

ELECTION SURVEILLANCE

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For most of this country’s history, we have relied on human eyes and ears to oversee our system of elections. Modern surveillance tools, from cell phones to video streaming platforms, are now cheap and ubiquitous. Technology holds great promise to increase election transparency. But the 2020 election confirmed what has become quite clear: the use of technology to record election processes does not always serve the goal of reassuring the public of the integrity of elections; in fact, it can do the opposite. As legislatures around the country reexamine rules governing elections following the 2020 election, an underexplored question is whether election surveillance should be promoted or curbed. The line between democracy-enhancing election transparency and civil liberty-trampling election surveillance is fuzzy. This Article examines the history and present of election surveillance and reviews legislation and litigation surrounding it. The goal is to better understand how election surveillance can promote confidence in election outcomes while dodging the dark sides of both transparency and surveillance. As historic levels of public mistrust of election outcomes threaten American democracy, Election Surveillance examines these urgent questions.

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* Professor of Practice, Co-Director of the Election Law Program, William & Mary Law School.

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INTRODUCTION

On May 11, 2021, the City of Anchorage, Alaska held a runoff election for mayor.¹ Turnout was high. Election officials nobly rose to the challenge of conducting the election under enormously strained pandemic and political conditions. Echoing national leaders during the 2020 election, one mayoral candidate called on supporters to “heavily watch” the election process for fraud and irregularities.² A deluge of the candidate’s supporters descended.³ Election officials reported receiving ominous warnings: “There are a lot of eyes on you individually. There are a lot of eyes on you as a group.”⁴ A post-election memo from city election officials described the candidate’s supporters congregating in the Anchorage Election Center parking lot taking photos of election officials entering and leaving and of license plate numbers on election officials’ cars.⁵ The candidate’s supporters also posted out-of-context photos and videos taken from inside the election center on an online gossip column and discussed what they saw on local talk radio, sowing disinformation and distrust about the election process.⁶ As it happened, their candidate won the election and the tumult quickly subsided.⁷ But the experience left local

1. MUN. OF ANCHORAGE, ALASKA, NOTICE OF MAYORAL RUNOFF ELECTION, NOTICE OF ANCHORAGE VOTE CENTERS (Apr. 25, 2021), <https://www.muni.org/departments/assembly/clerk/elections/documents/notices/1st%20notice%20of%20runoff%20election.pdf>.

2. Tim Elfrink, *As GOP Candidate Used RV for 24/7 Watch, Anchorage Election Staff Say They Faced ‘Unprecedented Harassment’*, WASH. POST (May 28, 2021), <https://www.washingtonpost.com/nation/2021/05/28/anchorage-election-harassment-bronson-dunbar/>.

3. *Id.*

4. MUN. OF ANCHORAGE, ALASKA, ASSEMBLY MEMORANDUM NO. AM 341-2021, CERTIFICATION OF THE MAY 11, 2021 MAYORAL RUNOFF ELECTION 15 (May 25, 2021), <https://www.muni.org/Departments/Assembly/Documents/AM%20341-2021%20May%2011%2C%202021%20Mayoral%20Ruoff%20Election.pdf>.

5. *Id.*

6. *Id.*

7. Elfrink, *supra* note 2.

election officials and those who care about ensuring public confidence in elections alarmed.⁸

The impulse to watch elections firsthand is as old as American democracy. *Viva voce*, or voice voting, routinely used in the late eighteenth century, satisfied Americans' desire for verifiable voting that they could see (and hear) for themselves.⁹ When the secret ballot arrived in the late nineteenth century, state election designers understood that nearly every other aspect of the process must be as transparent as possible to ensure public faith in outcomes.¹⁰ To accomplish this, states largely relied on structural transparency regimes by which candidates and political parties appointed members of the public to act as their eyes and ears during the election process and report problems they saw to election officials.¹¹ In modern elections, election observers (sometimes referred to as "poll watchers"), nonprofit groups, and members of the media monitor elections.¹² State laws constrain election observation to ensure that observers do not disrupt election processes, that problems are reported in an orderly way, and that voters are able to cast ballots free of intimidation or coercion.¹³

Rules in place for decades governing public oversight of elections face new challenges and urgently merit rethinking.¹⁴ Advances in technology, like instantaneous transmission of photographic and recorded content, place great stress on calibrations of old.¹⁵ Election surveillance is now possible on a scope and scale never previously imagined, is aimed at new targets, and has downstream effects not fully considered. States are only just beginning to come to terms with the power of our radically changed information environment, as well as its potential benefits and enormous risks.

We think of mechanisms that allow members of the public to observe voters and election officials during various points of the election process as no-brainer, good government transparency: a

8. *Id.*

9. Indeed, Virginia and Kentucky employed *viva voce* voting through the Civil War. James Schouler, *Evolution of the American Voter*, 2 AM. HIST. REV. 665, 671 (1897) ("[I]n the appeal to unflinching manliness at the polls these two states insisted still that every voter should show at the hustings the courage of his personal conviction.").

10. Rebecca Green, *Rethinking Transparency in U.S. Elections*, 75 OHIO ST. L.J. 779, 789–90 (2014).

11. *Id.*

12. See discussion *infra* Part I.

13. See *Policies for Election Observers*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 13, 2020), <https://www.ncsl.org/research/elections-and-campaigns/policies-for-election-observers.aspx#>.

14. See generally Rebecca Green, *Election Observation Post-2020*, 90 FORDHAM L. REV. 467 (2021) (describing needed election reform).

15. *Id.* at 480–82 (describing how advances in technology can work to undermine rather than promote transparency during elections).

means to allow people to see for themselves that elections are fairly run and that outcomes are correct. What better way to ensure public buy-in than to let the sunlight pour in?¹⁶ Transparency, especially in the election context, has long been understood as a democracy-enhancing good.¹⁷ But the use of recording technologies—like photographing election workers’ license plates in parking lots or recording officials and voters entering and exiting election offices—strikes a worrisome chord. These tactics feel surveillance-like, with all associated negative connotations.¹⁸ With the continuing national tumult following the 2020 election, questions surrounding the wisdom of election surveillance are heating up.¹⁹

When is election surveillance problematic and when is it beneficial? The line between democracy-enhancing election transparency and civil liberty-trampling election surveillance is fuzzy and underexplored. This Article examines the history and present of election surveillance and reviews legislation and litigation surrounding it. The goal is to better understand how election surveillance can best promote confidence in election outcomes while dodging the dark sides of both transparency and surveillance.

This Article proceeds in six parts. Part I defines election surveillance and determines its scope. Part II examines calls for increased election surveillance following the 2020 election and provides background for how these proposals differ from the status quo. Part III unpacks transparency and surveillance, the relationship between the two, and the risks and benefits of each in our current information environment. Part IV provides a short history of election surveillance tactics from Jim Crow to present. Part V reviews “right to record” and election surveillance jurisprudence. Finally, Part VI offers modest recommendations for regulating and reforming election surveillance practices and discusses drawbacks of the proposals offered.

16. Referring to Justice Louis Brandeis’ famed observation. See Louis D. Brandeis, *Other People’s Money*, HARPER’S WKLY. (Dec. 20, 1913), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v> (“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

17. Green, *supra* note 14, at 494 (“This form of ‘structured transparency’ . . . is a central component of modern-day election administration.”).

18. See *infra* Part IV (discussing the long history of election surveillance as a means of voter intimidation and discrimination).

19. See *infra* Part II; Eliza Sweren-Becker, *Who Watches the Poll Watchers?*, BRENNAN CTR., (April 29, 2021), <https://www.brennancenter.org/our-work/research-reports/who-watches-poll-watchers> (detailing proposed legislation following the 2020 election).

I. WHAT IS ELECTION SURVEILLANCE?

Election surveillance means different things to different people. To some, election surveillance feels sinister and threatening; to others, election surveillance is a civic imperative. This Part endeavors to parse a definition to provide a basis for analysis.

Sociologist and leading surveillance studies scholar David Lyon provides a helpful starting point.²⁰ Lyon describes surveillance as “focused, systematic[,] and routine attention . . . for purposes of influence, management, protection[,] or direction.”²¹ Two aspects of Lyon’s definition are important for present purposes. First, Lyon distinguishes systematic observation of people or places (surveillance) from casual observation. Surveillance is systematic, purposeful, and “structured” observation.²² Second, systematized surveillance is undertaken in service of a specified goal. In Lyon’s framing, those goals generally involve influence, management, protection, or direction.²³ In the election context, surveillance serves several goals, including, but not limited to, ensuring the election is conducted legally, identifying and deterring illegal activity, and securing public confidence in election outcomes.²⁴

With this general definition in mind, election surveillance here refers to the systematized recording of election processes using an audio or video device. Borrowing from surveillance law, this definition excludes election observation using only the naked eye.²⁵ Election surveillance can be targeted at people (e.g., voters and election officials) or at processes (e.g., absentee ballot processing, vote

20. Surveillance studies is a cross-disciplinary field of academic study that examines modern surveillance tactics and processes their influence. Julie Cohen has written thoughtfully about the overlap—and disconnect—between legal scholarship and surveillance studies. See Julie Cohen, *Studying Law Studying Surveillance*, 13 SURVEILLANCE & SOC’Y 91, 91 (2015) (defining the discipline of surveillance studies).

21. DAVID LYON, SURVEILLANCE STUDIES: AN OVERVIEW 14 (2007).

22. Structured election transparency, as I have noted elsewhere, is an attribute of election transparency in most U.S. states. In structured transparency regimes, states rely on individuals appointed by campaigns and political parties to observe in person. See Green, *supra* note 10 at 789–92.

23. LYON, *supra* note 21 and accompanying text.

24. *Election Security: State Policies*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 2, 2019), <https://www.ncsl.org/research/elections-and-campaigns/election-security-state-policies.aspx>.

25. Here, this Article is borrowing the framework used in the federal Electronic Communications Privacy Act, which regulates the use of electronic technologies to intercept communications. See 18 U.S.C. §§ 2510–2520 (defining “intercept” as “the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device”). Surveillance can be technologically sophisticated (spy satellites, microscopic microphones, and the like) or it can be accomplished with everyday devices like a cell phone.

tabulation, or voting equipment transport and storage). Depending on state statutory configurations, election surveillance may be conducted by election officials, by party or candidate-delegated election observers, by members of the public, or by outside groups seeking to monitor elections.²⁶ Election surveillance can take place at any stage in the election process—before, during, and after Election Day.²⁷ The term “election surveillance” also includes election officials’ use of electronic tools to monitor voters and election processes (termed here “official election surveillance”). Examples of official election surveillance include state-operated video cameras trained at absentee ballot drop boxes or recount tables.²⁸

Data tracking of voters and voter registration databases are beyond the scope of this Article. Numerous private organizations and political parties engage in sophisticated data tracking (sometimes referred to as “dataveillance”) of voters and voter registration databases to focus campaign efforts, curate candidate messaging, influence political participation, and attempt to identify ineligible voters.²⁹ The present effort focuses exclusively on electronic surveillance of the administration of elections, understood as processes associated with the casting and counting of ballots.³⁰

26. See generally Green, *supra* note 14 (discussing, in part, who may conduct election surveillance).

27. *How Votes Are Counted*, CITIZENS CLEAN ELECTIONS COMM’N, <https://www.azcleanelections.gov/election-security/how-votes-are-counted> (last visited Mar. 17, 2022).

28. The Election Assistance Commission and the Cybersecurity Infrastructure and Security Agency (“CISA”) issued guidance for jurisdictions installing drop boxes during the 2020 election to accommodate COVID-19 concerns. The recommendation included video surveillance for unstaffed twenty-four-hour drop boxes. See *BALLOT DROP BOX, CYBERSECURITY INFRASTRUCTURE & SEC. AGENCY* 5, https://www.eac.gov/sites/default/files/electionofficials/vbm/Ballot_Drop_Box.pdf; see also *infra* note 52 (showing examples of statutes requiring official surveillance of drop boxes).

29. Margaret Hu, professor of law, has written on the impact of dataveillance on voters. See Margaret Hu, *Algorithmic Jim Crow*, 86 *FORDHAM L. REV.* 633, 683–84 (2017); Margaret Hu, *Big Data Blacklisting*, 67 *FLA. L. REV.* 1735, 1745 (2016) (“Before individuals are allowed to fly, work, drive, or vote, citizens and noncitizens alike may now be subjected to mass data collection and automated or semi-automated database screening protocols.”); see also Ira S. Rubinstein, *Voter Privacy in the Age of Big Data*, 2014 *WIS. L. REV.* 861, 864 (2014) (discussing implications for voter privacy stemming from modern political campaigns’ increasing reliance on the analysis of large data sets relating to voter consumer habits and political activities).

30. This definition includes a wide variety of electronic devices and technologies that may be used to surveil voting and election processes including cell phones, video cameras, and other less obvious technologies like GPS tracking. See, e.g., Stephen Fowler, *GBI Says GOP’s Cellphone Data Lacks Enough Evidence to Prove Ballot Harvesting*, *GA. PUB. BROAD. NEWS* (Oct. 22, 2021, 4:01

The present discussion also does not engage whether, and the extent to which, state statutes should allow members of the media to cover elections—although media access raises a valuable set of questions that lurk on the periphery.³¹ Some state statutes contain specific provisions enabling members of the press to cover election processes for limited periods and under specified circumstances.³²

PM), <https://www.gpb.org/news/2021/10/22/gbi-says-gops-cellphone-data-lacks-enough-evidence-prove-ballot-harvesting> (describing unsuccessful allegations of voter fraud based on cell phone tracking data near absentee ballot drop boxes in Georgia).

31. Attorney Leena Ketkar offers an argument for greater press access at the polls. See Leena Ketkar, *Do Democracies Die Behind the Doors of Polling Places: Finding a First Amendment Right of Press Access to Polling Places for Newsgathering*, 76 U. PITT. L. REV. 593, 600–11 (2015).

32. See, e.g., CONN. GEN. STAT. § 9-236(c) (2021) (“Representatives of the news media shall be allowed to enter, remain within and leave any polling place or restricted area surrounding any polling place to observe the election, provided any such representative who in any way interferes with the orderly process of voting shall be evicted by the moderator.”); IND. CODE § 3-6-10-1 (2021) (allowing media organizations to appoint one watcher for each precinct but remaining silent on whether or not the media-appointed watcher may use recording equipment); IOWA CODE § 49.104 (2021) (“Reporters, photographers, and other staff representing the news media [may be present at polling places]. However, representatives of the news media, while present at or in the immediate vicinity of the polling places, shall not interfere with the election process in any way.”); MD. CODE REGS. 33.07.04.02 (2022) (prohibiting cameras in polling places but making an exception for members of the media: “Cameras [may be] used by media representatives as long as the media representatives are recording polling place operations and not a screen or ballot”); MINN. STAT. § 204C.06.8 (2021) (providing for media access at polling places: “A news media representative may enter a polling place during voting hours only to observe the voting process. A media representative must present photo identification to the head election judge upon arrival at the polling place, along with either a recognized media credential or written statement from a local election official attesting to the media representative’s credentials”); OKLA. STAT. tit. 26, § 7-112 (2021) (“[A] news reporter or photographer may, in the course of covering the election being conducted, be allowed inside the election enclosure for a period not to exceed five (5) minutes.”); VA. CODE § 24.2-604.5(B) (2020) (“The officers of election shall permit representatives of the news media to visit and film or photograph inside the polling place for a reasonable and limited period of time while the polls are open. However, the media (i) shall [not interfere with voting processes]; (ii) shall not film or photograph any person who specifically asks the media representative at that time that he not be filmed or photographed; (iii) shall not film or photograph the voter or the ballot in such a way that divulges how any individual voter is voting; and (iv) shall not film or photograph the voter list or any other voter record or material at the precinct in such a way that it divulges the name or other information concerning any individual voter. Any interviews with voters, candidates, or other persons; live broadcasts; or taping of reporters’ remarks shall be conducted outside of the polling place and the prohibited area.

Most state election codes are silent on whether members of the media are permitted to observe and/or record election processes.³³

Finally, election surveillance, as used here, also excludes ballot selfies—a phenomenon that first came to courts' attention in 2014.³⁴ Plaintiffs in states around the country challenged state laws prohibiting individual voters from photographing their own ballot on First Amendment grounds.³⁵ In some states, ballot selfies contravened statutes prohibiting photography in polling places. But the core concern (and the reasons why many state legislatures like New Hampshire's moved to ban the practice) involved ballot secrecy laws in place to prevent vote buying schemes.³⁶ For purposes of the present effort, election surveillance tactics considered here do not engage the ballot secrecy status quo. Individuals, organizations, and legislators pushing for increased election surveillance do not argue against ballot secrecy or advocate for the right to record the content of one's own ballot.³⁷ That said, as the discussion below reveals, ballot selfie litigation is informative since it forced courts—and legislatures—to think through the use of technology in polling places and the consequences of American voters' right to record during elections.

The officers of election may require any person who is found by a majority of the officers present to be in violation of this subsection to leave the polling place and the prohibited area.”).

33. Media questions are excluded in part because when the traditional press chooses to cover an event (an election, a town hall meeting, or a movie premiere, for example), press activity is not generally understood as surveillance (with the possible exception of some paparazzi tactics aimed at celebrities). Certainly, the British Royal Family attests to this problem. *See, e.g.,* Tara John, *Prince George is Being Hounded by Paparazzi, Complains William and Kate*, TIME (Aug. 14, 2015, 7:30 AM), <https://time.com/3997827/prince-george-paparazzi/> (describing efforts by the Royal Family to stop increasingly aggressive paparazzi surveillance tactics). In addition, it should be noted that as lines blur between citizen journalists and the traditional press, media coverage and election surveillance as understood here start to blend together. *See* Adam Cohen, *The Media that Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 13 (2011) (discussing the role of citizen journalists); Gary A. Hengstler, *Sheppard v. Maxwell Revisited—Do the Traditional Rules Work for Nontraditional Media?*, 71 LAW & CONTEMP. PROBS. 171, 172–73 (2008) (describing blurred lines between traditional and nontraditional media).

34. For a general overview of state responses to ballot selfies, see *Secrecy of the Ballot and Ballot Selfies*, NAT'L CONF. OF STATE LEGISLATURES (June 24, 2021), <https://www.ncsl.org/research/elections-and-campaigns/secrecy-of-the-ballot-and-ballot-selfies.aspx>.

35. *See infra* Part V.

36. *See* *Rideout v. Gardner*, 838 F.3d 65, 74 (1st Cir. 2016) (striking ballot selfie prohibition but acknowledging the state's interest in preventing vote buying and voter coercion made “easier by providing proof of how the voter actually voted”).

37. *See infra* Part V.

With this definition and scope of election surveillance in mind, Part II turns to an overview of post-2020 election surveillance legislative proposals and how they differ from the status quo.

II. THE PUSH FOR ELECTION SURVEILLANCE POST-2020

That elections should be transparent is a given. The more the public can verify that elections were administered fairly and according to state and federal law, the better. In the lead up to the 2020 election, this impulse propelled heated calls for “armies” of observers to ferret out fraud at the polls and attendant concerns about whether such tactics would lead to voter intimidation or even violence.³⁸ Following the 2020 election, legislators around the country have weighed increased election surveillance. The Illinois General Assembly, for example, considered a law requiring that all election observers wear body cameras.³⁹ The Texas Legislature considered a bill to empower poll watchers to take photos or videos of suspected ineligible voters at polling places to send to the state.⁴⁰ The bill proposed that “[a] watcher may electronically transmit a photo, video, or audio recording made by the watcher during the watcher’s service directly to the Secretary of State if the watcher reasonably believes the photo, video, or recording contains evidence of unlawful activity.”⁴¹

Criticism of the proposed law followed, noting the long history in Texas of poll watchers harassing and intimidating minority voters.⁴²

38. Trevor Hughes, *Trump ‘Army’ of Poll Watchers Could Frighten Voters, Incite Violence, Election Officials Warn*, USA TODAY (Oct. 14, 2020, 5:17 PM), <https://www.usatoday.com/story/news/politics/elections/2020/10/14/2020-election-trump-army-poll-watchers-stirs-fears-violence/5908264002/>. See the discussion *infra* Part IV, addressing the history of election surveillance. Importantly, such concerns did not appear to materialize, likely in part because COVID-19 complicated in-person voter intimidation efforts. Some suggest another reason: that voter intimidation tactics may be moving online. See Michael Weingartner, *Remedying Intimidating Voter Disinformation Through § 1985(3)’s Support-or-Advocacy Clauses*, 110 GEO. L.J. ONLINE 83, 86 (2021), <https://www.law.georgetown.edu/georgetown-law-journal/glj-online/glj-online-vol-110/remedying-intimidating-voter-disinformation-through-19853s-support-or-advocacy-clauses/> (“A more troubling explanation [why in-person voter intimidation did not emerge on a wide scale in 2020] is that voter intimidation simply moved from the polling place to cyberspace. Indeed, while things were quiet at the polls in 2020, social media and other electronic channels were awash with disinformation designed to intimidate voters and keep them from the polls.”).

39. H.B. 3553, 102d Gen. Assemb., 2021 Legis. Sess. (Ill. 2021).

40. S.B. 7, 87th Legis., Reg. Sess. (Tex. 2021).

41. *Id.*

42. Paul Stinson, *Texas Elections Bill Would Allow Video Surveillance at Polls*, BLOOMBERG L. (Apr. 12, 2021, 6:01 AM), <https://news.bloomberglaw.com/>

Said one critic, “[g]iving untrained poll watchers the authority to take matters into their own hands and record Texans who are simply trying to exercise their right to vote is a recipe for disaster.”⁴³ Countered the legislator who drafted the bill in its defense, “I would think we would want video to help sort out what really happened so it wouldn’t be a swearing match.”⁴⁴

Similarly moved by the promise of surveillance to address concerns about illegal voting, the New Hampshire legislature passed a law requiring voters who register on Election Day but lack an accepted photo ID to have their photos taken by election officials at the polling place.⁴⁵ Georgia, Illinois, Minnesota, and Virginia all also considered bills that would require video recording of election proceedings at various stages.⁴⁶

At present, most state statutes are either silent on election surveillance or prohibit certain actors from engaging in election surveillance in limited circumstances.⁴⁷ Virginia law, for example, bars election observers from recording inside polling places.⁴⁸ Georgians may not use cell phones, take photos, or record videos of voting.⁴⁹ Colorado law prohibits election surveillance broadly, banning the use of “any electronic device to take or record pictures, video, or audio in any polling location or other place election activities are conducted.”⁵⁰ Some prohibitions on election surveillance appear

privacy-and-data-security/texas-elections-bill-would-allow-video-surveillance-at-polls.

43. *Id.*

44. *Id.* (quoting Senate State Affairs Committee Chairman Bryan Hughes (R), who authored the bill).

45. H.B. 523, 2021 Session (N.H. 2021).

46. H.B. 537, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); H.B. 3553, 102d Gen. Assemb., Reg. Sess. (Ill. 2021); S.F. 1515, 92d Leg., Reg. Sess. (Minn. 2021); and H.B. 1746, 2021 Gen. Assemb., Reg. Sess. (Va. 2021).

47. Only twelve states explicitly prohibit recording in their election code: Arizona, ARIZ. REV. STAT. ANN. § 16-515(G) (2021); California, CAL. ELEC. CODE § 18541(a)(3) (West 2021); Colorado, COLO. CODE REGS. § 1505-1:8 (2021) (Rule 8.14.7); the District of Columbia, D.C. Mun. Regs. tit. 3, § 706.17(f) (2020); Georgia, GA. CODE ANN. § 21-2-408(d) (2021); Maryland, MD. CODE REGS. 33.07.04.02 (2022); Mississippi, MISS. CODE ANN. § 23-15-577(4)(c) (2021); Tennessee, TENN. CODE ANN. § 2-7-104(e) (2021); Texas, TEX. ELEC. CODE ANN. § 33.051(c) (West 2021); Utah, UTAH CODE ANN. § 20A-3a-801(5)(a)(i) (LexisNexis 2021); Virginia, VA. CODE ANN. § 24.2-604.4(D) (2021); and West Virginia (W. VA. CODE § 3-4A-23 (2021).

48. VA. CODE ANN. § 24.2-604.4(D) (2021) (“Authorized representatives shall be allowed, whether in a regular polling place or central absentee voter precinct, to use a handheld wireless communications device but shall not be allowed to use such a device to capture a digital image inside the polling place or central absentee voter precinct.”). *But see* VA. CODE ANN. § 24.2-604.5(B) (2021) (allowing media coverage for a limited period of time).

49. GA. CODE ANN. § 21-2-408(d) (2021).

50. COLO. CODE REGS. § 1505-1:8 (2021) (Rule 8.14.7).

in voter intimidation laws. For example, a California voter intimidation statute warns that “no person shall photograph, video record, or otherwise record a voter.”⁵¹

Numerous state statutes affirmatively require official election surveillance of various election processes.⁵² Arizona law, for example, requires that a recording be made of the chain of ballot custody that must be kept as a public record for at least as long as the challenge

51. CAL. ELEC. CODE § 18541(a)(3) (West 2021) (stipulating that this prohibition applies within one hundred yards of a polling place). In some states, prohibitions on recording do not appear in statutory or regulatory text but are found in guidance from chief election officials. For example, the Michigan Secretary of State’s website advises that election observers may not “use a video camera or recording device, or the camera or recording features of a smart phone or tablet in [a] polling place or clerk’s office.” THE APPOINTMENT, RIGHTS AND DUTIES OF ELECTION CHALLENGERS AND POLL WATCHERS, MICH. DEPT OF STATE BUREAU OF ELECTIONS (2020), https://www.michigan.gov/documents/SOS_ED_2_CHALLENGERS_77017_7.pdf. Other examples of states discouraging election surveillance via secretary of state guidance include Minnesota and Montana. *Polling Place Rules*, OFF. OF THE MINN. SEC’Y OF STATE STEVE SIMON <https://www.sos.state.mn.us/elections-voting/election-day-voting/polling-place-rules/> (last visited Mar. 17, 2022); MONT. SEC’Y OF STATE: ELECTIONS & VOTER SERVS. DIV., MONTANA ELECTION JUDGE HANDBOOK 2020, at 11 (2020).

52. Numerous state statutes require official election surveillance. *See, e.g.*, IDAHO CODE ANN. § 34-1007(2) (2021) (“If the absentee ballots are opened prior to election day, the ballots shall be securely maintained in a nonproprietary electronic access-controlled room under twenty-four (24) hour nonproprietary video surveillance that is livestreamed to the public and which video must be archived for at least ninety (90) days following the election.”); IOWA CODE § 53.17(4) (2021) (“A video surveillance system shall be used to monitor all activity at the ballot drop box at all times while the ballot drop box is in place. The system shall create a recording, which shall be reviewed by the state commissioner, county attorney, and law enforcement in the event that misconduct occurs.”); KY. REV. STAT. ANN. § 117.086(c)(3) (West 2021) (“Any drop-box or receptacle located outside of the county clerk’s office shall be . . . [u]nder video surveillance at all times”); N.J. STAT. ANN. § 19:63-16.1(2)(a) (West 2021) (“A ballot drop box shall mean a secured drop box that is not required to be within view of a live person for monitoring. All ballot drop boxes shall be available for use by a voter [twenty-four] hours a day and shall be placed at locations equipped with security cameras that allow for surveillance of the ballot drop box.”); OR. REV. STAT. § 254.074(1)(b)(H) (2021) (“A county elections security plan shall include, but is not limited to[,] . . . [t]he number and location of all video surveillance cameras within the elections office”); VT. STAT. ANN. tit. 17, § 2543a(d)(2) (2021) (“Drop boxes shall be installed and maintained in accordance with guidance issued by the [s]ecretary of [s]tate’s office. At a minimum, drop boxes shall . . . be under [twenty-four] hour video surveillance or in the alternative be within sight of the municipal building.”); N.M. STAT. ANN. § 1-6-9(E)(3) (2021) (“[A]ll secured containers shall be monitored by video surveillance cameras and the video recorded by that system shall be retained by the county clerk as a record related to voting pursuant to the provisions of Section 1-12-69 NMSA 1978.”).

period for the general election.⁵³ Given strained pandemic and political conditions in 2020, some states required live video streams of election processes to allow the public to observe remotely.⁵⁴

This brief review reveals that state election surveillance statutes are scattershot. These statutory vagaries are colliding head on with a crisis in confidence in elections. Despite the heroics of election administrators around the country to administer elections fairly and transparently amidst a pandemic in 2020,⁵⁵ and even though dozens of courts around the country rejected claims of malfeasance and fraud,⁵⁶ a steady drumbeat undermining the 2020 election outcome has convinced millions of Americans to distrust election administration in this country.⁵⁷ Far from dodging a bullet in 2020,

53. Arizona's statute mandates that the live video be made available on the Secretary of State's website for viewing by the public. ARIZ. REV. STAT. ANN. § 16-621(D) (2021) ("For any statewide, county[,] or legislative election, the county recorder or officer in charge of elections shall provide for a live video recording of the custody of all ballots while the ballots are present in a tabulation room in the counting center. The live video recording shall include date and time indicators and shall be linked to the secretary of state's website. The [S]ecretary of [S]tate shall post links to the video coverage for viewing by the public.")

54. Governor Hutchinson of Arkansas issued an executive order in advance of the 2020 election as follows:

WHEREAS: In addition to in-person examination of the canvassing process by candidates and poll watchers, I encourage county election officials to livestream the processing, canvassing, and counting of outer and inner envelopes online to the extent possible to provide additional transparency and otherwise mitigate unnecessary exposure to COVID-19 for individuals who may choose to observe remotely

Ark. Exec. Order No. 20-44 (Aug. 7, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-44.pdf.

55. Nathaniel Persily & Charles Stewart III, *The Miracle and Tragedy of the 2020 U.S. Election*, 32 J. DEMOCRACY 159, 159 (2021), <https://www.journalofdemocracy.org/articles/the-miracle-and-tragedy-of-the-2020-u-s-election/> ("The 2020 U.S. election was . . . a miracle in that election administrators, facing unprecedented challenges from a pandemic, were able to pull off a safe, secure, and professional election in which a record number of Americans turned out to vote.")

56. *Fact Check: Courts Have Dismissed Multiple Lawsuits of Alleged Electoral Fraud Presented by Trump Campaign*, REUTERS (Feb. 15, 2021, 10:41 AM), <https://www.reuters.com/article/uk-factcheck-courts-election/fact-check-courts-have-dismissed-multiple-lawsuits-of-alleged-electoral-fraud-presented-by-trump-campaign-idUSKBN2AF1G1> (noting that U.S. courts "dismissed more than [fifty] lawsuits of alleged electoral fraud and irregularities presented by Trump and allies").

57. Domenico Montanaro, *Most Americans Trust Election Are Fair, But Sharp Divides Exist, a New Poll Finds*, NPR (Nov. 1, 2021, 5:01 AM), <https://www.npr.org/2021/11/01/1050291610/most-americans-trust-elections-are-fair-but-sharp-divides-exist-a-new-poll-finds> (noting that only "[fifty-eight percent] [of respondents] said they trust elections").

the U.S. system of elections took a direct hit: a significant portion of the U.S. electorate doubts the 2020 outcome to this day.⁵⁸

In this uncertain environment, an understandable temptation is to subject elections to far greater surveillance. Surveillance has long been used as a mechanism to reduce perceived risk.⁵⁹ Yet we are learning that more watching is not always better, that transparency has its downsides, and that modern information architectures enable distorting effects that can undermine democratic functioning. With this in mind, the next Part examines transparency and surveillance theory as a backdrop for evaluating the benefits and risks of election surveillance.

III. TRANSPARENCY & SURVEILLANCE

As modern recording and communications technologies proliferate, both transparency and surveillance have experienced revolutionary change. Courts and policymakers have struggled with the implications of exploding capability and scale in both the transparency and surveillance contexts.⁶⁰ The following Subparts examine challenges that have surfaced in both realms.

58. Press Release, Ipsos, Reuters/Ipsos: Trump's Coattails (Apr. 2, 2021), https://www.ipsos.com/sites/default/files/ct/news/documents/2021-04/topline_write_up_reuters_ipsos_trump_coattails_poll_-_april_02_2021.pdf (finding that six months after the November 2020 election, fifty-five percent of Republicans believe former President Trump's 2020 election loss resulted from illegal voting or election rigging).

59. See DAVID LYON, SURVEILLANCE SOCIETY: MONITORING EVERYDAY LIFE 6 (2001) ("Surveillance is the means whereby knowledge is produced for administering populations in relation to risk.").

60. See, e.g., *United States v. Jones*, 565 U.S. 400, 415–16 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. The government can store such records and efficiently mine them for information years into the future. And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility." (quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004))); *U.S. Dep't of Just. v. Repts. Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (noting that in the Freedom of Information Act case, the difference between paper and electronic files is that "[p]lainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information").

A. *Transparency Transgressions*

“Transparency” is widely understood as a bedrock democratic principle.⁶¹ It is a device by which the weak can influence the powerful—the essence of democracy.⁶² Political theorists have long counseled that a citizenry must be adequately informed about government actors and institutions to hold elected officials accountable at the voting booth.⁶³ The goal of transparency in a liberal democracy is to compel the “state to give an account of itself to its public and to justify its actions.”⁶⁴ While long viewed as an unmitigated good, scholars are beginning to document the downsides of transparency in modern information environments.

In 2009, Harvard Law Professor Lawrence Lessig published an influential article, *Against Transparency*, challenging the notion that transparency is an inalienable good.⁶⁵ Professor Lessig noted that the “radical decline in the cost of collecting, storing, and distributing data,”⁶⁶ at least in theory, promised a new age of civic enlightenment. Despite this promise, Professor Lessig worried that “naked transparency” would lead to distortions.⁶⁷ Releases of information out of context, he cautioned, could “push any faith in our political system over the cliff.”⁶⁸ People exposed to a fire hose of government information might ignore, misunderstand, or misuse it to their—and democracy’s—detriment.⁶⁹ Responding to Justice Brandeis’s famous quip, Lessig concluded that, “[s]unlight may well be a great

61. Maria Smith, *Biden Must Act to Ensure Government Transparency*, BRENNAN CTR. FOR JUST. (Feb. 8, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/biden-must-act-ensure-government-transparency> (suggesting that “transparency” is a “bedrock value[] of our democracy”).

62. Nikki Sutton, *President Obama on Open Government: “The Essence of Democracy”*, WHITE HOUSE: BLOG (Sept. 20, 2011, 6:23 PM), <https://obamawhitehouse.archives.gov/blog/2011/09/20/president-obama-open-government-essence-democracy>.

63. James Madison famously cautioned that “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.” Letter from James Madison to W.T. Barry (Aug. 4, 1822), <https://founders.archives.gov/documents/Madison/04-02-02-0480>.

64. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 897 (2006).

65. Lawrence Lessig, *Against Transparency*, NEW REPUBLIC (Oct. 9, 2009), <https://newrepublic.com/article/70097/against-transparency>.

66. *Id.*

67. *See Id.* (analyzing the risks of the “naked transparency movement”).

68. *Id.*

69. *Id.* (quoting ARCHON FUNG ET. AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 53 (2007)) (“Whether and how new information is used to further public objectives depends upon its incorporation into complex chains of comprehension, action, and response.”).

disinfectant. But as anyone who has ever waded through a swamp knows, it has other effects as well.”⁷⁰

Ten years after Professor Lessig’s observations, when the harsh sociopolitical realities of our distorted information environment had become even more apparent, legal scholar Stanley Fish went further.⁷¹ Fish identified transparency not just as a potential peril but as a modern evil. Fish centered his critique of transparency on the First Amendment credo that more speech is invariably better: the Supreme Court-sanctified idea that the best antidote to problematic speech is counterspeech.⁷² Fish argued that in our current internet-addled information environment, “unimpeded circulation of unbounded amounts of information” tramples the First Amendment’s “more speech” theology.⁷³ Fish warned that Edenic “more speech” visions have crumbled in part because nefarious actors (foreign and domestic) seek to manipulate transparency mechanisms for bad ends. As Fish describes,

predators and trolls . . . take advantage both of the indiscriminate and undifferentiated nature of what is offered and of its anonymity, for in those features of the digital experience they will find the materials with which they can fashion malevolent messages, secure in the knowledge that the gatekeeping norms that might expose and stop them are nowhere in sight because they have been discredited.⁷⁴

The implications of naked transparency, or what Fish termed “unbounded information,”⁷⁵ in modern elections is concerning. Elections are complex, decentralized, administrative events that unfold in multiple stages and are governed by detailed federal, state, and local law, as well as regulation and practice.⁷⁶ Built into the

70. *Id.* (citing Brandeis, *supra* note 16).

71. For the full chapter containing Fish’s observations discussed below, see generally STANLEY FISH, *THE FIRST: HOW TO THINK ABOUT HATE SPEECH, CAMPUS SPEECH, RELIGIOUS SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP* (2019).

72. The “more speech” credo is perhaps most famously articulated by Justice Brandeis: “If there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

73. FISH, *supra* note 71, at 153. Fish drew on the work of Mark Fenster for the idea that government transparency is now obscured by way of deluge. As Fenster described, “[T]he excess of available information limits the ability to know and understand any part of the state and its operations.” MARK FENSTER, *THE TRANSPARENCY FIX: SECRETS, LEAKS, AND UNCONTROLLABLE GOVERNMENT INFORMATION* 129 (2017).

74. FISH, *supra* note 71, at 164–65.

75. FISH, *supra* note 71, at 162.

76. See generally *Election Administration at State and Local Levels*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 3, 2020), <https://www.ncsl.org/research/>

election process in every state are multiple layers of safeguards to prevent fraud and ensure fairness and ballot security—processes that to the untrained eye might seem inexplicable at best and criminal at worst. Those observing election processes often cannot *understand* what they see without training and—critically—context.

To make matters worse, nefarious actors seeking to manipulate information about elections have new tools enabling distortion and manipulation of audio and video images with a degree of realism never before possible.⁷⁷ The specter of deep fakes and other technologically sophisticated manipulations of election “evidence” adds to long-lived, low-tech manipulative editing.⁷⁸ Amped up manipulation capabilities constitute a dangerous threat to elections we are already seeing play out.

Examples of these currents in the 2020 election are many. Ballot duplication is illustrative. Ballot duplication is a process election officials undertake when, for a variety of reasons, a voter’s original ballot is spoiled or damaged.⁷⁹ Ballots can be spoiled for a variety of reasons from coffee spills to being filled out with an implement that the vote scanner cannot recognize (think highlighter, eyeliner, or crayon).⁸⁰ In these instances, where the intent of the voter is clear but the vote tabulation system will not count the ballot unless election officials take action, state laws provide for strict and multilayered procedures that allow teams of election officials to duplicate ballots so that they will pass through voting tabulation equipment and be

elections-and-campaigns/election-administration-at-state-and-local-levels.aspx (explaining the “highly decentralized election administration system” in the United States).

77. See Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World*, 64 ST. LOUIS U. L.J. 535, 542–43 (2020) (including a hypothetical about how deep fakes could falsify a politician’s statements); Rebecca Green, *Counterfeit Campaign Speech*, 70 HASTINGS L.J. 1445, 1451 n.30 (2019) (including a hypothetical about how deep fakes could place a politician next to a controversial figure). See generally Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753 (2019) (discussing the basics of deep fakes, their impacts on society, and solutions to the issues they present). Professors Chesney and Citron broadly define “deep fakes” as “[t]echnologies for altering images, video, or audio (or even creating them from scratch) in ways that are [highly realistic] and difficult to detect.” Chesney & Citron, *supra* note 77, at 1757.

78. See, e.g., Green, *supra*, note 77, at 1452 n.31 (discussing footage of Nancy Pelosi that was edited to make it seem as though she was drunk).

79. Michelle Shafer, *Ballot Duplication: What It Is, What It Is Not, and Why We Are Talking About It in 2020*, THE COUNCIL OF STATE GOV’TS (July 20, 2020), <https://ovi.csg.org/ballot-duplication-what-it-is-what-it-is-not-and-why-we-are-talking-about-it-in-2020/>.

80. *Id.*

counted.⁸¹ A new ballot is created and the damaged ballot is typically retained for auditing purposes.⁸²

To the untrained eye, ballot duplication might appear as if election officials are huddled in dark corners filling out blank ballots at whim. In reality, however, ballot duplication is a ho-hum, carefully regulated practice election officials undertake in every election. Nevertheless, in Philadelphia, an official livestream of election officials duplicating damaged ballots backfired wildly.⁸³ The feed was taken out of context and used to spread the lie that election officials were committing fraud.⁸⁴

Other examples in 2020 abound. A video in Fulton County, Georgia, showed a worker crumpling up an instruction sheet in frustration.⁸⁵ The video made it appear as if he was destroying a ballot. Death threats ensued, forcing the election worker into hiding.⁸⁶ In another example from Fulton County, conspiracists circulated video footage spreading a lie that an election worker had hidden a “suitcase” of ballots from observers and then scanned them without supervision.⁸⁷ The election worker (and her daughter) were subject to repeated threats and harassment, including death threats.⁸⁸ In another example, a photograph of an election worker turned into a scandal as some alleged that the Pennsylvania state election worker was in fact a state senator from Georgia.⁸⁹ One Facebook user wrote as a caption to the posted picture, “State Senator

81. Michelle Shafer, *Ballot Duplication Technology: What It Is and How Does It Work?*, COUNCIL STATE GOV'TS (Aug. 31, 2020), <https://ovi.csg.org/ballot-duplication-technology-what-is-it-and-how-does-it-work/>.

82. *Id.*

83. McKenzie Sadeghi, *Fact Check: Viral Video Shows Pennsylvania Poll Workers Fixing Damaged Ballots*, USA TODAY (Nov. 6, 2020, 4:25 PM), <https://www.usatoday.com/story/news/factcheck/2020/11/06/fact-check-video-shows-pennsylvania-poll-workers-fixing-damaged-ballots/6185589002/>.

84. *Id.*

85. Kate Brumback & Jude Joffe-Block, *Georgia Poll Worker in Hiding After False Claims Online*, AP NEWS (Nov. 6, 2020), <https://apnews.com/article/fact-check-georgia-poll-worker-in-hiding-aa0f256ec21de96fd5a41da703c4b443>.

86. *Id.*

87. Susan McCord, *Georgia Officials Debunk ‘Secret Ballot Suitcase’ Claim; To Re-certify Results for Biden*, AUGUSTA CHRON. (Dec. 7, 2020, 12:29 PM), <https://www.augustachronicle.com/story/news/politics/elections/presidential/2020/12/07/secret-suitcase-magic-ballots-actually-bag-ballots-packed/3858322001/> (explaining the source of the confusion of the “suitcase of ballots” conspiracy theory).

88. *See id.*; see also Reid J. Epstein, *Two Election Workers Targeted by Pro-Trump Media Sue for Defamation*, N.Y. TIMES (Dec. 2, 2021), <https://www.nytimes.com/2021/12/02/us/politics/gateway-pundit-defamation-lawsuit.html>.

89. Arijeta Lajka, *Photo Shows Poll Worker in Pennsylvania, Not Georgia Senator*, AP NEWS (Dec. 8, 2020), <https://apnews.com/article/fact-checking-9855850817>.

Elena Parent of Georgia is seen here counting ballots in Pa? Not sure that's lawful Senator"⁹⁰ The Georgia state senator tried to clarify that she had neither been to Pennsylvania in 2020 nor counted any ballots, but the damage had been done.⁹¹

As these examples demonstrate, the dangers of unbounded election transparency can fuel the fires of mis- and disinformation, bringing the perils of election surveillance into greater relief.

B. *The Transparency and Surveillance Overlay*

Concerns about transparency collide with modern surveillance techniques that transform the means by which those seeking transparency can secure it. Surveillance and transparency have a complex and poorly understood relationship.⁹² This Subpart points to three aspects of the transparency/surveillance overlay that can shed light on election surveillance questions: (1) the care and control dichotomy; (2) the distinction between covert versus overt surveillance; and (3) the impacts of who does the watching.

1. *Care and Control*

Unlike transparency, surveillance gets a bad rap. From a public perception standpoint, surveillance is commonly equated with the powerful manipulating or controlling the less powerful.⁹³ Surveillance invokes Orwell's "Big Brother,"⁹⁴ Foucault's panopticon,⁹⁵ and harmful, oppressive incursions into precious civil liberties. Surveillance is the all-seeing totalitarian state or the voracious company tracking our every move. Too much surveillance and we risk, as Justice Brennan cautioned in 1963, becoming

90. *Id.* Twitter also picked up on the action with one caption reading, "Elena Parent, Democratic Senator, why are you opening ballots and in counting rooms? I didn't know a [senator's] job description was to work in election counting rooms?" *Id.*

91. *Id.* ("The allegations are false. I am not depicted in the video or stills," Parent explained. "I have not been to Pennsylvania anytime in 2020 and I have never counted ballots in a state or local election.").

92. In some ways, the two concepts are like apples and oranges. As Frederick Schauer points out, we think of "transparency [as] an *attribute* rather than an *activity* (like speaking or writing)"—or, presumably, surveillance. Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1343–44 (2011) (emphasis added).

93. LYON, *supra* note 21, at 20, 32.

94. See GEORGE ORWELL, 1984, at 3, 34–45 (1949).

95. See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200–01, 203, 208 (Alan Sheridan trans., Pantheon Books 1977) (1975).

“hagridden and furtive.”⁹⁶ Surveillance, at least in the popular conscience, is decidedly democracy threatening.

And yet, modern society is replete with surveillance that serves the public good—from baby monitors in nurseries to sophisticated law enforcement surveillance technologies that detect and prevent crime.⁹⁷ Surveillance enables individuals and societies to manage risk, improve safety, and encourage law-abiding behavior.⁹⁸ This duality is captured in the term itself. As David Lyon points out, the word surveillance derives from the French verb *surveiller*, which means to “watch over.”⁹⁹ The act of watching over something or someone can be viewed as providing a social good. One might ask someone to “watch over” their child for purposes of ensuring the child’s safety. Then again, one might also request that a naughty child be “watched over” as a disciplinary effort to punish a little miscreant. At least from the child’s perspective, this latter version has a decidedly negative bent. Lyon identifies this “care and control” duality of surveillance.¹⁰⁰

The care and control duality is helpful in understanding divergent views on election surveillance. In one frame, election surveillance is a form of “caring” for the integrity of an election and

96. *Lopez v. United States*, 373 U.S. 427, 470 (1963) (Brennan, J., dissenting) (“If electronic surveillance by government becomes sufficiently widespread, and there is little in prospect for checking it, the hazard that as a people we may become hagridden and furtive is not fantasy.”).

97. See, e.g., Kami Chavis Simmons, *Body-Mounted Police Cameras: A Primer on Police Accountability vs. Privacy*, 58 HOW. L.J. 881, 884–89 (2015) (describing the benefits and shortcomings of police body cameras).

98. See LYON, *supra* note 21, at 6. Numerous scholars have written about the many benefits of surveillance. See Chaz Arnett, *From Decarceration to Ecarceration*, 41 CARDOZO L. REV. 641, 699–701 (2019) (discussing the literature supporting benefits of “ecarceration,” a term referencing correctional surveillance technology tools in the criminal justice system, such as electronic ankle monitors); Henry Lininger & Tom Lininger, *Unlocking the “Virtual Cage” of Wildlife Surveillance*, 27 DUKE ENV’T. L. & POL’Y F. 207, 214–15, 219–23 (2017) (discussing the benefits—and harms—of wildlife surveillance); Peter P. Swire, *Financial Privacy and the Theory of High-Tech Government Surveillance*, 77 WASH. U. L.Q. 461, 486–88 (1999) (discussing the benefits of government surveillance in the financial sector: “One can therefore see how detailed financial records can further the central goals of law enforcement, namely, the detection, deterrence, and proof of illegal activity”); David Thaw, *Surveillance at the Source*, 103 KY. L.J. 405, 411–14 (2015) (discussing generally the benefits of surveillance in a variety of contexts); Brandon C. Welsh et. al., *Effectiveness and Social Costs of Public Area Surveillance for Crime Prevention*, 11 ANN. REV. L. & SOC. SCI. 111, 112–13, 120–21 (2015) (noting the benefits of natural surveillance, such as lighting and defensible space in reducing crime by improving visibility, and the benefits of formal surveillance, such as security personnel and place managers who act as visible deterrents).

99. LYON, *supra* note 21, at 13.

100. *Id.* at 3.

enhancing election transparency.¹⁰¹ In another, election surveillance is an exertion of menacing “control,” serving nefarious ends like intimidating voters.¹⁰²

Transparency and surveillance both involve exertions of control. We think of transparency measures as vehicles to enable government accountability. But fundamentally, transparency measures are in place to enable citizen *control* of government actors and institutions.¹⁰³ As Frederick Schauer describes, transparency’s function is “the embodiment of public control as an end in itself.”¹⁰⁴ Both transparency and surveillance measures enable watchers to exert control over the objects of their gaze; both perform a disciplining function. Being watched—by a man in a trench coat, by constituents, by the state, or by fellow citizens—results in objects of the gaze adjusting their behavior to accommodate social norms, legal requirements, or other purposes for which transparency or surveillance mechanisms are in place.¹⁰⁵

Control functions of transparency and surveillance can thus be leveraged both in service of the common good (e.g., improving law abiding on the part of surveillance targets) or in service of injurious aims (e.g., manipulation and incursions into civil liberties).

2. *Covert vs. Overt Surveillance*

Targets within transparency systems know their actions will be watched and are routinely required by law to take part in documenting, displaying, or releasing information about their activities to the public.¹⁰⁶ The goals of transparency—deterrence, accountability, and an informed public—are served by a presumption of openness of which public servants are on notice.

101. See, e.g., Brooke Singman, *GOP Recruits 4,000 Poll Watchers for ‘Most Aggressive Ballot Security Operation in Georgia History’*, FOX NEWS (Dec. 9, 2020), <https://www.foxnews.com/politics/georgia-gop-poll-watchers-senate-runoffs> (demonstrating how conservative politicians and news outlets touted election surveillance as a needed and positive effort).

102. See, e.g., Nick Corasaniti, *G.O.P. Seeks to Empower Poll Watchers, Raising Intimidation Worries*, N.Y. TIMES (May 1, 2021), <https://www.nytimes.com/2021/05/01/us/politics/republican-pollwatchers.html> (showing that Democrats and minority voters in Georgia were worried about the potential for election surveillance to intimidate and negatively influence voters).

103. Schauer, *supra* note 92, at 1348.

104. *Id.* at 1349. Transparency as control arises in other contexts outside the scope of this Article. *Id.* at 1341 (showing as an example that shareholders and regulators mandate corporate transparency to exert control over corporations).

105. 1 JEREMY BENTHAM, *Farming Defended*, in WRITINGS ON THE POOR LAWS 276, 277 (Michael Quinn ed., Oxford Univ. Press 2001) (1797) (“[T]he more strictly we are watched, the better we behave.”).

106. Deborah G. Johnson & Kent A. Wayland, *Surveillance and Transparency as Sociotechnical Systems of Accountability*, in SURVEILLANCE AND DEMOCRACY 19, 24 (Kevin D. Haggerty & Minas Samatas, eds., 2010).

Conversely, surveillance—especially in its modern-day digitized form—commonly features passive targets like consumers who go about their business without knowledge they are being watched (or at least without sufficient knowledge of the scope of the surveillance to which they are being subjected to and/or the uses to which the data collected about them is being put).¹⁰⁷ Some of the more concerning forms of surveillance involve oblivious targets subject to covert surveillance.

But paradigmatic models of surveillance are consciously overt: as in transparency regimes, knowledge on the part of the target is a central feature.¹⁰⁸ In philosopher Jeremy Bentham’s prison panopticon, a key requirement is the prisoner’s full awareness of being watched as a mechanism of control and discipline.¹⁰⁹ This is so regardless of whether the surveillance even occurs; *signaling* surveillance serves its purpose. We see this in surveillance design more broadly: signs alerting customers, would-be trespassers, or employees that their actions are being monitored by surveillance cameras—whether or not cameras are present and whether or not anyone is behind the camera to see.¹¹⁰ Overt surveillance need not be confrontational.¹¹¹ Sometimes the point of the surveillance system is to vaguely signal its existence, putting the target on alert that “we are watching.”

In the election context, the presence of surveillance—or the target’s perception of it—has complex impacts. Not all are negative. One study, for example, suggests that there may be positive effects of voters knowing they are being watched.¹¹² This 2008 study involved researchers sending voters a letter informing them that researchers were studying turnout in their area.¹¹³ The effect was that more voters in that jurisdiction turned out to vote, suggesting that knowledge of being the subject of a voter-behavior study prompted changed behavior in the form of greater civic engagement.¹¹⁴

107. *Id.* at 28.

108. See Thomas J.L. van Rompay et al., *The Eye of the Camera: Effects of Security Cameras on Prosocial Behavior*, 41 ENV’T & BEHAV. 60, 62 (2009) (reviewing previous research documenting the prosocial effects of security cameras); see also Lorraine Mazerolle et al., *Social Behavior in Public Space: An Analysis of Behavioral Adaptations to CCTV*, 15 SEC. J. 59, 72 (2002).

109. BENTHAM, *supra* note 105.

110. Mazerolle et al., *supra* note 108 at 73.

111. BENTHAM, *supra* note 105.

112. Alan S. Gerber et al., *Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment*, 102 AM. POL. SCI. REV. 33, 40 (2008).

113. *Id.* at 38–39 (2008) (noting that researchers were able to increase voter turnout by sending a letter to voters telling them they were being studied).

114. Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 490 (2015) (“The knowledge that someone was observing their behavior

Potential positive impacts of voters' awareness of being watched, however, contrast with the long history of surveillance (both confrontational and more subtly signaled) playing a constant role in suppression of minority voters.¹¹⁵ The "we are watching" form of voter intimidation lurked in Jim Crow culture and has been a consistent feature of ballot security tactics in modern elections since.¹¹⁶ Voting is of course not the only context in which overt surveillance discriminates against historically disadvantaged groups.¹¹⁷ Surveillance studies scholars have documented how disadvantaged or marginalized people and groups wishing to avoid or otherwise reduce the impacts of surveillance change their behavior to do so—including removing themselves from surveilled spaces to their detriment.¹¹⁸ In elections, overt surveillance—whether subtle or not—has been effective in suppressing minority voting.

caused potential voters to behave in a way they considered more socially desirable.”). This same intuition has propelled the practice of sending mailers to voters using publicly available voter history data to encourage voters to vote. *See, e.g.*, Ken Dixon, ‘*CT Voter Project*’ Sends Mailers with Public Information on Voting History, CT POST (Oct. 27, 2020), <https://www.ctpost.com/politics/article/CT-Voter-Project-sends-mailers-with-public-15679355.php> (describing mailers sent to Connecticut voters with the following message as a means of encouraging voter turnout: “We’re sending this mailing to you, your friends, your neighbors, your colleagues at work and your community members to publicize who does and who does not vote”). Outside the voting context, others have noted that surveillance has positive effects in other ways—principal among them is encouraging law-abiding behavior. *See, e.g.*, Hille Koskela, ‘*The Gaze Without Eyes: Video-Surveillance and the Changing Nature of Urban Space*’, 24 PROGRESS IN HUM. GEOGRAPHY 243, 243, 250 (2000) (discussing how increasing surveillance “contributes to the production of urban space”). Reflecting on geography scholar Hille Koskela’s observation, privacy scholar Julie Cohen remarks that, “This point contrasts usefully with U.S. privacy theorists’ comparatively single-minded focus on the ‘chilling effect’ [of surveillance] . . .” JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 140 (2012).

115. *See* discussion *infra* Part IV.

116. *Id.* *See* a description of ballot security efforts in Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 177–78 (2015), for an example of this consistent feature.

117. *See* Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 441–50 (2017).

118. *See, e.g.*, JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY (2001) (describing the efforts of welfare recipients to avoid and navigate heavy surveillance); *see also* COHEN, *supra* note 114, at 150 (“[S]cholars in surveillance studies have documented the use of surveillance systems to control underprivileged populations.”); ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES xxii (1961) (documenting the chilling effects of surveillance in confined settings); CLIVE NORRIS & GARY ARMSTRONG, THE MAXIMUM SURVEILLANCE

3. *Who Is Watching?*

In transparency systems, we generally understand the public as the “watchers.” Transparency relies on the government enabling the public to “see what the government is up to.”¹¹⁹ Through this lens, transparency theorist Mark Fenster describes transparency as “a governing institution’s openness to the gaze of others.”¹²⁰

Though paradigmatic Big Brother-style surveillance is carried out by the state, surveillance systems have likewise historically enlisted citizen watchers too.¹²¹ In *Citizen Spies*, Joshua Reeves documents the long history of vigilante citizenship in the United States that relies on the gaze of fellow citizens.¹²² Reeves observes:

While American society has long nurtured an ethos of rugged, liberal individualism, at the same time it has continuously fostered cultures of vigilance, suspicion, meddling, snooping, and snitching. From its early displays in the witch hysterias and Puritan moral panics of colonial New England; to the vigilante posses of the Wild West and the Ku Klux Klan; to its Brown Scares, Green Scares, and Red Scares; and to the [United State]’s recurrent anxieties about immigrants, political dissidents, rebellious youth, criminals, and religious minorities,

SOCIETY: THE RISE OF CCTV 201 (1999) (explaining that surveillance falls disproportionately on the socially and economically marginalized); cf. Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L. & SOC. CHANGE 253, 253 (2018) (describing the ways in which marginalized groups fail to secure benefits due when falling outside surveillance architectures).

119. See U.S. Dep’t of Just. v. Repts. Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989); *id.* at 772–73 (“The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.” (quoting Henry Steele Commager, *The Defeat of America*, N.Y. REV. BOOKS, Oct. 5, 1972, at 7)).

120. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888 (2006); *id.* at n.1 (citing the OXFORD ENGLISH DICTIONARY 419 (2d ed. 1989) for its definition of “transparent, in its figurative uses, as both ‘[f]rank, open, candid, ingenuous,’ and ‘[e]asily seen through, recognized, understood, or detected”).

121. Sociology scholars Kevin Haggerty and Minas Samatas remind us that some of the most manifestly repressive and antidemocratic forms of state surveillance—such as was conducted by East Germany’s notorious secret police, the Stasi—drew upon extensive networks of informers, common citizens who were either enticed or coerced into informing on others. KEVIN D. HAGGERTY & MINAS SAMATAS, SURVEILLANCE AND DEMOCRACY 5 (2010).

122. See generally JOSHUA REEVES, CITIZEN SPIES: THE LONG RISE OF AMERICA’S SURVEILLANCE SOCIETY (2017) (discussing the development of Neighborhood Watch and other citizen surveillance programs throughout the twentieth and twenty-first centuries).

vigilance toward neighbors has long been aligned with American ideals of patriotic and moral duty.¹²³

Surveillance studies scholars have given various names to the concept of nonstate actors undertaking surveillance of each other.¹²⁴ Referred to as “lateral surveillance,” “synoptic surveillance,” the “participatory panopticon,” or, as used here, “coveillance,” scholars have recognized that surveillance systems often depend on members of the public taking part in surveillance.¹²⁵

Coveillance, supplemented by technological tools unavailable to previous generations, is all the mightier in the modern day. Instances abound, from “cyber sleuths” poring over footage from the January 6 insurrection to identify participants¹²⁶ to the Texas abortion law leveraging coveillance tactics among members of the public to police its requirements.¹²⁷ Coveillance is fundamentally different than “sousveillance,” the phenomenon of citizens turning cameras on the state—for example, using cell phones to film police.¹²⁸ For both, the rise of cheap and widely available surveillance tools has increased citizen surveillance powers dramatically.

123. *Id.* at 2.

124. *See, e.g.*, Kiel Brennan-Marquez, *The Constitutional Limits of Private Surveillance*, 66 U. KAN. L. REV. 485, 487 (2018) (using the term “private surveillance” in his discussion of surveillance law and the Fourth Amendment).

125. *E.g.*, Mark Andrejevic, *The Work of Watching One Another: Lateral Surveillance, Risk, and Governance*, 2 SURVEILLANCE & SOC’Y 479 (2004); Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 196–97 (2008); Bryce Clayton Newell, *Local Law Enforcement Jumps on the Big Data Bandwagon: Automated License Plate Recognition Systems, Information Privacy, and Access to Government Information*, 66 ME. L. REV. 397, 433 (2014); Jordana Wright et al., *Securing the Home: Gender, CCTV and the Hybridized Space of Apartment Buildings*, 19 THEORETICAL CRIMINOLOGY 95, 105 (2015).

126. Tim Mak, *The FBI Keeps Using Clues from Volunteer Sleuths to Find the Jan. 6 Capitol Rioters*, NPR (Aug. 18, 2021, 5:01 AM), <https://www.npr.org/2021/08/18/1028527768/>.

127. *See e.g.*, Jon Michaels & David Noll, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES (Sept. 4, 2021), <https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html> (noting that “enforcement of the [Texas law] will require intensive and intrusive surveillance of neighbors and colleagues”). *See generally* Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 WAKE FOREST L. REV. (forthcoming Fall 2022) (addressing issues posed by popular enforcement mechanisms like the one in the Texas law).

128. *See e.g.*, Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO ST. L.J. 1103, 1126–28 (2020) (describing sousveillance as a means to counteract police abuses); Steve Mann et al., *Sousveillance: Inventing and Using Wearable Computing Devices for Data Collection in Surveillance Environments*, 1 SURVEILLANCE & SOC’Y 331, 332 (2003) (discussing the difference between sousveillance and surveillance).

* * *

The notion that modern technology should be leveraged to increase public confidence in elections seems obvious. In a time of public distrust of elections, why shouldn't election surveillance be the norm? Why shouldn't every election official and poll watcher be equipped with a body camera? Why shouldn't every election process from ballot casting to recounts be recorded by multiple private actors? Then when election irregularities arise, roll the tapes!¹²⁹ The above discussion suggests reasons for pause. The next Part surveys the history of election surveillance to demonstrate that such concern is rooted in a long and troubling history—and present.

IV. A MODERN HISTORY OF ELECTION SURVEILLANCE

Interest among candidates, campaigns, voters, and others in “watching over” elections is as old as elections themselves. As this Part documents, however, the history of election surveillance reveals a troubling past.¹³⁰

Election surveillance tactics during Jim Crow were far from the predominant form of voter intimidation; Black voters were terrorized by rampant, racist violence as a brutally effective deterrence to voting. For those who bravely stepped forward to engage in democratic citizenship nevertheless, Black would-be voters were barred from registering to vote via devices like literacy tests, poll taxes, and racist administrative whim.¹³¹ As described by the 1959 Federal Commission on Civil Rights, “[t]he critical source of nonvoting by blacks . . . was the brazen refusal of southern authorities to permit blacks to register, as well as their willingness to intimidate those who tried.”¹³²

During the Civil Rights Era, the most common reference to surveillance involved attempts to intimidate and threaten its Black leaders. FBI surveillance of Civil Rights Era leaders, most notably Dr. Martin Luther King, demonstrated the power of surveillance as

129. Regina Rini, *Deepfakes and the Epistemic Backstop*, 20 *PHILOSOPHERS' IMPRINT* 1, 10 (2020) (“Recordings provide us with a form of perceptual evidence, which enjoys a stronger presumptive authority than testimonial evidence. And this is exactly why recordings are so well suited to provide the epistemic backstop. Their stronger evidential weight allows them to provide acute correction of deviant testimonial practices and passive regulation of trustworthy testimonial norms.”).

130. This review starts with the Jim Crow era with the understanding that similar tactics predated it and that Black voters were one of many groups targeted over the course of U.S. history.

131. Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, *HISTORY* (May 13, 2021), <https://www.history.com/news/jim-crow-laws-black-vote>.

132. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 208–09 (2000).

an intimidation tactic.¹³³ Though state-sponsored surveillance of Civil Rights Era leaders is well documented, official and private *election* surveillance tactics sought to intimidate would-be Black voters.¹³⁴ As one reporter described, “[m]any minority voters in the South recall a time when their presence at polling or voter registration locations was recorded and led to loss of their jobs or homes.”¹³⁵ Historian Alexander Keyssar describes how Blacks “who were adamant about registering could lose their jobs, have loans called due, or face physical harm. More than a few were killed.”¹³⁶

In Sunflower, Mississippi, in 1967, a local church ministry reported surveillance tactics being used to intimidate Black voters at the polls: “[T]he chief of police greeted each citizen at the door to the polling place, and another man used an 8mm movie camera to photograph every Negro voter.”¹³⁷ In another example, in North Carolina, a Black teacher’s three attempts to register to vote were met with warnings that “her request to vote had been reported and she was being watched by hostile observers . . . [implying] that she could become a victim of violence.”¹³⁸ In a third example, a photograph in the opening pages of Gary May’s book *Bending Toward Justice* features a Black man attempting to register to vote in 1964.

133. GARY MAY, *BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* 44–46 (2013) (describing FBI director J. Edgar Hoover’s surveillance campaign against Dr. King).

134. *Id.* at 28, 34–40 (recounting instances of private and official intimidation acts).

135. Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won’t Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359, 363 (2002) (citing Jim Abrams, *Minority Voter Intimidation Becomes Election Eve Issue*, ASSOCIATED PRESS STATE & LOCAL WIRE (Nov. 3, 1998)).

136. KEYSSAR, *supra* note 132, at 207.

137. *Delta Ministry Reports: May 1967*, COMM’N ON THE DELTA MINISTRY, NAT’L COUNCIL OF CHURCHES (May 1967) (on file with the Amistad Research Center, Tulane University). Publishing the names of those who registered to vote in the local newspaper was another intimidation tactic based on tapping fear of exposure. See, e.g., *Ole Miss. Prof. Hits State Voting Barriers*, MISS. FREE PRESS (Apr. 18, 1964), https://www.crmvet.org/info/6404_sncc_ms_vote-barriers.pdf (“[T]he whole pattern of voting requirements and of the registration form is calculated to make the process appear to the voter to be a hopelessly formidable one. The pattern is supposed to bristle with complexities which culminate in the publication of the would-be voter’s name in the local newspaper for two weeks. A major purpose of all this is to so overwhelm the voter that he will not have the audacity even to attempt registration. Behind this approach is supposed to be—and all too often is—a collection of fears that someone will challenge the voter’s moral character, that he may be prosecuted for perjury, or that he may be subjected to economic or other pressures if he attempts to register.”).

138. GARRINE P. LANEY, *THE VOTING RIGHTS ACT OF 1965, AS AMENDED: ITS HISTORY AND CURRENT ISSUES* (updated March 28, 2008) (citing an account in PAUL LEWISON, *RACE, CLASS, AND PARTY: A HISTORY OF NEGRO SUFFRAGE AND WHITE POLITICS IN THE SOUTH* 119 (1963)).

A sign posted on the wall above him reads in part, “After 10 days, applicants’ names and addresses are published for two consecutive weeks in the newspaper,” which the caption notes amounts to an invitation to retaliate.¹³⁹ Black citizens who attempted to register to vote or vote knew they were being watched—with overtly threatening and even lethal consequence.¹⁴⁰

Post-Civil Rights Era election surveillance morphed into coveillance tactics against minority voters in the name of “ballot security.”¹⁴¹ Though electronic recording devices did not feature prominently in the effort, “we are watching” coveillance lay at the core of the Republican National Committee’s (“RNC”) efforts in the early 1980s in New Jersey to prevent ineligible voters from casting ballots.¹⁴² In the November 1981 general election in New Jersey, the RNC’s National Ballot Security Task Force placed posters around polling sites in minority areas signaling its intent to conduct election surveillance:

WARNING
THIS AREA IS BEING PATROLLED
BY THE
NATIONAL BALLOT
SECURITY TASK FORCE
IT IS A CRIME TO FALSIFY A BALLOT OR
TO VIOLATE ELECTION LAWS¹⁴³

The posters offered a reward for information leading to the arrest and conviction of those violating New Jersey election laws.¹⁴⁴ The

139. MAY, *supra* note 133, at viii.

140. Some evidence suggests that efforts to challenge surveillance tactics against minority voters did not fare well in court. *See generally* United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (upholding district court’s denial of claim that surveillance of meetings intimidated voters and citing evidence of a legitimate motive to preserve order).

141. “Obstacles to black voting and candidacy continued in Mississippi, as documented by the Commission during the 1970s. Blacks attempting to register and vote faced dual registration requirements, erratic hours at the clerks offices, intimidation and humiliation by registration officials, purging of voter registration rolls, denials of ballots, and the location of polling places in all-white clubs and lodges.” *See, e.g.*, U.S. COMM. ON CIVIL RTS., *Voting Rights and Political Representation in the Mississippi Delta*, in RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY, AND DISCRIMINATION VOLUME VII: THE MISSISSIPPI DELTA REPORT (2001), <https://www.usccr.gov/files/pubs/msdelta/ch3.htm>.

142. *See* Richard J. Meislin, *Jersey Controversy Widens Over G.O.P. Patrols at Polls*, N.Y. TIMES (Nov. 7, 1981), <https://www.nytimes.com/1981/11/07/nyregion/jersey-controversy-widens-over-gop-patrols-at-polls.html>.

143. *Id.*

144. *Id.*

RNC hired off-duty police officers to patrol predominantly minority polling places on Election Day with weapons, two-way radios, and National Ballot Security Task Force armbands prominently displayed.¹⁴⁵ Members of the Task Force engaged in disruptive behavior, such as harassing election workers, stopping and questioning prospective voters, and blocking voters from entering polling places.¹⁴⁶

The Democratic National Committee (“DNC”) challenged these aggressive tactics in court alleging that they amounted to illegal voter intimidation.¹⁴⁷ Ultimately the RNC signed a consent decree barring it from “interrogat[ing] prospective voters as to their qualifications to vote prior to their entry to a polling place” and “undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to . . . conduct such activities.”¹⁴⁸

Despite the consent decree against the RNC, ballot security efforts by other actors persisted.¹⁴⁹ The problem became sufficiently acute by the late 1990s that the Department of Justice issued a

145. Amended Complaint for Declaratory and Injunctive Relief and for Damages at 11, *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, Civ. Action No. 81–3876 (D.N.J. Feb. 11, 1982), <https://www.brennancenter.org/sites/default/files/legacy/Democracy/dnc.v.rnc/1981%20complaint.pdf>.

146. *Id.* at 11.

147. *Id.* at 13.

148. See Consent Order, Settlement Agreement, at 2(d)–(e), *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, Civ. Action No. 81–3876 (D.N.J. Nov. 1, 1982), <https://www.brennancenter.org/sites/default/files/2020-07/1982%20consent%20decree.pdf>. In 2016, the United States District Court for the District of New Jersey lifted the consent decree. See *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, No. CV 81-03876, 2016 WL 6584915, at *1 (D.N.J. Nov. 5, 2016) (describing the original consent decree entered in 1982, and subsequently modified in 1987 and 2009, but refusing to extend it). As discussed below, overt surveillance tactics in the name of large-scale “ballot security efforts” have continued especially after a judge lifted the *DNC v. RNC* consent decree in 2017. See *infra* notes 238–46 and accompanying text.

149. See e.g., George Derek Musgrove & Hasan Kwame Jeffries, “*The Community Don’t Know What’s Good for Them*”: Local Politics in the Alabama Black Belt During the Post-Civil Rights Era, in *FREEDOM RIGHTS: NEW PERSPECTIVES ON THE CIVIL RIGHTS MOVEMENT* 315 (Danielle L. McGuire & John Dittmer eds., 2011) (describing how in a 1994 election, a “white dominated” political organization organized an effort to videotape Black voters entering and exiting the polls, while others photographed absentee ballots); Dave Williams, *Democrats Accuse GOP of Intimidation; Party Alleges that Instructions on Using Cameras at Election Are Attempt To Discourage Blacks from Voting*, *AUGUSTA CHRON.*, Oct. 31, 2000, at C08; Mariah Blake, *The Ballot Cops*, *ATLANTIC* (Oct. 2012), <https://www.theatlantic.com/magazine/archive/2012/10/the-ballot-cops/309085/> (reporting sightings of “poll watchers tailing vans that were transporting voters to the polls, snapping photos of voters’ license plates, even directing voters to the wrong polling places”).

statement in 1998 in which then-Attorney General Janet Reno voiced concern about election surveillance as a voter intimidation tactic:

We have heard reports that some private citizens may be thinking of going to polling places in minority areas to try interrupt voters by questioning them, or by photographing them, as a part of some attempt to uncover illegal voting. These people should take warning: we will not tolerate harassment of minority voters under this guise. We do not sanction efforts of individuals to take law enforcement efforts into their own hands.¹⁵⁰

As recording technologies became more widely available, state attorneys general periodically entertained questions concerning the legality of surveillance at the polls. One of the first questions to arise was the extent to which poll watchers already authorized to be present in polling places could use technology to augment observation. In a 1994 example, poll watchers wrote to the Louisiana Attorney General seeking guidance on whether they could use video cameras at polling places.¹⁵¹ The Louisiana Attorney General's advisory opinion concluded that so long as their actions did not interfere with voters or election officials, poll watchers could use video cameras at polling places on Election Day.¹⁵²

150. Statement by Attorney General Janet Reno, U.S. Dep't of Just. (Oct. 29, 1998), <https://www.justice.gov/archive/opa/pr/1998/October/512ag.htm>. Then-United States Attorney General Reno concluded this statement with the admonition that “[a]nyone who has evidence of illegal voting activity should give that information to law enforcement officials immediately.” *Id.* This call for evidence of election illegality amounts to mixed messaging, which no doubt furthers the lack of clarity on this issue. See Gil Delaney, *GOP Official Vows No Video Cameras at City Polling Places*, INTELLIGENCER J., Nov. 3, 1998 (describing Department of Justice press release underscoring that federal law “outlaws the use of intimidation, threats, or coercion to prevent people from voting”).

151. La. Att’y Gen. Op. No. 94-455 (Oct. 16, 1994).

152. “It is . . . the opinion of this office that a video camera may be used by a poll watcher at a polling precinct on election day, provided that this action does not in any way interfere, influence, or otherwise affect voters or the duties of the commissioner(s) assigned to the precinct. Additionally, we hereby recall and repeal Opinion Number 79-1404, which is in conflict with this opinion.” *Id.* The Louisiana Attorney General’s decision (as is often the case when it comes to surveillance tactics) was an incremental one—the Attorney General’s Office had first been asked in 1979 whether poll watchers might use cameras inside the polling place to take pictures (yes). See La. Att’y Gen. Op. No. 94-455 (Oct. 18, 1984) (“This conclusion reiterated the approach taken in Opinion Number 79-1380, which opinion concluded that, assuming no interference with a commissioner’s duties would occur, the watcher could take the photographs in the manner described.”). Then in 1991 whether poll watchers could take notes using “mechanical devices” (yes). La. Att’y Gen. Op. No. 90-599 (Feb. 5, 1991) (“[M]echanical devices may be allowed to be used by the watcher at the polling

The Mississippi Attorney General took a similar position in 1999, a year after Attorney General Reno's statement.¹⁵³ Despite acknowledging the U.S. Department of Justice's position, he noted that his office was "aware of no state statutory prohibition for the use of a video camera at a polling place when it is being used to record possible violations of the election laws of the state."¹⁵⁴

Coveillance tactics in the name of ballot security continued. In Houston, Texas, in 2010, according to one description, "volunteers from the King Street Patriots . . . reportedly followed voters after they checked in, stood directly behind voters as they filled out their ballots, tried to peer at their ballots . . . and hovered behind voters, 'writing down [voters'] every move as if [they were] doing something illegal.'"¹⁵⁵ In St. Paul, Minnesota, two years later, Tea Party affiliates reportedly "organized volunteer 'surveillance squads' to follow buses that took voters to the polls and to photograph and videotape any suspected irregularities at polling places."¹⁵⁶ As discussed further in Part V, such ballot security efforts continue to present.¹⁵⁷

Not all historical examples of election surveillance aimed at detecting and deterring fraud. Starting with the passage of the Voting Rights Act's federal observer program in 1965, Congress laid a foundation for what is termed here "voter protection surveillance," that is, surveillance seeking to prevent the denial of the right to vote and to ensure barriers to voting are catalogued and addressed.¹⁵⁸ The

place and the watcher may gather information to transmit outside of the polling place . . ."). When asked in 1994 about recording at the polls, having already allowed cameras and mechanical devices previously, the Louisiana Attorney General reasoned, poll watchers using video recording equipment to record inside the polls seemed reasonable. *See* La. Att'y Gen. Op. No. 94-455 (Oct. 16, 1994).

153. *See* Miss. Att'y Gen. Op. 1999-0256 (Aug. 6, 1999).

154. *Id.* Other states blessed election observers' use of video equipment as the question popped up around the country. In one example from 2009, the Arizona legislature voted to allow partisan observers to bring their own video camera to record post-election audits. *See* ARIZ. REV. STAT. ANN. § 16-602(B) (2021).

155. Cady & Glazer, *supra* note 116, at 217 (citations omitted). In another example in Wisconsin in 2012, "volunteers from True the Vote . . . reportedly followed vans that were transporting voters to the polls, photographed voters' license plates, directed voters to the wrong polling places, and hovered over voting tables, aggressively challenging voters' eligibility . . ." *Id.* at 218. Cady and Glazer further note that such ballot security efforts "often appear to target minority voters." *Id.* at 178.

156. *Id.* at 218.

157. Litigation surrounding more recent ballot security efforts is discussed *infra* at Subpart V.B.

158. *See* James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227, 230-235 (2007) (describing the role and function of federal observers under the Voting Rights Act).

1965 Voting Rights Act explicitly enabled federal courts and the United States Attorney General to designate federal observers to ensure minority access to polling places in the South.¹⁵⁹ During the first five years following the passage of the Voting Rights Act, the Attorney General assigned 5,234 federal observers to watch elections in seventy-four counties covered under the Voting Rights Act.¹⁶⁰

Voting Rights Act-mandated observation provided a blueprint for nonprofits and voting rights groups to establish nongovernment versions of voter protection surveillance. Voting rights activists deployed election coveillance tactics to “watch the watchers,” seeking to thwart voter intimidation and counteract abusive ballot security efforts.¹⁶¹ In one example from 2004, organizers convened a campaign

159. See 52 U.S.C. § 10305 (original version at 42 U.S.C. § 1973f (1976)). Observers could be appointed in jurisdictions in which federal election “examiners” were sent to register voters under 42 U.S.C. § 1973d (1976). The Attorney General considered three factors in determining whether to send federal observers: (1) the extent to which local officials are prepared to run fair elections; (2) the confidence of the minority community in the local electoral process; and (3) the possibility of racial violence or intimidation of voters. See *Extension of the Voting Rights Act of 1965: Hearing Before the Subcomm. on Const. Rts.*, 94th Cong. 538 (1975) (statement of J. Stanley Pottinger, Assistant Att’y Gen.).

160. See U.S. COMM’N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: UNFULFILLED GOALS* 10 (1981). More recently, the Department of Justice significantly curtailed the federal observer program following the U.S. Supreme Court’s decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), which invalidated the coverage formula that stood at the center of the federal observer program. See Sari Horwitz, *Justice Department Significantly Reducing Number of Federal Observers Stationed Inside Polling Places*, WASH. POST (Oct. 6, 2016), https://www.washingtonpost.com/world/national-security/justice-department-severely-curtails-election-observers-inside-polling-places-this-november/2016/10/06/dfb49caa-875a-11e6-92c2-14b64f3d453f_story.html. The following excerpt from the Department of Justice’s *About Federal Observers and Election Monitors* webpage is revealing: “Prior to the *Shelby County* decision in 2013, a total of 153 counties and parishes in [eleven] states were certified by the attorney general for federal observers: Alabama (22 counties), Alaska (1)[,] Arizona (4), Georgia (29), Louisiana (12), Mississippi (51), New York (3), North Carolina (1), South Carolina (11), South Dakota (1) and Texas (18). In light of the *Shelby County* decision [which invalidated the Voting Rights Act coverage formula in Section 4(b)], the Division is not relying on the Section 4(b) coverage formula as a way to identify jurisdictions for election monitoring. Hence, the Division is not relying on the AG certifications as a basis for sending federal observers to monitor elections.” *About Federal Observers and Election Monitors*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring> (last updated Sept. 11, 2020); see also U.S. DEP’T OF JUST., *FACT SHEET ON JUSTICE DEPARTMENT’S ENFORCEMENT EFFORTS FOLLOWING SHELBY COUNTY DECISION*, <https://www.justice.gov/crt/file/876246/download> (last visited Mar. 19, 2022).

161. “Watch the watchers” is a familiar phrase indicating that those in positions of power should be subjected to some form of public oversight. The Latin *quis custodiet ipsos custodes?* is variously translated as “Who will guard the

called the “Video Vote Vigil” to encourage members of the public to capture on video instances of voter intimidation at the polls.¹⁶² Many similar efforts blossomed, including [twittervotereport.com](https://twitter.com/votereport);¹⁶³ YouTube’s [videothevote](https://www.videothevote.org);¹⁶⁴ and the *New York Times* Polling Place Photo Project.¹⁶⁵ Each involved crowdsourced efforts to mobilize ordinary people to serve voter protection ends by uploading photos and videos during elections in real time.¹⁶⁶

By far the most predominant forms of voter protection surveillance are organized, nationwide efforts by voter protection networks seeking to assist individual voters and document problems

guards themselves?” or “Who watches the watchers?” John Stuart Mill used the phrase to capture the idea of government accountability. See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 94 (1861) (“The bad measures or bad appointments of a minister may be checked by Parliament; and the interests of ministers in defending, and of rival partisans in attacking, secure a tolerably equal discussion: but *quis custodiet custodes?* who shall check the Parliament?”).

162. See Associated Press, *Election Observers to Crowd Polling Places*, DESERET NEWS (Oct. 29, 2004, 12:00 AM), <https://www.deseret.com/2004/10/29/19858487/election-observers-to-crowd-polling-places> (“In Republican-leaning Texas, an Austin-based activist group is launching a ‘Video Vote Vigil’ to protect voter rights in low-income precincts. Members plan to interview willing voters as they enter and leave polling places and publish the clips online.”); see also Jamais Cascio, *The Rise of the Participatory Panopticon*, WORLD CHANGING (May 4, 2005, 6:16 PM), http://www.openthefuture.com/wcarchive/2005/05/the_rise_of_the_participatory.html (“[I]n last November’s national election, a group calling itself ‘video vote vigil’ asked citizens to keep a watch for polling place abuses and problems, recording them if possible with digital cameras or camera phones.”).

163. Twitter account @votereport went live during the 2008 election under the tagline: “A growing, grassroots effort to use Twitter to keep an eye on Election 2008,” but it does not appear to have been active since. See @votereport, TWITTER, <https://twitter.com/votereport?lang=en> (last visited Mar. 18, 2022).

164. See VIDEO THE VOTE, <https://www.videothevote.org/video/?year=2012> (last visited Mar. 18, 2022) (having seemingly last been active in the 2012 election).

165. See POLLING PLACE PHOTO PROJECT, <http://pollingplacephotoproject.org> (last visited Mar. 18, 2022) (appearing not to include photos from citizen journalists of elections but instead featuring blog posts on the political process; for example, there is a July 2021 post on how to become a politician without a law degree).

166. These efforts seem to have fallen away for reasons unknown, perhaps in part due to abuses of these platforms. See discussion *infra* Part VI (discussing Archon Fung’s observations about why popular election monitoring gets muddied). These efforts mimicked other projects outside the election context to use video surveillance as a means of documenting abuses including human rights abuses and police abuses. For example, in 1992, the musician Peter Gabriel founded The Witness Project, which sought to place video cameras in the hands of victims of human rights abuses around the world to document the abuse. See Peter Gabriel, *Peter Gabriel: Video Will Bring Us Justice in the Long Run*, TIME (May 16, 2017, 5:01 PM), <https://time.com/4781418/peter-gabriel-video-justice/>.

voters experience at the polls.¹⁶⁷ Voter protection surveillance is a blend of sousveillance (seeking to ensure election officials conduct elections according to law) and coveillance (aimed at ensuring that eligible voters are able to exercise their right to vote unimpeded).

The Lawyers' Committee for Civil Rights orchestrates the largest voter protection surveillance operation in conjunction with local state and national partners.¹⁶⁸ The group operates a national telephone hotline enabling voters who encounter problems at the polls to call in for help.¹⁶⁹ The Lawyers' Committee and its affiliates use these inputs to track the locations and nature of issues reported and respond in real time.¹⁷⁰ Observers in the field working with the Lawyers' Committee and its partners engage in various forms of election protection surveillance. The Lawyers' Committee Election Protection website explains, "[t]hroughout the election cycle, our volunteers provide voter information, document problems they encounter when voting and work with partners and volunteers on the

167. See Jocelyn Friedrichs Benson, *One Person, One Vote: Protecting Access to the Franchise Through the Effective Administration of Election Procedures and Protections*, 40 URB. LAW. 269, 278 (2008) (noting that especially since the 2000 election, "several nonpartisan groups have organized volunteers to serve as voter protectors or advocates in the polls on Election Day"); John Tanner, *Effective Monitoring of Polling Places*, 61 BAYLOR L. REV. 50, 80 (2009) (describing voter protection election monitoring efforts and how election monitors can best legally gather evidence for use in voter protection efforts).

168. ELECTION PROTECTION, <https://866ourvote.org/> (last visited Mar. 18, 2022). An earlier iteration called "Our Vote Live" served as a precursor to Election Protection's current efforts. Our Vote Live appears to have been active during elections in 2008, 2009, and 2010. According to the Electronic Frontier Foundation, "Our Vote Live logged over 86,000 calls, making it the largest database of voting-related inquiries, problems, and discrepancies ever created — all available to the general public." See *Our Vote Live*, ELEC. FRONTIER FOUND., <https://www.eff.org/code/tea> (last visited Mar. 18, 2022).

169. Political campaigns and parties mount similar efforts. In one law school newspaper, two prominent election law professors shared their experience working with the Obama campaign's sophisticated election protection effort in 2008. See *Pildes and Issacharoff Reflect on Working as Lawyers for the Obama Campaign*, NYU LAW NEWS (January 21, 2009), https://www.law.nyu.edu/news/ECM_PRO_059667 ("Without giving away any secrets about exactly how this was done, we can say that we were aware of every potential problem at polling places throughout the battleground states. This awareness ranged from the minor details, such as polling places that ran out of pens, to the more significant, such as challenges to the eligibility of individual voters to vote.").

170. Lizzie Widdicombe, *"Election Protection. Can I Have Your Name?"*, NEW YORKER (Nov. 8, 2012), <https://www.newyorker.com/news/news-desk/election-protection-can-i-have-your-name> (describing the scene at one Election Protection headquarters location fielding calls from New Jersey and Ohio).

ground to identify and remove barriers to voting.”¹⁷¹ Unlike ballot security efforts to patrol the polls for illegal voting activity, voter protection surveillance has not faced legal challenge, although it has not escaped criticism.¹⁷²

With this general picture of historical and modern election surveillance efforts as a backdrop, the next Part examines how courts have reckoned with the right of citizens to engage in sous- and coveillance (a legal question commonly referred to as the “right to record”). Discussion then turns to surveying courts’ reaction to election surveillance.

V. ELECTION SURVEILLANCE AND THE COURTS

This Part first tackles “right to record” jurisprudence.¹⁷³ It demonstrates that while courts have upheld the right to record, they have sanctioned important state interests in curbing it. The discussion next turns to election surveillance litigation, establishing that courts have been willing to limit First Amendment freedoms to

171. See *About Election Protection*, ELECTION PROT., <https://866ourvote.org/about/> (last visited Mar. 18, 2022). As an example, according to a 2020 Election Protection Report from New Jersey, field volunteers recorded their direct observations and experiences interacting with poll workers and voters and took photographs to document election-related issues. THE NEW JERSEY ELECTION PROTECTION COALITION, ELECTION PROTECTION REPORT: ISSUES NEW JERSEY VOTERS ENCOUNTERED FROM OCTOBER 15 THROUGH NOVEMBER 3, 2020, at 3 (2021), <https://www.lowerstein.com/media/6704/new-jersey-election-protection-report-4292021.pdf>.

172. See, e.g., James J. Woodruff II, *Where the Wild Things Are: The Polling Place, Voter Intimidation, and the First Amendment*, 50 U. LOUISVILLE L. REV. 253, 260–61 (2011) (“A common sight in recent election cycles has been the wearing of hats, shirts, buttons, and other paraphernalia proclaiming the wearer to be a ‘voter rights attorney,’ ‘voter rights counselor,’ ‘[candidate] voting team,’ ‘[state] voter rights attorney,’ ‘poll attorney,’ or other similar message. These individuals, some flown in from other states, have attempted to cloak themselves in the mantle of those civil rights lawyers who caused great change in the 1960s. However, rather than protecting a disenfranchised group’s right to vote, some of these individuals do quite the opposite: they engage in tactics to ensure certain members of society do not get to vote.” (alteration in original) (quoting Erika C. Birg, *Lawyers on the Road: The Unauthorized Practice of Law and the 2004 Presidential Election*, 9 TEX. REV. L. & POL’Y 306, 313–15 (2005))).

173. The present effort confines itself to physical surveillance of election processes. A different angle involves what surveillance studies scholars Kevin Haggerty and Richard Ericson refer to as the “surveillant assemblage.” Kevin D. Haggerty & Richard V. Ericson, *The Surveillant Assemblage*, 51 BRIT. J. SOCIO. 605, 605 (2000). As they understand it, the surveillant assemblage is not concerned with targeting a single body in a single physical space through many different modes but is instead rooted in “transforming the body into pure information, such that it can be rendered more mobile and comparable.” *Id.* at 613. I plan to explore the impact of the surveillant assemblage on voters and elections in later work.

prevent voter intimidation and disruption of the voting process. But courts have been less willing to curb election surveillance when those voter intimidation and process disruption are not directly implicated. The last Subpart examines ways in which current statutory and jurisprudential frames fail to fully address election surveillance harms.

A. *The First Amendment and the Right to Record*

With portable, sophisticated surveillance equipment in our pockets, our ability to record not only official acts but also each other is now a given. Outside the election context, citizen surveillance has caused social tumult and shed needed light, most notably on police abuses. From George Holliday's video of police beating Rodney King to Darnella Frazier's cell phone footage of the murder of George Floyd, Americans well understand the power of sousveillance.¹⁷⁴

Less in the limelight but equally contentious in the courts are longstanding coveillance conflicts. Unlike sousveillance, which many see as providing a needed check on government power, coveillance is often associated with invasive press practices (think paparazzi) and generally viewed as privacy invasive (think stalking) with few social benefits other than satisfying the prurient interest.¹⁷⁵

In her seminal article, *The Right to Record*, privacy law scholar Margot Kaminski establishes that courts routinely recognize the right to record as a First Amendment-protected activity.¹⁷⁶ Yet she notes that courts permit the state to limit the right to record, highlighting examples such as when the target of the recording is not

174. Seth Abramovitch, *Flashback: How a Plumber Altered History by Taping the Attack on Rodney King*, HOLLYWOOD REP. (Mar. 3, 2021, 1:15 PM), <https://www.hollywoodreporter.com/lifestyle/lifestyle-news/flashback-how-a-plumber-altered-history-by-taping-the-attack-on-rodney-king-4141644/> (describing how George Holliday pointed his new video camera at the commotion unfolding less than 100 feet from his apartment balcony in the San Fernando Valley); Elahe Izadi & Darnella Frazier, *the Teen Who Filmed George Floyd's Murder, Awarded a Pulitzer Citation*, WASH. POST (June 11, 2021, 1:33 PM), <https://www.washingtonpost.com/media/2021/06/11/darnella-frazier-pulitzer-george-floyd-witness/>.

175. See, e.g., Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890) ("To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."); *Galella v. Onassis*, 487 F.2d 986, 998–99 (2d Cir. 1973) (affirming an injunction requiring a photographer to stay away from Jacqueline Onassis and her children).

176. Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 168 (2017).

a matter of public concern (content) or when the recording takes place in private as opposed to public (location).¹⁷⁷

As to content, Kaminski cites two key reasons for why the First Amendment protects the right to record: (1) it can improve democratic self-governance and (2) recordings can contribute to the marketplace of ideas.¹⁷⁸ The First Amendment would seem squarely protective of election surveillance under both rationales.

As to location, when the target of a recording is in a nonpublic space—a living room or a bathroom, for example—courts have upheld the privacy rights of individuals against being recorded.¹⁷⁹ The right to record in public spaces is much thornier. How and under what circumstances can a person legally standing in a public place be prohibited from recording what their eyes already behold?

In general, courts are protective of the right to record in public spaces.¹⁸⁰ *Glik v. Cunniffe*¹⁸¹ is illustrative. In *Glik*, a bystander used his cell phone to record the police forcibly arresting a suspect on the Boston Common.¹⁸² When police saw Glik recording, they asked him to stop.¹⁸³ Glik replied, “I am recording this. I saw you punch him.”¹⁸⁴ Police promptly arrested Glik for unlawful recording under Massachusetts’s wiretap law. Weighing Glik’s rights under the First Amendment, the First Circuit concluded that the First Amendment “protects the filming of government officials in public spaces.”¹⁸⁵

177. *Id.* at 209 (“The home is in many ways the easy case. Protection for privacy in the home is paramount in case law.”).

178. *Id.* at 180–81.

179. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (“[P]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.”); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (“Plaintiff’s den was a sphere from which he could reasonably expect to exclude eavesdropping [H]e . . . should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording”).

180. *See* *Fields v. City of Philadelphia*, 862 F.3d 353, 355–56 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595–600, 608 (7th Cir. 2012). *See generally* Aidan J. Coleman & Katharine M. Janes, *Caught on Tape: Establishing the Right of Third-Party Bystanders to Secretly Record the Police*, 107 VA. L. REV. ONLINE 166, 168 (2021) (“Federal appellate courts across the country have consistently recognized the existence of a valid First Amendment right in recording the police in public spaces.”).

181. 655 F.3d 78 (1st Cir. 2011).

182. *Id.* at 79.

183. *Id.* at 80.

184. *Id.*

185. *Id.* at 83. The right to record police can and should be distinguished from election surveillance. First, interactions between police and citizens are fraught with violence and involve abuses that too often lead to physical injury and death. Violence is decidedly not part of the conduct of elections. The right to record

Courts, however, are not universally protective of the right to record in public. Courts have sanctioned restrictions on the right to record in certain public spaces, such as in prisons¹⁸⁶ and courtrooms.¹⁸⁷ The Supreme Court has also permitted restrictions of First Amendment activities in public spaces that serve as buffer zones. *Boos v. Barry*,¹⁸⁸ for example, involved a District of Columbia statute that prohibited congregating and refusing to obey a police dispersal order within 500 feet of an embassy.¹⁸⁹ In upholding the statute, the Supreme Court found, *inter alia*, that the need to protect diplomats as they entered and left embassies justified curtailment of First Amendment rights.¹⁹⁰ Likewise in *Hill v. Colorado*,¹⁹¹ the Supreme Court sanctioned prohibitions on buffer zones around abortion clinics.¹⁹² First Amendment freedoms do not apply in all public spaces, as these freedoms can sometimes imperil other constitutionally protected rights.¹⁹³

A final buffer zone case most relevant here is *Burson v. Freeman*,¹⁹⁴ a First Amendment challenge to a Tennessee statute

elections does not involve state actors who carry weapons and thus present a physical threat. Second, an important distinction is that police officers operating in the field often lack accountability, which recording can provide. Jocelyn Simonson, *Beyond Body Cameras: Defending A Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1563–64 (2016) (describing the right to record police as a critical accountability mechanism). Election processes are bounded to certain places and times and are already under intense, routine scrutiny, with multiple levels of checks and balances.

186. *Houchins v. KQED, Inc.*, 438 U.S. 1, 1 (1978) (holding that prison inmates have a privacy interest in not being recorded and broadcast by a television station).

187. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 609–10 (1978) (noting that neither the First nor Sixth Amendments require broadcasting trials to the public); *Estes v. Texas*, 381 U.S. 532, 534–35 (1965) (prohibiting televising from the courtroom does not violate the First Amendment); *United States v. Kerley*, 753 F.2d 617, 622 (7th Cir. 1985) (concluding that the exclusion of cameras from federal courtrooms does not violate the First Amendment).

188. 485 U.S. 312 (1988).

189. *Id.* at 315, 318 (holding that the government interest in preventing disruption justified a ban on congregating in a 500-foot zone outside a foreign embassy).

190. *Id.* at 323–24.

191. 530 U.S. 703 (2000).

192. *Id.* at 707, 735 (upholding a Colorado law creating an eight-foot floating buffer zone around a person within 100 feet of a healthcare facility).

193. *Id.* at 716–17 (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). The Supreme Court cited Justice Brandeis, explaining, “[t]he unwilling listener’s interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader ‘right to be let alone’ that one of our wisest Justices characterized as ‘the most comprehensive of rights and the right most valued by civilized men.’” *Id.*

194. 504 U.S. 191 (1992).

prohibiting electioneering (solicitation of votes and distribution of campaign materials) within 100 feet of a polling place.¹⁹⁵ One of the rare cases to survive a strict scrutiny analysis, the Supreme Court found the state's interests in preventing voter intimidation and election fraud sufficiently compelling and the ban itself narrowly tailored enough to meet those interests.¹⁹⁶ Importantly, the Supreme Court viewed the buffer zone around the polling place as a space of privacy for voters to be free of intimidation and coercion.¹⁹⁷

The Supreme Court acknowledged the difficulty of applying a narrow tailoring analysis to the one-hundred-foot rule.¹⁹⁸ If states must prove that the chosen boundary around polling places is "perfectly tailored to deal with voter intimidation and election fraud,"¹⁹⁹ the Court reasoned,

a [s]tate's political system [would] sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.²⁰⁰

Notably, Justice Scalia would have gone further in *Burson*. Scalia stressed that "streets and sidewalks around polling places have traditionally *not* been devoted to assembly and debate."²⁰¹ On this basis, Justice Scalia argued that strict scrutiny should not apply to the electioneering statute.²⁰²

Burson provides a nice segue into a review of election surveillance litigation. Election surveillance jurisprudence thus far reveals that courts are protective of voters and the voting process. But when these interests are not as directly at issue, those seeking to prevent election surveillance have been less lucky in court.

B. *Election Surveillance and the Courts*

Relatively few courts have examined the rights of poll watchers and other members of the public to use devices to record election processes before, during, and after Election Day. The Supreme Court has not considered the question directly. Perhaps the case most on

195. *Id.* at 193–94.

196. *Id.* at 198–200, 211.

197. *Id.* at 204 ("One commentator remarked of the New York law of 1888: 'We have secured secrecy; and intimidation by employers, party bosses, police officers, saloonkeepers and others has come to an end.'").

198. *Id.* at 208–10.

199. *Id.* at 209.

200. *Id.* at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)).

201. *Id.* at 216 (Scalia, J., concurring in judgment).

202. *Id.*

point is from California in 2010, *Poniktera v. Seiler*.²⁰³ In *Poniktera*, a San Diego poll watcher sued a local registrar arguing that election officials violated the First Amendment by “improperly limit[ing] the ability of citizens to document election voting with cameras and other recording devices.”²⁰⁴ Local officials contended that the prohibition of photography and recording devices was consistent with California’s statute prohibiting the photographing of voters within 100 feet of a polling place with the intent to intimidate.²⁰⁵

The state appeals court concluded that, for purposes of First Amendment analysis, the inside of a polling place is a nonpublic forum.²⁰⁶ The court cited a 2010 opinion from the U.S. Court of Appeals for the D.C. Circuit, standing for the proposition that “[t]he only expressive activity involved [at the polling place] is each voter’s communication of his own elective choice and this has long been carried out privately—by secret ballot in a restricted space.”²⁰⁷ Consistent with *Burson*, the court concluded that “polling places have not been opened for public discourse, and indeed are subject to significant restraints on expressive conduct within the polling station.”²⁰⁸

The court blessed the State’s interest in preventing voter intimidation, finding that

[t]he state could reasonably conclude voters may be deterred from voting if they know (either in advance or upon arriving at the polling station) their presence will be photographically recorded, even by photographers claiming to have the most benign of intents, because the voter cannot be expected to read the mind of the photographer and the voter is not required to

203. 181 Cal. App. 4th 121 (2010).

204. *Id.* at 125. The poll watcher manual used for Plaintiff’s training included the following statement: “Photography and videotaping are not allowed by the public or voters during voting hours. However, if someone would like to photograph the seals on voting equipment prior to the opening of the polls or after the polls close they may be permitted to do so.” *Id.* at 126.

205. *Id.*; CAL. ELEC. CODE § 18541 (West 2021).

206. In 1983, the Supreme Court established different levels of scrutiny applicable to different categories of spaces depending on whether they were traditionally open to First Amendment activity, newly open to First Amendment activity, or not traditionally open to First Amendment Activity. *See Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983). Other federal courts have followed since applying this approach. *See, e.g., United Food & Com. Workers Loc. 1099 v. City of Sidney*, 364 F.3d 738, 749–750 (6th Cir. 2004); *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001); *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 351 (S.D.N.Y. 2007).

207. *Marlin*, 236 F.3d at 719.

208. *Poniktera*, 181 Cal. App. 4th at 136.

accept at face value the photographer's protestations of benevolence.²⁰⁹

The court also considered the State's interest in preventing disruption of the voting process. The court held that the State could reasonably move to prevent disruption arising from involving poll workers in the unenviable job of refereeing disputes between poll watchers seeking to use cameras in polling places and voters seeking to avoid being caught in the frame.²¹⁰

Ultimately, the California court supported the rights of poll watchers to observe the conduct of elections but believed the photography ban inside the polling places protected both voter privacy and smooth election administration.²¹¹ To support its finding, the court referenced cases in which, outside the context of election surveillance, courts have held that poll watching is not a fundamental right that enjoys distinct First Amendment protections.²¹²

Evidence supports the conclusion that disruptions caused by recording in polling places have the potential to disrupt the voting process.²¹³ Testifying in a Michigan ballot selfie case in 2017, election

209. *Id.* at 137. Notice the nod to overt surveillance and its power to intimidate voters far from polling places—here the court acknowledges that the surveillance harm could manifest in voters steering clear of the polls upon learning of the presence of surveillance there.

210. *Id.* at 137–38.

211. The Supreme Court upheld First Amendment rights of citizens inside polling places in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). *Mansky* involved a challenge to a prohibition on wearing clothing with a political message inside the polling place. *Id.* at 1882. *Mansky* can be distinguished from prohibitions of recording in polling places. In *Mansky*, the Supreme Court hinged its decision on the vague prohibition and the discretion it unleashed in discerning what counts as “political” for purposes of the ban. *Id.* at 1880 (“[T]he unmoored use of the term ‘political’ in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota’s restriction to fail . . .”). Prohibitions on recording in polling places suffer from no such vagueness problem or potential for unmoored discretion in enforcement.

212. See *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364 (S.D.N.Y. 2007) (“[P]oll watching is not incidental to this right and has no distinct First Amendment protection.”); *Turner v. Cooper*, 583 F. Supp. 1160, 1161–62 (N.D. Ill. 1983) (holding that the act of poll watching is not protected by the First Amendment).

213. In a helpful frame, Professor Kaminski describes the state’s interest in restricting the right to record as one of enabling “boundary management.” See Margot E. Kaminski, *Regulating Real-World Surveillance*, 90 WASH. L. REV. 1113, 1113 (2015). Sometimes, Professor Kaminski explains, “a law enables boundary management by preserving an environment or context as free from recording.” *Id.* at 1131. In other instances, the boundary management acts in service of “keeping things the way they were before the introduction of new surveillance technology.” *Id.* The idea of boundary management is the state creating circumstances by which individuals can themselves navigate and control

expert Charles Stewart noted that allowing photography in polling places could lead to negative consequences, including delay and increased wait times, disruption, decreased voter confidence in the election process, and decreased confidence in the secrecy of the ballot.²¹⁴ The Eighth Circuit agreed with Stewart’s assessment, holding that the state’s ban on polling place photography “advances several serious governmental interests: preserving the privacy of other voters,²¹⁵ avoiding delays and distractions at the polls, preventing vote buying, and preventing voter intimidation.”²¹⁶

Another ballot selfie case from 2017 furthers the argument that photography in polling places may constitutionally be banned. In *Silberberg v. Board of Elections of New York*,²¹⁷ a federal district court in New York considered a statutory ban on photography in polling places.²¹⁸ Applying intermediate scrutiny, the court found that the ban on polling place photography fell under First Amendment protection but held that the government interest in protecting the

boundaries regarding which of their actions and utterances may be recorded. It is about preserving dignity and status quo in the face of advancing technology and about preventing “chilling effects, power imbalances, [and] vulnerability harms” that unrestricted recording might enable. *Id.* at 1139.

214. Defendant’s Expert Report of Charles Stewart III, Ph.D. at 4–5, *Crookston v. Johnson*, 370 F. Supp. 3d 804 (W.D. Mich. 2018) (No. 1:16cv-01109) (“Among the quantifiable effects, allowing photographs of voters and their ballots will likely increase the amount of time necessary to check in, vote, and scan a ballot. This additional ‘service time’ will, in turn, increase the amount of time necessary to check in, vote, and scan a ballot, thus increasing the likelihood that the quality of service will be decreased in polling places in Michigan; and increase wait times to check in, vote, and scan ballots. The unmeasurable effects will be similarly important. Among these are likely to be an increase in disruptions in polling places, which will interrupt the smooth flow of voters coming to the polls and decrease among voters a sense that the voting process is being run fairly, an increase in the level of voter intimidation due to the greater presence of cameras being used in polling places, and to greater conflict in polling places as their use is disputed, and an increase in the surprisingly common belief among non-voters that one’s ballot is not secret. Indeed, as photographs begin appearing in which other voters and their ballots are displayed, the mistaken belief that one’s ballot is not secret may become less mistaken.”).

215. The clash between voters’ First Amendment rights versus the right to record is thorny. As privacy scholar Scott Skinner-Thompson points out, “[w]idespread citizen recording—particularly if aimed at those engaged in embodied forms of participatory democracy—works in tandem with . . . surveillance laws to intensify the privacy burdens on entering the public square and participating in society.” Scott Skinner-Thompson, *Recording as Heckling*, 108 GEO. L.J. 125, 159 (2019). While Skinner-Thompson is referring to participating in public protests, the idea applies equally to engaging in the election process. Widespread election surveillance could easily lead to chilling effects that would be very hard to measure and could well be widespread. *Id.*

216. *Crookston v. Johnson*, 841 F.3d 396, 400 (6th Cir. 2016).

217. 272 F. Supp. 3d 454 (S.D.N.Y. 2017).

218. *Id.* at 459.

voting process (for example, avoiding longer wait times at the polls) and voter privacy justified the restriction.²¹⁹

Election surveillance outside polling place buffer zones has encountered mixed reactions from judges. During the 2016 presidential election, the Arizona Democratic Party sought a preliminary injunction to stop Republican ballot integrity efforts to “follow other voters and interrogate them as to their votes, to record other voters’ license plates, to photograph and video-record other voters, and to call 911 if they suspect someone has engaged in voter fraud.”²²⁰ The Plaintiff alleged that these activities would “constitute . . . an attempt to intimidate and/or threaten voters for voting or attempting to vote”²²¹ in violation of voter intimidation provisions in the Voting Rights Act,²²² the Ku Klux Klan Act,²²³ and Arizona statute.²²⁴

219. *Id.* at 479–80.

220. *Ariz. Democratic Party v. Ariz. Republican Party*, No. CV-16-03752-PHX-JJT, 2016 WL 8669978, at *5 (D. Ariz. Nov. 4, 2016).

221. *Id.* Pressing their claim that the campaign sought to illegally intimidate voters, Plaintiffs cited calls on the part of the Trump campaign and former President Trump himself, who exhorted followers to keep careful watch at the polls, adding, “[a]nd when I say ‘watch,’ you know what I’m talking about, right?” *Id.* at *8.

222. Section 11(b) of the Voting Rights Act provides, “No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or . . . for urging or aiding any person to vote or attempt to vote.” 52 U.S.C. § 10307(b).

223. The Ku Klux Klan Act provides that an injured party has a right of action for recovery of damages against a person who, with another person, “conspire[s] to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States.” 42 U.S.C. § 1985(3). For an excellent overview of federal statutes prohibiting voter intimidation, see Cady & Glazer, *supra* note 116, at 181–91; Gilda R. Daniels, *Voter Deception*, 43 *IND. L. REV.* 343, 361 n.98 (2010); and *FEDERAL PROSECUTION OF ELECTION OFFENSES* 33, 52, 217 (Richard C. Pilger ed., 8th ed. 2017), <https://www.justice.gov/criminal/file/1029066/download> (describing 18 U.S.C. § 241 which protects a citizen’s “exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States” involving “two or more persons” conspiring to “injure, oppress, threaten, or intimidate” a voter; 18 U.S.C. § 594 which “criminalizes conduct intended to force prospective voters to vote against their preferences, or refrain from voting, through activity reasonably calculated to instill some form of fear”; and 18 U.S.C. § 245 which prohibits “attempts to injure, intimidate or interfere with—any person . . . voting or qualifying to vote”).

224. Arizona statute, *ARIZ. REV. STAT. ANN.* § 16-1013 (2021), imposes criminal penalty for “directly or indirectly,” knowingly “practic[ing] intimidation” or

Defendants acknowledged that Arizona law prohibited talking to voters or taking photographs in polling places, but they asserted that poll watchers were “still free to follow voters out into the parking lot, ask them questions, take their pictures and photograph their vehicles and license plate[s].”²²⁵ The court credited this argument in denying the Plaintiff’s motion for a preliminary injunction. The court also credited Plaintiff’s argument that its goal was not to intimidate voters but to ensure compliance with the state’s new law prohibiting the collection and return of multiple ballots (a voter assistance practice many states allow, known pejoratively as “ballot harvesting”).²²⁶

The court noted that Defendants were not “training or otherwise instructing its credentialed poll watchers, or anyone else, to follow voters to their cars or take their photographs for reasons other than

“inflict[ing] or threaten[ing] infliction” of “injury, damage, harm or loss” in order “to induce or compel [a voter] to vote or refrain from voting for a particular person or measure at any election provided by law, or on account of such person having voted or refrained from voting at an election.” Numerous state statutes contain similar provisions prohibiting voter intimidation. *See, e.g.*, Arkansas, ARK. CODE ANN. § 7-1-104 (2021) (exemplifying a criminal statute that prohibits “any threat or attempt to intimidate any elector or the family, business, or profession of the elector” and any person who “interfere[s] with or . . . prevent[s] any qualified elector from voting at any election or . . . attempt[s] to interfere with or . . . prevent[s] any qualified elector from voting at any election”); Florida, FLA. STAT. § 104.0615 (2021) (imposing criminal liability for “directly or indirectly us[ing] or threaten[ing] to use force, violence, or intimidation or any tactic of coercion or intimidation to induce or compel an individual” to vote or refrain from voting); Georgia, GA. CODE ANN. § 21-2-567(a) (2021) (prohibiting “any person who uses or threatens to use force and violence, or acts in any other manner to intimidate any other person” to vote or refrain from voting or registering); Iowa, IOWA CODE § 39A.4 (2021) (prohibiting willfully “[l]oitering, congregating, electioneering, posting signs, treating voters, or soliciting votes, during the receiving of the ballots” and/or “interrupting, hindering, or opposing a voter while in or approaching the polling place for the purpose of voting”); Michigan, MICH. COMP. LAWS § 168.932(a) (2021) (barring a person from attempting “by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state”); Virginia, VA. CODE ANN. § 24.2-604(A) (2021) (making it unlawful for “any person (i) to loiter or congregate within 40 feet of any entrance of any polling place; (ii) within such distance to . . . in any manner attempt to influence any person in casting his vote; (iii) to hinder or delay a qualified voter in entering or leaving a polling place”).

225. *Ariz. Democratic Party*, 2016 WL 8669978, at *6.

226. *Table 10: Ballot Collection Laws*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 6, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-10-who-can-collect-and-return-an-absentee-ballot-other-than-the-voter.aspx> (describing state statutes permitting and not permitting family members and others to return absentee ballots as agents or designees).

suspected ballot harvesting.”²²⁷ In its findings, the court underscored the First Amendment rights of Defendants and their supporters.²²⁸ So long as Defendants proffered a legitimate reason for videotaping voters outside the seventy-five-foot zone (here policing potentially illegal behavior), the court found the balance weighed against issuing a preliminary injunction to stop Defendants’ election surveillance plan.²²⁹

Also in 2016, members of the Oath Keepers, an American anti-government militia, issued the following plea to supporters in New Jersey:

[W]e call on you to form up incognito intelligence gathering and crime spotting teams and go out into the public on election day, dressed to blend in with the public, without any Oath Keepers hat or T shirt on, and with video, still camera, and notepad in hand, to look for and document suspected criminal vote fraud or intimidation activities, by any individuals, groups, or parties, and then report these incidents to your local police.²³⁰

In denying a restraining order to prevent such activities, the court found particularly salient that the Oath Keepers instructed their followers to conduct election surveillance covertly.²³¹ In such circumstances, the court reasoned that voters could not be intimidated because they would be unaware that they were targets of Oath Keepers’ covert surveillance:

[T]he Oath Keepers have directed their members “NOT [to] film in an obvious manner. In general, stay out of view and observe at a distance. Observe and record covertly, report accurately.” The Oath Keepers further advise their members to “make it hard on the criminal bad guys to know if they are being observed and filmed.” As such, the Court fails to see how Defendant’s

227. *Ariz. Democratic Party*, 2016 WL 8669978, at *6. This was noted despite evidence introduced at trial that the Defendants’ website exhorted supporters: “If you observe anything improper or illegal at the polls on Election Day please use this form to report it to the Arizona Republican Party. *Submit any photos, videos, or other materials as evidence.* Thank you for your service to ensure the integrity of elections in Arizona!” (emphasis added). *Id.* at *7.

228. *Id.* at *12 (“Plaintiff has not provided the Court with a narrowly tailored injunction that would not unintentionally sweep within its ambit other activities that constitute exercise of freedom of speech.”).

229. *Id.* at *7–8.

230. *N.J. Democratic State Comm. v. N.J. Oath Keepers*, No.: 16-8230 (JLL), 2016 U.S. Dist. LEXIS 154272, at *3–4 (D.N.J. Nov. 7, 2016). Plaintiffs sought a restraining order citing federal voter intimidation prohibitions in the Voting Rights Act, 52 U.S.C. § 10307(b), and the Ku Klux Klan Act, 42 U.S.C. § 1985(3). *Id.* at *2.

231. *Id.* at *6.

members could intimidate voters who are not even aware of their presence.²³²

The Arizona and New Jersey courts both distinguished *Daschle v. Thune*,²³³ a 2004 case from North Dakota, in which the Plaintiff, then-Senator Tom Daschle, successfully obtained a temporary restraining order prohibiting Defendants from following Native American voters and recording license plates of vehicles transporting Native American voters to and from polling places.²³⁴ The *Oath Keepers* court distinguished *Daschle* because election surveillance in *Daschle* specifically targeted Native Americans, whereas the New Jersey court found “no evidence that Defendants’ ‘Call to Action’ [was] targeted at any particular group or groups of voters.”²³⁵ The Arizona court also distinguished *Daschle* on the grounds that in *Daschle*, the Defendants had already acted against a group of voters and the targeted group of voters already perceived Defendants’ actions as intimidation.²³⁶ The court reasoned, in the Arizona case, that Plaintiffs produced no evidence that Defendants’ actions would result in voter intimidation:

[Defendants’] public statements with regard to following and photographing voters outside the [seventy-five-foot] limit were made only in the context of helping law enforcement enforce the . . . ballot harvesting law and could not reasonably have been read to address voters generally, much less intimidate them. Moreover, credentialed poll watchers for both political parties are established and regulated by Arizona law, and there is no evidence of even a single incident between a credentialed poll watcher and voter since at least 2006.²³⁷

Recalling the care and control surveillance dichotomy, these decisions demonstrate that election surveillance harms is in the eye of the beholder. The same election surveillance effort might strike some as “care” (ensuring compliance with voting laws) and others as worrisome “control” (here, voter intimidation).

In the lead up to the 2020 election, national leaders (including then-President Trump) called for “armies” of poll watchers to ferret out election fraud.²³⁸ Plaintiffs challenged these efforts in court,

232. *Id.* (emphasis in original) (citations omitted).

233. No. 04-CV-04177 (D.S.D. Nov. 2, 2004) (CourtListener).

234. *Id.*

235. *Oath Keepers*, 2016 U.S. Dist. LEXIS 154272, at *4.

236. *Ariz. Democratic Party*, 2016 WL 8669978, at *7–8.

237. *Id.* at *7.

238. The Trump campaign put out the call for an “army” of election observers to observe at the polls and ensure that only eligible voters cast ballots. Former President Trump himself issued a call from the debate stage at the first presidential debate on September 29, 2020. Jarrett Renshaw & Joseph Tanfani,

seeking to ensure they did not intimidate voters or disrupt the election process.²³⁹ In one example, a month before the November 2020 election, an anonymous “consortium of business owners and concerned [private] citizens” sought to hire a private security firm called Atlas to patrol the polls in Minnesota.²⁴⁰ Municipal leaders and voting rights groups went to court, arguing that a paramilitary presence would intimidate minority voters and that election judges (already in short supply) would quit in fear of escalation.²⁴¹ Citing Section 11(b) of the Voting Rights Act, which prohibits any person from attempting to intimidate, threaten, or coerce those voting, attempting to vote, or aiding and encouraging others to vote,²⁴² a federal district court in Minnesota issued a preliminary injunction enjoining Defendants from mobilizing a private patrol at the polls.²⁴³

Candidates calling on supporters to serve as observers is nothing out of the ordinary—indeed, the U.S. system relies on candidate and political party representatives as primary overseers of elections.²⁴⁴ Yet the imagery of an “army” of observers and the steady drumbeat of false claims about mass illegal voting had many worried in 2020, not just about voter intimidation but about violent clashes at the polls

Cellphones in Hand, ‘Army for Trump’ Readies Poll Watching Operation, REUTERS (Oct. 7, 2020, 6:14 AM), <https://www.reuters.com/article/us-usa-election-poll-watchers-insight/cellphones-in-hand-army-for-trump-readies-poll-watching-operation-idUSKBN26S1J5> (“In a recruitment video posted on Twitter in September seeking volunteers for this ‘Army for Trump,’ the president’s son, Donald Trump Jr., made the unfounded claim that Democrats plan to ‘add millions of fraudulent ballots’ to rig the results. Trump repeatedly has refused to commit to accepting the outcome of November’s election. During the Sept. 29 presidential debate, he exhorted his supporters to ‘go into the polls and watch very carefully.’”); *see also* Michael Biesecker & Garance Burke, *Trump ‘Army’ of Poll Watchers Led by Veteran of Fraud Claims*, AP NEWS (Nov. 2, 2020), <https://apnews.com/article/mike-roman-trump-poll-watchers-election-e110e6c9e62c9c8520f4a1a2040d8cfc> (quoting an email sent by the head of the Minneapolis police union that aimed to recruit retired officers to serve as “Poll Challengers,” which explained that “Poll Challengers do not ‘stop’ people, per se but act as our eyes and ears in the field and call our hotline to document fraud”); *First Presidential Debate*, C-SPAN (Sept. 29, 2020), <https://www.c-span.org/debates/?debate=first>.

239. *See, e.g.*, Kristin Clarke, *Voter Intimidation is Surging in 2020. Fight for the Right that Begets all Other Rights.*, USA TODAY (Oct. 27, 2020, 12:01 PM) <https://www.usatoday.com/story/opinion/2020/10/27/voter-intimidation-surging-2020-protect-minority-voters-column/6043955002/>.

240. *Council on Am.-Islamic Rels.—Minn. v. Atlas Aegis, LLC*, 497 F. Supp. 3d 371, 375 (D. Minn. 2020).

241. *Id.*

242. 52 U.S.C. § 10307(b). *See generally* Cady & Glazer, *supra* note 116 (arguing for an increased use of § 11(b) of the Voting Rights Act to police ballot security efforts).

243. *Atlas Aegis*, 497 F. Supp. 3d at 381.

244. Green, *supra* note 14, at 472–73.

on Election Day.²⁴⁵ Particularly of concern in 2020 and beyond, such efforts also targeted election workers (as in the Anchorage mayoral race noted at the outset). As discussed below, preventing harm to election workers, without whom elections could not take place, constitutes a vital state interest in curbing abusive surveillance of people administering elections.²⁴⁶

Case law thus far suggests that election surveillance in polling places, and buffer zones around them, can be constitutionally prohibited. But the state interests at the center of this conclusion—protecting voters from intimidation and protecting the voting process

245. See, e.g., Amy Gardner et al., *Trump's Call for Poll-Watching Volunteers Sparks Fear of Chaos and Violence on Election Day*, WASH. POST (Sept. 30, 2020), https://www.washingtonpost.com/politics/trumps-call-for-poll-watching-volunteers-sparks-fear-of-chaos-and-violence-on-election-day/2020/09/30/76ce0674-0346-11eb-b7ed-141dd88560ea_story.html (“President Trump’s debate-stage call for volunteers to stand watch at voting locations has prompted an enthusiastic response from known neo-Nazis and right-wing activists, leading many state election and law enforcement officials to prepare for voter intimidation, arrests and even violence on Election Day.”). At least in 2020, no armies materialized. One election scholar offered a theory. Justin Levitt at Loyola Law School in Los Angeles noted that, “[i]f you’re waiting for the busloads of fraud to arise, and what you get is small American-flag-waving democracy, you begin to go out of your head. It’s like sitting in a field waiting for the UFOs and the UFOs never show up. And then you’re just sitting in a field, which is fine for a couple hours, but polls are open about 15 hours a day.” Jessica Huseman, *So Far, Trump's "Army" of Poll Watchers Looks More Like a Small Platoon*, PROPUBLICA (Nov. 2, 2020, 12:31 PM), <https://www.propublica.org/article/so-far-trumps-army-of-poll-watchers-looks-more-like-a-small-platoon>.

246. Calls for ballot integrity “armies” occurred, for example, in both the Gavin Newsom September 2021 recall election and in Virginia’s November 2021 gubernatorial election. See, e.g., Paige St. John, *Election Watchers Snap Photos of Workers, Challenge Voter Signatures as Recall Nears*, L.A. TIMES (Sept. 10, 2021, 12:38 PM), <https://www.latimes.com/california/story/2021-09-10/election-chiefs-wary-of-california-recall-vote-fraud-claims> (describing the efforts of volunteers with the Election Integrity Project in California’s recall); *id.* (“[E]lection workers arrive to pick up ballots from a county drop box outside of Leisure World and, no matter what time of day they make their rounds, [they] are invariably met by a man who pops out to take their picture. Other election workers report individuals photographing their license plates.”); Meagan Flynn & Shawn Boburg, *An Army of Poll Watchers — Many Driven by GOP's 'Election Integrity' Push — Turns Out Across Virginia*, WASH. POST (Oct. 27, 2021, 3:54 PM), <https://www.washingtonpost.com/dc-md-va/2021/10/27/virginia-poll-watchers-election/>. Election integrity efforts aimed at proving fraud in the 2020 election have gone to voters’ doorsteps. See, e.g., Sarah Mimms, *The Pro-Trump Conspiracy Internet Is Moving from Facebook to Your Doorstep*, BUZZFEED (December 14, 2021), <https://www.buzzfeednews.com/article/sarahmimms/election-fraud-conspiracy-groups-new-hampshire>; Aaron Parseghian, *Pro-Trump Activists Going Door-to-Door with Hopes of Finding Voter Fraud in Michigan*, FOX 17 (Oct 13, 2021), <https://www.fox17online.com/news/politics/pro-trump-activists-going-door-to-door-with-hopes-of-finding-voter-fraud-in-michigan>.

from disruption—do not fully capture the range of harms election surveillance can inflict. The next Subpart examines such harms and state interests in addressing them.

C. *Election Surveillance Harms and State Interest*

Courts have held that preventing voter intimidation and election process disruption are compelling government interests that are sturdy enough to survive strict scrutiny when it comes to constitutionally limiting the right to record in polling places and buffer zones surrounding them.²⁴⁷ But when voters are out of the picture (so to speak), what state interests apply? What is the state's interest in, for example, prohibiting surveillance of election workers in parking lots when no voter is in sight?²⁴⁸ What is the state's interest in prohibiting a credentialed observer of a recount from holding up her cell phone to record what she is legally there to see if doing so does not disrupt election processes or implicate ballot secrecy?²⁴⁹

The answer lies in understanding the precise nature of potential harms. As noted above, the first harm these actions could bring about has not crystallized until recently: election surveillance increasingly targets election workers. Threatening and harassing surveillance of election workers—at the polls, at election offices, and even at their homes—is deeply worrisome; the country relies on this (most often temporary) workforce for the wheels of democracy to turn. Election

247. *Burson v. Freeman*, 504 U.S. 191, 206 (1992).

248. It is possible that harassing election workers in parking lots is constitutionally protected activity unless and until such behavior amounts to “true threats.” Daniel Tokaji, Dean of University of Wisconsin Law School, has questioned whether ballot integrity activity constitutes a “true threat,” noting that the intimidation a target might feel from a ballot integrity effort might not rise to the level of a true threat. Daniel P. Tokaji, *True Threats: Voter Intimidation and the Constitution*, 40 N.Y.U. REV. L. & SOC. CHANGE, HARBINGER 101, 107 (2015) (“Voter intimidation may sometimes involve violence, but not always—as in the example of threats of criminal prosecution for voter fraud. It is not at all clear whether threats of something other than violence fall within the true threats doctrine. There is a strong argument that they should, given that non-violent threats may discourage eligible citizens from voting as much as threats of violence.”). Dean Tokaji goes on to note that the leading Supreme Court case, *Virginia v. Black*, 538 U.S. 343 (2003), seems to limit its true threats holding to those that involve violence. *Id.*

249. This raises interesting questions about technological capability. A cell phone might not be able to capture writing on a ballot at a distance of several feet. But technology exists that would allow such capture. See Samuel D. Hodge, Jr., *Big Brother Is Watching: Law Enforcement's Use of Digital Technology in the Twenty-First Century*, 89 U. CIN. L. REV. 30, 32–33 (2020) (describing video technology that allowed the user to “visualize words on a page hundreds of feet away”). Any rule covering election surveillance must take existing—and future—technological possibility into account.

workers, the vast majority of whom are part-time, ordinary citizens stepping up to perform a crucial public duty, have been the unfortunate targets of some of the worst surveillance abuses.²⁵⁰ If the state cannot ensure that election workers may do their job free from harassment, it will become increasingly difficult to find people willing to step forward. Following the events of the 2020 election, election officials are resigning in high numbers.²⁵¹ This institutional knowledge is difficult, if not impossible, to replace. The task of running elections in the absence of this expertise becomes exponentially more difficult. If action is not taken, the result could be increased instances of human error and less professionally run elections, which in turn could have a snowball effect of further degrading public confidence in elections. For this reason, courts must take states' interests in protecting election workers from surveillance seriously, even when doing so only indirectly implicates disruption of the election process itself.

A second harm is also newly emerging. As we come to terms with new ways in which modern information architectures threaten democracy, election surveillance footage threatens to fuel mis- and disinformation about election administration.²⁵² Swirling mis- and disinformation is perilous to public faith in the election process and its outcomes. We saw in vivid relief how video footage supposedly capturing malfeasance during the 2020 election fueled conspiracy theory fires.²⁵³ The use of images and recordings of election processes

250. Congressional Research Service, *Election Worker Safety and Privacy* (December 21, 2021), <https://crsreports.congress.gov/product/pdf/IN/IN11831>. Multiple news outlets have reported on this phenomenon. See, e.g., Melissa Nann Burke & George Hunter, *I Feel Afraid: Detroit Clerk Winfrey Testifies to U.S. House Panel on Death Threats She Received*, DETROIT NEWS (July 28, 2021, 3:44 PM), <https://www.detroitnews.com/story/news/politics/2021/07/28/winfrey-testifies-before-house-panel-threats-election-workers/5400419001/>; Zach Montellaro, *Local Election Officials are Exhausted, Under Threat, and Thinking About Quitting*, POLITICO (March 10, 2022, 5:01 AM), <https://www.politico.com/news/2022/03/10/election-officials-exhausted-under-threat-00015850>.

251. Michael Wines, *After a Nightmare Year, Election Officials Are Quitting*, N.Y. TIMES (July 2, 2021), <https://www.nytimes.com/2021/07/02/us/politics/2020-election-voting-officials.html>.

252. Misinformation is generally understood as false or out-of-context information that is presented as fact, regardless of its intent to deceive. See *Misinformation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/misinformation> (last visited April 11, 2022) (“[I]ncorrect or misleading information.”). Disinformation is a type of misinformation that is intentionally false and intended to deceive. See *Disinformation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/disinformation> (last visited April 11, 2022) (“[F]alse information deliberately and often covertly spread (as by the planting of rumors) in order to influence public opinion or obscure the truth.”).

253. See discussion *supra* Subpart III.A (including commentary on confusion over livestreamed, valid ballot duplication efforts feeding conspiracy theories about election workers illegally marking ballots).

by those with the intent to undermine the reliability of election outcomes is a significant concern. The need to ensure public confidence in election outcomes should inform courts deciding election surveillance cases, even when actions do not directly impact voters in polling places.

The Supreme Court has recognized the harm that decontextualized and/or manipulated information can sow. Outside the election context, the Supreme Court has acknowledged that the right of access can be distinguished from the right to distribute recordings of what is observed to protect against that harm. In *Nixon v. Warner Communications, Inc.*,²⁵⁴ media organizations sought access to tape recordings of President Nixon in the Oval Office played in open court.²⁵⁵ Members of the press were provided full access to the court proceeding in which the audio tapes were played aloud. The court additionally provided the press with written transcripts of the tapes.²⁵⁶ But the press sought access to the recordings themselves so the public could hear the sound of the president's voice on their broadcasts. In *Nixon*, the media alleged that "public understanding . . . remains incomplete in the absence of the ability to listen to the tapes and form judgments as to their meaning based on inflection and emphasis."²⁵⁷

Respondent argued that enabling press access to rebroadcast the full twenty-two hours of recordings could result in harmful distortion:

If made available for commercial recordings or broadcast by the electronic media, only fractions of the tapes, necessarily taken out of context, could or would be presented. Nor would there be any safeguard, other than the taste of the marketing medium, against distortion through cutting, erasing, and splicing of tapes. There would be strong motivation to titillate as well as to educate listeners.²⁵⁸

Crediting this concern, the Supreme Court denied press access to the recordings, concluding that, "[t]he [Sixth Amendment] requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."²⁵⁹

254. 435 U.S. 589 (1978).

255. *Id.* at 591.

256. *Id.* at 594.

257. *Id.* at 610.

258. *Id.* at 601.

259. *Id.* at 610. The Supreme Court has taken a similar stance with respect to the Freedom of Information Act. Access is the default, but when the plaintiff seeks access to government information in a particular format, the Supreme Court is unmoved. *See, e.g.,* U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989) (denying press access to digitized FBI rap

Public access to court proceedings and records provides a close analogy to public oversight of elections. Like public access to election processes, a key reason why public access to court proceedings is vital is to secure public faith in the fairness of outcomes.²⁶⁰ The American judicial system, like its British precursor, has long recognized the value of open courts in assuring not only just outcomes but also public acceptance of judicial verdicts.²⁶¹ Tests and rationales the Supreme Court has developed to assess whether and to what extent different court processes should be public do not map directly onto the elections space, but they are nevertheless instructive.²⁶² An absolute right of the public to be present to observe must be the default in courts and in elections. But, as in *Nixon*, demands for certain kinds of access—for example, to record election proceedings—should be constitutionally limited to protect the sanctity of the voting process *and* public confidence in outcomes in the face of alarmingly fragile public trust.

Concern about public confidence in outcomes is pressing.²⁶³ Particularly after the events of January 6, 2021, the risks of election

sheets). Speaking with a group of law students, Justice Antonin Scalia was asked why he stood against television cameras at the Supreme Court. He replied that “[i]f he were convinced that people would watch from the start of an argument to the end, then he would have no objection to cameras in the courtroom. But that is not how the video would be used. Instead, only snippets of the argument would be seen—only the most dramatic, or the most extreme—with the result being . . . that there would be less understanding about what the Court did, rather than more.” Lawrence Lessig, *Privacy and Attention Span*, 89 GEO. L.J. 2063, 2063 (2001).

260. See LOGAN CORNETT & NATALIE ANNE KNOWLTON, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PUBLIC PERSPECTIVES ON TRUST & CONFIDENCE IN THE COURTS 3 (2020).

261. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556 (1980) (surveying legal indicia from the antecedent British system); *id.* (“[T]he King’s will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to rich as to poor; *and for the better accomplishing of this*, he prayed the community of the county *by their attendance* there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare.”).

262. See, e.g., *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 8–9 (1986) (establishing a two-part test for whether government processes must be open according to whether (1) the relevant proceedings historically have been open and (2) the public access ensures the functioning of a governing process); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 610 (1982) (stating that the press and general public may be barred from the courtroom during the testimony of minor sex victims but are not denied access to transcripts, court personnel, or other resources that can provide an account of such testimony).

263. See generally YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS (2018) (describing the threat to democracy that mis- and disinformation pose);

surveillance-fed damage to public confidence is far greater than the possible late-night comedy butchering of Nixon's Oval Office rants. The government interest in preventing the spread of mis- and disinformation about election mechanics and reliability is not only compelling but also arguably democratically existential.²⁶⁴

The state's imperative to prevent voter intimidation, chilling of electoral participation, disruption of election processes, an exodus of election workers, and the undermining of public confidence in election outcomes all weigh in favor of regulating election surveillance carefully. Any such curbs must be targeted and narrowly tailored to address specific harms while still enabling robust, meaningful public oversight of elections to the fullest extent. The next Part posits several suggestions for how this needle might be threaded.

VI. ELECTION SURVEILLANCE: A PATH FORWARD

Eleven years ago, when the Internet's existential threat to democracy was but a glimmer, transparency researcher Archon Fung wrote a book chapter called *Popular Election Monitoring: How Technology Can Enable Citizen Participation in Election Administration*.²⁶⁵ Starting with rosy examples of crowdsourced bird research and Google Flu Trends, Professor Fung wondered: Could crowdsourced surveillance be leveraged to improve elections?²⁶⁶ Professor Fung argued that large-scale, technologically enhanced public monitoring of elections had many potential benefits, including providing real-time data that could help address polling place problems as they happened; increasing civic engagement in the election process; and enabling transparent data dissemination about election administration that could be used to benchmark best practices.²⁶⁷

Professor Fung surmised that negative consequences could flow as well. He noted, for example, the potential unreliability of what amounted to "citizen journalism," crediting this skepticism for a lack of buy-in among some media outlets for early experiments in

Nathaniel Persily, *The 2016 U.S. Election: Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63 (2017) (exploring the effects of the internet and digital campaigns on the 2016 election).

264. See Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 265–66 (2022) (arguing that laws prohibiting dissemination of false information about election mechanics are constitutional).

265. See generally Archon Fung, *Popular Election Monitoring, How Technology Can Enable Citizen Participation in Election Administration*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 192 (Guy-Uriel E. Charles, Heather K. Gerken, & Michael S. Kang eds., 2010).

266. *Id.* at 192–93.

267. Fung, *supra* note 265, at 193–94.

crowdsourced election monitoring.²⁶⁸ Professor Fung also registered concerns about who joins such efforts. In his 2008 pilot project, MyFairElection.com, participants skewed heavily from his home state due, he surmised, to the reach of his own social network.²⁶⁹ He noted that such tools were likely to be used by only a subset of the population: those who are “more affluent, better educated, computer savvy, socially connected.”²⁷⁰ Professor Fung also worried about what he described as “noise” and “spoiling,” by which he meant low-quality reporting by members of the public and even deliberate deformation “from those who intentionally submit erroneous or irrelevant reports.”²⁷¹

Professor Fung offered solutions to this latter problem that are instructive in thinking through election surveillance best practices. First, Professor Fung suggested that allowing only trained monitors to participate would reduce noise and spoiling.²⁷² Second, he posited that requiring those submitting reports to register and/or provide contact information might be wise.²⁷³ Effectively, what Professor Fung concluded mirrors the impulses of late nineteenth-century reformers: the best way to ensure public confidence in the orderly administration of elections is the imposition of structure.

Building on these impulses, the following discussion first lays out recommendations aimed at ensuring election surveillance improves public confidence in elections and then suggests some of the challenges these recommendations face.

268. *See id.* at 200–01 (“[D]oubts within [the news organization Professor Fung partnered with, ABC News] about the reliability of crowd-sourced information created a reluctance to promote the effort . . . This divergence indicates uncertainty on the part of professional journalists regarding the place of this new, technologically enabled method in particular and of citizen journalism more broadly.”).

269. *Id.* at 201.

270. *Id.* at 204. Such participation bias has been shown to create discriminatory impacts. In the famed Boston pothole example, the City of Boston created a mobile application called StreetBump, enabling city dwellers to transform their phones into mobile pothole detectors. “The app transmitted data directly to city government, which used the data to determine which areas of the city most needed street repair.” Gilman & Green, *supra* note 118, at 285. As it turned out, “residents of the more affluent portions of the city were more likely to install the app, thus distorting the true picture of need and exacerbating already-enormous disparities in Boston street maintenance.” Gilman & Green, *supra* note 118, at 285. *See also* Kate Crawford, *Think Again: Big Data: Why the Rise of Machines Isn't All It's Cracked Up to Be*, FOREIGN POL'Y (May 10, 2013, 12:40 AM) <http://foreignpolicy.com/2013/05/10/think-again-big-data/>.

271. Fung, *supra* note 265, at 204.

272. *Id.* at 204–05.

273. *Id.* at 205.

A. *Election Surveillance Recommendations*

During another era of great tumult in U.S. elections in the late 1800s, voting had become unruly.²⁷⁴ Reformers reacted by instituting the secret ballot,²⁷⁵ by bringing election administration under state control,²⁷⁶ and by implementing structured transparency regimes in which credentialed candidate and party observers served as the eyes and ears of the public.²⁷⁷

Answers today will involve finding ways in which the public can be reassured that election processes contain adequate checks and balances against malfeasance, that only eligible voters are casting ballots, and that illegal activity does not corrupt election outcomes. Failure to take action to address public confidence in elections results in worrisome political movements like private partisan “audit” efforts that threaten to further foment public distrust of elections.²⁷⁸

The following discussion proposes several ideas to impose structure on election surveillance in an effort to lessen its harms while simultaneously strengthening its ability to increase public confidence in elections. It offers three modest proposals that, working in tandem, might move the ball forward or at least ignite thinking. First, election surveillance should be carefully regulated. Second, states should impose strict penalties for circulation of surveillance material intentionally designed to falsely malign voters, election officials, or the conduct of elections. And third, states should enhance and expand official election surveillance mechanisms with built-in protections against distortion.

1. *Regulating Election Surveillance*

Just as the justice system is open to public observation by default, so too must be our system of elections. But free, open, and meaningful access to all stages of the election process should not extend to the

274. *See, e.g.*, RICHARD P. McCORMICK, *THE HISTORY OF VOTING IN NEW JERSEY: A STUDY OF THE DEVELOPMENT OF ELECTION MACHINERY 1664–1911*, at 114 (1953) (describing general drunkenness and debauchery at the polls); RICHARD FRANKLIN BENDEL, *THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY* 20 (2004) (same).

275. *See Green, supra* note 10, at 785–90 (describing how, over the course of the nineteenth century, American elections administered by political parties became increasingly unruly and maladministered, prompting the implementation of the secret ballot and the takeover of election administration by state administrators).

276. *Id.*

277. *See id.*; *see also supra* note 22 and accompanying text.

278. *See* JONATHAN BYDLAK ET AL., BRENNAN CTR., *PARTISAN ELECTION REVIEW EFFORTS IN FIVE STATES* 5 (2021), <https://www.brennancenter.org/our-work/research-reports/partisan-election-review-efforts-five-states/> (documenting the concerns regarding partisan election review efforts in Arizona, Pennsylvania, Wisconsin, Michigan, and Georgia).

right of observers to record what they see. Some states, as described above, ban the use of recording equipment at polling places already.²⁷⁹ Some states explicitly ban poll watchers from using recording equipment.²⁸⁰ Most state statutes, as noted, are silent on the question. Proposed here are uniform restrictions on election surveillance, prohibiting recording at any location in which election activities take place (e.g., not just polling places), and preventing poll watchers or any member of the public from using a device to record voters or election processes. Any prohibition of election surveillance should do nothing to restrict meaningful and plentiful opportunities for in-person observation of election processes before, during, and after Election Day, but states should limit the use of devices to record election activities and processes to prevent voter intimidation, disruption, and distortion.

Election surveillance prohibitions should not be confined to polling places. They should include areas through which voters and/or election officials must travel to engage in election activity. State voter intimidation statutes presage this enlarged scope by explicitly including thoroughfares outside of polling places. An Iowa statute, for example, prohibits intimidating a voter “while in or approaching the polling place,” making specific mention of ingress and egress to include activity

during the receiving of ballots, either on the premises of a polling place or within three hundred feet of an outside door of a building affording access to a room where the polls are held, or of an outside door of a building affording access to a hallway, corridor, stairway, or other means of reaching the room where the polls are held.²⁸¹

And finally, election surveillance prohibitions must protect election officials from harm in addition to voters and the voting process. Congress has taken note of the urgency in protecting election workers and is considering measures aimed at protecting election workers from threats, harassment, and interference.²⁸² Proposals

279. See *supra* notes 48–51 and accompanying text.

280. See *supra* notes 48–51 and accompanying text.

281. IOWA CODE § 39A.4(1)(a)(1)–(2).

282. Numerous groups have called for federal legislation to protect election workers from harassment and harm. See, for example, Letter from American-Arab Anti-Discrimination Committee et al. to Members of Congress (Dec. 1, 2021), <https://www.lwv.org/sites/default/files/2021-12/Election-Subversion-Letter.pdf>, and see also Gowri Ramachandran, *Congress Must Act to Protect Election Officials*, THE BRENNAN CENTER (July 28, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/congress-must-act-protect-election-officials>. Congress has taken notice; see, e.g., Linda So, *New U.S. Legislation Seeks to Expand Protections for Election Workers*, REUTERS (Oct. 21,

recognize that confining protections against surveillance must extend beyond polling places, and even election offices, to protect election workers' privacy more generally.²⁸³ States legislatures are taking notice too.²⁸⁴ Failing to protect election workers at all stages of the election process from surveillance tactics and harassment threatens continued democratic functioning in this country.²⁸⁵

2. *Penalties for Spreading Election Surveillance Disinformation*

Curbs on election surveillance may not be enough. Doctored images or decontextualized official election surveillance footage can nevertheless be used to undermine public faith in elections. For this reason, states should consider imposing penalties for circulating doctored or misleading images or videos of election processes intentionally designed to undermine public confidence in election outcomes.

Professor Richard Hasen has carefully considered the problem of policing lies in elections, concluding that the First Amendment is and

2021), <https://www.reuters.com/world/us/new-us-legislation-seeks-expand-protections-election-workers-2021-10-04/>. Members of Congress have introduced legislation aimed at protecting election workers. *See, e.g.*, Election Worker and Polling Place Protection Act, H.R. 6872, 117th Cong. (2022). The stalled Freedom to Vote Act contained election worker protections as well. *See* Freedom to Vote Act, S. 2747, 117th Cong. §§ 3101–3102 (2021) (“It shall be unlawful for any person, whether acting under color of law or otherwise, to intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce an election worker . . . with intent to impede, intimidate, or interfere with such official while engaged in the performance of official duties, or with intent to retaliate against such official on account of the performance of official duties.”).

283. The Preventing Election Subversion Act of 2021 would make it unlawful to publicly disseminate restricted personal information of election workers and their family members. *See* Preventing Election Subversion Act of 2021, S. 2155, 117th Cong. § 612 (2021).

284. *See* Matt Vasilogambros, *States Want to Boost Protections for Threatened Local Election Officials*, PEW (March 9, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/03/09/states-want-to-boost-protections-for-threatened-local-election-officials> (describing proposed legislation in ten states to protect election workers).

285. Election officials currently find themselves the targets of threats and intimidation. Election watchdogs are taking note and providing guidance and resources to help. *See, e.g.*, BRENNAN CTR. FOR JUST. & BIPARTISAN POL’Y CTR., ELECTION OFFICIALS UNDER ATTACK: HOW TO PROTECT ADMINISTRATORS AND SAFEGUARD DEMOCRACY (2021), https://www.brennancenter.org/sites/default/files/2021-06/BCJ-129%20ElectionOfficials_v7.pdf. In September 2021, prominent election attorneys Bob Bauer (a Democrat) and Ben Ginsberg (a Republican) founded the Election Official Legal Defense Network to provide pro bono assistance to election workers to respond to the imposition of criminal penalties for performing their professional duties and to threats of violence to themselves and their families. *See About*, ELECTION OFF. LEGAL DEF. NETWORK, <https://eoldn.org/about> (last visited Mar. 18, 2022).

should be a formidable barrier to preventing the circulation of misleading information during elections.²⁸⁶ Yet, Professor Hasen notes that a prohibition of election speech about the *mechanics* of voting, such as false statements about the date and time of voting, serve a compelling government interest that passes constitutional muster.²⁸⁷ A robocall to minority residents of a large city exhorting voters to “Vote on Wednesday,” for example, can be constitutionally prohibited.²⁸⁸

Statutes already on the books in many states prohibit certain types of false statements in elections in narrow circumstances. According to the National Conference of State Legislatures,

[t]wenty-seven states prohibit specific types of false statements, most commonly false claims of incumbency; false claims about candidate endorsements; or false statements about information people need to be able to vote, such as the date of the election Some states are not as specific, but do prohibit false statements concerning an election, typically making it a crime to knowingly or recklessly distribute false information about a candidate or election.²⁸⁹

Additionally, some state voter intimidation statutes restrict spreading falsehoods regarding voter eligibility. Florida’s voter intimidation statute, for example, imposes criminal liability for the use of false information to challenge or prevent voting.²⁹⁰

Aside from prohibiting false statements, many states discourage *misreporting* on the part of election observers by requiring those lodging claims against voters or election officials to do so in writing and under oath. In New Hampshire, for example, an election observer may challenge the eligibility of a voter only via a signed affidavit submitted after taking an oath administered by an election official.²⁹¹ A Maine statute likewise strictly limits challenges:

286. Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 77 (2013) (“[T]he state may no longer have the power to ban or punish malicious false campaign speech, whether made by candidates or others.”).

287. *Id.* at 57 (“[C]ourts should reject challenges to narrower laws that, under an actual malice/clear and convincing evidence standard . . . bar false (though not misleading) election speech about the mechanics of voting, such as false statements about the date and time of voting . . .”).

288. To use an example Professor Hasen suggests, see RICHARD L. HASEN, *VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 78 (2012).

289. Mark Listes & Wendy Underhill, *Reducing Lies in Elections*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 2014), <https://www.ncsl.org/research/elections-and-campaigns/reducing-lies-in-elections.aspx>.

290. FLA. STAT. §§ 104.0615(3)–(4) (2021).

291. N.H. REV. STAT. ANN. § 659:27-a (“No challenge may be asserted except in the form of a signed affidavit, under oath administered by an election official . . .”).

The challenge must be made to the warden. The challenger must state in the form of a signed affidavit setting forth, under oath administered by the warden, the challenger's name, address, party affiliation, status as a registered voter in the municipality, the name of the voter challenged, the reason the particular individual being challenged may be ineligible to vote, the specific source of the information or personal knowledge upon which the challenge of the particular individual is based and a statement that the challenger understands that making a false statement on the affidavit is punishable under penalties of perjury.²⁹²

These provisions exist for a reason. They are geared to enable those with concerns about what they are observing to voice them, but they require challengers to verify the accuracy of their reporting and formally stand by their accusations.²⁹³ The impulse behind such statutes is clear and narrowly targeted: to discourage false reporting, to prevent intimidation of voters, and to counteract intentional, false, and malicious undermining of public faith in elections and election outcomes. Just as perjury laws during trials seek to stop falsehoods from staining our system of justice, so too should election codes work

292. ME. STAT. tit. 21-A § 673 (2021); *see also* Georgia, GA. CODE ANN. §§ 21-2-230(a)–(b) (2021) (“Any elector of the county or municipality may challenge the right of any other elector of the county or municipality, whose name appears on the list of electors, to vote in an election. Such challenge shall be in writing and specify distinctly the grounds of such challenge Upon the filing of such challenge, the board of registrars shall immediately consider such challenge and determine whether probable cause exists to sustain such challenge.”); Hawaii, HAW. REV. STAT. § 11-25(a) (2021) (“Any registered voter may challenge the right of a person to be or to remain registered as a voter for any cause not previously decided by the board of registration or the supreme court in respect to the same person. The challenge shall be in writing, setting forth the grounds upon which it is based, and be signed by the person making the challenge. The challenge shall be delivered to the clerk who shall immediately serve notice thereof on the person challenged. The clerk shall, as soon as possible, investigate and rule on the challenge.”); New Hampshire, N.H. REV. STAT. ANN. § 659:27-a (2022) (“No challenge may be asserted except in the form of a signed affidavit, under oath administered by an election official, in the following form . . .”).

293. Regarding channeling complaints effectively in the elections context, the Help America Vote Act, (“HAVA”) mandates that each state create a formal complaint process. *See* 52 U.S.C. § 20901. Virginia has developed a particularly sophisticated reporting platform that generates useful and usable data on complaints and problems during elections for use in improving elections going forward. Such programs play an important role in improving public confidence in elections through responsive election management. Virginia’s Department of Elections takes the extra step of compiling complaint information to ensure an educated public. *See* VA. DEP’T OF ELECTIONS, NOVEMBER 3, 2020 POST-ELECTION REPORT (2021), https://www.elections.virginia.gov/media/formswarehouse/maintenance-reports/PostElectionReport_FinalRevised_211001.pdf (containing detailed information about the nature and location of complaints filed concerning the 2020 election).

to prevent false and malicious uses of election surveillance from undermining what is precious and precarious in a democracy: public faith in elections.²⁹⁴

One problem with applying this prohibition to circulation of photographs and recordings of election processes, of course, is that it might capture earnest attempts to alert the public to instances of election malfeasance. If a poll watcher is witnessing, for example, an election official engaged in blatantly illegal activity, the poll watcher's photographic or video evidence of that malfeasance could helpfully document it. Another clear challenge is innocent circulation: someone sharing misleading images of election processes may fully believe (mistakenly) that an election worker or a voter is breaking the law.

The solution to this conundrum is not to allow rampant co- and sousveillance of elections, sifting through what is captured and circulated for intentionally doctored or misleading images and video only after the damage to public confidence in outcomes is done. It is instead, again, to take steps to limit image capture up front; to ensure expansive opportunities for meaningful in-person observation at every stage of the election process; and to publicize clear rules for how watchers and members of the public can report observed election irregularities directly to election officials in a position to address concerns at the scene. Part of the solution is also expanded and extensive *official* election surveillance, as described next.

3. *Expanding Official Election Surveillance*

If election sous- and coveillance is curtailed, an important counterbalance is thoughtful expansion of official election surveillance mechanisms. As noted above, many state statutes mandate official surveillance of certain election processes.²⁹⁵ Such policies should be expanded with careful consideration to ensuring that official surveillance does not operate to intimidate voters or

294. Congress is considering legislation that would prohibit the circulation of knowingly false information about the time, place, or manner of an election. *See* Freedom to Vote Act, S. 2747, 117th Cong. § 3202(a) (2021) (“No person, whether acting under color of law or otherwise, shall, within 60 days before an election described . . . by any means, including by means of written, electronic, or telephonic communications, communicate or cause to be communicated . . . or produce information [regarding the time, place, or manner of holding any election] . . . with the intent that such information be communicated, if such person—(i) knows such information to be materially false; and (ii) has the intent to impede or prevent another person from exercising the right to vote in an election described . . .”). Even if circulating knowingly false video of an election process with the intent of undermining public confidence in elections fell under the “manner” category in this proposed rule, the provision appears to relate only to false information that would deter voters (like “the election has been moved to Wednesday” as opposed to general efforts to discredit elections).

295. *See supra* note 52 and accompanying text (describing existing state-mandated official election surveillance requirements).

compromise ballot secrecy. To the extent financially and practically feasible, states should consider recording all election processes, ideally from multiple angles.²⁹⁶ Such recordings need not be broadcast or indeed ever see the light of day, but should rather be preserved as evidence for use if allegations of misconduct arise.²⁹⁷

States should also consider expanding opportunities for remote observation of certain election processes where voter privacy and ballot secrecy are not at issue, such as ballot tabulation or recounts. If a state elects to offer remote observation, however, it should be done mindfully. The Council of State Governments (“CSG”) recommends that when election officials enable remote observation streamed online, those who wish to watch be required “to provide their name, address, and other information and to accept conditions/guidelines for remote observation.”²⁹⁸ CSG points to one such process used in Orange County, California.²⁹⁹ This is a form of structured transparency configured for the digital age. A variation of this idea would be to record everything and livestream it but only allow it to be viewed by those who have completed training on the law and practices of the relevant election processes. This would enable such knighted remote observers to both report problems in real time and transmit assurances to candidates, parties, and the public.³⁰⁰

Finally, careful thought should be given to improving public confidence in “disembodied” portions of the election process. Surveillance studies scholars have examined how in our increasingly disembodied, digitized world, surveillance techniques have emerged

296. Continual surveillance feeds are of course the norm in numerous private and public spaces. The benefits and drawbacks of continual surveillance is the subject of a whole vein of surveillance scholarship. See, e.g., BILGE YESIL, VIDEO SURVEILLANCE: POWER AND PRIVACY IN EVERYDAY LIFE (2009); ROUTLEDGE HANDBOOK OF SURVEILLANCE STUDIES (Kirstie Ball, Kevin D. Haggerty & David Lyon eds., 2012). For an interesting and related take on continual recording, see Anita L. Allen, *Dredging up the Past: Lifelogging, Memory, and Surveillance*, 75 U. CHI. L. REV. 47 (2008) (discussing technologies that allow for continual recording of life events and the benefits and costs of such technologies).

297. This idea draws on the same principles underpinning the impulse behind paper ballots and other means of verifying the voting process. Andrew W. Appel & Philip B. Stark, *Evidence-Based Elections: Create a Meaningful Paper Trail, Then Audit*, 4 GEO. L. TECH. REV. 523, 526 (2020) (“[B]ecause of the widespread recognition of this fatal flaw, only a handful of states use paperless [direct-recording electronic, (‘DRE’),] voting machines, and many of those states are transitioning to technologies that have a paper trail starting from the individual voter’s ballot.”).

298. Katyovi, *Election 2020 in Review: Poll Watchers, Observers and the Ballot Duplication Process*, THE COUNCIL OF STATE GOV’TS (Mar. 30, 2021), <https://ovi.csg.org/election-2020-in-review-remote-observation/>.

299. See *id.*; see also *Remote Election Observer Application*, ORANGE CNTY. REGISTRAR OF VOTERS, <https://ocvote.com/form/observer-request#no-back> (last visited Mar. 18, 2022).

300. See, e.g., Katyovi, *supra* note 298.

to compensate for “missing bodies.”³⁰¹ Surveillance can produce “tokens of trust” that corroborate human action as genuine and “distinguish between bona fide and the phony.”³⁰²

In the elections space, official election surveillance strategies thoughtfully deployed can help to repair the trust gap that is widening. When voters cast paper ballots in person and those ballots were counted by hand, election observers could effectively satisfy themselves in the fairness of the process by being present and watching. As election processes have become increasingly disembodied, as evidenced by, for example, increasing numbers of voters casting votes by absentee ballot (a trend that started well before 2020), opportunities to meaningfully watch the voting process have diminished.³⁰³ Those who design election processes should take steps to account for trust gaps that disembodied election processes give rise to and examine ways official election surveillance mechanisms (and other devices like risk-limiting audits) might be leveraged to fill those gaps.

B. Drawbacks/Difficulties

The proposals forwarded here—curtailing election surveillance, imposing penalties for malicious circulation of election surveillance designed to undermine public confidence in elections; and increasing official election surveillance mechanisms—come with costs.

First, denying people the right to record what they are legally allowed to see risks creating a perception that election administrators have something to hide. This is why prohibiting the use of recording devices must be accompanied by policies that allow and encourage *meaningful* public access for credentialed and trained observers and by expanded official election surveillance.³⁰⁴

Second, prohibitions on the right to record during elections are certain to face uphill battles on First Amendment grounds, especially the further election surveillance prohibitions stray from polling places. Elections are quintessentially matters of public concern.³⁰⁵ Despite precedent noted above and the constitutionality of recording bans in polling places, it may be difficult to convince a judge that protecting election workers from harassment and/or preventing

301. LYON, *supra* note 21, at 8 (discussing how, in the modern era, intervening interfaces supplant face-to-face interaction such that “bodies are disappearing”).

302. *Id.* at 125.

303. *See* Green, *supra* note 14, at 468–71.

304. *Id.* at 484–85 (discussing the importance of meaningful access for election observers).

305. Skinner-Thompson, *supra* note 215, at 138, 173 (citing *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) (suggesting that the right to record should be limited to public locations, to matters of public concern, or to situations involving an intent to distribute)).

intentional disinformation and distortion warrants curtailing First Amendment freedoms when voter intimidation and election disruption are not as directly in play. It may unfortunately take more time for these harms to manifest in judicially cognizable ways.

And finally, it is important to acknowledge that those determined to undermine public confidence in U.S. elections have a bottomless pit of options and multiple ways to hide their identity and/or subvert detection.³⁰⁶ Curtailing election surveillance does not remove the possibility of mischief. Anonymous recordings will continue to circulate. And official election surveillance footage can easily be manipulated and decontextualized by malicious actors. Even if a jurisdiction succeeds in prohibiting nonofficial election surveillance going forward, footage from previous elections can be used to implicate current election malfeasance or be manipulated to make what did not happen appear to have happened.³⁰⁷ The hope that prohibitions can prevent dissemination of nefarious election surveillance content confronts a reality in which anonymous actors (foreign and domestic) routinely engage in criminal activity online with abandon.

These hurdles are significant. The proposals suggested here provide only a starting point for thinking about the role of election surveillance in promoting public confidence in U.S. elections. The time to carefully consider election surveillance policies is now.

CONCLUSION

The comparison between allowing members of the public to observe elections and judicial proceedings is a good one. In both cases, a functioning and just democracy depends on the ability of members of the public to see and verify the integrity of both judicial and electoral processes. To secure public trust, the judicial system relies on full and open public access for anyone and everyone to see firsthand that justice is done.³⁰⁸ Likewise, transparent elections that allow meaningful access to observers of all political stripes must continue to lie at the core of state election administration. But for the same reason that federal courts prohibit cell phones and jurors are not equipped with body cameras, elections require curbs on surveillance to preserve decorum, defend the civil liberties of voters,

306. See Citron & Chesney, *supra* note 77, at 1792 (describing the attribution problem in online crimes).

307. See *id.* at 1777–78 (describing the challenges deep fakes present to democratic functioning); see also Green, *supra* note 77, at 1451 (describing the threat deep fakes in elections and arguing that counterfeit candidate speech can be constitutionally prohibited).

308. *Judiciary Takes Action to Ensure High Ethical Standards and Transparency*, U.S. CTS. (Oct. 26, 2021), <https://www.uscourts.gov/news/2021/10/26/judiciary-takes-action-ensure-high-ethical-standards-and-transparency>.

protect election workers, and preserve public confidence in the careful work of state election administrators to run fair elections.