*

170. *See Order Denying the City’s Motion for Summary Judgment on the Issue of Standing at 5, ACLU of Tennessee, Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-egb (W.D. Tenn. July 30, 2018) (“On June 30, 2017, the Court dismissed the Blanchard Plaintiffs from this action after determining that they lacked standing to enforce the Consent Decree as non-parties to it.”).

171. *Id.*

TN could bring suit. And even then, the ACLU-TN faced problems in the litigation because in *Kendrick*, the organization had a different name—the American Civil Liberties Union in West Tennessee.<sup>172</sup> Legislation does not pose a standing problem. Instead, it binds everyone equally, protecting all protesters who fall within its zone of interest.

Second, it is much more difficult to change a consent decree than it is to change legislation. Though legislation is by no means simple to alter,<sup>173</sup> amending legislation requires neither the consent of a court nor the consent of parties with structurally divergent motives. In the absence of litigation, a city or a police department has no incentive to strengthen the power of a consent decree against it. And the original plaintiffs—here, the protesters or institutional party—have no incentive to weaken a consent decree. But the ability to amend is crucial. After all, surveillance methods are constantly evolving. That is why Memphis City Chief Legal Officer Bryce McMullen correctly articulated another problem with the Memphis Decree: the Decree, written in 1978, is old.<sup>174</sup> As a result, the Decree’s description of electronic surveillance in subpart (D) was not and could not have been written in anticipation of the technology that exists today.<sup>175</sup> Nevertheless, the court held:

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172. *ACLU of Tennessee, Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-egb, slip op. at 5 (W.D. Tenn. Oct. 26, 2018).

173. See William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008) (discussing legislative “vetogates”).

174. During the trial, the City of Memphis publicly argued that the City could no longer be bound by the Decree because the Decree was so outdated. McMullen argued:

[T]he City maintains the 40-year-old consent decree, which was drafted before the existence of the Internet, security cameras, body cameras, sky cameras, traffic light cameras and smart phones, is woefully outdated and impractical to apply in modern law enforcement.

Reading the consent decree literally, and applying it in today’s technological world, would require the Police Department to turn off all security cameras and body-worn cameras during a protest. It would prevent police from looking at publicly posted content, and severely hamper their ability to provide public safety. We firmly believe the consent decree was drafted without any conscious thought of the technological advances that exist today, and that we have substantially complied with the consent decree in these modern times.

*Statement from Bruce McMullen*, CITY OF MEMPHIS (Aug. 10, 2018), [https://www.memphistn.gov/news/what\\_s\\_new/statement\\_from\\_bruce\\_mc\\_mullen](https://www.memphistn.gov/news/what_s_new/statement_from_bruce_mc_mullen) [<https://perma.cc/8VEB-ZPS3>]. The court specifically rejected McMullen’s argument by distinguishing between affirmative and inadvertent acts. *City of Memphis*, slip op. at 17 (“[S]imply receiving or inadvertently finding information does not [require affirmative acts].”).

175. Consent Decree, *supra* note 120, at 3 (subpart (D)).

While certain terms of the Consent Decree may be outdated, the concepts are not, and the dilemma faced by the City is not new. Every community must determine how much of its citizens' privacy it is willing to sacrifice in the name of public safety. The idea that police should be limited in their powers predates 2018 and 1978.<sup>176</sup>

Even though the *City of Memphis* court still interpreted the Decree against the City, it called upon the parties to edit the Decree in light of this flaw and noted that it may be more difficult to do that in the future as technology continues to evolve.<sup>177</sup> Legislation does not eliminate this second problem because, at the end of the day, statutes must also be updated as technology progresses. But structurally, the legislature—a body that is politically accountable to the *public*—is better equipped to adjust the law to new technology than are two parties in an inherently adversarial system.

Finally, and perhaps most obviously, consent decrees cannot be formed without litigation. It would be incredibly inefficient to effectuate change with parties bringing multiple lawsuits, hoping that those suits result in a decree. Legislation does not pose this problem. One does not have to wait for a lawsuit to benefit from the protections of legislation. In fact, if legislation is the product of a lawsuit, it typically will not help that initial plaintiff either because the suit has concluded or, if it has not concluded, because courts generally do not apply statutes retroactively.<sup>178</sup>

### B. Substance

Given that the best approach to reduce the surveillance of protesters in the absence of a clearer constitutional directive is legislation, the substance of the legislation must be considered next. A few cities have enacted or considered local ordinances that aim to protect protesters from surveillance.<sup>179</sup> Despite the fact that these ordinances are a step in the right direction, they fall short of the

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176. *City of Memphis*, slip op. at 36.

177. *Id.*

178. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994) (“[S]tatutory retroactivity has long been disfavored . . .”).

179. See, e.g., *infra* notes 180–88 and accompanying text; *City of Seattle* CB 119030, Sept. 1, 2017, <https://seattle.legistar.com/LegislationDetail.aspx?ID=2981172&GUID=0B2FEFC0-822F-4907-9409-E318537E5330&FullText=1> [<https://perma.cc/C785-ZQFX>]; *Surveillance-Technology and Community-Safety Ordinance*, COUNTY OF SANTA CLARA (July 21, 2016), <https://www.sccgov.org/sites/ceo/srtup/Pages/home.aspx> [<https://perma.cc/29UE-VPST>].

protections offered by the Memphis Consent Decree, which is why Memphis offers a better model for the substance of future legislation.

Take, for example, an enacted ordinance in Berkeley, California and a proposed ordinance in New York City, New York. In March 2018, the Berkeley City Council passed the Surveillance Technology Use and Community Safety Ordinance.<sup>180</sup> In it, Council approval is required, “except in Exigent Circumstances,” before the City Manager does any of the following:

- a. Seek[s], solicit[s], or accept[s] grant funds for the purchase of, or in-kind or other donations of, Surveillance Technology;
- b. Acquir[es] new Surveillance Technology, including but not limited to procuring such technology without the exchange of monies or consideration;
- c. Us[es] new Surveillance Technology, or us[es] Surveillance Technology previously approved by the City Council for a purpose, or in a manner not previously approved by the City Council; or
- d. Enter[s] into an agreement with a non-City entity to acquire, share or otherwise use Surveillance Technology or the information it provides, or expand[s] a vendor’s permission to share or otherwise use Surveillance Technology or the information it provides.<sup>181</sup>

This Berkeley ordinance defines “surveillance technology” as “an electronic device, system utilizing an electronic device, or similar technological tool used, designed, or primarily intended to collect audio, electronic, visual, location, thermal, olfactory, biometric, or similar information specifically associated with, or capable of being associated with, any individual or group.”<sup>182</sup> Exempted from this definition are nine categories of technology, including routine office hardware, municipal agency databases, security cameras, and cybersecurity technologies.<sup>183</sup>

Meanwhile, the New York City Council has considered the Public Oversight of Surveillance Technology (“POST”) Act.<sup>184</sup> If passed, the

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180. Berkeley, Cal., Mun. Code ch. 2.99 (2019).

181. *Id.* § 2.99.030(1).

182. *Id.* § 2.99.020(1).

183. *Id.*

184. New York City Council Int. 0487-2018, Feb. 14, 2018, <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3343878&GUID=996ABB2A-9F4C-4A32-B081-D6F24AB954A0&>

POST Act would require the New York Police Department to propose a “surveillance technology impact and use policy,” in which it would describe the “capabilities of a surveillance technology” and the “rules, processes and guidelines issued by the department regulating access to or use of such surveillance technology.”<sup>185</sup> The Act then authorizes a forty-five day public-comment period, which may be considered before a final policy is drafted.<sup>186</sup> The inspector general for the police department monitors compliance with the policy and publishes recommendations relating to revisions of the policy.<sup>187</sup> Just like the Berkeley ordinance, the POST Act exempts certain categories of technology.<sup>188</sup>

Each of these ordinances misses a key aspect of the Memphis Consent Decree: the general prohibition against the collection of political intelligence.<sup>189</sup> As a reminder, Memphis defined “political intelligence” as “the gathering, indexing, filing, maintenance, storage or dissemination of information, or any other investigative activity, relating to any person’s beliefs, opinions, associations or other exercise of First Amendment rights.”<sup>190</sup> This prohibition is why the court in *City of Memphis* described MPD as having the “opportunity to become one of the few, if only, metropolitan police departments in the country with a robust policy for the protection of privacy in the digital age.”<sup>191</sup>

Instead of broadly prohibiting particular uses across any type of technology, Berkeley and New York City created a lenient, case-by-case inquiry, where surveillance technology *may* be used to gather political intelligence, so long as certain requirements are met.<sup>192</sup> Under

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Options=ID%7cText%7c&Search=surveillance [https://perma.cc/VP7L-296V] (proposing to add § 14-175 to chapter 1, title 14 of the administrative code of New York City and § 809 to chapter 34 of the New York City charter).

185. *Id.* sec. 1, § 14-175(a)–(b).

186. *Id.* § 14-175(e).

187. *Id.* sec. 2, § 809(b).

188. *See id.* sec. 1, § 14-175(a). For more information on the POST Act, see *The Public Oversight of Surveillance Technology (POST) Act: A Resource Page*, BRENNAN CTR. FOR JUSTICE (June 12, 2017), <https://www.brennancenter.org/analysis/public-oversight-surveillance-technology-post-act-resource-page> [https://perma.cc/K9PT-UHE5].

189. *See* Consent Decree, *supra* note 120, at 3 (subpart (C)(1)).

190. *Id.* at 2 (subpart (B)(4)).

191. *ACLU of Tennessee, Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-egb, slip op. at 38 (W.D. Tenn. Oct. 26, 2018).

192. Concerningly, the statutes only regulate “surveillance technology,” meaning technology exempt from this category likely may be used to gather political intelligence without jumping through the hoops that surveillance technology must jump through. *See supra* notes 180–88 and accompanying text.

the POST Act, City Council approval is not even needed before technology may be used in this way.<sup>193</sup>

While reasonable minds can differ as to the contents of this legislation and still accomplish the goal of protecting protesters, there are several aspects of the Memphis Decree that should be incorporated into antisurveillance legislation. The best aspects of the Memphis Decree—chosen by how effectively they preserve First and Fourth Amendment values—are its general prohibition against political intelligence, its prohibition against the creation of an office for the purpose of carrying out this intelligence gathering, its prohibition against harassment and intimidation, and its exception for criminal proceedings.

Successful legislation should also incorporate the balance that the Memphis Decree struck. The point is not to *forbid* the gathering of information; rather, it is to ensure that where the collection of information serves a legitimate purpose, officers go through a proper protocol. Consider this explanation from the court in *City of Memphis*:

A police officer may, for example, need to “friend” a suspected drug dealer on Facebook as part of an investigation. The officer in question would not be conducting political intelligence, because while he may incidentally obtain information relating to the suspect’s exercise of First Amendment rights, he is not “gathering” that information. This officer does, however, need to seek formal approval, because the investigation “may result in the collection of information about the exercise of First Amendment rights.”<sup>194</sup>

This balance is further served when legislation, like the Decree, includes an action requirement. As the *City of Memphis* court explained, gathering information requires an affirmative act.<sup>195</sup> Because of this, “[a] police officer does not have to cover his body camera every time he passes someone with a political t-shirt, because

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193. See Nathan Sheard, *Lifting the Cloak of Secrecy from NYPD Surveillance Technology*, ELEC. FRONTIER FOUND. (Oct. 3, 2018), <https://www.eff.org/deeplinks/2018/10/lifting-cloak-secrecy-nypd-surveillance-technology> [<https://perma.cc/9WNS-3XN3>] (“[T]he POST Act stops short of empowering City Council members to decide whether to approve or deny spy tech acquisition. Nor does the POST Act provide the New York City Council with any power to order the NYPD to cease use of equipment . . . used in violation of the published policy.”).

194. *City of Memphis*, slip op. at 34 n.14 (quoting Consent Decree, *supra* note 120, at 4 (subpart (G)(1))).

195. *Id.* at 17.

the information received by the camera about political activities was not affirmatively sought out by the officer.”<sup>196</sup>

Finally, the Consent Decree bans the gathering of information for “the purpose of political intelligence,” and as the *City of Memphis* court clarified, this does *not* mean that “political intelligence” must be the *exclusive* purpose of the surveillance.<sup>197</sup> Legislation should similarly incorporate “mixed motive” claims so that police departments cannot easily sideline the requirements of the legislation.

### C. Implementation

With the advantages of legislation and its substance in mind, implementation can now be discussed more specifically. Legislation that protects protesters from surveillance can be implemented by three levels of actors: the federal legislature, state legislatures, and city councils. Each actor brings its own set of benefits, challenges, and possibilities of success. National legislation, for example, cultivates efficiency—no need remains for fifty state legislatures or thousands of city councils to consider the issue when Congress already has. On the other hand, the policies adopted by police departments vary based on locality, and state and local leaders may be better equipped to legislate with those policies in mind because they are more familiar with them.

These actors also differ with respect to the power to regulate police surveillance in the first place. For Congress, finding that grant of power can be a little tricky because the surveillance at issue does not involve regulation of the conduct of *federal* agencies or officers. Instead, the surveillance of protesters is primarily conducted by local police departments, which are regulated by states. This means that congressional regulation in this area could heavily intrude into an area typically left under state control.<sup>198</sup> But there are avenues for national

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196. *Id.*

197. The *City of Memphis* court outlined three problems related to having an exclusive purpose before finding a violation:

[First,] MPD can nearly always be said to have more than one purpose. Second, one purpose may lead to another. An officer may sit in his car, for example, for the purpose of observing traffic, which is done for the purpose of writing speeding tickets, which in turn is for the purpose of maintaining safe roads. The MPD may take an action for the purpose of political intelligence while simultaneously being motivated by a genuine desire to preserve public safety. Third, the Court notes that infringements on personal liberty are often accompanied by appeals to public safety.

*Id.* at 19.

198. See, e.g., *NFIB v. Sebelius*, 567 U.S. 519, 536 (2012) (“Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that

legislation. As Berkeley Law Professor Catherine Crump explains, for example, because the federal government largely funds local surveillance technology, it can likely condition the receipt of that funding on certain requirements.<sup>199</sup> She suggests three requirements in particular: (1) expanding local involvement in decisions about technology acquisition; (2) disclosing information on the impact of surveillance technology to local representatives; and (3) “requir[ing] that surveillance technologies be governed by use policies.”<sup>200</sup> Building on that argument, the substance of the Memphis Consent Decree can be transformed into a federal “use policy” that governs surveillance technology.<sup>201</sup>

Nevertheless, given that the power to regulate police departments is typically reserved to states and that gridlock often stalls federal legislation, the legislation advocated for in this Note is likely most viable on a state and local level. But an immediate practical issue emerges: Why would states or local governments ever want to impose such a limitation on themselves? As it turns out, “states have been *remarkably active*” in regulating police surveillance.<sup>202</sup> This is largely because state governments are more directly accountable to the

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touch on citizens’ daily lives are normally administered by smaller governments closer to the governed.”).

199. See Crump, *supra* note 40, at 1656–59 (discussing federal remedies).

200. *Id.*

201. One lingering concern is that conditioning the receipt of these funds might be an unconstitutional violation of Congress’s Spending Powers under *South Dakota v. Dole*, 483 U.S. 203 (1987), which requires conditional spending to (1) promote the general welfare, (2) be unambiguous, (3) be germane to the particular federal interest, (4) not be independently unconstitutional, and (5) not be “so coercive as to pass the point at which ‘pressure turns into compulsion.’” *Id.* at 207–08, 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). Here, the *Dole* test likely does not pose a significant issue given that the spending requirements would not create such an immense burden on the states as to be coercive and is tailored to the particular federal interest of protecting the First Amendment rights of protesters.

202. Crump, *supra* note 40, at 1659 (emphasis added). Professor Crump supports this contention by providing three recent statutes as examples:

[I]n 2015, California passed a comprehensive law, the California Electronic Communications Privacy Act, requiring warrants for digital records of emails, texts, and geolocation information, even when the data is stored in the cloud by service providers. CAL. PENAL CODE § 1546–1546.4 (West 2016). Virginia enacted legislation requiring law enforcement agencies to obtain a warrant (except in limited circumstances) before employing a drone. VA. CODE ANN. §§ 19.2–60.1 (2015). North Carolina adopted a bill that requires state and local agencies employing license plate readers to adopt a written use policy and sets limitations on data retention without a warrant. N.C. GEN. STAT. §§ 20-183.22–24 (2015).

*Id.* at n.303.

public.<sup>203</sup> Therefore, when police departments have surveilled local populations, “public ire targeted these departments’ respective city councils,”<sup>204</sup> meaning as public pressure mounts, such policies could instill legitimacy where legitimacy otherwise sits on shaky ground.<sup>205</sup>

### CONCLUSION

As a well-known Memphis activist, Tami Sawyer organized multiple protests in the years leading up to 2018, including protests to remove confederate statues.<sup>206</sup> She reported being personally yelled at and followed by police officers during and after protests, and court records from *City of Memphis* revealed that she was one of the protesters that MPD surveilled.<sup>207</sup> But on August 3, 2018, Sawyer was elected to the Shelby County Board of Commissioners, meaning that—in an ironic turn of events—“she can [now] keep tabs on the people who were keeping tabs on her.”<sup>208</sup>

From individuals like Sawyer to organizations like the ACLU, the history of Memphis shows that even when police departments have a genuine and valid concern for public safety, protesters still have a genuine and valid claim to protest without governmental interference, to speak without being recorded, and to appear without being followed. Although the Constitution may not explicitly protect these acts, the First, Fourth, and Fourteenth Amendments implicitly encode the principle of privacy that underlies them.

Unfortunately, police departments across the country have taken advantage of the constitutional gray zone that exists in this arena. Because it is unlikely that these constitutional ambiguities will be resolved anytime soon, this Note calls upon the legislature to step in and provide a solution modeled after the Memphis Consent Decree. It is important to note, however, that the issues surrounding surveillance will continue to develop in the age of technology, often beyond what

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203. See THE FEDERALIST No. 10 (James Madison) (“The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.”).

204. Crump, *supra* note 40, at 1650.

205. See, e.g., *id.* at 1659–60 (discussing the passage of state legislation after protests in Ferguson).

206. Brentin Mock, *Memphis: Spying on Activists Is Just Good Police Work*, CITYLAB (Aug. 9, 2018), <https://www.citylab.com/equity/2018/08/memphis-spying-on-activists-is-just-good-police-work/567101> [<https://perma.cc/TWP7-PF7H>].

207. *Id.*

208. *Id.*

any individual can reasonably predict. So, while Memphis tells a hopeful story, its lessons provide only a starting point. Much work remains to be done.