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THE SURVEILLANCE GAP: THE HARMS OF EXTREME PRIVACY AND DATA MARGINALIZATION

MICHELE GILMAN[∞] AND REBECCA GREEN^{∞∞}

ABSTRACT

We live in an age of unprecedented surveillance, enhanced by modern technology, prompting some to suggest that privacy is dead. Previous scholarship suggests that no subset of the population feels this phenomenon more than marginalized communities. Those who rely on public benefits, for example, must turn over personal information and submit to government surveillance far more routinely than wealthier citizens who enjoy greater opportunity to protect their privacy and the ready funds to secure it. This article illuminates the other end of the spectrum, arguing that many individuals who may value government and nonprofit services and legal protections fail to enjoy these benefits because they reside in a “surveillance gap.” These people include undocumented immigrants, day laborers, homeless persons, and people with felony conviction histories suffering collateral consequences of their convictions. Members of these groups often remain outside of the mainstream data flows and institutional attachments necessary to flourish in American society. The harms that surveillance gap residents experience can be severe, such as physical and mental health injuries and lack of economic stability, as well as data marginalization and resulting invisibility to policymakers. In short, having too much privacy can be as injurious as having too little.

The sources of the surveillance gap range from attempts to contain and control marginalized groups to data silos to economic exploitation. This article explores the boundaries of the surveillance gap, evaluates how this emerging concept fits within existing privacy paradigms and theoretical frameworks, and suggests possible solutions to enhance the autonomy and dignity of marginalized people within the surveillance gap.

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I.

INTRODUCTION

Although we live in a highly surveilled society, some people among us are functionally invisible. For example, low-wage workers—many of whom are undocumented immigrants—toil out of sight in an underground economy. A lack of a conventional paper trail or pay stub system linking workers to employers exposes these workers to potential wage theft and dangerous working conditions.¹ While these workers are perilously out of reach of government and nonprofit organizations that could otherwise provide assistance,² they are also subject to heightened forms of surveillance, typically under the increasingly watchful eye of agencies like Immigration and Customs Enforcement. Likewise, homeless persons' lives are defined by extremes: although they tend to live their lives in public, they are simultaneously governed by laws that criminalize their behavior, steadily pushing them out of view. Tellingly, when former Governor of Virginia Terry McAuliffe sought to restore the ability to vote to constituents who had committed felony crimes, his office was unable to find thousands of people—people who at one point spent time in the prison and parole systems where their whereabouts were always known to authorities.³ These examples illustrate that

1. See Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 659–60 (2014) (“A coarse definition of day labor is temporary work in which the work, and often the workers, lack documentation.”).

2. *Infra* Part II.B.

3. See *Howell v. McAuliffe*, 788 S.E. 2d 706, 710 (2016) (“McAuliffe’s Executive Order stated that it removed the political disabilities of approximately 206,000 Virginians who had been convicted of a felony but who had completed their sentences of incarceration and any periods of supervised release, including probation and parole.”); ACLU OF VA., ACLU OF VIRGINIA

marginalized people experience privacy differently than most Americans. Specifically, they experience privacy extremes—being seen or tracked too much or too little.

Existing privacy scholarship has largely focused on the harms derived from too little privacy, and, in this vein, several scholars have highlighted the particularly intense surveillance of low-income people.⁴ This article examines the other end of the spectrum—the surveillance gap. Life in the surveillance gap can be isolating, stigmatizing, dangerous, and harmful to a person’s physical and mental health. For one, legal protections available to other members of society remain out of reach to those in the surveillance gap. People also lose out on potential sources of economic and social support, because those who seek to provide services to disadvantaged members of our society often find it nearly impossible to reach them. Moreover, those who fall within the surveillance gap are not included within big data streams that ultimately shape public policy, thus leaving out their experiences and needs from the calculus that goes into creating policy.⁵ Frustratingly, the challenges facing these groups remain invisible, further entrenching these groups’ marginalization.

The surveillance gap has multiple causes, ranging from data silos to poor data sharing, and from benign neglect to administrative systems that purposefully exclude certain people. This article seeks to identify and understand the causes, contours, and consequences of the surveillance gap and to outline legal and policy tools for addressing it. Part II provides case studies of populations living in the surveillance gap, including undocumented immigrants, day laborers, homeless persons, and people with felony conviction histories. Part III situates the surveillance gap within several scholarly streams. First, it assesses the surveillance gap through the lens of scholarship that differentiates between privacy harms experienced by varying groups. Second, it builds on insights from feminist legal theory involving the public/private binary and the harms associated with having too much privacy, wrestling with the tensions identified by feminists between

CHALLENGES GOVERNOR MCDONNELL TO RESTORE VOTING RIGHTS TO GREATEST NUMBER POSSIBLE (June 25, 2013), <https://acluva.org/en/press-releases/aclu-virginia-challenges-governor-mcdonnell-restore-voting-rights-greatest-number> [<https://perma.cc/J9AK-L4E5>] (noting that over 350,000 disenfranchised Virginians awaited restoration of their rights).

4. See, e.g., Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1392–95 (2012) [hereinafter *Class Differential*]; Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEM. 317, 331–32 (2014); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, U.C. IRVINE L. REV. 297, 312–21 (2013); see generally VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2017) (describing how digital data collection and algorithmic decision-making processes target and harm the poor); KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017) (describing how poor mothers in the United States lack a right to privacy); JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE AND THE LIMITS OF PRIVACY* (2001) (describing the hyper-surveillance and lack of privacy rights of a population of women on public assistance in rural Appalachia).

5. DANIEL CASTRO, *CTR. ON DATA INNOVATION, THE RISE OF DATA POVERTY IN AMERICA* (Sept. 10, 2014), <http://www2.datainnovation.org/2014-data-poverty.pdf> [<https://perma.cc/J7Y7-FB7Q>].

liberalism's ideals and individuals' lived realities. Third, it examines notions of "choice" and "consent" in consumer and criminal privacy law, testing whether such frameworks are meaningful with regard to marginalized groups. Fourth, it adds a new dimension to emerging concepts of privacy as contextual. Fifth, it reviews fundamental rights theory's impact on the surveillance gap, positing that the gap cannot be found in legal regimes that view privacy as a fundamental human right, such as in the European Union. Part IV suggests ways to address harms that arise in the surveillance gap while also respecting desirable forms of privacy and the dignity and autonomy of marginalized persons.

II.

LIFE WITHIN THE SURVEILLANCE GAP

The rise of the surveillance state is well documented.⁶ Both state and non-state institutions routinely record individual actions to an unprecedented degree. Americans have famously been warned: "[p]rivacy is dead, get over it."⁷ The so-called death of privacy stems from two main sources. First are the increasingly sophisticated tools that the government uses to monitor and track the populace. Fear of the government's abuse of these tools has prompted some federal and state laws to protect Americans' privacy,⁸ although government surveillance at all levels is ever expanding and broader than most people realize.⁹ The second source derives from the private sector. To say that companies have come to appreciate the value of consumer data is a gross understatement. Companies now regularly collect, aggregate, buy, and sell consumer data on virtually every aspect of people's lives, including buying preferences, health status, criminal and voting histories, and physical whereabouts.¹⁰ For the modern citizen, this level of surveillance can be a form of control; it can be benign, helpful, or harmful, often

6. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); Kevin D. Haggerty & Richard V. Ericson, *The Surveillant Assemblage*, 51 *BRITISH J. SOC.* 605 (2000).

7. See Jeffrey Bellin, *eHearsay*, 98 *MINN. L. REV.* 7, 18 (2013) (discussing source of the quote); see also Mary Kay Mallonee & Eugene Scott, *Comey: 'There Is No Such Thing as Absolute Privacy in America'*, CNN (Mar. 9, 2017), <http://www.cnn.com/2017/03/08/politics/james-comey-privacy-cybersecurity/index.html> [<https://perma.cc/F6XG-9ULF>]; Marshall Kirkpatrick, *Facebook's Zuckerberg Says the Age of Privacy Is Over*, *READWRITEWEB* (Jan. 9, 2010, 9:25 PM), https://readwrite.com/2010/01/09/facebooks_zuckerberg_says_the_age_of_privacy_is_ov/ [<https://perma.cc/T5S7-NKDK>].

8. See, e.g., the Privacy Act, 5 U.S.C. § 552a, and the Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended at 18 U.S.C. §§ 2510–22, 2701–12, 3121–26 (2012)), and their state equivalents.

9. See generally JENNIFER STISA GRANICK, *AMERICAN SPIES: MODERN SURVEILLANCE, WHY YOU SHOULD CARE, AND WHAT TO DO ABOUT IT* 9–26 (2017).

10. See generally DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* (2004).

depending on the perspective of the surveilled.¹¹ Increasingly, large-scale data sharing between different levels of government and private industry blurs public/private distinctions. For instance, marketers build profiles of Americans using data from public databases and individual online browsing histories, while government agencies such as law enforcement purchase predictive analytic systems from private companies, which build their algorithms using combined public and private sources of data.¹² Together, government and private-sector surveillance have created the sense that Americans are universally tracked and that few—except those living purposely “off the grid”—are able to evade government or private-sector surveillance.

While this lack of privacy has raised increasingly vocal concerns, the contemporary phenomenon of non-surveillance—that is, systemic invisibility of large portions of certain classes of people living in the United States—has received less attention. We call this the “surveillance gap,” although we acknowledge that the term is imperfect. While the concept of surveillance is commonly associated with government control of its citizenry, some of the harms that we identify occur in the private sphere. Indeed, we adopt a broader notion of “surveillance” altogether, including all “focused, systematic, routine attention to personal details for purposes of influence, management, protection or direction.”¹³ This article thus tracks gaps within a variety of public and private surveillance systems, some of which overlap. We address our attentions to populations that remain outside seemingly omnipresent surveillance systems.¹⁴ The surveillance gap is a condition of invisibility in relation to mainstream society, as well as a difference in how marginalized groups experience privacy.

The phenomenon of “the uncounted” is not new. For decades, certain groups have been left out of this country’s most basic counting exercise: the U.S. Census. Since its inception, the census has suffered from not just inaccuracies, but also what is referred to as the “differential undercount,” or the routine counting of some classes of people more accurately than others.¹⁵ Historically, the classes of

11. For instance, consider Americans’ split reactions to Edward Snowden’s leaks about National Security Agency surveillance of Americans’ phone records. See Orin Kerr, *Edward Snowden’s Impact*, WASH. POST (Apr. 9, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/09/edward-snowdens-impact> [<https://perma.cc/3EJQ-V45X>].

12. Mary Madden, Michele Gilman, Karen Levy & Alice Marwick, *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. U. L. REV. 53, 63, 104–07 (2017).

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

14. By “gap” we do not refer to a space that must be bridged—indeed, for many individuals, the surveillance gap provides a crucial coping mechanism and resistance against oppression. As we discuss *infra* Part IV, the solution for the surveillance gap is not increased surveillance, but rather opportunities for marginalized groups to exercise greater autonomy and enhance their dignity.

15. See, e.g., Jennifer M. Safavian, *Down for the Count: The Constitutional, Political and Policy Related Problems of Census Sampling*, 8 GEO. MASON L. REV. 477, 477–78 (2000) (discussing problems associated with statistical sampling in the U.S. Census); Shane T. Stansbury, *Making Sense of the Census: The Decennial Census Debate and Its Meaning for America’s Ethnic and Racial Minorities*, 31 COLUM. HUM. RTS. L. REV. 403, 404 (2000) (documenting the problem of census “undercounts” and the disproportionate impact on racial and ethnic minorities).

individuals who have received a less accurate count included children, renters, residents of large cities, and racial minorities.¹⁶ This differential undercount is the census equivalent to the surveillance gap. In recent years, the Census Bureau has been forthright about such data collection problems for certain groups, even identifying in a 2016 report a list of groups that present the greatest challenge to its data collection efforts.¹⁷ The Census Bureau uses statistical extrapolation to “count” many who fall in one or more of these categories.¹⁸

Data marginalization in the U.S. Census has real consequences for policy-making in this country, because it impacts federal and state resource allocation, environmental priorities, and even the power of the ballot.¹⁹ The federal government uses census data to allocate hundreds of billions of dollars each year.²⁰ Education, welfare, transportation, and a myriad of other federal programs allocate funds based on census figures.²¹ A perfect example of this reality relates to the core purpose of the U.S. Census: apportionment, or the allocation, based on

16. Nathaniel Persily, *Color By Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 910 (2000). For an excellent history of the U.S. Census, see PETER SKERRY, COUNTING ON THE CENSUS? RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS (2000).

17. The full list of categories includes: children, homeless people, lower-income individuals, those with lower education, non-English-speaking people and/or people who do not have social security numbers, members of racial or ethnic minorities, people who do not have smart phone or Internet access, older individuals, people who live in rural areas, persons with disabilities, people who are angry with the government, and people who live in group quarters. See Memorandum from Director John H. Thompson to Chair Ditas Katague, U.S. Dep’t of Commerce, U.S. Census Bureau (Oct. 26, 2016), https://www2.census.gov/cac/nac/reports/2016-10-responses-admin_internet-wg.pdf [<https://perma.cc/X84J-QP8B>].

18. For a fascinating article on the legal battles surrounding, inter alia, statistical sampling in the U.S. Census, see Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755 (2011).

19. See Marisa Hotchkiss & Jessica Phelan, *Uses of Census Bureau Data in Federal Funds Distribution: A New Design for the 21st Century*, CENSUS.GOV (Sept. 2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf> [<https://perma.cc/M9JT-YTZ6>] (illustrating in Table 1 the billions of dollars allocated to programs such as Head Start, Low Income Energy Assistance, and Voting Access for Individuals with Disabilities).

20. See ANDREW REAMER, COUNTING FOR DOLLARS: THE ROLE OF THE DECENNIAL CENSUS IN THE GEOGRAPHIC DISTRIBUTION OF FEDERAL FUNDS 1 (Brookings Inst. ed., 2010), https://www.brookings.edu/wp-content/uploads/2016/06/0309_census_report.pdf [<https://perma.cc/R663-S358>] (“In FY2008, 215 federal domestic assistance programs used census-related data to guide the distribution of \$446.7 billion, 31% of all federal assistance. Census-guided grants accounted for \$419.8 billion, 75% of all federal grant funding.”). For a more recent version of this data, see ANDREW REAMER, COUNTING FOR DOLLARS 2020: THE ROLE OF THE DECENNIAL CENSUS IN THE GEOGRAPHIC DISTRIBUTION OF FEDERAL FUNDS (George Washington Inst. of Pub. Policy ed., 2017), <https://gwipp.gwu.edu/counting-dollars-role-decennial-census-geographic-distribution-federal-funds> [<https://perma.cc/HF8H-4YTW>].

21. See Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 REV. LITIG. 1, 29 (1993) (citing Abe L. Frank, *The 1990 Census: Its Effects on Allocation of Federal Funds to State and Local Governments*, ELECTION CTR. REP. 1 (Apr. 15, 1988)); Hotchkiss & Phelan, *supra* note 19, at 9 (“The 2000 Census short form was designed to collect basic demographic and housing information . . . to be used for apportionment and redistricting.”).

a state's population size, of representatives in the U.S. House of Representatives. When, as is routinely the case, populations are regularly left out of the count, those populations are, by definition, under-represented. As Samuel Issacharoff and Allan Lichtman explain, “[i]t is evident that problems surrounding the undercounting of identifiable groups have predictable political consequences . . . The undercount results in the underrepresentation of areas of minority concentration, particularly inner-city neighborhoods, to the benefit of wealthier suburban and some rural areas.”²²

The “undercount” problem—and controversy over how best to cure it—has consistently plagued census data.²³ In the lead-up to the 2020 Census, the Census Bureau convened a working group focused on improving counting of “Hard to Count” (HTC) groups.²⁴ The working group considered (1) making greater use of local data and imagery, (2) encouraging respondents to use the Internet and telephone, and (3) using administrative records and third-party private-sector databases.²⁵ Tellingly, the working group ultimately recommended against using third-party databases and administrative records to find HTC populations, citing “racialized disparities” in those databases to conclude that they might exacerbate the problem.²⁶ Mistrust and fear of government, particularly in minority and

22. Issacharoff & Lichtman, *supra* note 21, at 4.

23. See Persily, *The Law of the Census*, *supra* note 18, at 758–69 (discussing “‘Sampling,’ Imputation, and the Undercount” and detailing groups historically undercounted).

24. See U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU ADMINISTRATIVE RECORDS, INTERNET, AND HARD TO COUNT WORKING GROUP FOR THE 2020 CENSUS FINAL REPORT (2016), https://www2.census.gov/cac/nac/reports/2016-07-admin_internet-wg-report.pdf [<https://perma.cc/HN59-RCVX>].

25. U.S. GOV’T ACCOUNTABILITY OFFICE, HIGH-RISK SERIES: PROGRESS ON MANY HIGH-RISK AREAS WHILE SUBSTANTIAL EFFORTS NEEDED ON OTHERS, No. GAO-17-375T, 42 (Feb. 15, 2017), <https://www.gao.gov/assets/690/682787.pdf> [<https://perma.cc/9SFJ-6EH2>].

26. U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU ADMINISTRATIVE RECORDS AND THIRD PARTY DATA USE IN THE 2020 CENSUS WORKING GROUP FINAL REPORT 9 (2014), https://www2.census.gov/cac/nac/reports/2014_2020census_wg.pdf [<https://perma.cc/YFJ3-2TEL>] (“The currently available and/or tested government administrative records (AR) exacerbate racialized disparities in the quality of data available to the Census Bureau. Such racialized disparities may be attributed to both ‘coverage’ issues and ‘response’ issues in the AR databases’ quality. Such administrative records databases better ‘cover’ the White population than racial minority populations and are also more likely to produce cross-database response agreement for the White population than for racial minority populations.”). The working group also acknowledged that the census’s use of administrative or other third-party records might violate the privacy interests of people who had shared their data with third parties:

Individuals disclose information within a particular purpose or context with rules in mind at the time of disclosure. When interacting with a firm, a website, another individual, individuals reveal information with an understanding as to who can see that information, how it might be used, and the context in which it is revealed. Disclosure of information is not synonymous with information being public—disclosure is done within expectations of privacy.

Id. at 10.

immigrant communities, seem likely to create additional problems for the count in 2020.²⁷

Putting the undercount dilemma aside, this section examines several populations that evade, avoid, or (by design) fall outside the surveillance radar and discusses why. Though people living in the surveillance gap suffer differing experiences and harms, the case studies discussed below reveal several commonalities. First, the surveillance gap impacts some of the most marginalized and politically powerless groups in American society—undocumented people, day laborers, homeless persons, and people with felony conviction histories. Second, just as surveillance is used as a tool to “exert influence and reproduce power relations,” the surveillance gap can also serve as a social control mechanism.²⁸ Torin Monahan explains that, when it comes to oppressed populations, “surveillance plays an important role in policing bodies and maintaining boundaries between inside and outside, self and other.”²⁹ In other words, careful watching plays a social sorting function.³⁰ The same can be said of the extreme privacy that characterizes the surveillance gap. Third, people resist surveillance systems in subtle and empowering ways,³¹ quietly reclaiming their humanity and asserting their rights. Fourth, people in the surveillance gap often lack fundamental legal rights or access to remedies that protect rights.

27. See Hansi Lo Wang, *Run-Up to 2020 Census Raises Concerns over Security and Politics*, NAT'L PUB. RADIO (Mar. 28, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/28/521789446/run-up-to-census-2020-raises-concerns-over-security-and-politics> [https://perma.cc/R5K9-PE36] (“[The] Census Bureau is facing its longtime challenge of building up public trust. Kenneth Prewitt, a former director of the Census Bureau who served under the Clinton administration, says he’s concerned that the immigration debate could determine the questions asked on the Census.”); Danny Vinik, *Trump’s Threat to the 2020 Census*, POLITICO (Apr. 9, 2017), <http://www.politico.com/agenda/story/2017/04/trumps-threat-to-the-2020-census-000404> [https://perma.cc/C7DK-RVEC] (“‘If you imagine that the federal government is asking for personal information and you feel that the federal government is hostile and that if you were to answer this, perhaps they would use this against you,’ said Terry Ao Minnis, director of the census and voting programs at Asian Americans Advancing Justice.”). Some believe that traditionally undercounted communities will be particularly aggressive advocates for getting counted in the 2020 round. See, e.g., Nick Visser, *The U.S. Won’t Tally LGBT People in 2020 Census*, HUFFINGTON POST (Mar. 29, 2017), http://www.huffingtonpost.com/entry/us-census-lgbt-americans_us_58db3894e4b0cb23e65c6cd9 [https://perma.cc/5E4E-PALJ] (suggesting that undercounted groups plan to fight for their representation).

28. Torin Monahan, *Regulating Belonging: Surveillance, Inequality, and the Cultural Production of Abjections*, 10 J. CULT. ECON. 191, 192 (2017).

29. *Id.*

30. See *id.* (“[S]urveillance is a mode of ‘social sorting’, of categorizing populations according to perceived risk or value and treating those respective groups differently.”) (internal citation omitted).

31. For example, some “welfare recipients subsist by underreporting income, taking side jobs, engaging in barter economies, paying babysitters by letting them use their electronic benefit transfer (EBT) food-stamp cards, and so on . . . as ways for individuals to contest the stigmatized subjectivities that the state and others force upon them.” *Id.* at 193.

A. Undocumented Immigrants

Undocumented immigrants in the United States live at privacy's extremes.³² Approximately eleven million undocumented immigrants live in the United States, making up about four percent of the U.S. population.³³ Over sixty-two percent have lived in the United States for ten years or more.³⁴ Over 400,000 people per year are held in immigration detention in over 250 facilities while they await deportation or while their removal proceedings are pending.³⁵ Detainees are treated like inmates whether they are housed in a prison alongside people convicted of crimes or in a separate detention center.³⁶ Residents of detention centers are thus subject to extreme surveillance.

At the other end of the privacy extreme are the millions of undocumented individuals who live their lives in the shadows, fearful of any action or personal contact with a government agent that could result in deportation. Immigration enforcement was strengthened during the 1980s War on Drugs and further bolstered following the terrorist attacks of 9/11.³⁷ During his time in office, President Barack Obama deported between two to three million people, more than his predecessors combined, although the level of deportations under his watch

32. By “undocumented immigrant” we mean a person who lacks authorization under the United States’ immigration laws to be in the United States. See Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 68–69 (2009). The term was first used in the Supreme Court by Justice Sotomayor in *Mohawk Industries v. Carpenter*, 588 U.S. 100, 103 (2009). See Christina M. Rodriguez, *Uniformity and Integrity in Immigration Law: Lessons From the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J. FORUM 499, 504 (2014).

33. Jeffrey S. Passel & D’Vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, PEW RESEARCH CTR. (Sept. 21, 2016), <http://www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-population-stable-for-half-a-decade/> [<https://perma.cc/5QYU-NX8G>]; Jens Manuel Krogstad, Jeffrey S. Passel & D’Vera Cohn, *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/> [<https://perma.cc/6NK9-USQG>].

34. ROBERT WARREN & DONALD KERWIN, CTR. FOR MIGRATION STUDIES, MASS DEPORTATIONS WOULD IMPOVERISH US FAMILIES AND CREATE IMMENSE SOCIAL COSTS (Aug. 2017), <http://cmsny.org/publications/mass-deportations-impoverish-us-families-create-immense-costs/> [<https://perma.cc/JVE8-UJ8V>].

35. Detention centers are a mix of state and local jails, federal facilities, and for-profit facilities. See Maria Mendoza, *A System in Need of Repair: The Inhumane Treatment of Detainees in the U.S. Immigration Detention System*, 41 N.C. J. INT’L L. 405, 426 (2016).

36. “Both are secure environments in which guards monitor each resident’s movements. Meals, personal and legal visits, access to medical providers, and every other aspect of social life are regulated.” César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1383–84 (2014); see also *id.* at 1390. Despite the similarities to criminal imprisonment, detainees actually have fewer rights than criminal defendants. *Id.* at 1393–97. No judge individually assesses the validity of their detention or their suitability for release—even though the vast majority have deep roots in the United States and thus pose little public safety or flight risk. César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1457 (2015) (noting that eighty-nine percent of undocumented detainees “have never been convicted of a violent offense”).

37. On the history of immigration policing, see Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 12–13 (2014); on the history of immigration detention, see García Hernández, *Immigration Detention as Punishment*, *supra* note 36, at 1360–82.

dropped after 2012 due to shifting immigration enforcement priorities.³⁸ His administration focused on deporting people with criminal convictions and created Deferred Action for Childhood Arrivals (DACA), a program that offered deferred deportations and work permits to as many as 2.1 million children brought into the country as minors.³⁹ President Donald Trump's administration is pursuing more aggressive deportation policies,⁴⁰ including expanding the list of individuals subject to deportation,⁴¹ hiring additional enforcement agents to identify and deport undocumented immigrants;⁴² building a 2000-mile wall on the United States-Mexico border;⁴³ expediting deportation proceedings;⁴⁴ and ending the temporary protected status of approximately 200,000 Salvadorans who have resided in the United States for twenty years.⁴⁵ These aggressive immigration enforcement policies have significantly impacted undocumented immigrants and their surveillance avoidance.

Undocumented immigrants populate the surveillance gap despite, and in part because of, sophisticated efforts to track them. The government deploys a technologically-driven system of surveillance designed to identify, find, and apprehend undocumented people. Government databases, which include

38. See Jennifer M. Chacon, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 247–49 (2017).

39. *Id.* at 251–52.

40. *Id.* at 254.

41. Executive Order: Enhancing Public Safety in the Interior of the United States, WHITE HOUSE OFFICE OF THE PRESS SEC'Y (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> [https://perma.cc/BS3U-F84L].

42. *Id.* at Sec. 7.

43. Executive Order: Border Security and Immigration Enforcement Improvements, WHITE HOUSE OFFICE OF THE PRESS SEC'Y (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements> [https://perma.cc/H4DK-6GL5].

44. Currently, undocumented immigrants with no connection to any criminal conduct—other than being in the country illegally—are being deported in expedited proceedings. See Abigail Hauslohner & Sandhya Somashekhar, *Immigration Authorities Arrested 680 People in Raids Last Week*, WASH. POST (Feb. 13, 2017), https://www.washingtonpost.com/national/immigration-authorities-arrested-680-people-in-raids-last-week/2017/02/13/3659da74-f232-11e6-8d72-263470bf0401_story.html [https://perma.cc/D7G4-43PM] (“[A] DHS official confirmed that the term ‘criminal aliens’ includes anyone who had entered the United States illegally or overstayed or violated the terms of a visa. There are an estimated 11 million people in the United States who fit that profile.”); Lisa Rein, Abigail Hauslohner & Sandya Somashekhar, *Federal Agents Conduct Immigration Enforcement Raids in at Least Six States*, WASH. POST (Feb. 11, 2017), https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5_story.html [https://perma.cc/8D6M-YMMW].

45. See Nick Miroff & David Nakamura, *200,000 Salvadorans May Be Forced to Leave the U.S. as Trump Ends Immigration Protection*, WASH. POST (Jan. 8, 2018), https://www.washingtonpost.com/world/national-security/trump-administration-to-end-provisional-residency-for-200000-salvadorans/2018/01/08/badfde90-f481-11e7-beb6-c8d48830c54d_story.html [https://perma.cc/J789-PSR] (discussing how Salvadorans were permitted to live and work in the United States following devastating earthquakes in El Salvador).

biometric information such as fingerprints and DNA evidence,⁴⁶ are shared and aggregated with private databases that store reams of personal information, resulting in combined profiles used to enforce immigration laws and regulate access to social services, education, health care, driver's licenses, employment, housing, and transportation.⁴⁷ Anil Kalhan has labeled this system the "immigration surveillance state."⁴⁸ One of its goals is to identify people who should be deported; another is to make the level of monitoring so extreme that individuals self-deport. Another result, and just as common even if not explicitly intended, is to force these people to flee into the surveillance gap.⁴⁹

The consequences of hiding from the immigration surveillance state are concrete and harmful. Undocumented immigrants work, but typically off the books, in low-wage, dangerous jobs, where they suffer from wage theft and uncompensated workplace injuries.⁵⁰ They fear contact with government officials, which means they are unlikely to enforce their legal rights in court, seek health care, or use banks or other financial institutions.⁵¹ Reporting suggests that Trump administration policies are greatly exacerbating the problem.⁵² Undocumented

46. DORIS MEISSNER, DONALD KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, *MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* 5 (2013), <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery> [<https://perma.cc/9584-M4GM>] (explaining that "US-VISIT, with its IDENT database, stores more than 148 million fingerprint files that grow by about 10 million annually" and that it is the "largest law enforcement biometric database in the world," accessible by both immigration and law enforcement officials).

47. For example, these integrated systems are used by local police to screen arrestees for deportability, by employers to determine whether a potential hire is authorized to work, and by social service agencies to determine Medicaid eligibility. *See* Kalhan, *supra* note 37, at 27–34.

48. *Id.* at 27. According to Kalhan, the immigration surveillance state consists of:

a kind of immigration panopticism, which eliminates zones in society where immigration status is invisible and irrelevant and puts this large array of public and private actors in the position of identifying individuals and determining immigration status; collecting, analyzing, and storing personal information; screening and identifying potential immigration law violators; and sharing information with federal immigration authorities.

Id. at 61.

49. *Id.*

50. *See infra* Part II.B.

51. Nathalie Martin, *Giving Credit Where Credit Is Due: What We Can Learn from the Banking and Credit Habits of Undocumented Immigrants*, 2015 MICH. ST. L. REV. 989, 1000 (describing a fear of using the legal system), 1001 (describing fraud by lenders), 1009 (describing predatory lending), 1012 (describing under-service of undocumented immigrants by traditional banks) (2015); Carola Suárez-Orozco, Hirokazu Yoshikawa, Robert Teranishi & Marcelo M. Suárez-Orozco, *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. ED. REV. 438, 447 (2011) ("Fear and vigilance shape life in the labyrinth of liminality.").

52. *See* Caitlin Dewey, *Immigrants Are Going Hungry so Trump Won't Deport Them*, WASH. POST (Mar. 16, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/03/16/immigrants-are-now-canceling-their-food-stamps-for-fear-that-trump-will-deport-them> [<https://perma.cc/56WX-97HF>] (describing undocumented immigrants' fear of going to the grocery store).

immigrants have high rates of crime victimization, but fear reporting to police.⁵³ They fall prey to fraud and extortion schemes.⁵⁴ They exhibit high rates of stress, anxiety, and hopelessness.⁵⁵ Today, widespread fear is resulting in undocumented people taking extreme measures to avoid immigration authorities, such as pulling their children out of school and staying locked in their homes⁵⁶—and even cancelling annual cultural celebrations.⁵⁷

Extensive research has recorded the impacts on the 5.5 million children living in undocumented households: “the effects . . . are uniformly negative, with millions of U.S. children and youth at risk of lower educational performance, economic stagnation, blocked mobility, and ambiguous belonging.”⁵⁸ The 1.1 million undocumented children in the United States can suffer health deficits, because parents are scared to take them to doctors, and educational delays, because parents are scared of enrolling them in school.⁵⁹ Likewise, the 4.5 million U.S.-citizen children of undocumented parents suffer from constant fear of family separation.⁶⁰ Even though these children are entitled to government benefits such

53. Michelle Mark, *Trump’s Immigration Crackdown Appears to Be Having an “Alarming” Effect on Public Safety*, BUS. INSIDER (Mar. 27, 2017), <http://www.businessinsider.com/trumps-immigration-ice-order-crackdown-news-alarming-effect-public-safety-2017-3> [https://perma.cc/FX6P-NAPL].

54. Nereida Moreno, *Scam Artists Target Immigrant Communities, Promising Legal Status for Cash*, CHI. TRIB. (May 30, 2017), <http://www.chicagotribune.com/news/immigration/ct-immigration-notary-fraud-met-20170529-story.html> [https://perma.cc/HN3X-XQPE]; Kelly Weill, *Fake ICE Agent Told Immigrants: Pay Me or Get Deported*, DAILY BEAST (Mar. 8, 2017), <http://www.thedailybeast.com/fake-ice-agent-told-immigrants-pay-me-or-get-deported> [https://perma.cc/N22Z-Z8LZ].

55. James S. Gordon, *Living in Fear of Deportation Is Terrible for Your Health*, WASH. POST (Feb. 20, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/02/10/living-in-fear-as-a-refugee-in-the-u-s-is-terrible-for-your-health> [https://perma.cc/A3TB-EGEP].

56. Delphine Schrank, *Trump’s Season of Fear: Inside the Devastation Left by Immigration Raids*, GUARDIAN (Mar. 13, 2017), <https://www.theguardian.com/us-news/2017/mar/13/undocumented-immigration-raids-ice-impact> [https://perma.cc/G7LR-PGT2]; Katherine Q. Seeley & Jess Bidgood, *‘Don’t Open the Door’: How Fear of an Immigration Raid Gripped a City*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/immigration-raid-fear-brockton-massachusetts.html> [https://perma.cc/8MEK-F49T].

57. Christina Silva, *Trump’s Immigration Plan Prompts Immigrants to Cancel Cinco de Mayo Celebration in Philadelphia*, NEWSWEEK (Mar. 20, 2017), <http://www.newsweek.com/trumps-immigration-plan-prompts-immigrants-cancel-cinco-de-mayo-570952> [https://perma.cc/6CA9-WGMG].

58. Suárez-Orozco, Yoshikawa, Teranishi & Suárez-Orozco, *supra* note 51, at 461.

59. *See id.* at 447 (education); Jan Hoffman, *Sick and Afraid, Some Immigrants Forgo Medical Care*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/health/undocumented-immigrants-health-care.html> [https://perma.cc/CQ97-UCU3] (health care).

60. Suárez-Orozco, Yoshikawa, Teranishi & Suárez-Orozco, *supra* note 51, at 443, 449; Luis H. Zayas, Sergio Aguilar-Gaxiola, Hyunwoo Yoon & Guillermina Natera Rey, *The Distress of Citizen-Children with Detained and Deported Parents*, 24 J. CHILD & FAM. STUD. 3213, 3213 (2015).

as childcare subsidies, preschool programs, and food stamps, their parents are often too terrified to apply for benefits on their behalf.⁶¹

In the criminal justice context, Sarah Brayne has identified that law enforcement surveillance systems result in “system avoidance,” or deliberate efforts by individuals to avoid institutions that gather and keep formal records.⁶² Brayne explains that involvement with law enforcement—“from police contact to incarceration”⁶³—makes individuals wary of interacting with “hospitals, banks, employment, and schools,”⁶⁴ likely due to a fear of re-exposure to the criminal justice system.⁶⁵ As described above, undocumented immigrants also undertake such system-avoidance steps.⁶⁶

Whether they are in detention or attempting to avoid it, undocumented immigrants live at privacy’s extremes. The United States’ extensive immigration surveillance system is a creature of law and a tool of control. It seeks to demarcate the worthy citizen from the unworthy usurper, to create a visible structure that signifies immigrant fault for societal problems, and to make life in the United States so untenable that unauthorized immigrants give up trying to come to this country.

B. Day Laborers

The modern workplace is a site of extreme surveillance. Employers routinely require personality and drug tests before hiring and throughout employment; they observe workers through video cameras, monitor keystrokes, listen to telephone calls, review emails and Internet usage, deploy mystery shoppers, and track

61. Zayas, Aguilar-Gaxiola, Yoon & Natera Rey, *supra* note 60, at 3214; *see also* Suárez-Orozco, Yoshikawa, Teranishi & Suárez-Orozco, *supra* note 51, at 447 (describing how parents must discuss with their children plans for their care in the event of a parent’s deportation as “a unique parental ethnic-racial socialization to the realities of a shadowed existence”); Annie Lowrey, *Trump’s Anti-Immigrant Policies Are Scaring Eligible Families Away from the Safety Net*, ATLANTIC (Mar. 24, 2017), <https://www.theatlantic.com/business/archive/2017/03/trump-safety-net-latino-families/520779/> [<https://perma.cc/5WKR-T4B9>] (noting that just living under the cloud of deportability puts children in a “constant sense of vulnerability” that creates anxiety and stress levels that “lead to aberrant development trajectories in otherwise healthy children”).

62. Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79(3) AM. SOC. ASS’N 367, 368 (2014).

63. *Id.* at 368.

64. *Id.* at 385–86. These effects start early—for young people, “paternalistic contact with the state may lead people to avoid institutions that promote prosocial adult activity.” *Id.* at 386. All these impacts fall most heavily on disadvantaged and minority populations that face the most extensive surveillance.

65. Brayne, *supra* note 62, at 372, 385.

66. *See supra* notes 52–59 and accompanying text. Given the overlap between the criminal justice and immigration systems in terms of information sharing and incarceration—a phenomenon known as crimmigration, *see* Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration’s Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149, 151–52 (2016)—it is not surprising that system avoidance is creating a surveillance gap for many undocumented immigrants.

movements through GPS or radio frequency devices.⁶⁷ The realities of rampant workplace surveillance are only one extreme; thousands of workers operate beyond the reach of these surveillance regimes and find themselves in the surveillance gap.

One group of such workers is day laborers. On any given day in the United States, approximately 117,600 people⁶⁸ seek work as day laborers in jobs such as construction, landscaping, roofing, and painting, as well as in restaurants and nail salons.⁶⁹ Employers typically hire day laborers on a day-to-day basis at a public site (such as a gas station, street corner, or home improvement store parking lot), where as many as two hundred workers may gather.⁷⁰ The employer and worker negotiate a verbal, short-term employment agreement.⁷¹ Day-labor markets are usually unregulated, and workers are paid in cash;⁷² this is “temporary work in which the work, and often the workers, lack documentation.”⁷³ Earnings are variable, but the median wage for day laborers is \$10 per hour,⁷⁴ meaning that most day laborers remain below the poverty level, as their annual earnings rarely exceed \$15,000.⁷⁵ The market for day labor is driven by employer demands for

67. See Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CALIF. L. REV. 735, 743–44 (2017); Kristie Ball, *Workplace Surveillance: An Overview*, 51 LAB. HIST. 87, 89–90 (2010). These tools are particularly concentrated in the low-wage workforce. See *Class Differential*, *supra* note 4, at 1400–02. Overall, the purposes of workplace surveillance are to maximize worker productivity, protect proprietary information, reduce theft, and increase employee welfare and safety. *Id.* at 1408; Ajunwa, Crawford & Schultz, *supra*, at 739. Yet these systems also have economic and social costs. Studies find that employees suffer physical and mental effects from surveillance, as well as safety hazards. See *id.* at 744. Additional impacts on the bottom line can result from low morale, diminished trust, and high turnover. See *id.* at 745.

68. ABEL VALENZUELA JR., NIK THEODORE, EDWIN MELÉNDEZ & ANA LUZ GONZALEZ, ON THE CORNER: DAY LABOR IN THE UNITED STATES 4 (2006), <http://portlandvoz.org/wp-content/uploads/images/2009/04/national-study.pdf> [<https://perma.cc/FU37-EJMX>].

69. *Id.* at 9; Rebecca Smith, *Legal Protection and Advocacy for Contingent or “Casual” Workers in the United States: A Case Study in Day Labor*, 88 SOC. INDICATORS RES. 197, 203–04 (2008); Nicole Taykhan, *Defying Silence: Immigrant Women Workers, Wage Theft, and Anti-Retaliation Policy in the States*, 32 COLUM. J. GENDER & L. 96, 114 (2016) (discussing tactics used by nail salons, restaurants, and construction companies to avoid paying after an adverse wage theft case judgment).

70. VALENZUELA, THEODORE, MELÉNDEZ & GONZALEZ, *supra* note 68, at 1.

71. *Id.*; Smith, *supra* note 69, at 203; Lee, *supra* note 1, at 661; IMMIGRANTS’ RIGHTS/INTERNATIONAL HUMAN RIGHTS CLINIC, SETON HALL UNIVERSITY SCHOOL OF LAW, DAY LABORERS, WAGE THEFT, AND WORKPLACE JUSTICE IN NEW JERSEY 1 (2011), <https://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/loader.cfm?csModule=security/getfile&PageID=177699> [<https://perma.cc/HSD4-F6GK>] [hereinafter SETON HALL CLINIC].

72. SETON HALL CLINIC, *supra* note 71, at 1.

73. Lee, *supra* note 1, at 559–660. Seventy-five percent of the day-labor workforce is undocumented. See Nalini Junko Negi, *Battling Discrimination and Social Isolation: Psychological Distress Among Latino Day Laborers*, 51 AM. J. COMM. PSYCHOL. 164, 164 (2013); see also Smith, *supra* note 71, at 204.

74. VALENZUELA, THEODORE, MELÉNDEZ & GONZALEZ, *supra* note 68, at 10–11.

75. Smith, *supra* note 69, at 204; SETON HALL CLINIC, *supra* note 71, at 7 (finding in a study of New Jersey laborers weekly income ranging from \$200 to \$400 and an ability to find work for one to three days per week).

worker flexibility, a downtick in industrial and manufacturing jobs, and the number of migrant workers willing to accept payment below market and legally mandated rates.⁷⁶

Numerous studies highlight the vulnerabilities of day laborers. Many day laborers report being victims of wage theft, or the failure to be paid what a worker is owed under law.⁷⁷ Day laborers also toil in dangerous workplaces and suffer high rates of injury. A national study of day laborers found that one in five suffered a work-related injury and that half of those injured did not receive medical care.⁷⁸ Another study found that employers abuse day laborers by denying them adequate breaks for food, water, or rest (44%), abandoning workers at the work site (27%), insulting and threatening workers (28%), and even acting violently toward workers (18%).⁷⁹ These day laborers face extreme social isolation, as their families are often left behind in their home countries, and, while in the United States, these workers avoid mainstream social venues.⁸⁰ In sum, “[i]ts social

76. VALENZUELA, THEODORE, MELÉNDEZ & GONZALEZ, *supra* note 68, at 1–2; Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L.S. L. REV. 417, 429–30 (2005–2006); Edwin J. Meléndez, M. Anne Visser, Nik Theodore & Abel Valenzuela, Jr., *Worker Centers and Day Laborers’ Wages*, 95 SOC. SCI. Q. 835, 835 (2014).

77. Negi, *supra* note 73, at 164. A study of New Jersey’s day laborers found that fifty-four percent of day laborers statewide were paid less than they were promised by at least one employer. See SETON HALL CLINIC, *supra* note 71, at 7. A 2006 national study showed that “[n]early half of all day laborers (49 percent) have been completely denied payment by an employer for work they completed in the two months prior to being surveyed. Similarly, 48 percent have been underpaid by employers during the same time period.” VALENZUELA, THEODORE, MELÉNDEZ & GONZALEZ, *supra* note 68, at 15. In light of the pervasiveness of this practice, it should come as no surprise that wage theft takes many forms:

paying below the legal minimum; not paying for time worked by having workers work “off the clock” before checking in, after clocking out, or by requiring work during unpaid break time; not paying for overtime work at the statutory overtime rate; for tipped employees, expropriating tips that should be the employee’s; or just not paying at all.

Matthew W. Finkin, *From Weight Checking to Wage Checking: Arming Workers to Combat Wage Theft*, 90 IND. L.J. 851, 851 (2015).

78. VALENZUELA, THEODORE, MELÉNDEZ & GONZALEZ, *supra* note 68, at 12–14; Smith, *supra* note 71, at 204; Negi, *supra* note 73, at 164. The Seton Hall study found that twenty-six percent of day laborers were injured severely enough that they could not work. SETON HALL CLINIC, *supra* note 71, at 8. Two-thirds of injured workers lose work time due to injury, while others continue to work despite injuries due to their dire need for income. VALENZUELA, THEODORE, MELÉNDEZ & GONZALEZ, *supra* note 68, at 12. Injuries are caused by hazardous conditions such as chemical exposures; faulty equipment such as poor scaffold construction; lack of protective gear; and lack of safety training. *Id.*

79. VALENZUELA, THEODORE, MELÉNDEZ & GONZALEZ, *supra* note 68, at 15.

80. Negi, *supra* note 73, at 171. Studies of Latina immigrants reveal similar findings of loneliness, isolation, and lack of social support. See Alejandra Hurtado-de-Mendoza, Felisa A. Gonzalez, Adriana Serrano & Stacey Kaltman, *Social Isolation and Perceived Barriers to Establishing Social Networks Among Latina Immigrants*, 53 AM. J. COMMUNITY PSYCHOL. 73, 78 (2014).

status, physical danger, and uncertainty set day labor apart from other forms of work.”⁸¹

All of these abuses are against the law; the Fair Labor Standards Act (FLSA)⁸² sets forth specific pay, overtime, and recordkeeping requirements and covers citizens and non-citizens alike.⁸³ Indeed, courts have held that questions about citizenship status are impermissible in FLSA lawsuits.⁸⁴ Yet the law offers little recourse for day laborers. To begin with, because the majority of day laborers are undocumented, they live in fear that employers will retaliate against them by calling immigration authorities if they complain or make demands.⁸⁵

Day laborers who are willing to pursue their statutory rights face additional challenges. Government enforcement agencies are notoriously reluctant, understaffed, and ineffective in policing day labor violations.⁸⁶ This is compounded by language barriers and lack of information about legal rights.⁸⁷ Private lawsuits are hard to bring because the low dollar value of a claim deters private attorneys from taking on these claims.⁸⁸ Even for pro bono and public interest attorneys, lawsuits can be challenging because the employers frequently exist off the books, with no legal status, identifiable address, or entity to sue.⁸⁹ Collecting judgments is often fruitless as many employers develop “tactics to successfully avoid paying judgments even after losing the case,” such as declaring bankruptcy, selling their property, and creating bogus shell companies to hide

81. Lee, *supra* note 1, at 660; *see also* Jayesh M. Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 SETON HALL L. REV. 813, 831–32, 849–52 (2016).

82. Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201, *et seq.* (2014).

83. *See* Smith, *supra* note 71, at 205; *see also* Lucas v. Jerusalem Cafe, LLC, 721 F.3d 927, 933 (8th Cir. 2013) (“[E]mployers who unlawfully hire unauthorized aliens must otherwise comply with federal employment laws.”).

84. Jennifer J. Lee, *Outsiders Looking In: Advancing the Immigrant Worker Movement Through Strategic Mainstreaming*, 2014 UTAH L. REV. 1063, 1075 (2014) (citing cases).

85. *Id.*; SETON HALL CLINIC, *supra* note 71, at 1.

86. Smith, *supra* note 71, at 201; Lee, *supra* note 1, at 662; SETON HALL CLINIC, *supra* note 71, at 10; Finkin, *supra* note 77, at 855 (“This system has not proven equal to the task.”).

87. Lee, *supra* note 1, at 662; SETON HALL CLINIC, *supra* note 71, at 1.

88. Lee, *supra* note 1, at 662. The Seton Hall Clinic study found that only 2.6% of workers filed complaints with the state labor agency; 3.4% filed in small claims court; and 26% reported that employers threatened to report them to immigration authorities. SETON HALL CLINIC, *supra* note 71, at 9.

89. Rebecca J. Livengood, *Organizing for Structural Change: The Potential and Promise of Worker Centers*, 48 HARV. C.R.-C.L. L. REV. 325, 346–47 (2013) (“Employers who flout wage and hour regulations may also violate other laws regarding business corporations, and these violations may make employers more difficult to sue and to bind via judgment.”).

assets.⁹⁰ There is often no paper trail, such as pay stubs,⁹¹ time sheets, or tax reporting forms,⁹² linking these workers to their employers.

In addition, employers commonly misclassify day laborers as independent contractors, removing them from the purview of legal protections for wages and against discrimination, as well as workplace benefits such as workers compensation, unemployment insurance, and social security disability.⁹³ In turn, workers lack the legal knowledge or resources to challenge those misclassifications.⁹⁴ Many day laborers are hired by fly-by-night subcontractors, allowing companies at the top of the contracting chain to wash their hands of liability.⁹⁵ Making matters worse, many employers deem the costs of complying with compensation laws in the short term to be greater than the long-term costs of violating said laws, leading them to shirk their legal obligations.⁹⁶

Simultaneously, some jurisdictions have enacted anti-solicitation statutes to crack down on day-labor sites due to perceived threats to community safety and potential economic injuries to local businesses.⁹⁷ These laws push day laborers further into the surveillance gap. Moreover, when day laborers organize to claim and demand their rights—essential forms of resistance to the surveillance gap⁹⁸—they face increased pushback through employer lawsuits⁹⁹ and politically motivated restrictions on organizing.¹⁰⁰ Thus, day laborers find themselves in a

90. Taykman, *supra* note 69, at 114.

91. See, e.g., Arturo Gonzalez, *Day Labor in the Golden State*, CAL. ECON. POL'Y, July 2007, at 5, http://www.ppic.org/content/pubs/cep/EP_707AGEP.pdf [<https://perma.cc/HF5H-DMYM>]. “In most cases, employers and workers publicly negotiate terms of employment, including the type and length of task to be performed and the payment, typically in cash, for the work provided.” *Id.* at 2. One of this article’s co-authors, Michele Gilman, directs a law clinic that handles wage and hour claims. In the clinic’s experience working with day laborers, it is often impossible to obtain documentation of hours worked or pay earned, because employers pay in cash and/or fail to create such records.

92. Lee, *supra* note 1, at 660.

93. See Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and Its Impact on Low Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 355, 362 (2013); David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 140–41, 144–45 (2015).

94. See Raja Raghunath, *A Founding Failure of Enforcement: Freedmen, Day Laborers, and the Perils of an Ineffectual State*, 18 CUNY L. REV. 47, 60–63 (2014).

95. See Ruan, *supra* note 93, at 359.

96. See Finkin, *supra* note 77, at 855.

97. Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617, 1627–28 (2011); Negi, *supra* note 73, at 164; Smith, *supra* note 71, at 210 (noting that some of these statutes have been overturned as free speech violations).

98. See *infra* Part IV.

99. Nicole Hallett, *From the Picket Line to the Courtroom: A Labor Organizing Privilege to Protect Workers*, 39 N.Y.U. REV. L. & SOC. CHANGE 475, 478–79 (2015) (describing employer litigation tactics to squelch day-labor organizing).

100. See Cummings, *supra* note 97, at 1620 (discussing anti-solicitation ordinances designed to push day laborers out of certain areas); Ben Penn & Tyrone Richardson, *Labor Department Looking into Worker Center Scrutiny: Acosta*, BLOOMBERG LAW (Nov. 15, 2017), <https://www.bna.com/labor-department-looking-n73014472124/> [<https://perma.cc/BUT5-XSHY>]

constant push-and-pull between remaining in the surveillance gap and surfacing to assert their rights, facing the associated risks of doing so.

C. Homeless People

Homeless people live in a polarized state of privacy—on the one hand, they live their lives in public; on the other hand, they are pushed to the margins of public spaces and often treated as invisible by passers-by. According to a 2015 study by the National Law Center on Homelessness & Poverty, “at least 2.5 to 3.5 million Americans sleep in shelters, transitional housing, and public places [and] an additional 7.4 million have lost their own homes and are doubled-up with others due to economic necessity.”¹⁰¹ One-third of homeless people live outside, exposing their belongings and personal lives to the public;¹⁰² about two-thirds of homeless persons reside in some form of shelter or transitional housing.¹⁰³ These shelter settings are privacy-stripping by their very nature, due to a status quo defined by overcrowding and pervasive surveillance systems.¹⁰⁴ Regardless of whether they have found shelter or live their lives out in the open, homeless individuals find that their destitution is often on display.¹⁰⁵ Yet, paradoxically, homeless people simultaneously inhabit a state of invisibility, a form of extreme privacy brought about by societal norms and laws that push people without homes to society’s margins. As Don Mitchell and Nik Heynan describe, “[l]aws (or increased policing) that make sleeping more difficult and dangerous, panhandling riskier, and tending to bodily needs all but impossible, push the homeless as well as the housed poor more deeply into the urban shadows.”¹⁰⁶

Surveillance of homeless people comes in many forms: homeless people hoping to secure a place in a shelter must answer personal intake questions and submit to background checks as the price of admission. To remain in the shelter,

(discussing the Trump administration’s attempts to define worker centers as unions in order to subject them to financial disclosure rules).

101. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES (Jan. 2015), https://www.nlchp.org/documents/Homeless_Stats_Fact_Sheet [<https://perma.cc/T8JE-UHT7>].

102. U.S. DEP’T OF HOUSING & URBAN DEV., THE 2016 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 8 (2016), <https://www.hudexchange.info/resources/documents/2016-AHAR-Part-1.pdf> [<https://perma.cc/Z3A3-Z7S7>] [hereinafter AHAR].

103. *Id.*

104. *See infra* notes 140–141 and accompanying text.

105. “[T]he hallmark of homelessness is a lack of private seclusion, so people experiencing homelessness endure conditions of persistent, nearly inescapable visibility.” Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 6 (2016). Homelessness is associated with vice, laziness, and pathology. *See id.* at 7, 14; Tony Sparks, *Broke Not Broken: Rights, Privacy, and Homelessness in Seattle*, 31 URB. GEOGRAPHY 842, 843 (2010).

106. Don Mitchell & Nik Heynan, *The Geography of Survival and the Right to the City: Speculations on Surveillance, Legal Innovation, and the Criminalization of Intervention*, 30 URB. GEOGRAPHY 611, 613 (2009).

they must acquiesce to extensive and prolonged surveillance.¹⁰⁷ Further, to access certain social services, homeless people must provide answers to highly personal questions, including information about HIV/AIDS status, mental health and substance abuse history, and their experience with domestic violence.¹⁰⁸ Their responses are funneled into the nationwide Homeless Management Information System (HMIS), a database designed to assess and measure needs and to coordinate a response through homeless services.¹⁰⁹ In addition, and specifically for homeless families, the school systems' residency verification requirements can worsen housing instability. For example, if, as a result of a school inquiry, a landlord learns that unauthorized occupants are living in a unit, she might evict the occupants—people who likely have no other place to go.¹¹⁰

The law has limited capacity to protect homeless individuals from these privacy intrusions, largely because the Fourth Amendment's prohibition on unreasonable government searches and seizures generally does not apply to people and personal items in public spaces.¹¹¹ Yet the activities of homeless people are, by necessity, "conducted in public; [homeless people] typically make their 'home' on property that they are not entitled to be on; their belongings and activities are on 'open fields' which common passersby can easily see; and they are almost perpetually voluntarily exposing themselves to the public."¹¹² *United States v. Jones*,¹¹³ which held that it is an unconstitutional physical trespass for police to

107. See Sparks, *supra* note 105, at 856 (describing a state of "heightened surveillance and nearly constant hypervisibility").

108. J.C. O'Brien, *Loose Standards, Tight Lips: Why Easy Access to Client Data Can Undermine Homeless Management Information Systems*, 35 *FORDHAM URB. L.J.* 673, 688 (2007).

109. See *HMIS Data and Technical Standards*, U.S. DEP'T OF HOUS. & URBAN DEV., <https://www.hudexchange.info/programs/hmis/hmis-data-and-technical-standards/> [https://perma.cc/L56W-ZFA8] (last visited Nov. 7, 2017).

110. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *HOMELESS STUDENTS COUNT: HOW STATES AND SCHOOL DISTRICTS CAN COMPLY WITH THE NEW MCKINNEY-VENTO EDUCATION LAW POST-ESSA 8* (2016), <https://www.nlchp.org/documents/Homeless-Students-Count> [https://perma.cc/PN22-CYRC] ("[School systems] must use due care to ensure that residency verification policies, McKinney-Vento eligibility determinations, and other procedures designed to prevent fraud accommodate the unique needs of homeless students and/or their families, and do no erect barriers to their identification or immediate enrollment.").

111. On personal property, see generally Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 *YALE L.J.* 946 (2016). Brady discusses cases involving property of homeless persons, concluding that homeless persons fare poorly before courts that focus only on the location of privacy, but do better before courts that look at the overall context of the item and the expectations of its owner.

112. Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 *U. MD. L. J. RACE, RELIGION, GENDER & CLASS* 240, 250 (2014); see also Lindsay J. Gus, *The Forgotten Residents: Defining the Fourth Amendment "House" to the Detriment of the Homeless*, 2016 *U. CHI. LEGAL F.* 769 (2016); Elizabeth Schutz, *The Fourth Amendment Rights of the Homeless*, 60 *FORDHAM L. REV.* 1003 (1992); Justin Stec, *Why the Homeless Are Denied Personhood Under the Law: Toward Contextualizing the Reasonableness Standard in Search and Seizure Jurisprudence*, 3 *RUTGERS J.L. & URB. POL'Y* 321 (2006); David H. Steinberg, *Constructing Homes for the Homeless? Searching for a Fourth Amendment Standard*, 41 *DUKE L.J.* 1508 (1992).

113. *United States v. Jones*, 565 U.S. 400 (2012).

put a GPS on a person's car, has spurred hope that the Supreme Court might expand notions of privacy outside the home.¹¹⁴ Yet Kami Chavis Simmons argues that this is unlikely to help the poor, because it does not reach “the face-to-face law enforcement interactions that many residents of poor, urban neighborhoods face on a daily basis.”¹¹⁵ For these reasons, it is widely recognized that homeless people lack the legal or spatial privacy granted to people who can afford homes. By contrast, it is less recognized how homelessness can result in *too much* privacy—or a surveillance gap.

Homeless people inhabit the surveillance gap for several reasons. To begin with, homeless people who live outside (roughly one-third of the homeless population) face a barrage of laws designed to push them out of sight.¹¹⁶ Across the country, cities have enacted laws that essentially criminalize homelessness—these laws prohibit camping in public; sleeping in public; sleeping in vehicles; sitting or lying down in public; panhandling; loitering, loafing, and vagrancy; living in vehicles; bathing in public fountains; urinating or defecating in public; using shopping carts in public parks; storing personal property on public property; and sharing food in public.¹¹⁷ At the same time, local law enforcement agents issue “move-on” orders and trespass warnings to homeless people and engage in sweeps of homeless camps, removing homeless people from public space and destroying their belongings.¹¹⁸ Ironically, surveillance technologies deployed by law enforcement, such as closed-circuit television (CCTV) cameras positioned around cities, operate to push homeless people into the surveillance gap.¹¹⁹ Together, these statutes and enforcement strategies disperse the homeless to secluded places, where the cycle of “banishment” and “eviction” begins again.¹²⁰ As a result, homeless persons dedicate “more resources of time, energy, and money into not appearing homeless, or disappearing into darker and more dangerous recesses of the urban fabric.”¹²¹ Criminalization policies that make it harder for people to exit homelessness—such as expensive fines and the collateral

114. See Simmons, *supra* note 112, at 240.

115. *Id.* at 255.

116. See NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 10–12, 22–28 (2016), <https://www.nlchp.org/documents/Housing-Not-Handcuffs> [https://perma.cc/S2HQ-UEPD] [hereinafter HOUSING NOT HANDCUFFS]; Jordan Bailey, *Food-Sharing Restrictions: A New Method of Criminalizing Homelessness in American Cities*, 23 GEO. J. ON POVERTY L. & POL'Y 273, 277–80 (2016). On food sharing restrictions, see also Mitchell & Heynan, *supra* note 106, at 623–24.

117. HOUSING NOT HANDCUFFS, *supra* note 116, at 22–28.

118. *Id.* at 12, 30–31; see also Mitchell & Heynan, *supra* note 106, at 617.

119. See Mitchell & Heynan, *supra* note 106, at 618–19. CCTV cameras are also positioned above dumpsters in order to discourage dumpster diving and to prevent homeless people from sleeping in them. *Id.* at 618.

120. HOUSING NOT HANDCUFFS, *supra* note 116, at 12, 30.

121. See Sig Langegger & Stephen Koester, INVISIBLE HOMELESSNESS: ANONYMITY, EXPOSURE AND THE RIGHT TO THE CITY 26, http://www.ucdenver.edu/academics/colleges/CLAS/Departments/PoliticalScience/Research/Documents/Homelessness%20Research/Invisible%20Homelessness_Langegger_Koester.pdf [https://perma.cc/6DFT-GQKY].

consequences of convictions—create barriers to employment and secure housing, which in turn perpetuate residence in the surveillance gap.¹²²

Lawsuits challenging municipal restrictions against homeless people have had mixed results.¹²³ Most successful have been challenges to food-sharing laws in which the plaintiffs are not homeless people, but rather charities claiming violations of their associational and free-exercise-of-religion rights.¹²⁴ The number of laws that force homeless people into the surveillance gap has increased across the board, in some cases dramatically, over the last decade.¹²⁵ During this time, courts have found ways to distinguish groundbreaking cases such as *Pottinger v. City of Miami*,¹²⁶ which held that it is unconstitutional to arrest homeless individuals for engaging in “life sustaining conduct” such as sleeping, sitting, or standing in certain public places.¹²⁷ Finally, even when a court strikes down an anti-homeless ordinance, the remedy awarded tends to fall short of addressing the underlying structural problem: a lack of available housing.¹²⁸

Unaccompanied homeless children represent a particularly distressing subsection of the surveillance gap population.¹²⁹ An estimated 1.7 million

122. HOUSING NOT HANDCUFFS, *supra* note 116, at 13.

123. See Marc L. Roark, *Homelessness at the Cathedral*, 80 MO. L. REV. 53, 126–27 (2015) (describing legal successes and subsequent development of doctrine); see also Rankin, *supra* note 105, at 31–36 (discussing First Amendment challenges to anti-begging ordinances), 48–50 (discussing Eighth Amendment challenges to criminalization of homelessness laws).

124. See Bailey, *supra* note 116, at 289–90. In particular, cities have had better success in defending food-sharing laws that restrict, rather than forbid, food sharing. *Id.* at 290 (“A City determined to keep charities from feeding individuals experiencing homelessness will always be able to find permitted alternatives if a preferred method is defeated in litigation.”).

125. HOUSING NOT HANDCUFFS, *supra* note 116, at 10–11. For instance, camping bans have increased by 69%; sleeping in public bans have increased by 31%; bans on sitting or lying down in public have increased by 52%; bans on loitering, loafing, and vagrancy have increased by 88%; bans on living in vehicles have increased by 143%; and panhandling bans have increased by 43%.

126. *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

127. The arrests violated the Eighth Amendment ban on cruel and unusual punishments, the Fourth Amendment prohibition on warrantless searches and seizures, the Due Process Clause, and the right to travel. *Id.* at 1565–77. However, the original *Pottinger* holding was narrowed considerably in subsequent years. For an overview of litigation results, see Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL’Y 545, 555–57 (2006).

128. See Eric S. Tars, Heather Maria Johnson, Tristia Bauman & Maria Foscarnis, *Can I Get Some Remedy?: Criminalization of Homelessness and the Obligation to Provide an Effective Remedy*, 45 COLUM. HUM. RTS. L. REV. 738, 743 (2014) (discussing the *Pottinger* case and noting, despite a favorable holding in the lower court, a failure to ultimately secure adequate housing as a part of a later settlement).

129. See Lynn M. Harter, Charlene Berquist, B. Scott Titsworth, David Novak & Tod Brokaw, *The Structuring of Invisibility Among the Hidden Homeless: The Politics of Space, Stigma, and Identity Constructions*, 33 J. APPLIED COMM. RES. 305, 306 (2005). A point-in-time survey identified 36,097 unaccompanied homeless children and youth. This number is likely to be an undercount. See NAT’L ALL. TO END HOMELESSNESS, THE STATE OF HOMELESSNESS IN AMERICA 1, 30 (2016), <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/> [https://perma.cc/M25M-8B5F].

children fall into this category per year.¹³⁰ These children typically fall into homelessness due to family strife, financial crises, and housing instability.¹³¹ A large proportion are LGBTQ¹³² and are cast out by their families.¹³³ Homeless children are acutely aware of the stigma of homelessness, which drives them to live their lives underground, to mask their homelessness. As Lynn Harter and her colleagues explain, “[t]o make their status visible by seeking help risks public stigmatization; to avoid stigmatization requires invisibility.”¹³⁴ Thus, they develop street smarts to survive, which involves “reliance on instincts to read a situation, preparedness, adaptability, and in general a heightened level of awareness of one’s surroundings.”¹³⁵ However, these tactics of invisibility can consequently limit access to services provided by the government or private agencies. Further, the tensions of maintaining invisibility result in some young people becoming “aggressive,” which “often put[s] them at risk for arrest and incarceration,” while other youths become “withdrawn, listless, or depressed—characteristics that increase their likelihood of experiencing personal victimization.”¹³⁶ Homeless children are particularly susceptible to physical abuse and sexual exploitation, and they may resultantly face mental health challenges, develop substance abuse issues, or even die.¹³⁷ Meanwhile, schools and other institutions are unable (or unwilling) to recognize and develop the survival skills that homeless children have honed, despite the potential sources of social capital or personal transformation these skills represent.¹³⁸ While the McKinney-Vento Homeless Assistance Act requires states and school districts to identify homeless children and enroll them in school, the law is inadequately funded, and states struggle to comply due to a lack of staffing and technical assistance.¹³⁹

130. *Supporting the Education of Unaccompanied Students Experiencing Homelessness*, NAT’L CTR. FOR HOMELESS EDUC. 2 (Aug. 2017), <https://nche.ed.gov/downloads/briefs/youth.pdf> [<https://perma.cc/VSU6-DTW2>].

131. *See Homeless and Runaway Youth*, NAT’L CONFERENCE OF STATE LEGISLATURES (Apr. 14, 2016), <http://www.ncsl.org/research/human-services/homeless-and-runaway-youth.aspx> [<https://perma.cc/7YGT-Y6FQ>].

132. *Id.* (between twenty and forty percent).

133. Alex Morris, *The Forsaken: A Rising Number of Homeless Gay Teens Are Being Cast Out by Religious Families*, ROLLING STONE (Sept. 3, 2014), <http://www.rollingstone.com/culture/features/the-forsaken-a-rising-number-of-homeless-gay-teens-are-being-cast-out-by-religious-families-20140903> [<https://perma.cc/M3RJ-ZXH3>]. Shelters offer limited beds for the youth population, and children congregate in different areas than homeless adults. *See* Harter, Berquist, Titsworth, Novak & Brokaw, *supra* note 129, at 312–15.

134. Harter, Berquist, Titsworth, Novak & Brokaw, *supra* note 129, at 323.

135. *Id.* at 319.

136. *Id.* at 318.

137. *See Homeless and Runaway Youth*, *supra* note 131.

138. Harter, Berquist, Titsworth, Novak & Brokaw, *supra* note 129, at 321–22.

139. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY: HOMELESS STUDENTS COUNT: HOW STATES AND SCHOOL DISTRICTS CAN COMPLY WITH THE NEW MCKINNEY-VENTO EDUCATION LAW POST-ESSA 2 (2016), <https://www.nlchp.org/documents/Homeless-Students-Count> [<https://perma.cc/WM4X-AJP3>].

The surveillance gap is also reinforced when homeless people refuse social services. Shelters can be dehumanizing and dangerous, with a lack of privacy, strict conduct rules, and extreme surveillance, leading some homeless persons to prefer living outside.¹⁴⁰ Some shelters sound more like prisons than social service providers; for example, one such shelter is “operated by the county’s sheriff’s department with the help of private security guards, [where] rule breakers are required to sleep outside in an exposed courtyard, even when it rains.”¹⁴¹ This lack of privacy may be why some people who find themselves impoverished resist the shelter systems and, therefore, circumvent additional public aid that may otherwise enable them and their children to break the cycle of poverty.

In addition, homeless people may not seek out shelters because they do not want to provide the personal information that HMIS systems require.¹⁴² Notably, information provided to HMIS can be released to law enforcement on a mere oral request for the purpose of identifying or locating a suspect or material witness.¹⁴³ As one commentator has noted, “[t]he ease of accessibility to client [data] through oral requests threatens to compound the already challenging task of eliciting complete and accurate information from homeless clients,”¹⁴⁴ who are, by virtue of their homelessness, often living in violation of laws that regulate their public conduct. Of course, this withdrawal from homeless service systems has a cost, as people lose out on public aid and services that may be able to help them survive or transition out of homelessness. Still, by opting to remain in the surveillance gap, homeless people are pointedly defying surveillance.¹⁴⁵ Thus, the story of homelessness is “not a one-way story of oppression, restriction, and decline It is also a story of both coping in the shadowed interstices of the city and of fighting back.”¹⁴⁶

D. *People with Felony Conviction Histories*

A final and much narrower example illustrates the nuanced gradations of the surveillance gap: the elusiveness of Virginians with felony conviction histories who, despite the Commonwealth’s desire to reinstate their right to vote, cannot be located by government officials.¹⁴⁷ Virginia’s constitution strips individuals

140. See Sparks, *supra* note 105, at 849, 856.

141. *Id.*

142. See O’Brien, *supra* note 108, at 689–90.

143. *Id.* at 693.

144. *Id.* at 694.

145. See Geoffrey DeVerteuil, Matthew Marr & David Snow, *Any Space Left? Homelessness Resistance by Place-Type in Los Angeles County*, 30 URB. GEOGRAPHY 633, 635 (2009) (describing the act of refusing shelter as a “form of resistance to the infantilizing tendencies of the welfare state”).

146. Mitchell & Heynan, *supra* note 106, at 613. Homeless resistance to the surveillance gap is discussed *infra* Part IV.

147. One of the primary motivations for writing this article comes from co-author Rebecca Green’s experience working on rights restoration in Virginia. In 2014, Green and her then-student Mark Listes co-founded Revive My Vote, a nonpartisan organization that assists Virginians in

convicted of a felony of their voting rights permanently,¹⁴⁸ but the governor has discretion to restore voting rights to individuals.¹⁴⁹ Starting with his inauguration in 2014, former Governor McAuliffe made restoring voting rights to those with felony convictions a centerpiece of his administration.¹⁵⁰ In April 2016, McAuliffe decided to grant the right to vote to every Virginian who had finished her term of incarceration and supervised probation.¹⁵¹ Yet when it came to identifying and locating those whose rights were to be restored, the Restoration of Rights Office (RoR) within Virginia's Secretary of the Commonwealth could identify only 206,000¹⁵² of the estimated 350,000¹⁵³ people who stood to regain the right to vote in Virginia. Ultimately, the Virginia Supreme Court found that McAuliffe's April order violated the Virginia constitution, requiring McAuliffe instead to restore rights on a case-by-case basis.¹⁵⁴ McAuliffe proceeded to comply by affirmatively restoring rights to every eligible person meeting his single criterion: completion of her term of incarceration and supervised probation.¹⁵⁵ While McAuliffe restored rights to more Virginians than any other

regaining the right to vote through a hotline and website. REVIVE MY VOTE, www.revivemyvote.com [<https://perma.cc/Y4WX-H5GX>] (last visited Jan. 31, 2018). Through a generous grant from the Knight Foundation, Revive My Vote has helped hundreds of Virginians. Governor McAuliffe's 2016 reforms make rights restoration easier than it has ever been. That said, Revive My Vote's hotline has received queries from hundreds of Virginians who, for many reasons as discussed here, fall through the cracks of Virginia's records systems.

148. See VA. CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."). Virginia is one of four states that permanently disenfranchise people convicted of felonies. The other three are Florida, Kentucky, and Iowa. See *Felony Disenfranchisement Laws in the United States*, SENTENCING PROJECT (Apr. 28, 2014), <http://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/> [<https://perma.cc/6FU7-UDPW>]. According to the Sentencing Project, 6.1 million United States citizens cannot vote because of a felony conviction. *Id.*

149. VA. CONST. art. II, § 1.

150. Press Release by Office of the Governor of Va., *Governor McAuliffe Restores More Voting Rights than Any Governor in American History* (Apr. 27, 2016), <https://governor.virginia.gov/newsroom/newsarticle?articleId=20164> [<https://perma.cc/J82K-96XS>] (explaining at an April 2017 rights restoration event in Norfolk that "[e]xpanding democracy in Virginia has been my proudest achievement during my time as Governor").

151. See Press Release by Office of the Governor of Va., *Governor McAuliffe Restores Voting and Civil Rights to Over 200,000 Virginians* (Apr. 22, 2016), <https://governor.virginia.gov/newsroom/newsarticle?articleId=15008> [<https://perma.cc/6BWQ-9WLZ>].

152. See *Howell v. McAuliffe*, 788 S.E. 2d 706, 710 (2016).

153. See ACLU OF VIRGINIA, *supra* note 3. Some sources put this figure closer to 450,000. See Dara Lind, *Map: 5.8 Million Americans Can't Vote Because of Their Criminal Records*, VOX (Oct. 5, 2014, 10:00 AM), <https://www.vox.com/2014/10/5/6906875/state-prisoner-voting-law-felon-disenfranchisement-map-virginia> [<https://perma.cc/F5U8-VW4X>].

154. See *Howell*, 788 S.E. 2d at 722–24.

155. McAuliffe announced the new standard for rights restoration on August 22, 2016, following the Supreme Court of Virginia's ruling that his April 22, 2016, blanket restoration exceeded his authority under Virginia's constitution. The new standard instructed the Secretary of the Commonwealth's office to identify "individuals who may meet the Governor's standards for restoration: individuals who have been convicted of a felony and are no longer incarcerated or under active supervision by the Department of Corrections (DOC) or other state agency." See Governor

governor in the state's history (173,000 people during his term),¹⁵⁶ he had the political will to restore many more. What stood in his way, even amid a so-called “golden age of surveillance,” was his administration's inability to identify, locate, and notify all eligible individuals.¹⁵⁷

It has been difficult for RoR to locate eligible Virginians for several reasons. To begin, RoR is dependent on other state agencies to provide data on individuals who may be eligible, yet Virginia statutes, like those of other states, prohibit information sharing between state agencies except under defined circumstances.¹⁵⁸ Further, confidentiality restrictions on who may access state databases prevent advocacy groups from helping with the work.¹⁵⁹

Accessing Virginia's court records to confirm eligibility and contact information is likewise constrained. Prior to 2016, Virginians hoping to regain the right to vote could do so only by submitting an application.¹⁶⁰ Since Virginia lacks a centralized management system for court records, individuals, advocacy organizations, and RoR sought records at individual county courts. Some, but not all, counties make records available online, to varying degrees, and information about accessing court records is often murky.¹⁶¹ What is more, Virginia court

McAuliffe Policy Memorandum, *Governor McAuliffe's Restoration of Rights Policy* (Aug. 22, 2016), <https://commonwealth.virginia.gov/media/6733/restoration-of-rights-policy-memo-82216.pdf> [<https://perma.cc/H4CK-72J2>].

156. See *Outgoing Va. Gov. McAuliffe Says Rights Restoration His Proudest Achievement*, ASSOC. PRESS (Jan. 10, 2018, 9:00 PM), <https://wtop.com/virginia/2018/01/gov-terry-mcauliffe-final-state-commonwealth> [<https://perma.cc/26YZ-U55L>].

157. Peter Swire & Kenesa Ahmad, *Encryption and Globalization*, 13 COLUM. SCI. & TECH. L. REV. 416, 420 (2012).

158. See VA. CODE ANN. § 2.2-3806 (requiring that notice be provided to a data subject of “the possible dissemination of part or all of this information to another agency, nongovernmental organization or system not having regular access authority,” and requiring the agency to “indicate the use for which [the data] is intended”); see also VA. CODE ANN. § 2.2-3800; VA. CODE ANN. § 2.2-3803 (requiring that agencies holding personal information “[m]ake no dissemination to another [data] system without (i) specifying requirements for security and usage including limitations on access thereto, and (ii) receiving reasonable assurances that those requirements and limitations will be observed”).

159. Each year, RoR makes public a list of individuals whose rights have been restored (as required by Article V Section 12 of Virginia's constitution). See LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, SENATE DOCUMENT NO. 2 (2017), <https://rga.lis.virginia.gov/Published/2017/SD2/PDF> [<https://perma.cc/E5YJ-P3AN>] for a recent example listing individuals whose civil rights were restored between January 2016 and January 2017. These lists do not contain personal information such as contact information, date of birth, or social security numbers. This makes it difficult for advocacy organizations to reach out to individuals whose rights have been restored to conduct new and returning voter education efforts.

160. For a brief period prior to leaving office, Governor Robert F. McDonnell restored rights to individuals who had not applied for rights restoration upon receiving lists from Virginia's Department of Corrections of individuals who had completed their terms of incarceration and supervised probation. See *Governor McDonnell Announces Process for Automatic Restoration of Voting and Civil Rights for Non-Violent Felons*, ALEXANDRIA NEWS (July 15, 2013), <https://www.alexandrianews.org/2013/governor-mcdonnell-announces-process-for-automatic-restoration-of-voting-and-civil-rights-for-non-violent-felons/> [<https://perma.cc/87ZA-6GPM>].

161. See VIRGINIA COURTS CASE INFORMATION WEBPAGE, <http://wasdmz2.courts.state.va.us/CJISWeb/circuit.jsp> [<https://perma.cc/8DDN-YFA8>] (last visited Nov. 5, 2017) (“This is the case

clerks are elected, meaning that politics may play a role in how quickly courts respond to requests for information on people seeking to restore their civil rights.¹⁶² Beginning in 2016, McAuliffe no longer required people to produce court records in order to regain their right to vote.¹⁶³ Yet, in the case of federal convictions, RoR must verify information with federal law enforcement agencies and federal courts, a process that has also proved challenging due to federal court clerk concerns about data sharing and privacy.¹⁶⁴

Despite gubernatorial efforts to simplify the rights restoration process, RoR and voting rights organizations still exert “a tremendous amount of effort” to identify individuals eligible for rights restoration in Virginia.¹⁶⁵ Finding contact information for individuals recently released from prison and not under supervised probation or parole is often a challenge. Those recently released from prison often live with friends or families or in transitional housing, and they therefore lack a permanent address.¹⁶⁶ For those released from the correctional system years or

management system for circuit courts in Virginia. This is a project with a limited number of courts. Cases may be searched using name, case number, or hearing date. Searches must be done by individual courts. Statewide searches are not possible. Please note: The Circuit Courts of Alexandria and Fairfax do not use the statewide Circuit Case Management System, and therefore, cannot participate in the Online Case Information System. Please contact these courts directly for case information not available through this System.”).

162. VA. CODE ANN. § 24.2-217. Prior to McAuliffe’s removal of the requirement that fines and fees be paid as a condition of rights restoration in July 2015, providing proof of payment of fines and fees constituted an enormous obstacle to many because of difficulties associated with confirming payment at the relevant court. See Travis Fain, *McAuliffe Widens Voting Rights Restoration*, DAILY PRESS (June 23, 2015), <http://www.dailypress.com/news/politics/dp-nws-mcauliffe-felon-voting-20150623-story.html> [<https://perma.cc/SD3J-UZ2L>] (describing how McAuliffe removed the requirement that individuals pay court costs prior to applying for rights restoration). The governor’s order did not remove the requirement that court fees be paid, it just provided that payment status would no longer prevent individuals from applying for rights restoration.

163. See Governor McAuliffe Policy Memorandum, *supra* note 155 (noting that the RoR will affirmatively restore rights to individuals even when they have not applied for rights restoration).

164. Citing privacy concerns, federal court clerks hesitate to share conviction data with RoR, making it surprisingly difficult for RoR to confirm that Virginians with federal convictions have completed their sentences for purposes of restoring their right to vote. Interview by co-author Rebecca Green with Kelly Thomasson, Va. Sec’y of the Commonwealth, in Richmond, Va. (Mar. 10, 2017) (discussing a letter that Thomasson received from a Fourth Circuit clerk). The Virginia State Police has access to federal data, but only recently began sharing this information with RoR. Federal probation officers and judges have expressed discomfort with sharing information in bulk about federal conviction histories, instead requiring RoR to make individual requests. RoR therefore sends hundreds of individual letters asking for information to confirm completion of incarceration and supervised probation. Federal probation officers have told RoR that they will not disclose names of people currently under supervision, citing privacy concerns. *Id.*

165. Graham Moomaw, *McAuliffe Rights Restoration Official Will Stay on Under Northam*, RICHMOND TIMES-DISPATCH (Dec. 28, 2017), http://www.richmond.com/news/virginia/governments-politics/mcauliffe-rights-restoration-official-will-stay-on-under-northam/article_bfdc6d2a-525b-56e5-a2df-02e0083be72e.html [<https://perma.cc/3TTG-K8TM>].

166. See Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 CRIME & DELINQ. 360, 361 (2003) (“Prisoners have historically returned to the communities from which they were sentenced, generally to live with family members, attempt to find a job, and successfully avoid future criminality.”); Nathan James, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*, CONG. RESEARCH SERV.

even decades ago, locating accurate address information is similarly daunting, a task made more difficult if the individual moves, especially out of state, or changes her name.

Another cognizable hurdle to locating individuals who are eligible for voting rights restoration is reticence on the part of people with prior convictions to engage with government institutions. Institutional avoidance among people with histories of police stops, arrests, convictions, or incarceration is well documented.¹⁶⁷ This lack of engagement with societal institutions has negative impacts on people's health, employment, financial security, and exposure to crime. The surveillance state may even "fuel the very behavior it is trying to suppress," because people who live "off the books" lack the sorts of institutional attachments, such as employment, associated with low crime rates.¹⁶⁸ Unsurprisingly, this pattern of disengagement disproportionately impacts disadvantaged and minority populations.¹⁶⁹

Many otherwise-eligible Virginians hesitate to come forward because of a perceived stigma related to their convictions. One caller to a radio talk show about rights restoration in Virginia who lost his voting rights as a young adult for marijuana possession explained that he lies to his kids every year on Election Day when they ask whether he voted.¹⁷⁰ Many Virginians excluded from the political polity are too embarrassed to come forward to regain the right to vote.¹⁷¹ Additionally, in summer of 2016, frequent changes in policy combined with back-and-forth litigation left many otherwise-eligible Virginians confused about whether their right to vote could be restored.¹⁷²

(Jan. 12, 2015), <https://fas.org/sgp/crs/misc/RL34287.pdf> [<https://perma.cc/9HGS-NZKX>] (noting several factors that make housing difficult for inmates recently released, including "the scarcity of affordable and available housing, legal barriers, discrimination against ex-offenders, and strict eligibility requirements for federally subsidized housing").

167. See generally Brayne, *supra* note 62.

168. *Id.* at 372.

169. *Id.* at 369, 385.

170. *Hearsay with Cathy Lewis*, WHRO RADIO (June 4, 2013), <http://www.hearsay.org/post/HearSay-from-the-Headlines-64.aspx> [<https://perma.cc/9KQC-6KHU>] at 16:15 (follow "Download Episode" hyperlink).

171. See, e.g., Sam Levine, *Listen to Former Felons Who Can Vote Again Explain the Power of the Ballot*, HUFFINGTON POST (Nov. 9, 2017), https://www.huffingtonpost.com/entry/virginia-restoration-of-voting-rights_us_5a045ea9e4b03deac08b96f9 [<https://perma.cc/2DW9-2QFW>] (describing one citizen's embarrassment regarding his right to vote because he felt like an "outcast" on Election Day).

172. Revive My Vote, a project at William & Mary Law School to assist Virginians in regaining the right to vote, see REVIVE MY VOTE, *supra* note 147, receives frequent callers to its hotline who assume that the Virginia Supreme Court decision prevents McAuliffe from restoring voting rights to otherwise-eligible Virginians. This is crippling misinformation, since there has never been a better time for restoring voting rights in Virginia. See Zachary Roth, *Murky Picture on Voting Rights for Virginia's Ex-Felons*, NBC NEWS (July 26, 2016), <https://www.nbcnews.com/politics/2016-election/murky-picture-voting-rights-virginia-s-ex-felons-n617261> [<https://perma.cc/8CZY-D6DH>] ("Thanks to confusion and uncertainty caused by the back and forth, not to mention the lengthy timeline likely required for restoring rights individually, it's far from clear just how many former felons will end up registering to vote by the fall.").

Although McAuliffe was extremely motivated to restore voting rights to as many Virginians as he could, and despite the expansiveness of the modern surveillance state, the task of locating eligible Virginians was remarkably fraught. These residents of the surveillance gap proved very difficult to find.

E. Conclusion

As these case studies show, life in the surveillance gap can be miserable and dehumanizing. It can harm mental and physical health, reinforce poverty, tear apart families, and strip people of dignity. In the surveillance gap, economic stability is difficult to maintain, and becoming economically mobile is nearly impossible. For citizens within the gap, the ability to effect change through voting is often restricted by barriers to voter registration, such as a lack of a permanent address (i.e., homeless individuals), voter disenfranchisement, or system avoidance. Government and private actors increasingly gather, aggregate, and analyze data to tackle social issues and apportion resources in health care, education, financial services, and more. People in the surveillance gap are excluded from these data streams due to a lack of access to technology,¹⁷³ fear of creating an electronic trail,¹⁷⁴ or failure to be captured within mainstream data collection mechanisms.¹⁷⁵ As a result, their experiences and needs are left out of policy discussions and responses.¹⁷⁶ Laws perpetuate the surveillance gap—a largely lawless zone. Moreover, elites obtain political benefits from the surveillance gap and maintaining its boundaries. The myth about the surveillance

173. See Andrew Perrin, *Smartphones Help Blacks, Hispanics Bridge Some—but Not All—Digital Gaps with Whites*, PEW RESEARCH CTR. (Aug. 31, 2017), <http://www.pewresearch.org/fact-tank/2017/08/31/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/> [https://perma.cc/3CV9-QRUG]; Andrew Perrin, *Digital Gap Between Rural and Nonrural America Persists*, PEW RESEARCH CTR. (May 19, 2017), <http://www.pewresearch.org/fact-tank/2017/05/19/digital-gap-between-rural-and-nonrural-america-persists/> [https://perma.cc/6T4Z-5XUB]; *Access & Use of Technology: Factors Affecting Access and Use of Information Technology*, USC PRICE TOMÁS RIVERA POL'Y INST. (June 19, 2015), <http://immigrantservices.uscmediacurator.com/key-barriers-to-access-and-use-of-technology-2/> [https://perma.cc/H6KF-P5ZK].

174. See Mary Ann Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 453 (2017); Joel Rose, *Federal Plan to Keep Files of Immigrant Social Media Activity Causes Alarm*, NAT'L PUB. RADIO (Sept. 30, 2017), <https://www.npr.org/2017/09/30/554557044/federal-plan-to-keep-files-of-immigrant-social-media-activity-causes-alarm> [https://perma.cc/8J9P-9KXE].

175. Mimi Onuoha, *On Missing Data Sets* (Aug. 15, 2016), <https://github.com/MimiOnuoha/missing-datasets> [https://perma.cc/PTD9-9EBL]. Onuoha lists four reasons why datasets that should exist might not:

1. Those who have the resources to collect data lack the incentive to.
2. The data to be collected resist simple quantification (corollary: we prioritize collecting things that fit our modes of collection).
3. The act of collection involves more work than the benefit the presence of the data is perceived to give.
4. There are advantages to nonexistence.

Id.

176. Jonas Lerman, *Big Data and Its Exclusions*, 66 STAN. L. REV. ONLINE 55, 58–60 (2013) (describing economic and political harms of big data exclusion).

gap is that its inhabitants are responsible for their plight and affirmatively choose to remain invisible. By upholding this myth, society evades the collective costs of reforming structural systems that cause and perpetuate the surveillance gap.

III.

FRAMING THE SURVEILLANCE GAP

The discussion below examines the surveillance gap through five analytical lenses. First, we look to the growing recognition in privacy theory of differentiated privacy harms—the idea that different groups experience privacy harms in different ways. Second, we examine how feminist legal theory teaches us about the problem of viewing privacy harms through a strictly public-versus-private lens. Third, we review the consumer and criminal privacy scholarship that attaches agency to individuals through choice and consent defaults. Fourth, we explore fundamental rights theories of privacy, examining how countries that have formalized this theory into their bodies of laws effectively closed the surveillance gap altogether. Finally, we analyze how and whether Helen Nissenbaum’s theory of contextual integrity can inform our understanding of the harms suffered in the surveillance gap.

A. Differentiated Privacy

In 1890, the grandfathers of American privacy law, Samuel Warren and Louis Brandeis, criticized the growing phenomenon of yellow journalism, chronicling the lifestyles of the rich and famous, in their seminal article, *The Right to Privacy*. Warren and Brandeis wrote:

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. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual.¹⁷⁷

For Warren and Brandeis, the objects under the microscope were their elite peers; the voyeuristic masses ogled elites distastefully through the expanding dual scourges of instantaneous photography and penny journalism.¹⁷⁸ American privacy law was therefore born not of respect for every American’s right of

177. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

178. Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1304 (2010) (contending that Warren and Brandeis wanted to protect elites from the glare of privacy invasions by social inferiors).

privacy, but rather of a push for rarified privacy, freeing elites from the gaze of the uncivilized.¹⁷⁹ Warren and Brandeis's assertions in some way mark the beginning of marginalized groups' exclusion from the privacy narrative.¹⁸⁰

In his 1967 book *Privacy and Freedom*, Alan Westin—another significant privacy scholar—took a more democratized approach to privacy, arguing that privacy of the common man manifested a core pillar of democratic society.¹⁸¹ Westin painstakingly documented the many ways in which the lack of privacy marked the totalitarian state.¹⁸² The expansion of privacy enabled the democratic citizen to form her thoughts and engage in democratic betterment.¹⁸³ Though Westin democratized privacy, he did not address marginalized groups or examine the nuanced problem that too much privacy poses.¹⁸⁴ For Westin, privacy was a good that every democratic citizen ought to seek and enjoy.¹⁸⁵

Since Westin, scholars have fostered a narrative of privacy's gradual demise. In light of an increasingly powerful and omnipresent administrative surveillance state and increasingly sophisticated private-sector efforts to track consumers on- and offline, scholars began to examine the impact of privacy laws and norms on different groups—what we call here “differentiated privacy.”¹⁸⁶ Others began to ask whether and under what circumstances too much privacy is a problem.¹⁸⁷ More recently, new strains of scholarship have begun to examine more nuanced impacts of differentiated privacy. Scholarship examining discriminatory surveillance is one example.

179. See *Class Differential*, *supra* note 4, at 1424–27. For an additional critique of Warren and Brandeis as elitist, see ROBERT ELLIS SMITH, BEN FRANKLIN'S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET 125, 135–36 (2000).

180. See *Class Differential*, *supra* note 4, at 1394. “The right to be left alone was conceived to protect society's elites (such as Warren and Brandeis) from the glare of public scrutiny.” *Id.* at 1426.

181. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 24 (1967) (“Just as social balance favoring disclosure and surveillance over privacy is a functional necessity for totalitarian systems, so a balance that ensures strong citadels of individual and group privacy and limits both disclosure and surveillance is a prerequisite for liberal democratic societies.”).

182. See *id.* at 651–58.

183. See *id.* at 51 (1967) (“[P]rivacy is a necessary element for the protection of organizational autonomy, gathering of information and advice, preparation of positions, internal decisionmaking, inter-organizational negotiations, and timing of disclosure. Privacy is thus not a luxury . . . ; it is a vital lubricant of the organizational system in free societies.”).

184. *Id.*

185. *Id.*

186. See, e.g., Helaine F. Lobman, *Spousal Notification: An Unconstitutional Limitation on a Woman's Right to Privacy in the Abortion Decision*, 12 HOFSTRA L. REV. 12, 531–60 (1984) (women); Robin Morris Collin & Robert William Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACKLETTER J. 181, 215 (1991) (poor people); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 22–55 (1997) (Black women). This term should not be confused with “differential privacy,” which refers to a process of systematically adding “random numbers generated from a special distribution centered at zero to the results of all data queries” for the purposes of protecting the privacy interests of individuals whose data is contained in datasets. See Jane Bambauer, Krishnamurty Muralidhar & Rathindra Sarathy, *Fool's Gold: An Illustrated Critique of Differential Privacy*, 16 VAND. J. ENT. & TECH. L. 701, 703 (2014).

187. Feminist legal theory narratives discussed below provide examples. See *infra* Part III.B.

Discriminatory surveillance can be understood as surveillance of, or privacy intrusions on, certain groups as opposed to others. John Gilliom's work on the welfare system's hyper-surveillance of women receiving government benefits in rural Appalachia is illustrative.¹⁸⁸ Other scholars follow this line of thought, wondering to what extent the dominant privacy narrative left out the stories of marginalized groups.¹⁸⁹ They have explored what marginalized people have long known: that marginalized people tend to have less privacy in their homes, bodies, and decisions than their more privileged counterparts.¹⁹⁰ As far back as the United States' founding, "overseers of the poor" chased indigent people out of colonial towns or auctioned them off for labor.¹⁹¹ In the 1800s, "when poorhouses became the dominant poor relief policy, the poor were warehoused in dismal quarters where they labored under the watchful eye of the 'keeper.'"¹⁹² Near the turn of the twentieth century, poverty policy became more benevolent,¹⁹³ nevertheless, the Scientific Charity Movement "relied on 'friendly visitors' to investigate the homes of the poor and exhort them to higher morals."¹⁹⁴ When the New Deal created the modern welfare state, surveillance of the "undeserving poor"—able-bodied adults seen as capable of doing work—continued.¹⁹⁵ For instance, in administering welfare, "states devised a variety of surveillance tactics—such as midnight raids on welfare recipients' homes and moral fitness tests."¹⁹⁶ These tactics aimed to "reduce the welfare rolls and push poor women, mostly of color, into the low-wage labor force."¹⁹⁷ Welfare surveillance continues today, in the

188. GILLIOM, *supra* note 4.

189. *See, e.g., Class Differential, supra* note 4, at 1389; BRIDGES, *supra* note 4, at 5–6; Franks, *supra* note 174, at 427–28; VIRGINIA EUBANKS, *DIGITAL DEAD END* 25–34 (2011).

190. *See* Madden, Gilman, Levy & Marwick, *supra* note 12, at 58; *see also* GILLIOM, *supra* note 4, at 19.

191. *See* Madden, Gilman, Levy & Marwick, *supra* note 12, at 58; *see also* WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 9 (6th ed. 1999).

192. *See* Madden, Gilman, Levy & Marwick, *supra* note 12, at 59; *see also* TRATTNER, *supra* note 178, at 57–61; MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 27–28 (10th ed. 1996).

193. *See* Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569, 583–84 (2001).

194. *See* Madden, Gilman, Levy & Marwick, *supra* note 12, at 59; *see also* KATZ, *supra* note 192, at 70 (discussing the role of "charity organization society agents and visitors"); TRATTNER, *supra* note 191, at 91–92 (discussing the proliferation of charitable organizations during this time and their practices).

195. *See* Madden, Gilman, Levy & Marwick, *supra* note 12, at 59. On the New Deal division between deserving and undeserving poor, *see* Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER, SOC. POL'Y & L. 247, 257–58 (2014), and sources cited therein.

196. *See* Madden, Gilman, Levy & Marwick, *supra* note 12, at 59; KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* 21 (2011) (describing the "man in the house" rule, according to which unmarried women who were found sleeping with men were deemed morally unfit and cut off from assistance).

197. *See* Madden, Gilman, Levy & Marwick, *supra* note 12, at 59; *see also* GUSTAFSON, *supra* note 196, at 21 ("The unstated but underlying goals of the rules were to police and punish the sexuality of single mothers, to close off the indirect access to government support of able-bodied

form of drug tests, DNA tests, fingerprinting, extreme verification requirements, and various forms of intrusive questioning.¹⁹⁸ In short, scholars have documented the ways in which many marginalized persons have far less privacy than other Americans. Yet this narrative is incomplete; some marginalized persons have too much privacy.

Dean Spade explains the mechanisms by which the administrative state categorizes people, resultantly replicating power imbalances and further harming marginalized groups.¹⁹⁹ Social welfare programs “are designed in ways that reflect and amplify contemporary understandings of who is ‘inside’ and who is ‘outside’ of the group whose protection and cultivation is being sought, which means they always include determinations of who deserves protection and who is a threat.”²⁰⁰ The groups of people described in this article’s case studies are all persons considered, in one way or another, to be a threat—either for their criminality, their impact on labor competition, or their failure to succeed in a

men, to winnow the welfare rolls, and to reinforce the idea that families receiving aid were entitled to no more than near-desperate living standards.”).

198. See Madden, Gilman, Levy & Marwick, *supra* note 12, at 59; see also Gustafson, *supra* note 4, at 312–21 (discussing drug testing of welfare recipients); BRIDGES, *supra* note 4, at 111–12 (discussing intrusive questions asked of Medicaid recipients); *Class Differential*, *supra* note 4, at 1397–1400 (discussing privacy intrusions that welfare recipients face, including paternity testing and fingerprinting). The current welfare system focuses on putting poor people to work, but the low-wage workforce—where one-third of workers are employed—is rife with sophisticated surveillance tactics:

Employers today log computer key strokes, listen to telephone calls, review emails and Internet usage, conduct drug tests, employ mystery shoppers, watch closed-circuit television, and require psychometric and “honesty” tests as conditions of employment. Employers increasingly track employee movements through GPS or radio frequency devices, which “create new streams of data about where employees are during the workday, what they are doing, how long their tasks take, and whether they comply with employment rules.”

Madden, Gilman, Levy & Marwick, *supra* note 12, at 60 (quoting Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 TEX. L. REV. 85, 112 (2014)); see generally Kirstie Ball, *Workplace Surveillance: An Overview*, 51 LAB. HIST. 87 (2010); ALEX ROSENBLAT, TAMARA KNEESE & DANAH BOYD, DATA & SOC’Y RESEARCH INST., WORKPLACE SURVEILLANCE (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536605 [<https://perma.cc/6Z9E-6RBR>]; Ajunwa, Crawford & Schultz, *supra* note 67 (discussing workplace surveillance).

199. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 73–93 (Rev. ed. 2015). Spade writes in the context of critical trans theory. Administrative sorting by gender is problematic because trans people can be difficult to classify, misclassified, or forced into categories that do not match their lived existence. *Id.* at 77. As a result, the state denies many trans people basic life necessities, such as health care, and exposes them to violence, such as through incarceration in sex-segregated facilities. *Id.* at 81–82. The War on Terror in particular has heightened the costs of “inconsistencies in identifying information.” *Id.* at 16.

200. *Id.* at 75. Scholarship on surveillance and social sorting makes a similar point. See, e.g., Magdalena König, *The Borders, They Are A-Changin’! The Emergence of Socio-Digital Borders in the EU*, 5 INTERNET POL’Y REV. (Mar. 31, 2016), <https://policyreview.info/node/403/pdf> [<https://perma.cc/L2TW-JNSD>] (“[M]odern surveillance becomes increasingly influential in determining societal power relations.”).

capitalist system. Thus, they fall outside the line of societal protections, resources, and support.²⁰¹

Surveillance scholars are also beginning to unpack what can be termed big-data discrimination.²⁰² What happens when the harnessed forces of big data meant to address societal problems have negative impacts on certain groups? One early observer of this phenomenon, Kate Crawford, pointed to the problem of benefits flowing principally to the affluent and Internet-connected:

Big data can provide valuable insights . . . but it can only take us so far. Because not all data is created or even collected equally, there are “signal problems” in big-data sets—dark zones or shadows where some citizens and communities are overlooked or underrepresented. . . . [B]ig-data approaches to city planning depend heavily on city officials understanding both the data and its limits.²⁰³

Crawford cites Boston’s “Street Bump” app as an example. As the civic data movement took off, the City of Boston joined in, enabling city dwellers to transform their phones into mobile pothole detectors using a simple app. The app transmitted data directly to city government, which used the data to determine which areas of the city most needed street repair. Although an ingenious bit of civic imagination, the project had its weaknesses: most notably, 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.²⁰⁴

Daniel Castro similarly urges attention to this “data divide,” pointing out that “individuals who come from data-rich environments may find that they have a

201. See SPADE, *supra* note 199, at 75 (“Norms regarding race, gender, sexuality, national origin, ability, and indigeneity always condition and determine who falls on either side of [the] line.”).

202. See generally Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671 (2016) (discussing big-data discrimination in employment and lack of adequate legal remedies); Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735 (2015) (discussing impacts of administrative database screening and digital watchlisting programs); Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 860 (2017) (discussing big-data discrimination in employment); Andrew D. Selbst, *Disparate Impact in Big Data Policing*, GA. L. REV. 38 (forthcoming 2017) (discussing big-data discrimination in policing); Craig Konnoth, *Health Information Equity*, 165 U. PA. L. REV. 1317 (2017) (discussing big-data discrimination in health care). On the risk of exclusion, see Lerman, *supra* note 176, at 55.

203. 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) <http://foreignpolicy.com/2013/05/10/think-again-big-data/> [<https://perma.cc/X64D-HLWJ>].

204. *Id.* Other scholars have picked up on Crawford’s concern. See, e.g., Barocas & Selbst, *supra* note 202, at 685 (“[Errors of exclusion] may befall historically disadvantaged groups at higher rates because they are less involved in the formal economy and its data-generating activities, have unequal access to and relatively less fluency in the technology necessary to engage online, or are less profitable customers or important constituents and therefore less interesting as targets of observation.”); Lerman, *supra* note 176, at 55 (discussing the “threats big data poses to those whom it overlooks”).

comparative advantage over those who grow up in data poverty,” and suggesting that these “advantages may translate into better health care outcomes, increased access to financial services, enhanced educational opportunities, and even more civic participation.”²⁰⁵ This growing divide may lead to “data deserts,” or “areas of the country characterized by a lack of access to high-quality data that may be used to generate social and economic benefits.”²⁰⁶ Harms that result from data deserts and discriminatory algorithms are drawing increasing scholarly attention.²⁰⁷ The case studies in this article show that the deserts already exist.

These examples provide illustrations of potentially discriminatory impacts of the civic data movement, data deserts, and distortion. Low-income people in particular risk either exclusion from opportunities such as access to credit or exposure to discrimination in the form of predatory lending based on data-driven algorithms, collaterally and adversely impacting areas such as employment, education, and policing.²⁰⁸ Yet current law, devised long before the rise of the Internet, provides scant protection against data discrimination.²⁰⁹

Since Warren and Brandeis, privacy scholarship has reckoned with differentiated privacy. Increasingly, modern privacy scholarship focuses on the problem of discriminatory surveillance, data collection, and data use. The surveillance gap adds an additional harm: discrimination that arises from the lack of data inputs from marginalized groups. The next section traces seeds of this idea in feminist legal theory.

B. *Feminist Legal Theory and the Public/Private Binary*

The bulk of privacy scholarship focuses on defining the benefits of privacy, tracking privacy’s demise, and suggesting remedies to restore it. In these discussions, privacy generally has positive connotations; it is variously associated with “freedom of thought, control over one’s body, solitude in one’s home, control over information about oneself, freedom from surveillance, protection of one’s reputation, and protection from searches and interrogations.”²¹⁰ By contrast,

205. Castro, *supra* note 5, at 2.

206. *Id.*

207. See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY* (2015) (describing privacy implications of corporate data collection and analysis); Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1 (2014) (describing how scoring industries collect data and apply algorithms to rank consumers without oversight of how the ranking is done or protections against discriminatory scoring outcomes); Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023 (2017) (discussing discriminatory effects of corporate consumer data use); Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671 (2016) (describing data discrimination).

208. See Madden, Gilman, Levy & Marwick, *supra* note 12, at 56–57. Increasingly, big data profiles are being built not only from information gathered about individuals, but also from social networks inputs, subjecting people to inferences drawn from the behavior of their online “friends.” *Id.* at 56.

209. See generally *id.* at 79–112.

210. Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1088 (2002).

feminist theorists have long recognized that privacy can be a double-edged sword; their insights are thus helpful for examining surveillance gaps.

Second-wave feminists identified and deconstructed the public/private divide in society and law that historically served to oppress women.²¹¹ Traditionally, the public domain was dominated by men to the exclusion of women, namely in work and politics.²¹² “By contrast, the private domain was that of home and family, where autonomous individuals lived free from state interference.”²¹³ Nevertheless, feminists observed that domestic autonomy only truly extended to men, because women and children depended on them for material goods.²¹⁴ This dominance emboldened men to abuse women in the home, their abuse exacerbated by a parallel failure of the state to intervene.²¹⁵ Elizabeth Schneider called this dynamic “the violence of privacy.”²¹⁶ Recognizing that facially harmless government inaction can ultimately be as detrimental as overtly destructive government action, feminists “rejected the view that the government’s hands-off approach was formally neutral, because the state set the legal ground rules that permitted private inequality to flourish unchecked.”²¹⁷

Moreover, feminists argued that the ideal of autonomy was a myth for women, who are typically enmeshed in family relationships of dependency, caregiving, and attachment.²¹⁸ Catherine MacKinnon posited that privacy can never be a basis for claiming rights, because it is a tool of gender subordination that leaves men alone (that is, out of the public eye) and thus free to oppress women.²¹⁹ The feminist critique of the public/private divide led to legal and political demands

211. See Martha A. Ackelsberg & Mary Lyndon Shanley, *Privacy, Publicity, and Power: A Feminist Rethinking of the Public-Private Distinction*, in REVISIONING THE POLITICAL, FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY 213, 217–20 (1996). Parts of this summary of feminist legal theory were previously recounted in Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L. FORUM 1, 14–23 (2008) [hereinafter *Welfare, Privacy*].

212. See *Welfare, Privacy*, *supra* note 211, at 14; see also Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 568 (2006) (summarizing the public/private dichotomy).

213. See *Welfare, Privacy*, *supra* note 211, at 14; Kim, *supra* note 212, at 568–69.

214. See *Welfare, Privacy*, *supra* note 211, at 14; see also Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 850–51 (2000).

215. See *Welfare, Privacy*, *supra* note 211, at 14; see also Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 128–29 (1989); NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 180 (2006).

216. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983 (1991).

217. *Welfare, Privacy*, *supra* note 211, at 14–15; see also Frances Olson, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1510 (1983); OKIN, *supra* note 215, at 111.

218. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2–3 (1988); Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81, 84 (1987).

219. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 194 (1989). Further, MacKinnon argued that privacy obscures women’s lack of choice and consent within the private realm, and, by isolating women, it obscures “women’s shared experience.” *Id.*

and had powerful repercussions. For instance, the state today criminalizes domestic violence, provides legal recourse for women demanding equal treatment in the workplace, and recognizes a right to abortion, which enforces decisional privacy.²²⁰

This second-wave feminist theory of privacy, however, faced at least three major critiques. First, because it is based on the experiences of white, middle-class women, it ignored differences of class and race, particularly the experiences of poor, African-American women, who have historically lacked privacy in their bodies and homes.²²¹ The state appropriated Black women's bodies during slavery²²² and subsequently coerced poor Black women into sterilization, disproportionately removed Black children from their homes through the child welfare system, and subjected Black women to searches and ongoing surveillance as a condition of receiving welfare.²²³ Thus, for poor, minority women, privacy in the home could offer a refuge from the oppression and racism of the outside world.²²⁴ At the same time, Black women were never excluded from the workforce; after slavery, they often worked outside the home, usually in domestic roles or backbreaking manual labor.²²⁵

Second, the feminist critique downplayed certain positive liberal values associated with privacy. Liberal feminists such as Anita Allen and Linda McClain have championed privacy, unwilling to “toss out the baby . . . with the bath water.”²²⁶ They acknowledge the harms done to women under cover of “privacy,”²²⁷ but contend that a reconceived notion of the public/private divide can be valuable for women as both a descriptive tool and normative goal. Privacy

220. See ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 4–5 (2000). At the same time, engagement with the state to combat domestic violence has costs; the state often reflects and enforces patriarchal norms, and state enforcement limits women's autonomy. *Id.* at 181–98 (describing tensions inherent in the criminalization of domestic violence).

221. See Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 *CARDOZO WOMEN'S L.J.* 303, 319 (2005) (“[B]ecause the black female body is inscribed and engraved with particular gendered and racialized cultural meanings, the black female subject has never been granted the same kind of privacy as the white female, the privacy that some feminists have argued needs to be ‘exploded.’”); see also ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 61 (1988) [hereinafter *UNEASY ACCESS*] (“It is plain that in the United States domestic privacy is a virtual commodity purchased by the middle class and the well-to-do.”).

222. Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 *WM. & MARY L. REV.* 759, 770 (1999); see also Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 *HARV. L. REV.* 1419, 1437–40 (1991).

223. See *id.* at 1440–44.

224. *Id.* at 1470–71. PRISCILLA NADASEN, *WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES* 237 (2005).

225. JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 1–7 (2010). “[B]lack married women have always worked in proportionately greater numbers than white wives[.]” *Id.* at 2.

226. *UNEASY ACCESS*, *supra* note 221, at 71; see also McClain, *supra* note 222, at 765.

227. See *UNEASY ACCESS*, *supra* note 221, at 70; McClain, *supra* note 222, at 776.

is essential to moral personhood and self-development;²²⁸ it provides women with a respite from lives devoted to domestic labor.²²⁹ Following liberal tradition, these feminists argue that women “should be permitted to live out their disparate, nonconforming preferences” and that privacy promotes this goal by giving women the space to develop and carry out their own ends.²³⁰

Third, a new generation of feminists has jettisoned certain forms of privacy. This movement, called “third-wave feminism,” is generally associated with a first-person, “narrative approach; [an] emphasis on sexual empowerment and liberation; [an] anti-essentialist perspective” that recognizes the diversity of women’s lives; and an “embrace of technology” as an organizing and confessional “tool.”²³¹ Third-wave feminism is less overtly political than its forbears and focuses more on “personal evolution” than “collective revolution.”²³² For these feminists, “throwing off the mantle of privacy is a freely directed choice by a liberated woman, or at least a positive step toward claiming autonomy” on her own terms.²³³ Female autonomy, however, faces an inevitable backlash. Women engaging in the public, online sphere have faced onslaughts of revenge porn and cyber-harassment.²³⁴ In turn, Allen has queried whether we need to “coerce privacy”²³⁵ in order to “undergird the liberal vision of moral freedom and independence [that] is generally consistent with both liberalism and with the egalitarian aspirations of feminism.”²³⁶

Feminist theory provides a helpful frame for considering the surveillance gap. It recognizes that privacy, at either of its extremes, can be devastating to people’s autonomy, dignity, and day-to-day subsistence.²³⁷ It shows how law demarcates both public and private spheres and can be a tool for both oppression and

228. See *UNEASY ACCESS*, *supra* note 221, at 36.

229. McClain, *supra* note 222, at 783.

230. *UNEASY ACCESS*, *supra* note 221, at 76.

231. *Welfare, Privacy*, *supra* note 211, at 20.

232. *Id.* at 20–21.

233. *Id.* at 22.

234. See Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 378–84 (2009); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350–54 (2014); Lori Janjigian, *Nearly 10 Million Americans Are Victims of Revenge Porn, Study Finds*, BUS. INSIDER (Dec. 13, 2016), <http://www.businessinsider.com/revenge-porn-study-nearly-10-million-americans-are-victims-2016-12> [<https://perma.cc/U9PC-89ZZ>] (“[W]omen under 30, minorities, and members of the LGBTQ community are much more likely to be threatened with revenge porn than men.”).

235. Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 740 (1999) (“To speak of ‘coercing’ privacy is to call attention to privacy as a foundation, a precondition of a liberal egalitarian society. Privacy is not an optional good . . .”).

236. *Id.* at 729.

237. Compare Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 122 (2011) (describing the “devastating absence of privacy” for indigent pregnant women that “distinguishes their experiences with the state from [those of] their monied counterparts”) with Katherine T. Bartlett, *Feminism and Family Law*, 33 FAM. L. QUART. 475, 475 (1999) (“Feminists have attempted to pierce this shield of [family] privacy, to reach the injustice of family relationships and the law that permits them.”).

liberation. Just as law creates surveillance regimes, it also can create and reinforce surveillance gaps—by pushing certain groups into system avoidance or by privileging powerful interests over vulnerable groups. People in the surveillance gap—undocumented immigrants, homeless people, people with felony conviction histories, and day laborers—tend to have too much or too little privacy. Yet feminist theory recognizes what people in the surveillance gap know from experience: that privacy is inherently neither desirable nor distasteful. Rather, it is a deeply contextualized condition, its value varying based on the differences in people's lives.

A key strand of feminist theory focuses on intersectionality, i.e., recognition that people embody multiple identities and can consequently suffer multiple oppressions on the basis of self-identity. Intersectionality is a “method for interrogating the institutional reproduction of inequality, whether at the level of the state, the family, or of legal structures more generally.”²³⁸ Kimberle Crenshaw identified how people experience different, interlinked systems of oppression and how law often fails to recognize those intersections. For instance, in employment discrimination, Crenshaw explained that Black women sometimes “experience discrimination as Black women—not the sum of race and sex discrimination.”²³⁹ Because discrimination law recognizes harms only on the basis of the mutually exclusive categories of race and sex, these Black women have difficulty stating a cognizable legal claim.²⁴⁰ Similarly, people in the surveillance gap suffer from interlocking forms of oppression and discrimination. For instance, day laborers fall into the surveillance gap due to a combination of national origin, gender, class, skill level, age, language, and non-citizen status. They are subject to structural constraints emanating from the “operation of global capital, through international relations, monetary policies, domestic social policies, the employment relationship [and] the family.”²⁴¹ This combination of identities and structural inequalities results in extreme isolation and pushes legal relief out of reach for day laborers, as law protects some of their individual attributes, but ignores or punishes others. Indeed, the state of being surveilled or overlooked is itself an intersectional factor, but one that is rarely recognized. As Mary Ann Franks writes, “[m]arginalized populations, especially those who experience discrimination at the intersection of multiple forms of subordination, also often find themselves at the intersection of multiple forms of surveillance: high-tech and low-tech, virtual and physical.”²⁴² Or, they might find themselves pushed into the surveillance gap.

238. EMILY GRABHAM, DAVINA COOPER, JANE KRISHNADAS & DIDI HERMAN, *Introduction*, in *INTERSECTIONALITY AND BEYOND: LAW, POWER, AND THE POLITICS OF LOCATION* 1 (2008).

239. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHI. L.F. 139, 149 (1989).

240. *Id.* at 141–43, 148–49.

241. GRABHAM, COOPER, KRISHNADAS & HERMAN, *supra* note 238, at 3.

242. Franks, *supra* note 174, at 464.

C. *Choice, Consent, and Resistance Within the Surveillance Gap*

Most privacy discussions today explore how to preserve and maintain privacy boundaries when much of our personal information has been collected and stored by government and private industry. Although Americans routinely tell pollsters that they value privacy,²⁴³ most appear willing to sacrifice some degree of privacy to gain other benefits such as the convenience of online shopping, the sense of security when travelling through an airport, or the ability to chat with a wide network of friends on social media. The truth is that people do not want privacy absolutely; rather, they want to choose when to give it up and when to retain it.²⁴⁴ Given these attitudes, along with our political history, it is not surprising that our privacy-law regime is based on a liberal conception of the individual as an autonomous person who freely strikes bargains for her benefit.²⁴⁵ This framework is ill-fitting not only for preserving privacy, but also for bridging the surveillance gap.

Currently, privacy law in the United States is “fragmented” and “sectoral.”²⁴⁶ Unlike most other developed nations, the United States does not have a single data protection law.²⁴⁷ Instead, it has industry-specific statutory protections, such as laws that govern the collection and use of data by health or financial services industries.²⁴⁸ Outside of these narrow statutes, the United States relies for its privacy regime primarily on the same approach that it has used since the 1970s—self-regulation by the entities that gather and maintain personal data along with responsibility on individuals to police their own data disclosures.²⁴⁹ This approach

243. Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1886 (2013) [hereinafter *Privacy Self-Management*].

244. Christine Jolls, *Privacy and Consent over Time: The Role of Agreement in Fourth Amendment Analysis*, 54 WM. & MARY L. REV. 1693, 1693–94 (2013) (“Privacy, far from referring to a sphere within which one is always ‘let alone,’ refers to a sphere in which we are allowed to determine who may enter, when, and under what circumstances.”).

245. However, social science studies have shown this model to be imperfect, demonstrating that individuals make choices based on false assumptions and that context, as opposed to autonomy, shapes our privacy preferences. See *Privacy Self-Management*, *supra* note 243, at 1887.

246. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 587 (2014).

247. Although this article focuses on federal law due to its national scope, state laws also govern privacy, surveillance, and data collection. Partly due to congressional intransience, some state legislators and attorneys general have been particularly energetic in protecting and enforcing privacy interests, particularly in the consumer context. See Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 750 (2016); Ganka Hadjipetrova & Hannah G. Poteat, *States Are Coming to the Fore of Privacy in the Digital Era*, 6 LANDSLIDE 12 (2014); Paul M. Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902, 917–18 (2009). For a list of relevant laws, see *State Laws Related to Internet Privacy*, NAT’L CONFERENCE OF STATE LEGISLATORS (June 20, 2017), <http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-related-to-internet-privacy.aspx> [<https://perma.cc/LLT3-A9LF>].

248. See generally BJ Ard, *The Limits of Industry-Specific Privacy Law*, 51 IDAHO L. REV. 607, 607 (2015) (describing why “the distinct features of online commerce . . . challenge discrete industry-specific laws”).

249. See *Privacy Self-Management*, *supra* note 243, at 1880.

is referred to as “notice and choice.”²⁵⁰ The linchpin of this privacy self-management is the assumption that people consent to the use of their personal data when they access a website and agree, either implicitly or explicitly, to the terms of service. Advocates of the notice-and-choice approach contend that it respects individual autonomy, encourages technological innovation, and helps businesses provide information to consumers and target people with beneficial offers.²⁵¹ By contrast, critics charge that notice and choice is a fiction since people do not understand what privacy interests they forfeit when they log on to various websites or make consumer choices, given that privacy disclosures are lengthy, vague, jargon-filled, and time-consuming to read.²⁵² Even a person who reads a particular company’s privacy policy would not understand the extent to which “Internet giants use data mining to shape and control the environment in which consumers use their products and services.”²⁵³ Further, simply “too many entities [are] collecting and using personal data to make it feasible for people to manage their privacy separately with each entity”²⁵⁴ or to foresee how their data might be used downstream. In short, consumer consent is a mirage.

The law regarding government surveillance is also based on a model of consent. The Fourth Amendment protects people from unreasonable government searches and seizures. The Supreme Court has long held that the Fourth Amendment protects only objectively reasonable expectations of privacy. In *Katz v. United States*, the Court ruled that a defendant had a reasonable expectation of privacy in a phone booth.²⁵⁵ Once outside the proverbial phone booth (or if citizens choose not to close the phone booth door), citizens lose this protection; they have chosen to give up their privacy rights. Thus, the Fourth Amendment does not attach to information that people share in public or to third parties,²⁵⁶ such as “data given to commercial third parties, including banking records, telephone call lists, cell phone locations, or Internet search or subscriber information.”²⁵⁷ All of this privately gathered data is shared regularly with government entities in a “public private surveillance partnership.”²⁵⁸ To keep

250. See Joel R. Reidenberg, N. Cameron Russel, Alexander J. Callen, Sophia Qasir & Thomas B. Norton, *Privacy Harms and the Effectiveness of the Notice and Choice Framework*, 11 I/S: J.L. & POL’Y FOR INFO. SOC’Y 485, 486–87 (2015).

251. See *id.* at 489–90 (summarizing arguments).

252. Nancy S. Kim & D.A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723, 732–33 (2015); *Privacy Self-Management*, *supra* note 243, at 1884–85.

253. Kim & Telman, *supra* note 252, at 729.

254. *Privacy Self-Management*, *supra* note 243, at 1881.

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

256. *United States v. Miller*, 425 U.S. 435, 443 (1976) (“The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.”).

257. Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 373–75 (2015); see also Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35, 59 (2014).

258. Kim & Telman, *supra* note 252, at 763.

anything private, one must maintain absolute secrecy, which is increasingly impossible.²⁵⁹ Moreover, as everyday expectations of privacy diminish, it is less reasonable to expect the government to respect individual privacy. Even where the Supreme Court recognizes a reasonable privacy interest, the Fourth Amendment's requirement of a warrant supported by probable cause falls away in the face of voluntary consent.²⁶⁰ The Court has found consent even in situations marked by extreme police intimidation.²⁶¹ As one commentator has summarized, "though the premise of the consent-search doctrine is that people are free to decline, the reality is that nearly everyone 'consents,' at least as the Court has defined that term."²⁶²

The consent calculus falls particularly harshly on marginalized people. The Supreme Court has ruled that once a person seeks government assistance, she "chooses" to relinquish any claims to privacy.²⁶³ For instance, in *Wyman v. James*, the Court upheld the policy of having government workers search the homes of welfare recipients to ensure compliance with welfare eligibility requirements.²⁶⁴ The Court ruled that the visits were not searches covered by the Fourth Amendment because "[t]he choice is entirely [the individual's], and nothing of constitutional magnitude is involved."²⁶⁵ Yet someone whose children are hungry and who faces homelessness without government assistance "consents" only under conditions of duress.²⁶⁶ By contrast, more affluent citizens are not asked to consent to searches of their private homes in exchange for the valuable government benefits they receive, such as mortgage home deductions and child tax credits.²⁶⁷

In both the consumer-privacy and government-search contexts, it is tempting to argue that providing clear and accurate information to help people make informed and voluntary choices would resolve these disparities in privacy norms that contribute to the surveillance gap. Yet the choice-and-consent framework

259. Franks, *supra* note 174, at 438.

260. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (holding that "when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied"); see also Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 1, 58–62 (2008).

261. *United States v. Mendenhall*, 446 U.S. 544, 547–48 (1980); *Florida v. Bostick*, 501 U.S. 429, 431–32 (1991); *United States v. Drayton*, 536 U.S. 194, 194 (2001). In one study of consent searches during traffic stops, "none of the 90–95% of subjects who consented knew of the right to refuse consent, and those few who knew the law were skeptical that the officer would actually take no for an answer." Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 126, 160 (2016) (citing study).

262. Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 511 (2015).

263. *Wyman v. James*, 400 U.S. 309, 324 (1971).

264. *Id.* at 326.

265. *Id.* at 324.

266. See Bach, *supra* note 4, at 331–32.

267. See *Welfare, Privacy*, *supra* note 211, at 24.

assumes that people negotiate their own privacy boundaries. In the surveillance gap, people have far less agency and information to strike privacy bargains in their interest. Many do not consent to live with the extreme forms of privacy that demarcate the surveillance gap. Rather, many possess little or no political voice or power. To the degree that individuals in the surveillance gap exercise autonomy, they must do so in a very narrow space that is restricted by outside forces.

Compounding the problem, ideologies promoting individual choice can place blame on marginalized groups for their predicament. Undocumented immigrants, for example, *choose* to come to the United States. Criminals *choose* to commit crimes. Low-wage laborers *choose* to work by the day. Homeless people *choose* to live outside of society's margins. Otherwise-eligible people with felony conviction histories are *uninterested* in voting. But in reality, these are highly constrained choices. Thousands of undocumented immigrants come to the United States to flee conditions such as violence, persecution, and hunger.²⁶⁸ Day laborers lack the documentation or legal status necessary to obtain work in the formal economy.²⁶⁹ People with felony conviction histories find themselves subject to the whim of arbitrary and often confusing state laws, some of which "place no restrictions" on the ability to vote from prison (as in Vermont and Maine),²⁷⁰ others of which bar people who have committed felonies from voting for life.²⁷¹ People become homeless as rents rise and incomes fall. In this way, choice-and-consent frameworks are problematic for all people, are particularly problematic for disadvantaged populations, and are nearly useless in the surveillance gap. If notions of consent come to dictate our understanding of how people fall into the surveillance gap, we are doomed to widen it. Still, agency and choice go both ways: giving more choice to people in the surveillance gap can be a critical means of protecting their dignity and safety.

Agency has been an important concept as privacy scholars have attempted to understand privacy harms and construct ways to address them. A piece of the agency puzzle came into focus with the important work of one scholar who suggests that individual choices about information flow are a matter of context. We turn to Helen Nissenbaum's theory of contextual integrity next.

268. See, e.g., Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 15, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> [<https://perma.cc/ER3E-GR9P>]; Vivian Yee, Kenan Davis & Jugal K. Patel, *Here's the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html> [<https://perma.cc/GCQ9-6RW7>].

269. See Lee, *supra* note 1, at 661.

270. Brent Staples, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES (Nov. 18, 2014), https://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html?emc=eta1&_r=1 [<https://perma.cc/J7FX-E8G5>].

271. VA. CONST. art. II, § 1; KY. CONST. § 145; see FLA. CONST. § 4.

D. *Contextual Privacy and the Surveillance Gap*

In 2010, Helen Nissenbaum presented a resonant theory of privacy in a digitally connected world. She posits that what offends privacy sensibilities is not the sharing of information in and of itself, but the sharing of information along pathways different from those that a particular piece of information generally travels.²⁷² For example, a doctor sharing a patient's information with a nurse or another attending physician does not raise privacy hackles; a doctor sharing her patient's sensitive information with a marketing agency would, for many, constitute a grievous privacy invasion. Nissenbaum terms this idea "contextual integrity."²⁷³ Her premise is that the right of privacy boils down to the right to *appropriate* information flows.²⁷⁴

Is this theory useful in understanding the surveillance gap? In one sense, fears of contextual integrity harms propel some people into the surveillance gap. The fear, for example, that immigrant data collected in one context (DACA) will be used in another context (deportation) is a prime reason that many undocumented people populate the surveillance gap.

In another sense, the surveillance gap is hard to fit within the theory of contextual integrity. Nissenbaum's work assumes an extreme information environment where data flows even without individual data subjects' knowledge. As Nissenbaum describes it, the problem of contextual integrity arises from "the extraordinary surge [in the modern world] in powers to communicate, disseminate, distribute, disclose, and publish—generally spread—information."²⁷⁵ In this environment, contextual integrity seeks to explain a crisis in privacy—situations in which privacy norms amid this massive information flow are not respected. The surveillance gap, however, is the inverse of out-of-control information flow: expected information flows between Point A and Point B are not happening at all.

The surveillance gap is not a failure to adhere to privacy norms, but rather a failure—be it purposeful or accidental, benign or malignant—of data and information to follow the same flows for residents of the surveillance gap as nonresidents. This "information inequality" is a source of privacy concern.²⁷⁶ Information inequality describes the problem when the holder of data has more information than the data subject, resulting in the data holder controlling or otherwise duping the data subject. For example, two people might enjoy buying books from an online bookseller. In collecting information about the buying habits of one user versus another, the online bookseller might opt to offer a discount to

272. See generally HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND INTEGRITY OF SOCIAL LIFE* (2010).

273. *Id.* at 127.

274. *Id.*

275. *Id.* at 51.

276. Jeroen van den Hoven, *Privacy and the Varieties of Moral Wrong-Doing in an Information Age*, 27 SIGCAS COMPUTERS & SOC'Y, Sept. 1997, at 33, 35; OSCAR GANDY, *THE PANOPTIC SORT* (1993).

one user but not the other. Both users are unaware of the benefit flowing to one and not the other, and both are victims of information inequality with respect to the information that the users have versus the information that the bookseller has. Information inequality in this context is problematic, akin to price discrimination.²⁷⁷ In the surveillance-gap context, information inequality results in data flows providing benefit to some but precluding others from receiving similar benefits because the provider of the benefit has no information about some individuals at all.

Many of us expect that, in our modern data-driven environment, an entity, government or otherwise, can effortlessly grant benefits to citizens. Whether the benefit is healthcare, democratic participation, or a coupon for a consumer good, we assume that the body hoping to bestow the good or service will be able to reach targeted individuals to provide it. The surveillance gap disrupts this expected flow, not by improperly re-routing information, but by stopping the flow altogether. If privacy, as it is often conceived, is the ability to control access to self,²⁷⁸ then the residents of the surveillance gap have won the privacy game—they have it. But to the extent that residents of the surveillance gap want to assert the autonomy that a functioning flow of information provides, or to the extent that these surveillance gap residents have “privacy” as the result of an *unwanted* or *inappropriate* disruption in flow, Nissenbaum’s core concern is reflected. As Nissenbaum explains, contextual integrity is “the right to live in a world in which our expectations about the flow of personal information are, for the most part, met.”²⁷⁹ In the case of the surveillance gap, information flow does not meet expectations because information does not get where it is supposed to go. Like the notice-and-choice problem in the consumer-privacy context, residents of the surveillance gap cannot exercise autonomy and choice in setting the norms that define information flows to them and about them.

E. Privacy, Fundamental Rights, and the Gap

The United States Constitution does not directly afford Americans the right to privacy.²⁸⁰ In Europe, in contrast, Articles 7 and 8 of the Charter of

277. See, e.g., Akiva A. Miller, *What Do We Worry About When We Worry About Price Discrimination? The Law and Ethics of Using Personal Information for Pricing*, 19 J. TECH. L. & POL’Y 41, 43 (2014) (exploring legal and ethical principles implicated in the use of personal information for the purpose of setting retail prices).

278. See, e.g., Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980); see also Westin, *supra* note 181, at 7 (defining privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”).

279. Nissenbaum, *supra* note 272, at 231.

280. The United States constitutional provisions cited for protecting Americans’ privacy require contextual interpretation of “penumbral” rights granted under the Constitution. See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.”). The Supreme Court has interpreted a constitutional right to privacy in cases such as *Griswold v. Connecticut*, *id.* at 484 (holding that the First Amendment

Fundamental Rights of the European Union affirmatively grant a European Union citizen “the right to respect for his or her private and family life, home and communications” and “the right to the protection of personal data concerning him or her.”²⁸¹ As a consequence, privacy in Europe is perceived as a fundamental human right.²⁸² This theoretical perspective has deep implications for European laws ranging from aggressive libel laws to protect the dignity of persons²⁸³ to Europe’s strict data protection rules,²⁸⁴ and beyond.

One might assume that a fundamental-rights approach to privacy would cast the entire European population into the surveillance gap—i.e., that its residents would be sheltered from surveillance because of the primacy with which Europeans place the right to privacy. To the contrary, recognizing privacy as a fundamental human right in Europe has a counterintuitive effect: no surveillance gap to speak of. Indeed, as one Spanish privacy law scholar put it, the idea of a surveillance gap in Europe is “simply unthinkable.”²⁸⁵

The fundamental-rights approach to privacy can inform our understanding of the surveillance gap in the United States. Government surveillance in Europe is generally not seen as a menacing privacy invasion that threatens personal liberty.²⁸⁶ For example, one account describes the millions of European CCTV cameras as “a friendly eye in the sky, not Big Brother but a kindly and watchful uncle or aunt.”²⁸⁷ Viewing the state as a helpful partner, rather than as the ominous threat as it is often feared to be in the United States, has the effect of closing the surveillance gap in Europe almost entirely; this attitude defines in many ways how

protects married couples’ decision-making about contraception), and *Lawrence v. Texas*, 530 U.S. 558, 578–79 (2003) (holding that the Constitution implicitly grants a right to privacy even though such right is not explicitly enumerated).

281. Charter of Fundamental Rights of the European Union, art. 7 & 8, 2012 O.J. C 326/391.

282. Marc Rotenberg & David Jacobs, *Updating the Law of Information Privacy: The New Framework of the European Union*, 36 HARV. J.L. & PUB. POL’Y 605, 652 (2013).

283. For example, London is widely referred to as the “libel capital of the world” given Britain’s aggressive stance on protecting individual dignity through libel law. See GEOFFREY ROBERTSON & ANDREW NICOL, *MEDIA LAW* (4th ed. 2002) (discussing the legal rights of journalists and broadcasters and examining publishing and reporting laws); see also Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT’L L. 933, 999 (1996) (discussing the problem of forum shopping in libel law and the attractiveness of European libel laws to Americans).

284. See, e.g., Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L281) 31.

285. Email from Pablo García Mexía, Director, Revista de Privacidad y Derecho Digital, to co-author Rebecca Green (Apr. 15, 2017, 12:16 EST) (on file with author) (responding to the question of whether a surveillance gap exists in Europe).

286. Private-sector surveillance, conversely, is widely seen in Europe as a violation of fundamental privacy rights and is severely restricted through regimes like the European Union Privacy Directive (which also curbs government data collection, but which is riddled with exceptions to protect public safety).

287. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 494 (2006) (quoting JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 36 (2004)).

Europeans live and interact with authorities on a daily basis and is a critical means by which Europeans enjoy full rights of personhood. Relatedly, most European countries have a larger social safety net than the United States,²⁸⁸ and poor people may thus feel that turning over personal information to the government is well worth the benefits obtained.

Two aspects of European administrative practice illustrate this reality. First, many European countries use town registry systems to keep tabs on their citizens. In Austria, all people establishing residency within a town or city must register with the Meldebehörde for themselves and all minors in their household within three days of moving.²⁸⁹ In Belgium, new residents have eight working days to register at the municipal administration office/town hall (*maison communale/gemeentehuis*).²⁹⁰ In Italy, residents are required to inform the local municipality of their intention to move and their new address.²⁹¹ Local government officials verify registrations, and failure to comply with local registration requirements within the deadline for doing so results in fines.²⁹² This system allows European national governments to keep track of their citizens for purposes of public safety, administering social safety net programs, administering nationalized healthcare, running elections, conducting the national census, and many other administrative state functions.²⁹³

288. ALBERTO ALESINA & EDWARD L. GLAESER, FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE 2, 18 (2004). *But see* IRWIN GARFINKEL, LEE RAINWATER & TIMOTHY SMEEDING, WEALTH & WELFARE STATES: IS AMERICA A LAGGARD OR LEADER? 7–8 (2009) (arguing that if education spending is considered, the United States fares more favorably in social welfare spending comparisons).

289. *Registration*, HELP, <https://www.help.gv.at/Portal.Node/hlpd/public> [<https://perma.cc/28G6-FPEP>] (last visited Dec. 6, 2017).

290. *See Moving to Belgium: Complete Guide to Belgian Visas and Permits*, EXPACTICA, https://www.expatica.com/be/visas-and-permits/Moving-to-Belgium-Guide-to-Belgian-visas-and-permits_100069.html#Register [<https://perma.cc/H5JZ-S9QF>] (last visited Jan. 13, 2018); *Changement d'adresse*, BELGIUM.BE, https://www.belgium.be/fr/logement/demenagement/changement_d_adresse [<https://perma.cc/24VT-VJ7A>] (last visited Jan. 13, 2018) (describing, in French, that Belgians have eight business days to declare a change of address at the population service (“*service population*”) of the new residence or face fines).

291. *See Anagrafe General Registry*, FARNESINA, http://www.ambtallinn.esteri.it/ambasciata_tallinn/en/informazioni_e_servizi/servizi_consolari/anagrafe/ [<https://perma.cc/XM93-7PBU>] (last visited Jan. 23, 2018).

292. *See Anagrafe Italiani residenti all'estero (A.I.R.E.)*, FARNESINA, http://www.esteri.it/mae/en/italiani_nel_mondo/serviziconsolari/aire.html/ [<https://perma.cc/6PZG-GF8X>] (last visited Jan. 14, 2018) (describing, in Italian, the residency registration system, “*Anagrafe della Popolazione Residente*”).

293. As in the United States, keeping track of immigrant populations poses a huge challenge in Europe. The International Organization for Migration estimates that 387,739 immigrants arrived in Europe in 2016. This figure includes apprehended immigrants (for example, those who attempted sea crossings). *See* INT’L ORG. FOR MIGRATION, MIXED MIGRATION FLOWS IN THE MEDITERRANEAN AND BEYOND (2016), http://migration.iom.int/docs/2016_Flows_to_Europe_Overview.pdf [<https://perma.cc/R8BB-3JWA>]; *Migration and Migrant Population Statistics*, EUROSTAT STATISTICS EXPLAINED (Mar. 2017), http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics&oldid=327524#Basis_for_data_collection [<https://perma.cc/B3QE-EJUM>]; *see also* Phillip Connor, *Illegal Migration to EU Rises for Routes*

A second and related illustration is the widespread use of national identification cards in Europe.²⁹⁴ Many European countries require residents to carry identification cards. Some make the national identification card compulsory.²⁹⁵ Though national identification systems in Europe are not ubiquitously approved—in Great Britain, for example, national identification became a central campaign issue in the lead-up to the 2010 general election²⁹⁶—national identification cards are nevertheless a mainstay in most European countries, and indeed around the world.

In contrast, the United States does not have a compulsory (or non-compulsory) resident registration program, nor do citizens carry a national identification card.²⁹⁷ This has caused headaches in administrative contexts, including voting.²⁹⁸ By basing our laws and norms on a liberty-centric conception

Both Well-Worn and Less Traveled, PEW RESEARCH CTR. (Mar. 18, 2016), <http://www.pewresearch.org/fact-tank/2016/03/18/illegal-migration-to-eu-rises-for-routes-both-well-worn-and-less-traveled/> [<https://perma.cc/ZKD5-8ZSE>] (discussing “illegal” immigrant flows in Europe). The inability of European countries to reliably track immigration data predated the current refugee crisis. See Brian Wheeler, *The Truth Behind UK Immigration Figures*, BBC NEWS (Oct. 15, 2012), <http://www.bbc.com/news/uk-politics-19646459> [<https://perma.cc/GL4E-7PQ2>] (“Keith Vaz, chairman of the influential home affairs committee says he finds it incredible that a supermarket loyalty scheme can collect and store details on the shopping habits of millions of people, yet a similar database can not [sic] be set up to record arrivals and departures.”). Though the system is imperfect, European Union trans-border surveillance is highly sophisticated. See Katja Franko Aas, *‘Crimmigrant’ Bodies and Bona Fide Travelers: Surveillance, Citizenship and Global Governance*, 15(3) THEORETICAL CRIMINOLOGY 331 (2011) (providing an overview of trans-border surveillance systems in the European Union). Recent proposals to add biometrics and facial recognition tools suggest further ramping up. See *Identification of Applicants (EURODAC)*, MIGRATION AND HOME AFFAIRS, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants_en [<https://perma.cc/K6DM-ZZK9>] (last visited Dec. 6, 2017) (describing EuroDac, biometric data collection of asylum seekers); *EUROSUR*, FRONTEX, <http://frontex.europa.eu/intelligence/eurosur/> [<https://perma.cc/4YLB-6D4T>] (last visited Dec. 6, 2017) (describing EuroSur, drone and satellite surveillance programs).

294. See David Lyon, *National ID Card Systems and Social Sorting: International Public Opinion*, in *SURVEILLANCE, PRIVACY, AND THE GLOBALIZATION OF PERSONAL INFORMATION, INTERNATIONAL COMPARISONS* (Elia Zureik, Lynda Harling-Stalker, Emily Smith, David Lyon & Yolande E. Chan eds., 2010).

295. Belgium, Germany, Italy, and the Netherlands, among others, maintain compulsory identification laws. See Kevin Drum, *The Quick Way to End the Vote-Fraud Wars? A National ID Card*, MOTHER JONES 2 (July/Aug. 2012), <http://www.motherjones.com/politics/2012/07/national-id-card-voter-fraud-solution/#> [<https://perma.cc/TXX4-QNEG>].

296. Edgar A. Whitley & Gus Hosein, *GLOBAL CHALLENGES FOR IDENTITY POLICIES* (2010); *HISTORIES OF STATE SURVEILLANCE IN EUROPE AND BEYOND* 211–15 (Kees Boersma, Rosamunde van Brakel, Chiara Fonio & Pieter Wagenaar eds., 2014).

297. See Jonathan Weinberg, *Demanding Identity Papers*, 55 WASHBURN L.J. 197 (2005) (describing longstanding resistance to national identification in the United States); ELECTRONIC PRIVACY INFO. CTR., *REAL ID IMPLEMENTATION REVIEW: FEW BENEFITS, STAGGERING COSTS* 1 (May 2008), https://epic.org/privacy/id_cards/epic_realid_0508.pdf [<https://perma.cc/9XYQ-6BJ2>] (noting that throughout its history, the United States “rejected the idea of a national identification system”).

298. Maintaining accurate voting lists presents an enormous challenge when individuals who move from one state to another suffer no consequence for failing to remove their name from the voter list in the state from which they moved, not to mention registering to vote in their new location.

of privacy, Americans forgo the civic protections that a fundamental rights-based orientation offers. This lack of civic and legal protection plagues members of the surveillance gap. The next part explores potential ways to address the surveillance gap's worst consequences.

IV.

BRIDGING THE SURVEILLANCE GAP

One potential fix for the harms that stem from the surveillance gap—at least if Europe's experience is a guide—is surely out of reach: wholesale adoption of a fundamental rights theory of privacy. Socio-cultural norms are undoubtedly too ingrained to undo American aversion to state surveillance and cataloging of the populace. Nevertheless, a dignity-based understanding of privacy may allow for a reduction of the ill effects of the surveillance gap, as described below.

Closing the surveillance gap is difficult significantly because Americans want their liberty to be let alone.²⁹⁹ For many Americans, the existence of the surveillance gap is a manifestation of liberty. They may see the surveillance gap not as a problem, but as an outgrowth of a value that Americans hold dear: the right to disappear.

Additionally, the surveillance gap is a complex space, and one set of solutions is unlikely to address the contextualized harms that arise within it. It exists for multiple reasons, ranging from bias on the part of government actors, to economic advantage for employers, to the choice to remain by surveillance gap residents in the face of oppressive state systems or societal neglect. People in the surveillance gap constitute a huge cross-section of American society and hold diverse goals and interests. Even within the same sub-category of surveillance gap inhabitants, interests may diverge. For example, while many Virginians with felony conviction histories are thrilled to be “found” when it comes to regaining the right vote, others prefer to eschew all interaction with the state—including voting.³⁰⁰ Indeed, being counted is not necessarily a solution to extreme privacy because it can bring people into systems that are themselves harmful without transforming those systems.³⁰¹

Finally, “solutions” to the surveillance gap are difficult to pinpoint because the causes of the surveillance gap are wildly intractable. Poverty, discrimination,

The result is massively bloated and inaccurate voter rolls that feed fraud accusations haunting the American system. See Richard Hasen, *THE VOTING WARS 200* (2012) (proposing national voter registration and national voter identification).

299. Warren & Brandeis, *supra* note 177, at 193.

300. One of the co-authors has experienced through her work on the Revive My Vote hotline at William & Mary Law School, *REVIVE MY VOTE*, *supra* note 147, that many applicants are joyful to receive word that their voting rights have been restored, and some even break into tears of joy. Volunteers conducting outreach for Revive My Vote occasionally interact with individuals who are hostile to the idea of voting.

301. See SPADE, *supra* note 199, at 86–87 (encouraging a “move[] away from an uncritical call to ‘be counted’ by the administrative mechanisms of violent systems” and instead recommending strategizing “our interventions on these systems with an understanding of their operations and of their tendencies to add new categories of legibility as methods of expanding their control”).

economic subjugation, and social control all feed the surveillance gap's existence. If the surveillance gap is a consequence of these much larger forces, perhaps it is no more "solvable" than these large and deeply embedded social ills.

With these complexities in mind, this section offers measures that might, at least at the margins, address the ill effects of the surveillance gap. Our suggestions hinge on the dual concepts of resilience and resistance. With regard to resilience, Martha Fineman has explained how vulnerability is a universal and inevitable human condition; for instance, we all face periods in life when we are children, ill, or victims of accidents or disasters.³⁰² Yet American law is built on the notion of an autonomous individual without communal ties or responsibilities.³⁰³ Fineman thus urges creation of a "responsive state" that actively invests in enhancing the resilience of its vulnerable citizens.³⁰⁴ In her view, resilience is "what provides an individual with the means and ability to recover from harm, setbacks, and the misfortunes that affect her or his life."³⁰⁵ Resilience is "largely dependent on the quality and quantity of resources or assets that he or she has at their disposal or command."³⁰⁶ In turn, these resources are "accrued . . . within an array of social structures and institutions over which individuals may have little, if any control."³⁰⁷ Currently, people in the surveillance gap show tremendous resilience in staying afloat, often through family and community support and sharply honed survival skills. Yet from a societal perspective, they are denied resources—such as education, job access, affordable housing, fair pay, or a voice in our democracy—that would build their resilience and ability to live with dignity, without fear or hardship. People in the surveillance gap currently develop resilience in the face of a restrained state, not with the support of a responsive state.³⁰⁸

Resistance is another key element of bringing privacy into balance. Scholars have long noted how heavily-surveilled populations resist in subtle ways. Gilliom in his study of Appalachian welfare mothers described how welfare recipients resist government surveillance by seeking cash-only jobs to supplement their

302. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1, 8–9 (2008).

303. *Id.* at 5, 19. ("Our current system has been built upon myths of autonomy and independence and thus fails to reflect the vulnerable as well as dependent nature of the human condition.")

304. *Id.* at 13–15.

305. Martha Albertson Fineman, *Equality and Difference—The Restrained State*, 66 *ALA. L. REV.* 609, 622 (2015).

306. *Id.*

307. *Id.* at 623.

308. As an example, Fineman points to LGBT youth, who suffer high rates of homelessness, child welfare placements, and suicide due in part to a legal system that "valoriz[es] family privacy, parental rights, individual liberty, and choice." Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 *TEMP. POL. & C.R. L. REV.* 307, 309, 322 (2014); *id.* at 313 ("Looking at the child within the family from a vulnerability perspective makes it apparent that it is time to rend this veil of privacy and bring the child into focus as a political and legal subject who, independent of the family, deserves the attention and protection of law and policy.")

income, accepting gifts such as diapers from family and friends, and taking similar steps to “quietly meet the needs of their dependents through daily actions that defy the commands of the state.”³⁰⁹ Similarly, studies find that call-center employees resist surveillance by pretending to talk on the phone, leaving call lines open without customers on the line, and misleading customers.³¹⁰ Gilliom envisions a future in which “[e]veryday tactics of evasion, subterfuge, and concealment, then, may very well become a defining form of politics in the surveillance society.”³¹¹ These tactics also describe daily survival in the surveillance gap. However, resistance within the surveillance gap can also look diametrically different; it often means coming into the sunshine. To climb out of the surveillance gap, marginalized groups benefit from organizing and demanding that they be seen. Some examples are illustrative. For day laborers, one of the most effective forms of resistance to the surveillance gap has been organizing through worker centers,³¹² “community-based and community-led organizations that engage in a combination of service, advocacy, and organizing to provide support to low-wage workers.”³¹³ Worker centers fill a regulatory and union gap. There are at least 150 of them, and they aim to engage workers in collective action within a social justice frame.³¹⁴ One common strategy is to target employers who engage in wage theft by “calling employers and asking them to pay, filing wage claims, and picketing when they don’t.”³¹⁵ These actions have targeted small employers as well as major chains such as Taco Bell, which was the subject of a boycott to improve working conditions and wages for tomato pickers.³¹⁶ Worker-center efforts have also been successful in coordinating enforcement with government agencies and enacting beneficial local and state legislation, such as a New York Unpaid Wages Law that increased the penalties on employers for wage theft.³¹⁷

Most recently, a worker center in Jackson Heights, New York developed a smartphone app called *Jornalera*, which means “day laborer,” that allows workers to track their hours and pay, take and upload pictures of work sites and employers, and share this information for legal and advocacy efforts.³¹⁸ Using technology is

309. GILLIOM, *supra* note 4, at 111.

310. *Class Differential*, *supra* note 4, at 1409–10.

311. GILLIOM, *supra* note 4, at 101.

312. See generally Kimberly M. Sánchez Ocasio & Leo Gertner, *Fighting for the Common Good: How Low-Wage Workers’ Identities Are Shaping Labor Law*, 126 YALE L.J. FORUM 503 (2017), www.yalelawjournal.com/forum/fighting-for-the-common-good [https://perma.cc/ZV5Q-DS9N] (discussing successful organizing strategies for day laborers).

313. Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y. L. REV. 417, 419 (2005–2006).

314. *Id.* at 431, 438; see also Héctor R. Cordero-Guzmán, *Worker Centers, Worker Center Networks, and the Promise of Protections for Low-Wage Workers*, 18 J. LAB. & SOC’Y 31, 45 (2015).

315. Fine, *supra* note 313, at 434.

316. *Id.* at 435.

317. *Id.* at 436–37.

318. Liz Robbins, *New Weapon in Day Laborers’ Fight Against Wage Theft: A Smartphone App*, N.Y. TIMES (Mar. 1, 2016), <https://www.nytimes.com/2016/03/02/nyregion/new-weapon-in->

a particularly powerful way to increase the autonomy of day laborers, who are in the best position to gauge the level of privacy that they want to retain or shed.³¹⁹ Overall, worker centers “provide the necessary mechanisms to increase the transparency of the hiring process, effectively monitor employment conditions, and provide opportunities for worker incorporation into the formal economy.”³²⁰ Day laborers who take advantage of worker centers are also associated with higher rates of social inclusion and reduced isolation.³²¹ Despite these successes, the vast majority of day laborers are not served by worker centers, and worker centers struggle to maintain funding.³²² Further, the Trump administration is expected to impose restrictions on worker centers to limit their effectiveness, such as limitations on protest activities.³²³ Still, traditional organizing tools and new technologies hold promise for day laborers in resisting the surveillance gap.

Additional, powerful examples of resistance to the surveillance gap arise in the context of homelessness. Homeless people have used their visibility as a way to fight the surveillance gap. For instance, in Seattle, a coalition of shelters and tent camps called SHARE/WHEEL fought the city’s proposed HMIS mandatory tracking system by threatening to move all residents into public parks.³²⁴ HMIS, which gathers data about homeless persons for the ostensible purpose of assessing needs and coordinating services, has been critiqued for presuming that homelessness is a personal pathology created by poor life choices that requires state intervention and management.³²⁵ Moreover, while HMIS captures data about

day-laborers-fight-against-wage-theft-a-smartphone-app.html?_r=0 [https://perma.cc/2ANG-8X23].

319. See Julia Ticona, *New Apps Like Jornalero Aim to Protect Low-Income Workers. Here’s How They Could Backfire*, SLATE: FUTURE TENSE (Mar. 21, 2016, 11:18 AM), http://www.slate.com/blogs/future_tense/2016/03/21/new_apps_like_jornalero_aim_to_protect_low_income_workers_here_s_how_they.html [https://perma.cc/5WKA-XJBD] (pointing out that potential shortcomings to this approach include a lack of consistent Internet access, unrealistic expectations of documentation for all wage theft claims, and potential capture of data by government surveillance).

320. VALENZUELA, THEODORE, MELÉNDEZ & GONZALEZ, *supra* note 73, at 836. Worker centers also have a positive impact on wages. *See id.* at 849.

321. M. Anne Visser, *From Economic Integration to Socioeconomic Inclusion: Day Labor Worker Centers as Social Intermediaries*, 38 URB. GEOGRAPHY 243, 260 (2017).

322. See Cordero-Guzmán, *supra* note 314, at 52; Lee, *supra* note 1, at 661; ON THE CORNER, *supra* note 68, at 22–23 (citing a 2002 survey showing that only ten percent of day laborers in the New York metropolitan area have turned to worker centers for assistance). Worker centers also face the risk that if they are too successful, “they will be categorized as labor organizations and subjected to the restrictions imposed by the labor laws.” Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 UC IRVINE L. REV. 561, 580 (2014).

323. Chris Opfer & Jasmine Ye Han, *Worker Centers May Get Closer Look Under Trump*, BNA DAILY LAB. REP. (Feb. 16, 2017), <https://www.bna.com/worker-centers-may-n57982083896/> [https://perma.cc/5ZZK-EG8L].

324. See Sparks, *supra* note 105, at 843.

325. *See id.* at 852. “What is more, appearing unkempt, carrying one’s belongings, and sleeping on park benches have long been considered lifestyle choices, rather than survival strategies.” Langegger, *supra* note 121, at 1039.

services used, it does not allow homeless persons to identify their own needs.³²⁶ Thus, for the Seattle movement, members sought “to maintain a space outside the gaze of the state wherein the presumption of the pathology could be both avoided and contested.”³²⁷ The homeless individuals were less concerned about data privacy (a pre-occupation of wealthier Americans when it comes to big data collection), than about evading the stigma of homelessness. For this reason, Tony Sparks argues that privacy rights are not simply carried by individuals; they also populate physical space.³²⁸ Ultimately, the protest was successful. After lengthy mediations, the city adopted an “opt-in” version of HMIS that did not require individuals to offer information to receive services or require shelters to participate as a funding condition.³²⁹

A project in Ann Arbor, Michigan involved having homeless people photograph their everyday lives “as a way to document their struggles and strengths . . . and to reach policy makers and the broader public about issues of concern to homeless people.”³³⁰ This project was part of a health-promotion strategy called photovoice—with roots in feminist theory, documentary photography, and critical education—which helps people to see connections between their individual situations and root causes and to devise strategies for change.³³¹ Participants were recruited from local shelters and trained not only in photographic methods, but also in the ethics and power dynamics involved in photographing other people.³³² After the photo shoots, participants discussed the content and context of their photographs, and the photos they selected were featured in local media, a gallery exhibition, and a forum at a public theater.³³³ Policy makers were surprised to learn that people living in shelters sometimes held multiple jobs,³³⁴ and they had to confront the way that homeless people perceived the building of a new homeless shelter on the outskirts of town.³³⁵ This process of making their lives visible was powerful for the homeless participants—they reported improvements to their self-esteem and quality of life and spoke of the

326. See Sparks, *supra* note 105, at 853.

327. *Id.* at 855.

328. See *id.* at 854–55.

329. See Sparks, *supra* note 105, at 857–58. The victory is “bittersweet” given that the outcome might lessen federal funding for homeless services in Seattle. See *id.* at 858.

330. Caroline C. Wang, Jennifer L. Cash & Lisa S. Powers, *Who Knows the Streets as Well as the Homeless? Promoting Personal and Community Action Through Photovoice*, 1 HEALTH PROMOTION PRAC. 81, 81–82 (2000).

331. See *id.* at 82.

332. See *id.* at 83.

333. See *id.* at 84.

334. See *id.* at 85.

335. See *id.* (“The photovoice project did not substantively affect these plans [to build a homeless shelter on the outskirts of town] but enabled board members, planners, community people, and community leaders to rethink issues from the perspective of the homeless.”).

ability to define their own lives outside the parameters that society placed on them.³³⁶

Homeless people's visibility has led to the development of formal tactics to render them invisible. Nevertheless, from within the surveillance gap, homeless persons have resisted by re-asserting their visibility. In turn, "the presence of visible poverty forces society to confront inequality of income, education, health care, and criminal justice."³³⁷ Ultimately, homeless people need autonomy to set their own privacy boundaries, a power that wealthier Americans already possess. "[W]hat homeless people . . . need more of is *both* publicity—through which their needs can be recognized as legitimate—and privacy—through which they can protect themselves from absorption and de-legitimization from the public."³³⁸

Striking this balance is essential for other people in the surveillance gap as well. Marginalized people tend to live at privacy's extremes. At either end of the spectrum, people lack control over their personal information and the degree to which they interact with mainstream institutions. Strategies that give people the autonomy to assert or shed privacy are essential to their individual dignity and to fulfilling our communal, democratic promise. The examples above show that grassroots organizing, driven by the objectives and insights of affected groups, can be powerful in enhancing autonomy. Professionals working with marginalized populations, such as social workers, lawyers, and community organizers, can assist in these grassroots movements by providing support to a group's self-defined goals. Education about legal rights, remedies, and risks can help people in the surveillance gap make wise decisions about how to live their lives. For instance, many ex-felons in Virginia are unaware that they have the restored right to vote; without that knowledge, they cannot exercise an informed opinion about whether to register. Likewise, new technologies—as simple as a smartphone application—can be effective in helping people strike a privacy balance that calibrates to their needs.

In addition, some states have been receptive to building the resilience of undocumented persons. Consider, for instance, the twelve states, along with the District of Columbia and Puerto Rico, that allow undocumented immigrants to receive driver's licenses and obtain insurance, so that they can drive, to work and elsewhere, without breaking the law.³³⁹ Certain states and localities are limiting

336. See *id.* at 85–86.

337. Rankin, *supra* note 105, at 52.

338. Sparks, *supra* note 105, at 850 (quoting Ted Kilian, *Public and Private, Power and Space*, in *PHILOSOPHY AND GEOGRAPHY II: THE PRODUCTION OF PUBLIC SPACE* 115, 125 (Andrew Light & Jonathan M. Smith eds., 1998)).

339. See Liz Robbins, *For the Undocumented, a Broken Headlight Can Lead to Deportation*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/18/nyregion/driving-illegal-immigration-trump-administration.html> [<https://perma.cc/WJ9T-8MM4>] ("As many as 12 states, along with the District of Columbia and Puerto Rico, offer driver's licenses for unauthorized immigrants, up from three in 2010."); see also Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 822–23 (2017) (discussing states that grant driver's licenses and higher education benefits to recipients of DACA). Such a driver's license law "had a transformative effect on the lives

their law enforcement cooperation with federal immigration authorities “in furtherance of important state interests involving their immigrant communities.”³⁴⁰ These jurisdictions believe that their sanctuary stance enhances public safety by encouraging immigrants to report crimes and by allocating spending toward crime fighting rather than illegal-immigrant search expeditions.³⁴¹ In the current polarized political climate, advocacy at the state and local level can sometimes be more fruitful in law reforms that aid marginalized communities.

Lawyers should continue to develop robust visions of positive, constitutional social rights, despite the current conception of a Constitution that protects individuals only against government interference³⁴² and thus fails those living in the surveillance gap. In the 1960s and 1970s, a legal movement for constitutional social and economic rights led the Court to adopt procedural due process rights to protect governmental benefits and to invoke statutory interpretations that increased access to benefits.³⁴³ While the Court became more conservative and ultimately pulled back from an emerging theory of minimum social entitlements,³⁴⁴ the future may cycle back, giving way to a more responsive state that pulls marginalized persons into the mainstream.³⁴⁵

The first step in tackling the problems of the surveillance gap is to recognize its existence and to acknowledge the harms it produces. From there, we can integrate it into privacy discussions and create tools that enable residents of the surveillance gap to fight against its worst consequences and to access social supports on their own terms.

of its undocumented immigrant beneficiaries, enabling them to drive without fear of being stopped by state or local police, arrested, detained, or fined, and thereby facilitating their daily access to work, friends, and family.” *Id.* at 836.

340. See Barbara E. Armacost, “Sanctuary” Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1199 (2016). Four states and about 633 counties have these policies. Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html> [<https://perma.cc/5RNB-WYHB>].

341. See Armacost, *supra* note 340, at 1201.

342. See generally Sotirios A. Barber, *Fallacies of Negative Constitutionalism*, 75 FORDHAM L. REV. 651, 651–52 (2006); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

343. See William Forbath, *Not So Simple Justice: Frank Michelman on Social Rights, 1969–Present*, 39 TULSA L. REV. 597, 606–12 (2013) (describing the Court’s doctrine in this era and influence of legal scholars Frank Michelman and Charles Reich).

344. *Id.* at 612.

345. Cf. Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 210, 247 (2008) (arguing that the legitimacy of judicial enforcement of welfare rights depends on evolving societal norms).

V.
CONCLUSION

The current narrative within privacy law is that privacy is dead, or at least on life support. The loss of privacy threatens people's sense of self and engagement in self-expression. Poor people and members of minority groups face great privacy incursions and may be subject to increasing forms of big-data discrimination. This article shines a light on a countervailing reality—the harms of having *too much* privacy in a society in which attachment to mainstream data streams, resources, and institutions is necessary to thrive. Many undocumented persons, day laborers, homeless persons, people with conviction histories, and others live within a surveillance gap, yet this phenomenon is rarely acknowledged in privacy discourse. The harms within the surveillance gap are serious, encompassing physical and mental injuries, big-data marginalization, economic instability, and loss of democratic participation. Like surveillance, the surveillance gap is a form of social control. It keeps people down.

In response, people living in the surveillance gap have shown incredible resilience, surviving day-to-day by engaging in multiple forms of resistance. But small triumphs do not transform the structural inequalities that perpetuate the gap. Accordingly, a vision of privacy and a framework for privacy law that balances the privacy interests of all persons and that does not simply reflect the assumed desires and needs of elites is needed. Marginalized communities should have a role in shaping a balanced vision of privacy that recognizes both the benefits and costs of privacy in differing contexts. Too little privacy is bad, but so is too much. The key going forward is to get the balance right.