RELIGIOUS PROFILING: WHEN GOVERNMENT SURVEILLANCE VIOLATES THE FIRST AND FOURTH AMENDMENTS

*Katelyn Ringrose**

INTRODUCTION

Government surveillance has a long history in the United States, consistently intertwined within the political landscape, with a deep and disparate impact on religious minorities. English Separatists, before leaving for America on ships like the Mayflower, were subject to surveillance by government spies affiliated with the Church of England.[1] Government monitoring, however, did not end in the Old World, and numerous American religious groups have since experienced persecution in the form of surveillance pressuring them to abandon their beliefs out of fear and discomfort.[2] Religious minorities that have been affected by government monitoring include Fundamentalist Mormons who have been subjected to both state and federal monitoring due to stigma surrounding polygamy;[3] the FBI's monitoring and attempted delegitimization of Reverend Martin Luther King, Jr. and other members of the black clergy;[4] and the 20th century surveillance of Jewish and Quaker communities.[5] Following the attacks on September 11th, 2001, however, no minority community has been as deeply affected as American-Muslims.[6]

With new technologies performing massive internet dragnets searching for signs of extremism and radicalization in the hopes of preventing terrorism, state sanctioned monitoring of religious groups has reached an unprecedented

* J.D. Candidate 2019, University of Notre Dame Law School.

1. *See generally* John Coffey, *A ticklish business: defining heresy and orthodoxy in the Puritan revolution*, *in* HERESAY, LITERATURE AND POLITICS IN EARLY MODERN ENGLISH CULTURE (D. Loewenstein and J. Marshall, eds., 2006).

2. Hassan v. City of N.Y., 804 F.3d 277 (3d Cir. 2015).

3. Reynolds v. United States, 98 U.S. 145 (1878).

4. *See* Lerone Martin, *Bureau Clergyman: How the FBI Colluded with an African American Televangelist to Destroy Dr. Martin Luther King, Jr.*, 28 REL. & AM. CULTURE: J. INTERPRETATION 1 (2018).

5. *The Color of Surveillance: Government Monitoring of Religious Minorities,* GEO. L. (2018), https://www.law.georgetown.edu/privacy-technology-center/events/color-of-surveillance-2018/.

6. Ashley Moore, *American Muslim Minorities: The New Human Rights Struggle*, HUMAN RIGHTS & HUMAN WELFARE 91 (2010), *available at* https://www.du.edu/korbel/hrhw/researchdigest/minority/Muslim.pdf.

high.[7] Government monitoring has a chilling effect on religious expression and this effect is acutely felt online where religious groups, particularly religious minorities, gather and plan in faith-based chat rooms, websites, and over group or individual social media accounts.[8] Rather than look to the Equal Protection Clause of the Fourteenth Amendment to provide protections against such surveillance, this Note suggests that arguments centered in the First and Fourth Amendments provide equally clear solutions for courts attempting to remedy the harms caused by surveilling minority religious groups.[9]

This Note, in Part I, looks to contemporary surveillance, focusing primarily on Muslim-American surveillance as a most recent example of the largely unregulated practice. In Part II scrutinizes the impacts of such surveillance. Part III catalogs federal and state court opinions with an eye towards understanding how religious groups have largely structured their arguments against government intrusions into their privacy and freedom to assemble and express, and how their claims have prevailed thus far. It also analyzes how Fourth Amendment claims, after a series of recent cases expanding its scope,[10] will likely be used in the future to argue various claims which previously arose under the Fourteenth Amendment. In conclusion, this Note examines how this new framework has recently developed throughout cases involving Muslim-American surveillance and how it can pave the way for future cases arising under similar circumstances.[11]

I. CONTEMPORARY SURVEILLANCE

Anti-Muslim bias leading to government surveillance of chat rooms, websites, and social media is particularly problematic as research contradicts the notion that reliable indicators exist to identify would-be terrorists or other security threats.[12] In the absence of such indicators, the government is scrutinizing and penalizing religious affiliation.[13] The path to radicalization is neither predictable nor religious. The American government's approach to radicalization has been chiefly informed by stereotypes and misinformation.[14] It is possible to

7. *Raza v. City of New York - Legal Challenge to NYPD Muslim Surveillance Program*, ACLU (Aug. 3, 2017), https://www.aclu.org/cases/raza-v-city-new-york-legal-challenge-nypd-muslim-surveillance-program.

8. *See* Martin, *supra* note 4.

9. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (". . . a free-speech clause without religion would be Hamlet without the prince.").

10. *See* United States v. U.S. Dist. Court E. Dist. Mich., 407 U.S. 297, 313 (1972) ("National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime.").

11. Government surveillance often constitutes violations of 50 U.S.C. §1809 (2010); 18 U.S.C. § 2511 (2018); 18 U.S.C. § 2702(a)(1) or (a)(2); and 18 U.S.C. § 2702(a)(3).

12. Christopher Raleigh Bousquet, *Why the Police Should Monitor Social Media to Prevent Crime*, WIRED (April 20, 2018), https://www.wired.com/story/why-police-should-monitor-social-media-to-prevent-crime/.

13. JAMIE BARTLETT ET AL., THE EDGE OF VIOLENCE A RADICAL APPROACH TO EXTREMISM 22 (2010), https://www.demos.co.uk/files/Edge_of_Violence_-_web.pdf.

14. FAIZA PATEL, RETHINKING RADICALIZATION, BRENNAN CTR. JUSTICE N.Y.U. SCH. L. (2011), https://www.brennancenter.org/sites/default/files/legacy/RethinkingRadicalization.pdf.

combat terrorism without intruding into the personal activities of innocent citizens and stigmatizing entire communities on the basis of their ethnicity and religion, risking law enforcement's relationships with the same communities that police seek to partner with in order to fight terrorism.[15]

Prior to 9/11, the First and Fourth Amendments held little weight in cases involving surveillance of religious minorities on the part of various law enforcement agencies. Under two newly developing doctrines, however, the "First Amendment criminal procedure" and the "mosaic theory," individuals have a reasonable expectation of privacy in their online communications and the chilling of their religious expression online is considered injurious.[16] Both doctrines imply standing on the behalf of citizens who believe themselves to be surveilled. While the Fourth Amendment principles of privacy still lag behind newer First Amendment claims, it is plausible that these arguments will garner strength as more cases unfold of government agencies being limited by courts as to which information they can accrue and retain on private citizens.[17]

II. CONSTITUTIONAL HARMS OF SURVEILLANCE

The Supreme Court developed the chilling effects doctrine during the McCarthy era when laws aimed at suspected communists were called into question.[18] Given the history of the chilling effects doctrine, and its applicability to minority groups, it does not seem too difficult to extend the doctrine to cover the activities of religious minorities who are simply seeking to exist and express themselves online. In order to meet the tenets of the chilling effects doctrine, however, any lawsuit challenging domestic surveillance programs must first overcome the high bar of standing set by *Laird v. Tatum* and *Clapper v. Amnesty International USA*.[19]

In *Amnesty International USA,* the Court held that the plaintiffs' fear of being monitored was too abstract given their lack of actual knowledge of government surveillance.[20] In a footnote, however, the Court noted that, "in some instances, we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm."[21] The bar set in *Amnesty International USA* was met in *Hassan* where plaintiff—alleging that the New York Police Department was discriminating against them as Muslims in violation of the Free Exercise and Establishment Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment—successfully argued that their online activities

15. *Id.*

16. *See* Matthew A. Wasserman, *First Amendment Limitations on Police Surveillance: The Case of the Muslim Surveillance Program*, 90 N.Y.U. L. REV. 5 (2015); *see also* Daniel J. Solove, *The First Amendment as Criminal Procedure,* 82 N.Y.U. L. REV. 112, 132 (2007).

17. *See* Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018).

18. *See generally* Baggett v. Bullitt, 377 U.S. 360 (1964); Lamont v. Postmaster Gen. of U.S., 381 U.S. 301 (1965); Dombrowski v. Pfister, 380 U.S. 479 (1965).

19. Laird v. Tatum, 409 U.S. 824 (1972); Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).

20. *Clapper*, 568 U.S. at 416.

21. *Id.* at 414 n.5.

were chilled.[22] The plaintiffs' claims were not as abstract as those in other cases due to the very public knowledge that the Muslim Surveillance Program existed, following a series of Pulitzer Prize-winning articles issued by the Associated Press.[23]

According to Stephen Weitzman, author of *The FBI and Religion: Faith and National Security Before and After 9/11*, following 9/11, "the FBI was charged with preempting crime, or detecting it before it happened, which meant that it needed to engage in new forms of intelligence gathering."[24] Weitzman also declared, "[t]hat put a new pressure on the FBI and incentivized it to behave in ways that it wouldn't have behaved in previous decades."[25] According to researchers, this increase in law enforcement's use of surveillance has prompted profoundly negative effects on minority communities.[26] Following *Hassan*, surveillance "inevitably leads to more discoveries of questionable activities. These discoveries are then used to prop up the stereotypes that lead to communities of color, of religious minorities, and of immigrants being disproportionately monitored in the first place."[27]

In addition to encouraging, instead of dispelling, stereotypes, surveillance also "prevents a subset of Americans from meaningfully engaging in the American social and political systems while jeopardizing one of the values that Americans hold most dear: *the right to privacy*."[28] The right to privacy is one that has changed a great deal since the advent of certain technologies, and never before has it been more infringed upon by the government. *Hassan*, and the behavior of law enforcement since, has paved the way for future cases arising out of similar arguments under the First and Fourteenth Amendments, but it also hinted at the very real possibility that Fourth Amendment claims would have been viable if raised.

III. CONTEMPORARY CASES SET A FRAMEWORK

In order to best limit concerns arising out of privacy violations, the chilling of speech in public arenas, and the discriminatory nature of whom the technology is most likely to target, Congress should create laws limiting the aggregation and retention of data kept on members of religious minorities. The following five principles serve as an adequate starting ground: limit the collection of data; provide notice to communities to increase transparency; limit the

22. Hassan v. City of N.Y., 804 F.3d 277 (3d Cir. 2015).

23. *See Matt Apuzzo, Adam Goldman, Eileen Sullivan and Chris Hawley of* the Associated Press, THE PULITZER PRIZES (2012), https://www.pulitzer.org/winners/matt-apuzzo-adam-goldman-eileen-sullivan-and-chris-hawley.

24. Emma Green, *How the FBI Is Hobbled by Religious Illiteracy,* THE ATLANTIC (Feb. 26, 2017), https://
www.theatlantic.com/politics/archive/2017/02/the-fbi-and-religion/517746/.

25. *Id.*

26. *See id.*

27. Katie Hahn, *Surveillance at the Margins*, *in* Shifting Paradigms 56 (Johannes L. Gartner ed., 2016), *available at* https://www.humanityinaction.org/knowledgebase/698-surveillance-at-the-margins.

28. *Id.* (emphasis added).

retention of data; strictly limit with whom the data may be shared; and enact independent oversight and annual reviews for the purposes of accountability.[29] These principles will help regulate how law enforcement deploys surveillance actions; aggregate and keep that data; and ensure that the data isn't being accrued arbitrarily. Current court cases, however, have largely centered around a user's right to free speech while also hinting at violations of individual's reasonable expectation of privacy,[30] and we await federal legislation on the issue.

A. First Amendment Arguments

According to the constitutional doctrine of strict scrutiny, the government may pursue practices which burden free speech if they are "narrowly tailored to serve a compelling state interest."[31] The Supreme Court has made clear that violations of freedom of association survive constitutional scrutiny when they "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[32] This is often called the "means to an end" exception and law enforcement agencies have (and will) cited the practice of monitoring social media and websites as constitutionally acceptable when done in the interests of reducing crime[33]—however vague their aims truly are. In order for surveillance to be constitutionally valid, however, there must be sufficient evidence of a clear and present danger or a serious and imminent threat to a compelling government interest.[34]

In *Hassan*, the Third Circuit acknowledged that, "a principal reason for a government's existence is to provide security."[35] The court also noted, however, that, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[36] In regards to the speculative nature of the city's claims of ensuring security, "'mere speculation or conjecture is insufficient,' as are appeals to 'common sense' which might be inflected by stereotypes."[37] The court concluded that, "no matter how tempting it might be to do otherwise, we must apply the same rigorous standards even where national security is at stake. We have learned from experience that it is often where the asserted interest appears most compelling that we must be most vigilant in protecting constitutional

29. JENNIFER LYNCH, FACE OFF: LAW ENFORCEMENT USE OF FACE RECOGNITION TECHNOLOGY (Feb. 12, 2018), https://www.eff.org/wp/law-enforcement-use-face-recognition (These principles are largely influenced by the nine prinicpals set forth in this report).

30. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206 (2018).

31. Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 (2015).

32. *See* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984); *see also* Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2291 (2012); NAACP v. Button, 371 U.S. 415, 438 (1963). *But see* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996).

33. Bousquet, *supra* note 13.

34. Microsoft Corp. v. U.S. Dep't of Justice, 233 F. Supp. 3d 887, 901–02 (W.D. Wash. 2017).

35. *Id.* at 306.

36. *Id.* (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000)).

37. *Id.* (quoting Reynolds v. City of Chicago, 296 F.3d 524, 526 (7th Cir. 2002)).

rights."[38] The court finished its analysis by noting that, "history teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."[39]

The Third Circuit's approach to restrict the government's monitoring of individuals based on their Muslim identity is one that may serve as a roadmap for future cases. The concept of chilled speech directly applies in the case of American Muslims, and the very valid fear that online communications are being monitored is only going to serve to drive the communications of religious minorities further underground.

B. Possible Fourth Amendment Arguments

Although the plaintiffs in *Hassan* did not overtly allege a violation of their right to privacy, this claim likely would—and should—have prevailed. The Third Circuit, in a footnote to *Hassan*, stated, "We do not take a position on whether Plaintiffs could have brought suit to vindicate such [a privacy] interest. They do not allege a violation of some constitutional right to privacy, but to equal treatment."[40] Rather than examine whether the plaintiffs could have alleged a privacy interest in their public worship, we can turn to the question of whether they have a privacy interest in their social media presences, or over their avatars used in faith-based chat rooms and other websites.

While some disagree that citizens have a reasonable expectation of privacy when it comes to their online presence, there is a newly rising doctrine which notes that while social media users expect friends or perhaps a few strangers to see their posts, few users reasonably expect that law enforcement is tracking all of their posts over an indefinite amount of time, i.e., social mining or dragnetting. The mosaic theory may serve to provide the foundation for the concept that there can be an injury when law enforcement engages in this practice of social mining.[41] Under the mosaic theory, a citizen may not call a single social media post private but may be able to claim privacy interests in the entirety of their social media presence during an extended time period.[42] The mosaic theory is a means of articulating the very real feeling of violation which occurs when an individual is confronted with the knowledge that his or her entire life, or substantial portions of it, are being stored and reviewed by law enforcement. Pervasive government surveillance is becoming increasingly implemented, and distrust of such surveillance has expanded alongside a rise in technology.

38. *Id.* at 306–07.

39. *Id.* at 307 (quoting Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 635 (1989)).

40. *Id.* at 292 n.3.

41. Steve Horn, *Courts Have Made Social Media a Landmine for Defendants. Could It Change Soon?* CRIMINAL LEGAL NEWS (July 21, 2018), https://www.criminallegalnews.org/news/2018/jul/21/courts-have-made-social-media-landmine-defendants-could-it-change-soon/.

42. Christian Bennardo, *The Fourth Amendment, CSLI Tracking, and the Mosaic Theory*, 85 FORD. L. REV. 2385 (2017), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5409&context=flr.

Electronic surveillance may be said to have begun with a prohibition-era case, *Olmstead v. L. C. by Zimring*, where federal law enforcement wiretapped a bootlegger's home.[43] According to the Court in 1922, there was no Fourth Amendment violation: "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only. There was no entry of the houses or offices of the defendants."[44] Later, the Court would change its rhetoric in a series of cases over the legality of law enforcement surveillance, including: *Katz v. United States*;[45] *United States v. Miller*;[46] and *Smith v. Maryland.*[47] These cases set Fourth Amendment limits and solidified the concept of a "reasonable expectation of privacy." They also laid the framework for deciding issues involving both social media and law enforcement.[48] Over the past decade, what was once a strict view of social media has begun to degrade. What began as a fairly straightforward designation of social media as a public square—"No person choosing MySpace or Facebook as a communications forum could reasonably expect that his communications would remain confidential, as both sites clearly express the possibility of disclosure"—has devolved.[49] Although early courts decided that phone conversations are not private, later courts noted that individuals do have a reasonable expectation of privacy during phone conversations.[50] A similar trend is occurring in the realm of online communications, allowing for more protections on the part of citizens who do not expect law enforcement to be surveilling their online profiles.

While past court rulings on this issue have overwhelmingly been decided in favor of law enforcement, cyberlaw scholars look to two recent cases providing Fourth Amendment protections against police intrusions:[51] *United States v. Jones*[52] and *Carpenter v. United States*.[53] Both cases limit the ability of law enforcement to be able to acquire and retain data on private citizens. Following *Carpenter*, there are bound to be changes in how law enforcement can collect and keep data gained through the monitoring of faith-based chat rooms, websites, and social media accounts of groups or individuals. The *Carpenter* decision expresses the willingness of the Court to address critical lapses in how the law has thus far approached technology and privacy. This change will hopeful-

43. Olmstead v. United States, 277 U.S. 438 (1928).

44. *Id.* at 464.

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

46. United States v. Miller, 425 U.S. 435 (1976).

47. Smith v. Maryland, 442 U.S. 735 (1979).

48. Horn, *supra* note 41.

49. McMillen v. Hummingbird Speedway, Inc., No. 113-2010CD, 2010 WL 4403285 (Pa.Com.Pl. Sep. 9, 2010).

50. *See* Horn, *supra* note 41.

51. Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 EMORY L.J. 527 (2017), http://law.emory.edu/elj/_documents/volumes/66/3/levinson-waldman.pdf.

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

53. Carpenter v. United States, 484 U.S. 19 (1987).

ly begin with lower courts applying *Carpenter* in a wide range of cases, and end with Congress enacting new laws restricting law enforcement.[54]

Although this Note has concentrated on the effects of law enforcement's on Muslim-Americans, concerns with monitoring exist across minority religious groups. In *Hassan*, the court quotes Theodore Roosevelt, in his Sixth Annual Message to Congress on December 3rd, 1906: "We must treat with justice and good will all immigrants who come here under the law [,]… [w]hether they are Catholic or Protestant, Jew or Gentile…."[55] A recent concern, raised due to the Trump administration's treatment of immigrants, is the "social media vetting" of immigrants under the guise of identifying "national security concerns."[56] In order to avoid the same mistakes our government has made in surveilling minority religious groups, the same concerns mentioned above in the Muslim-American context apply to this recent change in how the government scrutinizes the religious speech of immigrants.

CONCLUSION

In conclusion, without needing to touch on the Equal Protection Clause, the framework articulated above—which uses religious expression argument under the First Amendment and a privacy argument under the Fourth Amendment—paves the way for future cases arising under similar circumstances. Muslim-Americans are not the only individuals at risk of government intrusions; and it is important that we keep the arguments against unregulated government surveillance in mind as we apply a similar lens to the next religious minority that is, inevitably due to the normalization of such surveillance, subject to intrusive government monitoring and a chilling of their religious beliefs and practices.

54. Alan Butler, *Supreme Court puts us on a Pro-Privacy Path for the Cyber Age,* THE HILL (June 29, 2018), https://thehill.com/opinion/judiciary/394808-supreme-court-puts-us-on-a-pro-privacy-path-for-the-cyber-age.

55. Hassan v. City of N.Y., 804 F.3d 277, 305 (3d Cir. 2015).

56. Manar Waheed, *New Documents Underscore Problems of 'Social Media Vetting' of Immigrants,* ACLU (Jan. 3, 2018), https://www.aclu.org/blog/privacy-technology/internet-privacy/new-documents-underscore-problems-social-media-vetting.