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Remarks

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REMARKS

Andrea Dennis*

Over the course of one week, the *Michigan Journal of Law Reform* presented its annual Symposium, this year titled *Reimagining Police Surveillance: Protecting Activism and Ending Technologies of Oppression*. During this week, the *Journal* explored complicated questions surrounding the expansion of police surveillance technologies, including how police and federal agencies utilize their extensive resources to identify and surveil public protest, the ways in which technology employed by police is often flawed and disparately impacts people of color, and potential reforms of police surveillance technology. Before delving into these complicated questions, I presented remarks on the history of police surveillance in America to situate subsequent panel conversations on the topic.

My research has closely examined informing, also known as snitching, during antebellum slavery as well as the Black experience of police surveillance in America. As I have expressed before, “[t]he foundation for today’s expansive state surveillance system was built upon the lessons learned from America’s history of monitoring Black people in America.”¹ As police surveillance efforts increasingly enter our public consciousness, it is important to remember that pervasive government surveillance in the United States is not a new phenomenon, especially for Black people in America.² Rather, surveillance has been vital to the creation and perpetuation of unequal, overpoliced, and racially segregated communities in the United States.

Before government-backed law enforcement organizations and a modern criminal legal system were created and embedded in society, policing and surveillance were communal and informal. Since as early as the seventeenth century, police surveillance existed in the colonies as a result of the “informer system” that was transplanted from England.³

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1. Andrea L. Dennis, *Mass Surveillance and Black Legal History*, American Constitutional Society, Feb. 18, 2020, <https://www.acslaw.org/expertforum/mass-surveillance-and-black-legal-history/> [<https://perma.cc/6SZ4-BVSH>] [hereinafter Dennis, *Mass Surveillance and Black Legal History*].

2. *Id.*

3. See Andrea L. Dennis, *A Snitch in Time: An Historical Sketch of Black Informing During Slavery*, 97 MARQ. L. REV. 279, 285-86 n.24 (2013) [hereinafter Dennis, *A Snitch in Time*] (“Not surprisingly, given the historical connection between the English and American legal systems, scholars describe the development of a government-backed system of informants in England and translation to policing in the American colonies.”); see also ROBERT M. BLOOM, *RATTING: THE USE AND ABUSE OF IN-*

Informer statutes that allowed individuals to sue others for violations of penal law and provide evidence for criminal prosecutions also permitted monetary compensation of informers.⁴ During antebellum slavery, white society sought information on Black behavior to protect white interests.⁵ Pursuant to informer laws, both free and enslaved Black persons at times could be rewarded for revealing an escape or rebellion plot, for divulging a Black person's possession of prohibited materials (such as poison or personal property which were impermissible for enslaved Black people to possess), and even for informing on whites who had helped facilitate Black lawlessness.⁶ Thus, well before the United States existed and had a formalized system of policing and criminal legal process, the informer system facilitated the enforcement of various criminal and penal laws.

As the modern institutionalized police state began to arise in the 1830s, law enforcement took a larger role in the surveillance of individuals that had been traditionally carried out by informers. In particular, a transition from human surveillance by lay citizens in the street to human surveillance by law enforcement in the street occurred. Notwithstanding, lay citizens continued to be a significant tool for human surveillance.

Because this year the *Journal's* symposium began on Martin Luther King Junior Day, it was particularly appropriate to think about police surveillance efforts during the Civil Rights and Black Nationalist movements of the 1950s through the 1970s. J. Edgar Hoover's creation of the FBI's COINTELPRO—the counterintelligence program—was specifically aimed at surveilling, infiltrating, undermining, and extinguishing civil rights and Black power organizations. COINTELPRO is a watershed moment in the evolution of government surveillance. Pursuant to this program, the FBI collected information to foment dissent,

FORMANTS IN THE AMERICAN JUSTICE SYSTEM 1-6 (2002) (providing an overview of informing in a variety of historical contexts).

4. Dennis, *A Snitch in Time* at 290 (“State codes expressly authorized legislatures to reward “informers” who acted as private prosecutors.”); see also *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (“Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.”).

5. See Dennis, *A Snitch in Time* at 291 (“If Whites were unable to access such otherwise secreted information, their personal safety, communal safety, financial interests, and ultimately the institution of slavery would have been seriously threatened. Consequently, the necessity for protection of White interests was the driving factor respecting the types of offenses or misconduct meriting societal endorsement of slave informing.”). White society includes white plantation owners and slaveholders in the South, as well as white communities more broadly in both the South and North, the latter which some people tend to overlook.

6. See Dennis, *A Snitch in Time* at 313-16.

engage in blackmail and coercion, and police and prosecute many individuals.⁷ Well-known targets for surveillance included the Reverend Doctor Martin Luther King Junior, Malcolm X, Huey P. Newton, and Fred Hampton.⁸ Other subjects included organizations such as the Congress of Racial Equality (CORE), the Student Nonviolent Coordinating Committee (SNCC), the Black Panther Party, the Revolutionary Action Movement, the Black Liberation Army, the American Indian Movement, and the Puerto Rican Socialists.⁹

All of these individuals and groups—who were viewed as having the potential to undermine the government’s interest and presumably white society’s interest—were targeted for surveillance based on race, ethnicity or political beliefs. There were certainly white people and organizations who were aligned with many of these monitored individuals and organizations, but they too were viewed as undermining government interests or white society’s interests and so they too came under surveillance.

After the end of the Civil Rights and Black Nationalist movements, the modern era of government surveillance took another momentous step forward as a result of California’s creation of a gang database.¹⁰ Beginning in the 1970s in Los Angeles, police officers conducting traffic stops of individuals would write down information on index cards—called field identification cards—and these cards were then kept in large archival systems, not unlike a library card catalog system. Police officers noted individual names, identifying information, and details the officer thought documented an individual’s gang membership or gang affiliation. Los Angeles eventually transitioned this low-tech system into an electronic system called GREAT—the “Gang Reporting Evaluation and Tracking” system.¹¹ Officers then had the option to look

7. Dennis, *Mass Surveillance and Black Legal History*; see also Jeffrey O.G. Ogbar, *The FBI’s War on Civil Rights Leaders*, THE DAILY BEAST (Apr. 11, 2017), <https://www.thedailybeast.com/the-fbis-war-on-civil-rights-leaders> [<https://perma.cc/992K-HZHC>].

8. Ogbar, *supra* note 7.

9. See Dennis, *Mass Surveillance and Black Legal History*; see also James Kirkpatrick Davis, *Spying on America: The FBI’s Domestic Counterintelligence Program* 117 (Praeger 1992).

10. See Dennis, *Mass Surveillance and Black Legal History* (“After the end of the Civil Rights and Black Nationalist Movements, state and federal law enforcement officials turned their attention to street gangs, which were growing locally, regionally, and nationally. Law enforcement agencies nationwide established gang units and task forces that in turn created paper-based gang databases and relied on street-level informants for information.”).

11. See *Law Enforcement: Information on the Los Angeles County Sheriff’s Department Gang Reporting, Evaluation, and Tracking System* (Jun. 26, 1992) U.S. GOVERNMENT ACCOUNTABILITY OFFICE, <https://www.gao.gov/products/t-ggd-92-52> [<https://perma.cc/XAF4-Y8QQ>]; see also Ali Winston, *You May be in California’s Gang Database and Not Even Know It*, REVEAL NEWS ORG. (March 23, 2016), <https://revealnews.org/article/you-may-be-in-californias-gang-database-and-not-even-know-it/> [[https://perma.cc/V4TJ-\]8A6](https://perma.cc/V4TJ-]8A6)].

through the index cards or search the electronic database, which at the time was cumbersome and inefficient.

Fast forward to today, California uses what is called “CalGang,” of which the first prototype was developed in 1996 for San Diego.¹² CalGang is a privately-created, electronic, searchable, analyzable database used by law enforcement throughout California.¹³ In its most modern incarnation, it can also incorporate or consider other technologies, such as body camera videos and facial recognition. Additionally, the information that is obtained from this database can be compared or cross referenced with other databases.

Though California was at the forefront of gang database creation, many states and police agencies today have similar databases—whether large scale and computer-based or more informal and internal. These database systems serve as an example of the historical movement from low-tech systems of identifying alleged gang affiliations on the street to today’s modern technology that has been developed through public-private partnerships and expanded beyond gang-related intelligence.

A concerning aspect of these databases is that the information is closely guarded by private developers, police, and prosecutors. Many people are not aware that these databases exist, much less know of their breadth and what information or which individuals they contain. Consequently, errors in the databases go unchecked. Indeed, in 2016, a California state auditor concluded that there were many problems with the CalGang database. For instance, individuals were included in the database as a result of false information entered by law enforcement.¹⁴ Furthermore, there were inclusions that defied logic, such as individuals whose birthdates indicated that they were less than one year old at the time their information was entered.¹⁵ Lastly, most individuals did not know they were in the database, and there was no means to remove one’s name from the database.

In the last several decades, gang databases have connected to and fed into the government’s mass incarceration of Black people, particularly Black male youth and young Black men from low-income communities, which in turn has substantially perpetuated unequal and racially

12. Winston, *supra* note 11 (“CalGang brought a sea change to state law enforcement by allowing officers in the field instant access to digitized intelligence about an individual’s gang ties. Before its launch, officers had to turn to an expensive and cumbersome electronic filing system called GREAT or dig through filing cabinets to pull up that person’s paper file.”).

13. *Id.*

14. CALIFORNIA STATE AUDITOR, THE CALGANG CRIMINAL INTELLIGENCE SYSTEM, REPORT 2015-130, at 31-25 (Aug. 2016).

15. *Id.* at 39.

segregated communities in the United States.¹⁶ Because mass incarceration relies extensively on surveillance (among other government practices), it is inextricably interlined with government endorsed snitching. Many investigations and prosecutions rely on human surveillance informants who work with law enforcement to provide information about the alleged criminal activities of others in exchange for criminal leniency.¹⁷ More specifically, a cooperator’s information is used to investigate and prosecute other individuals who may or may not become cooperators. Generally, informants do not receive absolution or a “free pass.” These individuals are still convicted, incarcerated, and sentenced, but their sentences are reduced.

This government endorsed snitching, or what Professor Alexandra Natapoff has called the “snitching institution,” is embedded within the modern criminal legal system.¹⁸ Individuals receive awards for providing information, although the reward is not monetary. It is a system that is enshrined in prosecution policies and modern sentencing law, which specifically recognize reductions in penalty for cooperation. In contrast to the original informer system, it is a highly regulated, formalized, self-perpetuating tool of government control that operates within our very modern criminal legal system.

As described, over hundreds of years, methods for surveilling Black communities evolved from informal, street-based human surveillance by individuals and communities to formalized government-backed systems of human surveillance. Moreover, as technology has advanced, so too have surveillance technologies. Today, government agents monitor online spaces, particularly social media and virtual platforms.¹⁹ Over

16. See Earl Smith and Angela J. Hattery, *Incarceration: A Tool for Racial Segregation and Labor Exploitation*, 15 RACE, GENDER & CLASS J. 79, 79, 87-90 (2008) (“As a tool of segregation, incarceration not only removes African Americans as competition in a tight labor market, but takes those who were formerly ‘unexploitable’ and transforms them into labor that can be exploited for profit through their work in prison industries.”).

17. See Dennis, *A Snitch in Time* at 332; see also See MALACHI L. HARNEY & JOHN C. CROSS, *THE INFORMER IN LAW ENFORCEMENT* 12, 14 (2d ed. 1968) (discussing former law enforcement officers’ recognition of the necessity of informants); Rick Hampson, *Anti-snitch Campaign Riles Police, Prosecutors*, USA TODAY (Mar. 29, 2006, 1:00 PM), https://usatoday30.usatoday.com/news/nation/2006-03-28-stop-snitching_x.htm [<https://perma.cc/8BE5-G93E>] (quoting Pittsburgh police commander: “Informers are a necessary evil”).

18. See ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 1-3 (2009) [hereinafter NATAPOFF, *CRIMINAL INFORMANTS*]; see also Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 645 (2004) [hereinafter Natapoff, *Communal Consequences*].

19. See Dennis, *Mass Surveillance and Black Legal History*; see also Jonah Engel Bromwich, Daniel Victor & Mike Isaac, *Police Use Surveillance Tool to Scan Social Media*, A.C.L.U. Says, *The New York Times* (Oct. 11, 2016), <https://www.nytimes.com/2016/10/12/technology/aclu-facebook-twitter-instagram-geofeedia.html> [<https://perma.cc/UMD3-BEQU>].

time, this move from low-tech to high-tech surveillance has allowed governments to readily surveil not just individuals but entire networks and communities, and such data can then be amassed and analyzed for policing and prosecution. Researchers in many disciplines have taken notice and begun to identify and explore the racial and class distinctions and impacts of this new technology-driven form of surveillance and data collection.

Despite government efforts to use surveillance as a means of racial control and to capitalize on racial or ethnic resources, Black communities have employed various means of resistance to combat the harms of surveillance, both historically and today. During antebellum slavery Black people reverted to native African language and used coded language, music and song that whites were unable to understand, in order to organize work slowdowns, facilitate escapes, or plan illicit meet-ups.²⁰ Additionally, Blacks frustrated surveillance by maintaining close confidences and being unwilling to reveal information to other individuals, especially whites, through a “code of silence.”²¹ For example, Blacks might refuse to share information about community members with white overseers and patrollers charged with controlling enslaved and free Blacks. Also, while organizing the infamous, quite successful rebellion in Southampton Virginia in 1831,²² Nat Turner—an enslaved Black man—told only a small group of men about his plans and provided anyone who agreed to be involved with very few organizing details.²³ Through this strategy, he was able to avoid the plot being discovered and quelled in advance. Today, this unwillingness to share information with the police, and government officials more broadly, continues to hold among some segments of the Black community, although the ethos is not without critique.

In conclusion, whether government surveillance is used to control or capitalize on the resources and labor of a particular group or collect information about particular groups that would otherwise be unknown

20. See Dennis, *A Snitch in Time* at 318-19.

21. *Id.* at 319 (explaining that there is support for the proposition that Blacks on the whole adhered to a code of silence against providing incriminating information about other Blacks to Whites).

22. See Dennis, *A Snitch in Time* at 329; see also Jennifer L. Larson, *A Rebellion to Remember: The Legacy of Nat Turner*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/highlights/turner.html> [<https://perma.cc/DF3C-M5HH>] (last visited Apr. 3 2022); U.S. Dep't of Interior, *Slave Rebellions*, NATIONAL PARK SERVICE, http://www.nps.gov/subjects/ugrr/discover_history/slave-rebellions.htm [<https://perma.cc/Q7PN-GPKL>] (last updated Sept. 6, 2011).

23. See Dennis, *A Snitch in Time* at 329; see also NAT TURNER & THOMAS R. GRAY, THE CONFESSIONS OF NAT TURNER, THE LEADER OF THE LATE INSURRECTION IN SOUTHAMPTON, VA. AS FULLY AND VOLUNTARILY MADE TO THOMAS R. GRAY 10-11 (Richmond, Thomas R. Gray 1832).

to the government, we should contemplate that the modern consequences of police and government surveillance are fully well intended. Surveillance contributes to, maintains, and exacerbates racial, ethnic, and socioeconomic disparities in society. This was evident during antebellum slavery and the Civil Rights and Black Power movements and remains apparent during this era of mass incarceration.²⁴ As we move into the next phase of surveillance, Martin Luther King Junior’s life and legacy serve as a harsh reminder of what can happen if government surveillance goes unchecked, unregulated, and without accountability.

24. Cf. Shane Bauer, *The Origins of Prison Slavery*, Slate (Oct. 20, 2018), <https://slate.com/news-and-politics/2018/10/origin-prison-slavery-shane-bauer-american-prison-excerpt.html> [<https://perma.cc/UT2X-Y9F6>].

