

Platforms and Police Departments: On the Risk of Contractual Liability for Social Media Surveillance of Political Activism

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I. INTRODUCTION

In 1978, the American Civil Liberties Union of Tennessee¹ obtained the first consent decree² in the nation “forbidding the maintenance of domestic intelligence units that monitor the First Amendment activities of individuals.”³ The decree ordered the City of Memphis and the Memphis Police Department to refrain from initiating investigations into the free exercise of rights protected by the First Amendment.⁴ The Memphis government was also required to disseminate the

1. The American Civil Liberties Union of Tennessee (“ACLU-TN”) is an affiliate of the nationwide American Civil Liberties Union (“ACLU”). See *Affiliates*, ACLU, <https://www.aclu.org/about/affiliates> (last visited Aug. 24, 2019). Both the ACLU and the ACLU-TN consider themselves the “nation’s premier defender[s] of the rights enshrined in the U.S. Constitution.” *ACLU History*, ACLU, <https://www.aclu.org/about/aclu-history> (last visited Aug. 24, 2019). In 1978, the ACLU-TN was subdivided into three regions across Tennessee: West, Middle, and East. See *Opinion & Order* at 5, *Blanchard v. City of Memphis*, No. 2:17-cv-2120-JPM-egb (W.D. Tenn. Oct. 26, 2018), ECF No. 151. The 2018 litigation, discussed *infra*, involved much discussion about whether the ACLU-TN could sue to enforce the consent decree because the ACLU of West Tennessee was the original party to the consent decree. See *id.* at 4–13. Ultimately, the court concluded that the ACLU-TN had standing to bring the suit. *Id.* at 13.

2. A consent decree is a court decree “that all parties agree to.” *Consent Decree*, BLACK’S LAW DICTIONARY (10th ed. 2014). A consent decree ordinarily arises in equity suits. See Gregory C. Keating, *Settling Through Consent Decree in Prison Reform Litigation: Exploring the Effects of Rufo v. Inmates of Suffolk County Jail*, 34 B.C. L. REV. 163, 163 n.5 (1992). However, consent decrees can be used in institutional reform litigation. See Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020–21 (1986). For an overview of consent decrees and their varied use, see generally Symposium, *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. LEGAL F. 1 (1987).

3. *Blanchard et al. v. City of Memphis*, ACLU TENN. (July 25, 2018) [hereinafter ACLU TENN.], <http://www.aclu-tn.org/blanchard-et-al-v-city-of-memphis/>; see also *Complaint for Enforcement of Order, Judgment & Decree, Damages & Other Relief* at 4–6, *Blanchard v. City of Memphis*, No. 2:17-cv-02120-JPM-dkv (W.D. Tenn. June 30, 2017), ECF No. 1 [hereinafter *Complaint for Enforcement Order*].

4. See *Order, Judgment & Decree* at 5, *Kendrick v. Chandler*, No. 2-76-cv-00449 (W.D. Tenn. Sept. 14, 1978).

contents of the court order to all members of the Memphis Police Department to ensure future compliance.⁵ The consent decree has remained in full effect since its entry.⁶

The 1978 litigation was thrust back into the public's mind in 2017 when, responding to an open records request,⁷ the City of Memphis released a list of people who must be escorted by police when visiting City Hall.⁸ The list included names of individuals who were known political activists in the Memphis community, but many of them had no criminal record.⁹ Notably, several of the names included on the list were participants¹⁰ in a July 2016 Black Lives Matter¹¹ rally held in Memphis.¹²

5. *See id.*

6. *See* Complaint for Enforcement of Order, *supra* note 3, at 4.

7. Throughout the twentieth century, citizens demanded more access to information held by the government. *See* Jennifer Dearborn, *Ready, Aim, Fire: Employing Open Records Acts as Another Weapon Against Public Law School Clinics*, 39 RUTGERS L. REC. 16, 16 (2012). The federal government responded by passing the Freedom of Information Act in 1966. *Id.* All states have since enacted similar legislation, though none is exactly the same as the federal statute. *Id.* Subject to exceptions, all state records are open to public inspection upon request. *See id.* at 17.

8. *See* ACLU TENN., *supra* note 3.

9. *Id.*

10. *See* Antonia Noori Farzan, *Memphis Police Used Fake Facebook Account to Monitor Black Lives Matter, Trial Reveals*, WASH. POST (Aug. 23, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/08/23/memphis-police-used-fake-facebook-account-to-monitor-black-lives-matter-trial-reveals/?utm_term=.7a7c147fef9c (commenting on people who were included in the City Hall escort list).

11. Black Lives Matter is an organization whose “mission is to build local power and to intervene in violence inflicted on Black communities by the state and vigilantes.” *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> (last visited Aug. 24, 2019). The organization self-describes as “liberators” fighting to uplift marginalized people. *Id.* Black Lives Matter uses its voice to argue for political change in the United States, focusing primarily on police use of force. *See* Jamilah King, *How Black Lives Matter Has Changed US Politics*, NEW INTERNATIONALIST (Mar. 5, 2018), <https://newint.org/features/2018/03/01/black-lives-matter-changed-politics>.

12. The rally started modestly in the streets of downtown Memphis but eventually grew to over 1,000 people. *See* Jody Callahan, *Marchers Shut Down I-40 Bridge at Memphis During Black Lives Matter Rally*, COMM. APPEAL (July 10, 2016), <http://archive.commercialappeal.com/news/tennessee-black-caucus-calls-for-calm-amid-racial-unrest—3714d93e-1078-6a7d-e053-0100007f134e-386214081.html>.

On October 26, 2018, a federal judge ruled that the City of Memphis and the Memphis Police Department¹³ violated the consent decree by collecting political intelligence on the activists listed in the City Hall escort list.¹⁴ The court specifically found that the city and the

The marchers then moved to the Interstate 40 bridge over the Mississippi River. *Id.* The rally shut down the bridge for nearly four hours. *Id.* No one was injured as a result of the rally and no arrests were made. *Id.*

13. The police department's actions are especially troubling considering Memphis's uneasy past with political activism. See *Blacklisted: Memphis Police Surveillance and Kendrick v. Chandler—A Timeline*, ACLU TENN. (Mar. 2, 2017) [hereinafter ACLU Timeline], <https://www.aclu-tn.org/blacklisted-memphis-police-surveillance-and-kendrick-v-chandler-a-timeline/>. At the height of the Civil Rights Movement, the Memphis Police Department created a Domestic Intelligence Department ("DID") to surveil and maintain records of political activists engaged in constitutionally protected activities. See *id.* The DID gathered intelligence on political activists engaged in conduct the department considered subversive or politically controversial. See *id.* The department gathered information on numerous politically charged groups including student organizations, civil rights groups, school teachers, and white supremacist groups. See Brentin Mock, *The Evolution of Domestic Spying Since MLK in Memphis*, CITYLAB (Apr. 9, 2018), <https://www.citylab.com/equity/2018/04/the-evolution-of-domestic-spying-since-mlk-in-memphis/557468/>.

One such organization the DID surveilled was the City Sanitation Workers. *Id.* The City Sanitation Workers attempted to form a union to help the workers fight for better working conditions. *Id.* Dr. Martin Luther King, Jr. eventually joined the organization's push to unionize. *Id.* Following Dr. King's assassination, the DID expanded its operations to include surveillance of the ACLU and NAACP. *Id.* In the decade following Dr. King's assassination the DID's budget continued to expand. *Id.*

Following one local journalist's numerous requests to view his private files, the DID began destroying documents related to its surveillance. See ACLU Timeline, *supra*. This effort to hide the information from the public drew the attention of many organizations, including the ACLU of Tennessee. See Daniel Connolly, *ACLU 'Blacklist' Lawsuit Against City of Memphis Approaches Trial*, COM. APPEAL (July 15, 2018), <https://www.commercialappeal.com/story/news/2018/07/15/memphis-spying-aclu-blacklist-lawsuit/738951002/>. The ACLU of Tennessee filed for an order to keep the City of Memphis from destroying any additional files from the department's records, but before the city was served the order, it destroyed ten filing cabinets of information. See Leta Mccollough Seletzky, *The Memphis Police Spied on Activists*, N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/opinion/the-memphis-police-spied-on-activists.html> (discussing Memphis's troubled past with the Civil Rights Movement).

14. See Opinion & Order, *supra* note 1. Importantly, the court did not hold that the City of Memphis or the Memphis Police Department discriminated against any group of people based on certain points of view or racial characteristics. *Id.* at 3.

Memphis Police Department violated the consent decree by intercepting electronic communications and joining the political activist groups using the “Bob Smith”¹⁵ Facebook account.¹⁶ The court found that the police department violated the consent decree in seven different ways, many of the violations stemming from the department’s creation and use of the fake Facebook account.¹⁷

Despite the verdict for the ACLU in the 2018 litigation, the City of Memphis and the Memphis Police Department received little punishment, and the political activists who were surveilled received no remedy.¹⁸ The court acknowledged that the “remedy in a lawsuit involving the violation of a court order, like the Consent Decree in this

Instead, the court found that the Memphis government used Facebook accounts to monitor groups of all identities and political persuasions. *Id.*

15. *Id.* at 3. The “Bob Smith” Facebook account was the primary account that the Memphis Police Department used to “friend” political activists. *See id.* Facebook believed, however, that the police department used more than one account, and the social media platform stated that it disabled multiple fake accounts as a result of its own investigations. *See* Letter from Andrea Kirkpatrick, Dir. & Assoc. Gen. Counsel, Sec., Facebook, to Michael Rallings, Dir., Memphis Police Dep’t (Sept. 19, 2018) [hereinafter Facebook Letter], <https://www.eff.org/document/facebook-letter-memphis-police-department-fake-accounts> (“[W]e have disabled the fake accounts that we identified in our investigation.”).

16. Facebook operates a social media networking service that connects some two billion users around the world. *See Company Info*, FACEBOOK NEWSROOM, <https://newsroom.fb.com/company-info/> (last visited Mar. 13, 2019). Facebook offers its services for free. *See* FACEBOOK, <https://www.facebook.com/> (last visited Mar. 13, 2019). *But see* John M. Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513, 551–55 (2018) (arguing, among other things, that “Free” services are not in fact free because users give up their privacy, and when “consumers pay, no matter the medium of exchange, Free is not free”). Users agree to Facebook’s terms of service when creating an account and every time the user opens Facebook’s website. *See* *Cross v. Facebook, Inc.*, 222 Cal. Rptr. 3d 250, 255 (Cal. Ct. App. 2017) (“Use of the service is free, but users agree to Facebook’s terms of service when they sign up for a Facebook account and each time they access or use Facebook.”).

17. *See* Opinion & Order, *supra* note 1, at 2–3 (listing the ways the City of Memphis violated the consent decree).

18. *Id.* at 32–35. The City of Memphis and the Memphis Police Department had to: (1) define political intelligence and inform officers political intelligence is not permissible; (2) design a training for police command staff; (3) establish a process to approve conduct that may inadvertently gather political intelligence; (4) create written guidelines the use of manual social media searches; and (5) maintain a list of all search

case, is not meant to punish a defendant, but rather to ensure future compliance with the order.”¹⁹ Future compliance, however, does not compensate or make whole the non-criminal political activists.²⁰

Facebook responded to the litigation by sending the Memphis Police Department a letter stating that the department’s fake account was a violation of Facebook’s terms of service and community standards.²¹ Facebook reiterated that it deletes fake accounts when it becomes aware of them,²² but this does not help the users that are already harmed. Facebook’s community standards and terms of service are meant to benefit all users, and fake accounts like the “Bob Smith” account detract from the online community.²³

The social media company made as much clear in its community standards by naming authenticity a “cornerstone” of Facebook’s services.²⁴ Facebook believes that its users are more responsible “for their statements and actions when they use their authentic identities.”²⁵ The company requires “people to connect on Facebook using the name they go by in everyday life,” because its “authenticity policies are intended to create a safe environment where people can trust and hold one another accountable.”²⁶ The company says that authenticity is a “core

terms used for social media police work. *Id.* Conspicuously absent were any remedies for the victims of the political intelligence gathering. *See id.*

19. *Id.* at 2.

20. Political activists, if recognized as third-party beneficiaries to the contract between police departments and Facebook, can potentially bring claims for injunctive relief, damages, and, potentially, attorney fees. *See* 42 U.S.C. § 1988(b) (2018) (allowing the prevailing party to collect attorney fees in litigation involving deprivation of rights); *see also infra* Parts II, III.

21. *See* Facebook Letter, *supra* note 15. Facebook’s letter to the Memphis Police Department underscored the company’s policy against users creating or using a fake Facebook account. *Id.* Facebook deleted the “Bob Smith” account several months after the litigation commenced. *See id.*; *see also* Complaint for Enforcement of Order, *supra* note 3.

22. *See* Facebook Letter, *supra* note 15.

23. *Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards/integrity_authenticity (listing misrepresentation as a violation of its community guidelines under Part IV) (last visited Feb. 7, 2019).

24. *Id.*

25. *Id.*

26. *Id.*

principle” that “differentiates Facebook from other services on the Internet.”²⁷

The fake account problem is not Facebook’s alone. Fake social media accounts are prevalent throughout all of the major social media platforms.²⁸ Facebook, however, is especially saturated with fake accounts.²⁹ Law enforcement officers and agencies³⁰ have started using fake accounts to monitor and obtain information on private social media users.³¹ These accounts, as noted above, violate Facebook’s terms

27. Facebook Letter, *supra* note 15.

28. See Lauren Reichart Smith et al., *Follow Me, What’s the Harm? Considerations of Catfishing and Utilizing Fake Online Personas on Social Media*, 27 J. LEGAL ASPECTS SPORT 32, 33 (2017) (noting that Facebook deemed over eighty million accounts as fake). The fake account problem has many real-world repercussions. See Martin Matishak, *What We Know About Russia’s Election Hacking*, POLITICO (July 18, 2018), <https://www.politico.com/story/2018/07/18/russia-election-hacking-trump-putin-698087>. During the 2016 presidential election, it is believed that Russian nationals created “bot” accounts on many social media platforms, including Facebook, to “promote pro-Trump and anti-Clinton hashtags.” *Id.* The bots also “encouraged minority groups either to not vote or to vote for a third-party candidate starting in the latter half of 2016.” *Id.*

29. Scott Shane & Mike Isaac, *Facebook Says It’s Policing Fake Accounts. But They’re Still Easy to Spot.*, N.Y. TIMES (Nov. 3, 2017), <https://www.nytimes.com/2017/11/03/technology/facebook-fake-accounts.html> (noting that Facebook estimates that its site has 200 million duplicate accounts and sixty million fake accounts).

30. This Note will look at fake Facebook accounts authorized for use by police departments and local governments. This Note will not look at individual police officers and any abuse of police resources the officers may have engaged in without departmental approval. See, e.g., Ben Kesslen, *Florida Officer Resigned After Accused of Using Police Database to Find Women to Date*, NBC NEWS (Mar. 11, 2019, 7:04 PM), <https://www.nbcnews.com/news/crime-courts/florida-officer-resigned-after-accused-using-police-database-find-women-n981981>.

31. See Kashmir Hill, *The Wildly Unregulated Practice of Undercover Cops Friending People on Facebook*, THE ROOT (Oct. 23, 2018, 1:30 PM), <https://www.the-root.com/the-wildly-unregulated-practice-of-undercover-cops-frie-1828731563> (discussing police surveillance online and the general unwillingness of courts to address the issue).

of service.³² Other scholars have analyzed how this practice is problematic from a constitutional and privacy perspective;³³ however, scholars have not considered the issue from a contract perspective.

This Note argues that political activists on Facebook have a cause of action against police departments using fake Facebook accounts because the activists are intended third-party beneficiaries of the contract between police departments and Facebook. Part II analyzes the harm done and why non-contract remedies for the political activists would be ineffective. Part III shows that the political activists fall under the third-party beneficiary principle and have a cause of action to redress harms from police surveillance. The contract cause of action survives notwithstanding provisions in Facebook's terms of service to the contrary. Part IV briefly concludes.

II. POLITICAL ACTIVISTS LACK TRADITIONAL REMEDIES AGAINST POLICE DEPARTMENTS

The United States Constitution guarantees an individual's right to privacy³⁴ and freedoms of speech, assembly,³⁵ and association.³⁶ Or-

32. *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last visited Feb. 7, 2019).

33. *See, e.g.*, Angela Foster, *Admissibility of Social Media Evidence in Federal Court—Is It What It Purports to Be?*, 295 N.J. LAW. 42 (2015); James R. O'Connor, *Asocial Media: Cops, Gangs, and the Internet*, 42 HOFSTRA L. REV. 647 (2013); Colleen M. Koch, Comment, *To Catch a Catfish: A Statutory Solution for Victims of Online Impersonation*, 88 U. COLO. L. REV. 233 (2017).

34. Privacy is never explicitly mentioned in the Constitution; however, the Supreme Court has found a right of privacy implicit in a number of constitutional amendments. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.”). *See generally* Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971 (2006); Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

35. U.S. CONST. amend. I.

36. Similar to privacy discussed *supra* note 34, freedom of association is not mentioned in the Constitution. The Supreme Court, however, has held that “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

dinarily, courts will allow suits against governmental entities for violations of these constitutional rights.³⁷ Courts have, however, been hesitant to say that online police surveillance with fake accounts violates a constitutional right when the surveillance is related to criminal activity.³⁸ This Part will look at how the non-criminal political activists' rights are harmed by police surveillance with fake accounts on Facebook. Further, this Part will show that traditional causes of action are unavailable to online political activists. Finally, this Part will show how a contract theory could be used to circumvent the immunity that normally protects governments from liability.

A. Harm to Political Activists

Although Congress “shall make no law . . . abridging the freedom of speech,”³⁹ the reality is that there are many limitations placed on speech.⁴⁰ Notwithstanding the many limitations, the Supreme Court

37. *But see* Emma Andersson, *When Your Constitutional Rights Are Violated but You Lose Anyway*, ACLU (July 11, 2018, 4:45 PM), <https://www.aclu.org/blog/criminal-law-reform/when-your-constitutional-rights-are-violated-you-lose-anyway> (showing that qualified immunity often bars claims against government workers even though there have been clear violations of constitutional rights).

38. *See* *People v. Harris*, 949 N.Y.S.2d 590, 594–95 (N.Y. Crim. Ct. 2012) (declining to give social media posts Fourth Amendment protections); *see also* Rachel Levinson-Waldman, *Government Access to and Manipulation of Social Media: Legal and Policy Challenges*, 61 HOW. L.J. 523, 544 (2018) (noting that law enforcement agencies are generally permitted to “engage in undercover activities, both in real life and online, without getting a warrant or clearing some other judicial hurdle”).

39. U.S. CONST. amend. I. The Supreme Court has held that the freedom of speech, and presumably the freedoms to associate and assemble, *see* O'Connor, *supra* note 33, at 669–73, extend to online speech and interactions. *See, e.g.,* *Reno v. ACLU*, 521 U.S. 844 (1997) (discussing the Communications Decency Act's impact on the First Amendment).

40. For example, as Justice Holmes famously remarked, falsely shouting fire in a theater is undoubtedly speech that may be regulated. *Schenck v. United States*, 249 U.S. 47, 52 (1919). There are numerous other permissible regulations of speech. *See, e.g.,* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1641 (2013) (noting that the Supreme Court has recognized many categories of

is more hesitant to limit political speech than other forms.⁴¹ The Court protects political speech so strongly because speech and expression are generally considered special categories of rights.⁴² These categories are generally considered special because citizens often believe that the “uninhibited exchange of information . . . and the open criticism of government are positive virtues.”⁴³

One major rationale for protecting political speech is that regulations might have a chilling effect on the marketplace of ideas.⁴⁴ The Supreme Court believes that placing obstacles in the way of free political speech will harm not only the individual speakers but also society as a whole.⁴⁵ Critiques of the government—a foundational right for Americans—may be suppressed by placing restrictions on political speech, so it is best to err on the side of more speech.⁴⁶

Similarly, the freedom to assemble ensures that political groups, particularly political dissenters, are able to gather without government

unprotected speech including defamation, incitement, threats, obscenity, child pornography, fraud, and fighting words).

41. See, e.g., *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186–87 (1999) (citing *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1999)) (noting that political speech, when it is “core political speech” receives First Amendment protection “at its zenith”).

42. See generally Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1983) (noting how the Founding Fathers intended political speech to be protected).

43. Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 693 (1978) (footnotes omitted). But see K-Sue Park, Opinion, *The ACLU Needs to Rethink Free Speech*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/opinion/aclu-first-amendment-trump-charlottesville.html>. Park argues that free speech is not available to all communities of people equally because other factors in the public sphere effectively chill marginalized speech at times. *Id.* Park further argues that the protection of speech and the platform to speak is especially important for marginalized peoples and minority groups. *Id.*

44. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 335 (2010) (observing that the marketplace of ideas is intended to benefit society).

45. See *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (noting that overbroad laws have a chilling effect on otherwise protected speech).

46. See Schauer, *supra* note 43, at 689.

interference and oppression.⁴⁷ While not discussed as much as the freedom of speech, the freedom to assemble is still regarded as an instrumental right that furthers other constitutionally protected rights.⁴⁸ The freedom to assemble is often used to ensure that other rights can be effectively asserted.⁴⁹ Notably, the freedom to assemble is not limited to assemblies for the “common good” and can be used by marginalized groups to more effectively use their individual freedom of speech.⁵⁰

Further, the freedom of association ensures that the freedom of speech is not harmed by allowing people to join others. The Supreme Court has held that the freedom of association is implicit in the language of the First Amendment because it is an essential part of the freedoms of speech and assembly.⁵¹ More specifically, political association is protected to ensure citizens have the ability to effectively exercise their other constitutional rights.⁵² Although similar to the freedom of assembly, the freedom of association is distinct and may be infringed without harming the freedom of assembly.⁵³

47. See John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 570 (2010) (noticing that most groups invoking the right of assembly are political dissenters from the majority or government standards). In early-American jurisprudence, the freedom to assemble played a large role in combatting government oppression. See *id.* More recently, the freedom helped some of the largest social movements in American history—including the Civil Rights Movement. *Id.* at 566. The freedom to assemble, however, has gradually vanished in American jurisprudence in recent years. See Robert F. Bauer, *The Right to “Do Politics” and Not Just to Speak: Thinking About the Constitutional Protections for Political Action*, 9 DUKE J. CONST. L. & PUB. POL’Y 67, 83 (2013) (arguing that freedom of assembly jurisprudence should be revived alongside the right to petition).

48. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984) (noting that the freedom to assemble is an “expressive association” that furthers other important constitutional rights).

49. See Inazu, *supra* note 47, at 566–69.

50. See *id.* at 571–73.

51. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (holding that freedom of association is guaranteed by the Constitution).

52. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (“The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization.” (citing *Elrod v. Burns*, 427 U.S. 347, 357 (1976))).

53. See John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1120–22 (2013) (detailing the various ways intimate association may be infringed without implicating other constitutional rights).

Although rapid advances in technology have profoundly influenced the ways in which people communicate,⁵⁴ the rights to speak freely, assemble, and associate exist in the online world as well.⁵⁵ Companies like Facebook have played a large role in this change. Facebook encourages users to become more politically involved using its website.⁵⁶ Now, Facebook plays an integral role in the way groups exercise their constitutional rights in modern society.⁵⁷ Many organizations rely on Facebook to organize political protests and rallies.⁵⁸

The threat of unregulated police officers listening in on political conversations will undoubtedly have a chilling effect on the political conversations groups would otherwise have on Facebook.⁵⁹ Without these conversations, political activists will not be able to assemble and associate with other activists as effectively. Therefore, the activists are harmed by the police activity because their First Amendment rights are being infringed. More specifically, the police are potentially chilling important political speech and action by surveilling the political

54. For a somewhat pessimistic view of how technological advances have impacted modern society, see Hito Steyerl, Opinion, *Technology Has Destroyed Reality*, N.Y. TIMES (Dec. 5, 2018), <https://www.nytimes.com/2018/12/05/opinion/technology-has-destroyed-reality.html>.

55. See Inazu, *supra* note 53, at 1120–22 (arguing that the logic of First Amendment jurisprudence naturally carries these protections into the virtual world).

56. See *Facebook for Government, Politics, and Advocacy*, FACEBOOK, <https://politics.fb.com> (last visited Mar. 22, 2019) (encouraging users to use Facebook to spread their political voice by using the tools on the social media platform to become more widely heard).

57. Nearly half of all Americans engaged in some form of political or socially focused speech on social media in 2017. Monica Anderson et al., *Activism in the Social Media Age*, PEW RES. CTR. (July 11, 2018), <http://www.pewinternet.org/2018/07/11/activism-in-the-social-media-age/>. Social media platforms like Facebook play an especially important role in activism for certain groups of social media users—particularly minority groups. *Id.* These groups feel that social media is an important way for them to share their political views and get involved in the American political system. See *id.*

58. See Deevra Norling, *The Art of Protesting: How to Organize a Protest That Brings Results*, HUFFPOST (Jan. 27, 2017, 7:44 AM), https://www.huffpost.com/entry/the-art-of-protesting-how-to-organize-a-protest-that_us_588b2de1e4b0020b224b43a0 (noting that one way to organize a political protest is by using social media platforms).

59. See generally Hill, *supra* note 31 (detailing examples of police “stalking” Facebook users to catch the Facebook users acting illegally).

groups.⁶⁰ The political activists' rights are precisely the rights that the Supreme Court is so concerned with protecting because of their role in political discourse.

B. Limits on Other Causes of Action and Contract as a Solution

Government employees often enjoy some immunity from suit.⁶¹ Although the government is afforded immunity, executive branches often do not have complete immunity.⁶² Congress and state legislatures retain the authority to broaden or limit the scope of immunity the government enjoys.⁶³ In fact, Congress and state legislatures have waived immunity for constitutional claims, giving individuals the right to sue the government.⁶⁴

Courts have been hesitant, however, to allow constitutional causes of action to combat police surveillance on social media platforms.⁶⁵ Courts have been so cautious that the Department of Justice's policies on online investigations allow agents to use other people's identities—with or without consent depending on the severity of the situation.⁶⁶ Courts do not believe that this “mere” surveillance harms

60. See *Black Lives Matter v. Town of Clarkstown*, 354 F. Supp. 3d 313, 323–25 (S.D.N.Y. 2018) (discussing the chilling effect police surveillance has on political activists).

61. See Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1529 (1992) (noting that the federal government is generally immune from suit without its consent and need not pay damages for violating rights).

62. See *id.* at 1535 (discussing instances where immunity is waived).

63. See *id.*; see also 42 U.S.C. § 1983 (2018) (removing governmental immunity where individuals have been deprived of constitutional or federal statutory rights).

64. See Jonathan M. Stemerman, *Unclearly Establishing Qualified Immunity: What Sources of Authority May be Used to Determine Whether the Law Is “Clearly Established” in the Third Circuit?*, 47 VILL. L. REV. 1221, 1221 (2002). Stemerman notes that an individual may sue state officials for constitutional rights violations, and courts may impose civil liability upon the infringing government officials. See *id.* Importantly, Stemerman shows that even though civil liability may be imposed by statute, the doctrine of qualified immunity will generally protect government officials from suit. *Id.* at 1221–22; see also Andersson, *supra* note 37.

65. See Levinson-Waldman, *supra* note 38, at 532–41 (arguing that courts have allowed police departments to surveil criminals on social media).

66. *The Department of Justice's Principles for Conducting Online Undercover Operations*, PUB. INTELLIGENCE (Mar. 22, 2010), <https://publicintelligence.net/the-department-of-justices-principles-for-conducting-online-undercover-operations/>.

constitutional interests enough to allow private citizens to bring suit, so police departments generally receive qualified immunity.⁶⁷ Without some alternative theory of suit, political activists would not have a way to redress harms.⁶⁸

Contracts offer a way for impacted citizens to get around the qualified immunity problem that they face when trying to bring constitutional suits.⁶⁹ Congress waived the executive branch's immunity for contract claims.⁷⁰ Similarly, most states waived sovereign immunity for contract claims.⁷¹

Of course, as with all waived immunity, the government may withdraw its consent to suit.⁷² The government is unlikely to withdraw from the right to sue on a contract theory for multiple reasons.⁷³ First, the Constitution forbids states from passing laws "impairing the obligation of contracts."⁷⁴ Further, the Supreme Court has borrowed from the Fifth and Fourteenth Amendments' takings clauses to buttress the right to sue the government on a contract.⁷⁵ Finally, the government

67. See Levinson-Waldman, *supra* note 38, at 540 (noting that courts may be more receptive to constitutional claims if the plaintiff can show more than only police surveillance).

68. See *id.*

69. See Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 471 (1999) (noting that governments, both state and federal, have generally waived immunity for contract claims).

70. Krent, *supra* note 61, at 1572.

71. See Matthew J. Whitten, *Fiction Becomes Reality: When Will Texas Abrogate the "Catch-22" of Sovereign Immunity When It Contracts?*, 33 TEX. TECH L. REV. 243, 262 (2004).

72. *Lynch v. United States*, 292 U.S. 571, 581–82 (1934) (holding that the government does not have to provide a remedy in the court system and may withdraw all remedies against the government). The government may even withdraw consent to suit while a suit is pending. See *District of Columbia v. Eslin*, 183 U.S. 62, 65 (1901).

73. See Hadfield, *supra* note 69, at 487.

74. U.S. CONST. art. 1, § 10, cl. 1.

75. See *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 & n.16 (1977) (holding that contract rights, including the right to sue on the contract, are similar to property and can only be taken with just compensation).

needs to hold itself out as a reliable contracting partner to benefit the public and avoid public outrage.⁷⁶

Constitutional and precedential constraints make it unlikely that governmental consent to contract suits will be withdrawn. This means contractual remedies are viable options for political activists because they are third-party beneficiaries.⁷⁷ The police effectively waived sovereign immunity when they entered into the contract with Facebook. By entering into the contract, police departments have allowed political activists to circumvent the qualified immunity issue. Political activists now may be able to sue cities and police departments using a contract theory.

III. POLITICAL ACTIVISTS HAVE A CAUSE OF ACTION AS THIRD-PARTY BENEFICIARIES

Third-party beneficiaries have not always been part of contract law, and the concept has sometimes clashed with traditional contracting principles.⁷⁸ The third-party beneficiary principle, however, has grown tremendously since its inception, and it has continued to broaden to allow more people to sue on contracts using the principle.⁷⁹ Originally a limited exception to the privity requirement,⁸⁰ third-party beneficiary law “has become so general and far-reaching in its consequences as to have ceased to be simply an exception [that it is now] recognized . . . as an affirmative rule.”⁸¹

Many modern courts apply the third-party beneficiary principle to an expanding number of areas of contract law using the liberal ap-

76. See *United States v. Winstar Corp.*, 518 U.S. 839, 883–84 (1996) (finding that the government’s responsibility to fulfill contracts is necessary to make private parties to the contract whole).

77. See *infra* Part III.

78. See *CONTRACTS FOR A THIRD-PARTY BENEFICIARY: A HISTORICAL AND COMPARATIVE ACCOUNT 1* (Jan Hallebeek & Harry Dondorp eds., 2008) (tracing the origins of the third-party beneficiary theory in contract law).

79. See discussion *infra* Section III.A.

80. Privity is the “connection or relationship between two parties.” *Privity*, *BLACK’S LAW DICTIONARY* (10th ed. 2014). Privity of contract is the particular relationship between two parties with respect to a contract. *Id.*

81. 16 AM. JUR. PROOF OF FACTS 2D 55 *Intent of Contracting Parties to Benefit Third Person* § 1 (2019).

proach of the *Restatement (Second) of Contracts* (“*Second Restatement*”).⁸² Third-party beneficiaries have been allowed to sue on insurance policies,⁸³ contracts to bequeath or devise property,⁸⁴ and in pollution cases.⁸⁵ Crucially, courts have allowed citizens to sue the government using the third-party beneficiary principle in government contracts as well.⁸⁶

This Part will detail the evolution of the third-party beneficiary principle and show how encompassing the principle now is. Then, it will show how political activists on Facebook are third-party beneficiaries to the contract between Facebook and police departments. Finally, this Part will demonstrate how Facebook’s terms of service provision on third-party beneficiaries violates public policy and is unnecessary to protect the company from this kind of liability.

A. *The Third-Party Beneficiary Principle Is Well-Established and Expanding*

The third-party beneficiary rule is “an altruistic doctrine” that “provides a contract remedy for individuals or classes not party to a

82. See James Thuo Gathii, *Incorporating the Third Party Beneficiary Principle in Natural Resource Contracts*, 43 GA. J. INT’L & COMP. L. 93, 110–14 (2014) (detailing the expanding scope of the third-party beneficiary principle).

83. See 16 AM. JUR. PROOF OF FACTS 2D 55 *Intent of Contracting Parties to Benefit Third Person* § 6 (2019) (noting that insurance contracts represent a common situation “that illustrates a contract for the benefit of a donee third person”).

84. See 79 AM. JUR. 2D *Wills* § 348 (2019) (noting that third parties may at times receive injunctive relief to prevent a promisor in a will contract from revoking the contract to keep the promisor from placing the property beyond the reach of the promisee).

85. See Vince Imbordino, *Contracts—The Third Party Beneficiary Concept is Available as a Theory of Recovery in Pollution Cases*, 3 TEX. TECH L. REV. 385, 386 (1972) (citing *Ratzlaff v. Franz Foods of Ark.*, 468 S.W.2d 239 (Ark. 1971)) (noting that the court recognized a “new theory of recovery in pollution cases”).

86. See *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1259–61 (Fed. Cir. 2005) (noting that claims may be asserted against the government “in accordance with the rules applicable to third-party claims”); see also Robert S. Adelson, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE L.J. 875, 878 (1985) (noting that in some ways, all members of the public are intended beneficiaries of public contracts, but arguing that the intent to benefit test is too encompassing to be a reliable test for the judiciary).

contract but who will otherwise benefit from its performance.”⁸⁷ Early in American contract law, the requirement of privity “prevented the third party from enforcing a contract to which he was not a party.”⁸⁸ Public policy concerns helped drive the move toward acceptance of third-party beneficiary rights because “justice and practicality” demanded parties be able to redress harms.⁸⁹ The modern development of third-party beneficiary law gradually eroded the privity requirement through case law that took an increasingly liberal view on who could sue to enforce a contract.⁹⁰

The seminal case of *Lawrence v. Fox*⁹¹ illustrates the noticeable departure from the privity requirement that had been growing in contract law throughout the nineteenth century.⁹² In *Lawrence*, the two contracting parties, Holly and Fox, agreed to a deal where Holly loaned money to Fox.⁹³ Fox was to use the money to repay a debt to Lawrence, the plaintiff who was not part of the contract.⁹⁴ The court held that Lawrence could enforce the contract against Fox and recover the preexisting debt.⁹⁵ *Lawrence* was the first case to recognize third-party beneficiaries in America, and it represents the merging of two types of recovery: contract with quasi-contract.⁹⁶

87. Patience A. Crowder, *More Than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment Contracts*, 17 GEO. J. ON POVERTY L. & POL’Y 287, 288 (2010).

88. David M. Summers, *Third Party Beneficiaries and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880, 880 (1982).

89. Note, *The Third Party Beneficiary Concept: A Proposal*, 57 COLUM. L. REV. 406, 406 (1957).

90. See Summers, *supra* note 88, at 880.

91. 20 N.Y. 268 (1859).

92. See *id.* at 275 (Comstock, J., dissenting) (“The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. . . . In general, there must be privity of contract. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking.”).

93. *Id.* at 270 (majority opinion).

94. *Id.*

95. *Id.* at 274; see also Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1362–65 (1992) (detailing the case and discussing the ramifications it had on third-party beneficiary law).

96. Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1115 (1985). As the name suggests,

Following *Lawrence*, courts continued to erode the privity requirement to allow recovery when justice demanded and further blended traditional contract remedies with quasi-contract principles.⁹⁷ In *Seaver v. Ransom*, the court noted that third-party rights were “confined” to four areas: (1) to cases where there is a monetary obligation to the third party; (2) to cases where the contract is made to benefit a man’s wife; (3) to public contract cases where the government seeks to protect its inhabitants; and (4) to cases where the promise runs directly to the third party through express terms without any consideration from the third party.⁹⁸ Although the court characterized the scope of third-party beneficiary rights as confined, public contracts were already recognized as a potential avenue for third-party beneficiary claims, and the scope of third-party rights had already greatly expanded.⁹⁹

After the developments in cases like *Lawrence* and *Seaver*, the drafters of the *Restatement (First) of Contracts* (“*First Restatement*”) attempted to summarize the less stringent requirements for suing on contracts.¹⁰⁰ The *First Restatement* illustrated that the privity requirement was somewhat diminished following these cases and showed that third parties sometimes had formal rights in some contracts to which they were not a party.¹⁰¹ The drafters of the *First Restatement*, however, did not articulate any general principles governing all third-party beneficiary cases.¹⁰² Instead, the drafters found three categories courts used to determine when third parties could sue: donee beneficiaries¹⁰³

quasi-contracts are not “true” contracts. Instead, obligations are “created by law for reasons of justice.” RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. b (AM. LAW INST. 1981).

97. See, e.g., *Seaver v. Ransom*, 120 N.E. 639 (N.Y. 1918).

98. *Id.* at 640–41.

99. See *id.* at 640.

100. E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 925–26 (8th ed. 2013).

101. See Summers, *supra* note 88.

102. See Eisenberg, *supra* note 95, at 1376.

103. A donee beneficiary receives a gift promise. RESTATEMENT (FIRST) OF CONTRACTS § 133(1)(a) (AM. LAW INST. 1932). A donee beneficiary is created when “a performance objective of the contracting parties . . . is to give effect to a donative intention . . . that will benefit the third party.” Eisenberg, *supra* note 95, at 1389. It is important to allow donee beneficiaries to enforce contracts as third parties because the third party’s benefit is necessary means “of effectuating the performance objectives of the parties to such a contract.” *Id.* at 1391.

could enforce contracts; creditor beneficiaries¹⁰⁴ could enforce contracts; but third-party beneficiaries who were neither donees nor creditors generally could not enforce contracts.¹⁰⁵ With the *First Restatement*, the drafters showed the modernizing view of third-party beneficiary law: recognizing that the privity requirement weakened with *Lawrence* and illustrating the transformation that contract law and theory underwent throughout the nineteenth and early twentieth centuries.¹⁰⁶

Notwithstanding the positive steps, this approach was flawed and proved difficult for courts to apply evenhandedly.¹⁰⁷ Courts attempted to focus on whether the parties to the contract intended to benefit a third party when third parties did not fall neatly within the donee or creditor beneficiary category.¹⁰⁸ But allowing the courts to decide intent is an inherently vague test, and vagueness and ambiguity are disfavored in the law and should be avoided if possible.¹⁰⁹

The drafters of the *Second Restatement* attempted to remedy the vagueness problem by illustrating the changing framework courts across the United States used to determine third-party beneficiary status.¹¹⁰ The *Second Restatement* nominally threw out the donee and

104. A creditor beneficiary receives satisfaction of an “actual or supposed or asserted duty” that is not a gift. RESTATEMENT (FIRST) OF CONTRACTS § 133(1)(b) (AM. LAW INST. 1932). *Lawrence* is an example of an early creditor beneficiary claim. Eisenberg, *supra* note 95, at 1391. A creditor beneficiary claim arises when the “promisee owed the third party a legal obligation prior to the contract.” *Id.*

105. RESTATEMENT (FIRST) OF CONTRACTS § 133 (AM. LAW INST. 1932); *see also* Crowder, *supra* note 87, at 299.

106. *See* Eisenberg, *supra* note 95, at 1362–72.

107. *See* Crowder, *supra* note 87, at 298–99.

108. *See id.* at 299–300.

109. *See* Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL’Y 101, 113 (1997). Posner argues that law should favor rules over standards. *Id.* Announcing what is permitted or not permitted in the legislature provides the advance warning necessary for citizens to conform their conduct accordingly. *See id.* Clear and definite rules also provide predictability to the legal process. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989). *But see* Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism*, 19 B.U. PUB. INT. L.J. 175, 175 (2010) (arguing that “bright-line” rules should not be preferred to vague standards).

110. FARNSWORTH ET AL., *supra* note 100, at 925–96.

creditor beneficiary designations,¹¹¹ and it moved to a more expansive definition of “intended beneficiaries” against “incidental beneficiaries” that seemed to be the focus of most courts.¹¹² The changes that allowed more people to claim third-party beneficiary status were necessitated by uneven application of the donee and creditor beneficiary claims throughout different states.¹¹³ Some jurisdictions refused to recognize third parties in some instances, while other jurisdictions took an expansive approach to the “intent to benefit” theory.¹¹⁴

Although clear on its face, the drafters did not present any clear methodology or system for applying the “intent to benefit” test that was seemingly created.¹¹⁵ Section 302’s definition of intended beneficiary simply combined the elements of the *First Restatement* test with the muddled intent to benefit tests courts employed following the *First Restatement*.¹¹⁶ More problematically, the drafters did not adequately define incidental beneficiary to give courts guidance. Subsection 302(2) only defines an incidental beneficiary as “a beneficiary who is not an intended beneficiary.”¹¹⁷ The drafters’ lack of a definition is saved only by their clear focus on intent.¹¹⁸

This Note uses the *Second Restatement*’s intended and incidental beneficiary formulation despite its shortcomings. Even with the *Second Restatement*’s liberalization of third-party beneficiary principles, the third party seeking to sue on the contract must be an intended beneficiary.¹¹⁹ Incidental third-party beneficiaries do not have standing

111. Although the *Second Restatement* does away with the distinction between donee and creditor beneficiaries, the Commentary to the *Second Restatement* still uses the terms. See RESTATEMENT (SECOND) OF CONTRACTS § 302 cmts. b–c (AM. LAW INST. 1981).

112. *Id.* § 302.

113. Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1171 (1985).

114. See *id.* at 1171–72.

115. Summers, *supra* note 88, at 881.

116. Eisenberg, *supra* note 95, at 1382.

117. RESTATEMENT (SECOND) OF CONTRACTS § 302(2) (AM. LAW INST. 1981).

118. *Id.* Subsection 302(1) recognizes third-party beneficiaries when it “is appropriate to effectuate the intention of the parties.” *Id.* § 302(1). Subsection 302(1)(a)–(b) essentially restates the donee and creditor beneficiary definitions of the *First Restatement*, but both subsections also place some importance on the intention of the parties. *Id.*

119. See 1 CORBIN ON CONTRACTS DESK EDITION § 44.02 (2015).

to sue even in the most generous of courts.¹²⁰ Courts abroad and a few domestic courts have greatly expanded the scope of third-party beneficiary rights, but the vast majority of courts in the United States have not gone this far.¹²¹ Because the majority of courts still use the *Second Restatement's* formulation, this Note will as well, even though it is not the most liberal of third-party beneficiary rights used in modern courts.

B. Victims of Political Surveillance Are Intended Third-Party Beneficiaries

Whether both parties need to intend the beneficiary varies by jurisdiction, but scholars have argued that courts should recognize how generous the third-party principle has become.¹²² Courts should look to the contract and focus on the intent that is reflected in the agreement and any surrounding circumstances.¹²³ However, because courts are split on whether both parties must intend the beneficiary for the party to become a third-party beneficiary, this Note uses the more stringent theory of dual intent. Therefore, an examination of each party's intent when entering into the terms of service contract is necessary.

The political activists are intended third-party beneficiaries to the contracts between Facebook and police departments. A third-party beneficiary is created when the "circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."¹²⁴ Facebook clearly intends to confer a benefit—an authentic Facebook environment—upon the beneficiary, the other Facebook users. Further, when government agencies enter into contracts, the government is attempting to benefit the public at large in some form.¹²⁵

120. *See id.*

121. *See Gathii, supra* note 82, at 112–14.

122. Harry G. Prince, *Perfecting the Third Party Beneficiary Standing Rule Under Section 302 of the Restatement (Second) of Contracts*, 25 B.C. L. REV. 919, 981 (1985) (noting that courts should recognize "that [s]ection 302 is not meant to impose the restrictive requirement that there be evidence of both parties' individual intent").

123. *Id.* (arguing section 302 "is meant to focus on the shared intent as reflected in the agreement and surrounding circumstances").

124. RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b) (AM. LAW INST. 1981).

125. The police department's intent is more problematic because government contracts have their own peculiarities.

1. Facebook's Intent

Facebook's community standards and statements about ensuring people are who they say they are clearly reflects the company's intent to create an authentic and private online environment.¹²⁶ "Authenticity is the cornerstone of [the Facebook] community," and "Integrity and Authenticity" receives its own section in Facebook's community standards.¹²⁷ Further, Facebook's Help Center provides six different options for reporting fake accounts that violate the terms of service.¹²⁸ Finally, the social media company encourages users to actively report accounts that "represent fake or fictional people" to maintain the authenticity the company wishes to provide.¹²⁹

Although Facebook has financial incentive to promote user growth,¹³⁰ the company has a strong incentive to provide an authentic

126. Facebook CEO Mark Zuckerberg recently came forward with a potential new business model stemming from repeated breaches of user privacy information and the fake account epidemic. See Ryan Duffy, *Facebook's Privacy Play*, MORNING BREW (Mar. 7, 2019), <https://www.morningbrew.com/emerging-tech/stories/2019/03/07/facebook-s-privacy-play>. While Facebook still endeavors to create an authentic environment for its users, the company is eyeing a turn to a more privacy focused platform. *Id.* Still, Zuckerberg doubled down on Facebook's commitment to authenticity in his memo on privacy by stating that "there must never be any doubt about who you are communicating with." Mark Zuckerberg, *A Privacy-Focused Vision for Social Networking*, FACEBOOK (Mar. 6, 2019), <https://www.facebook.com/notes/mark-zuckerberg/a-privacy-focused-vision-for-social-networking/10156700570096634/>. Facebook and Zuckerberg hope to create a safer environment for user information, something the company has not done in the past. See Kinsey Grant, *Do Not Disturb Mark Zuckerberg*, MORNING BREW (Mar. 7, 2019), <https://www.morningbrew.com/daily/stories/2019/03/07/not-disturb-mark-zuckerberg>.

127. *Community Standards*, *supra* note 23.

128. *Hacked and Fake Accounts*, FACEBOOK, https://www.facebook.com/help/1216349518398524?helpref=hc_global_nav (last visited Aug. 23, 2019).

129. *Id.*

130. Of course, Facebook is a profit-driven organization, and high user counts help generate a more profitable enterprise. See Shane & Isaac, *supra* note 29 (discussing Facebook's advertisement revenue business model). Facebook's near-constant growth, whether by real users or fake accounts, means the company has little incentive to police itself on the fake account problem. See *id.* Facebook, for instance, reported record profits in November 2017, "even as executives testified about Russian exploitation of their services." *Id.*

website. Facebook users use the platform for “real connections and results, not fakes.”¹³¹ Advertisers and businesses using the platform will not be able to achieve “results and could end up doing less business on Facebook if the people they’re connected to aren’t real.”¹³² Facebook further acknowledges that it is in the company’s “best interest to make sure that interactions are authentic.”¹³³ Even if Facebook is motivated solely by profits, it will be more profitable if it ensures an authentic environment.¹³⁴

Facebook’s chief executive officer, Mark Zuckerberg, maintains that the company is focused more on protecting the authenticity of the Facebook environment instead of maximizing profits.¹³⁵ When Facebook learned of the Memphis Police Department’s fake account, for example, the company issued a statement that repeated these sentiments because “[p]eople come to Facebook to connect and share with real people using their authentic identities.”¹³⁶ Facebook repeatedly says it wishes to make people “more accountable for their statements and actions” by requiring all members of the community to actually be who they are claiming.¹³⁷ As mentioned above, Facebook’s core reasoning behind this policy is to ensure that it has created “a safe environment where people can trust and hold one another accountable.”¹³⁸

The “growth at all costs” mindset, however, might only lead to a Pyrrhic victory for the social media company. Dante Disparte, *Facebook and the Tyranny of Monthly Active Users*, FORBES (July 28, 2018, 5:43 PM), <https://www.forbes.com/sites/dantedisparte/2018/07/28/facebook-and-the-tyranny-of-monthly-active-users/#158b01d66aea>. Facebook’s meteoric rise before becoming publicly traded firmly placed the corporation at the top of the social media hierarchy. *Id.* Continued focus on raising the number of users at all costs, however, is actually negatively impacting the way users perceive the brand. *Id.* If Facebook continues to ignore privacy, data, and authenticity issues, users may continue to become more and more frustrated with the company and stop using the platform. *Id.*

131. *Keeping Facebook Activity Authentic*, FACEBOOK (Oct. 4, 2014, 11:00 AM), <https://www.facebook.com/notes/facebook-security/keeping-facebook-activity-authentic/10152309368645766/>.

132. *Id.*

133. *Id.*

134. *See id.*

135. Shane & Isaac, *supra* note 29.

136. Facebook Letter, *supra* note 15.

137. *Community Standards*, *supra* note 23.

138. *Id.*

Whether motivated by continued user growth or the moral compass the top-brass at the company purports to hold, Facebook intends to create an environment free from fake profiles.

2. The Police Department's Intent

Assuming that both parties need to intend that a third-party beneficiary exists, the police department's intent is relevant. When a government entity enters into a contract, "the citizens of the governmental entity's jurisdiction are deemed to be third party beneficiaries to that contract."¹³⁹ The *Second Restatement* also expressly provides that third-party beneficiaries may sue on government contracts.¹⁴⁰ Despite the government contract being slightly different from private contracts, government contracts "can and should be analyzed under the general third-party-beneficiary principle."¹⁴¹ Because government contracts are intended to benefit the citizens of its jurisdiction and should not be analyzed any differently than other contracts for third-party beneficiary purposes, the police departments that create fake accounts intended to create third-party beneficiaries in the public when entering into the terms of service contract with Facebook.

Regardless of whether both parties need to intend to benefit a third party, both Facebook and government entities intended to benefit third parties when entering into the terms of service contract. Facebook intends that each of its users experience interactions with other authentic users. Further, governmental entities intend to benefit the citizens they serve when entering into contracts. Political activists using Facebook are both users and members of the public. Therefore, the political activists are intended third-party beneficiaries of the contract between Facebook and governmental entities who could seek recourse against the police under a contract theory.

139. Gathii, *supra* note 82, at 110.

140. RESTATEMENT (SECOND) OF CONTRACTS § 313(1) (AM. LAW INST. 1981) (extending the provisions of section 302 to government contracts).

141. Eisenberg, *supra* note 95, at 1407.

C. *Facebook's No Third-Party Beneficiary Provision Is Void Against Public Policy for Harmed Political Activists and Unnecessary*

Even though Facebook's terms of service unambiguously state that the terms "do not confer any third-party beneficiary rights,"¹⁴² courts should not enforce the provision. As discussed above, Facebook and the Memphis Police Department clearly intended to benefit third parties by entering into the terms of service contract.¹⁴³ The provision in Facebook's terms of service contract stating there are no third-party beneficiaries to the contract should be considered void as against public policy. While these users are intended beneficiaries, they still do not have any recourse available to them because of the provision in the contract. Courts should hold that any terms in Facebook's terms of service purporting to limit third-party beneficiaries violates public policy because the provision will leave harmed individuals without an adequate remedy at law.¹⁴⁴

Public policy arguments have famously been called the "very unruly horse" of contract law.¹⁴⁵ Instead of asking the court to enforce an otherwise valid contract provision, the party is asking the court to divine, interpret, or pronounce some public policy from the bench.¹⁴⁶ It is well settled law that a term of an agreement is void against public policy if the "interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."¹⁴⁷

142. *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last visited Aug. 23, 2019).

143. *See supra* Section II.B.

144. *See supra* note 20. Of course, the general principles of standing would apply.

145. *Richardson v. Mellish* (1824) 130 Eng. Rep. 294, 303 (HL).

146. David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 565 (2012) (taking an extended look at public policy arguments in contract claims).

147. *CD Int'l Enters., Inc. v. Rockwell Capital Partners, Inc.*, 251 F. Supp. 3d 39, 45 (D.D.C. 2017) (quoting *Jacobson v. Oliver*, 55 F. Supp. 2d 72, 79 (D.D.C. 2008)).

1. The Provision Violates Public Policy

Many courts use their own tests to determine when a contract provision should be considered void against public policy.¹⁴⁸ The *Second Restatement* provides some guidance and, like discussed above, will be the primary focus for this Note. In section 178, the drafters of the *Second Restatement* observe that courts weigh the interest in the provision's enforcement against the public policy against the enforcement.¹⁴⁹ Courts determine public policy from relevant legislation and public welfare in general, but the *Second Restatement* provides several policy concerns that judges often use.¹⁵⁰

Importantly, included in the non-exhaustive list as a potential ground for invalidating a provision against public policy is section 196—misrepresentation.¹⁵¹ To void a contract based on misrepresentation, the affected party must show the other party made an “assertion that is not in accord with the facts.”¹⁵² In cases where one party lies, the factor is satisfied.¹⁵³ At times, silence can constitute an affirmative act of concealment, leading courts to find that a party misrepresented facts through silence.¹⁵⁴

Courts routinely hold that “[a] term unreasonably exempting a party from the legal consequences of a misrepresentation is unenforceable on grounds of public policy.”¹⁵⁵ Of course, simply involving some

148. See Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 735 (2016) (noting that courts generally only “pay lip service to the language of the Restatement” before courts use their own individual approach).

149. RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

150. *Id.* § 179.

151. *Id.*; see also Stephanie R. Hoffer, *Misrepresentation: The Restatement's Second Mistake*, 2014 U. ILL. L. REV. 115, 125 (2014) (noting that when one party to a contract misrepresents a material fact and the misrepresentation results in a mistaken belief, the other party can generally void the contract).

152. RESTATEMENT (SECOND) OF CONTRACTS § 159 (AM. LAW INST. 1981).

153. See Hoffer, *supra* note 151, at 126.

154. *E.g.*, *Lindberg Cadillac Co. v. Aron*, 371 S.W.2d 651, 652–53 (Mo. Ct. App. 1963) (finding that concealing facts amounted to an affirmative misrepresentation).

155. RESTATEMENT (SECOND) OF CONTRACTS § 196 (AM. LAW INST. 1981).

form of misrepresentation does not automatically invalidate the contract provision. The *Second Restatement* analyzes public policy through the test in section 178:

(a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.¹⁵⁶

Applying the *Second Restatement's* test, a strong public policy exists against allowing misrepresentation during contracting.¹⁵⁷ Police departments knowingly entered into the terms of service contracts in breach because they were not the individual who they claimed—misrepresenting themselves as legitimate Facebook users.¹⁵⁸ Allowing the police departments to misrepresent themselves while entering into a contract that explicitly prohibits this practice is in direct contravention to public policy against misrepresentations.¹⁵⁹ The police department's misrepresentations should invalidate any provision that protects them.

If courts refuse to enforce the terms of service provision, police departments will very likely have to reconsider creating fake Facebook profiles to surveil citizens, satisfying the second part of the test. Fake profiles are an inexpensive way to gather information on citizens.¹⁶⁰ As noted above, the police department and city normally enjoy immunity from most civil suits.¹⁶¹ Allowing citizens to sue on the terms of

156. *Id.* § 178(3).

157. *See id.* § 196.

158. *See* Facebook Letter, *supra* note 15 (describing the Memphis Police Department's misrepresentation).

159. *See* RESTATEMENT (SECOND) OF CONTRACTS § 196 (AM. LAW INST. 1981).

160. *See* FACEBOOK, *supra* note 16. Although Facebook recently changed its slogan, the company's slogan advertised the site as free. *See* Ruqayyah Moynihan & Alba Asenjo, *Facebook Quietly Ditched the 'It's Free and Always Will Be' Slogan From Its Homepage*, BUS. INSIDER (Aug. 27, 2019, 8:01 AM), <https://www.businessinsider.com/facebook-changes-free-and-always-will-be-slogan-on-homepage-2019-8> (detailing how the company recently changed its slogan from "It's free and always will be" to "It's quick and easy").

161. *See supra* Section II.B.

service contract will provide a remedy against the cities and police departments and will serve as a deterrent. Any potential liability from suits by political activists will make the fake Facebook profiles a much greater risk for police departments. Consequently, police departments will likely be more cautious when creating fake profiles, furthering the policy that disfavors misrepresentations in contracting.¹⁶²

As for the third part of the test, police officers misrepresenting themselves as private citizens is both serious and deliberate. The seriousness of the misrepresentation is seen in the harm that the political activists suffer.¹⁶³ Further, the misrepresentation by the police is deliberate; the process of creating a fake Facebook profile takes much time and effort, and it can only be done intentionally.¹⁶⁴ Because of the seriousness of the consequences and the deliberateness of the police department's actions, the third part of the test is satisfied.

The final part of the test is more problematic for political activists but not fatal. The connection between the provision and the misconduct is not direct. The *Second Restatement*, however, directs courts to weigh the factors instead of requiring all elements from section 178.¹⁶⁵ Three of the four factors weigh heavily in favor of invalidating the provision on public policy grounds, and courts could easily find that the provision in the contract is void against public policy.

Courts often employ their own test for what violates public policy.¹⁶⁶ Because public policy arguments are so “unruly,”¹⁶⁷ police departments should anticipate that the provision is against public policy and reform their tactics to avoid potential liability. Without the provision, surveilled political activists would be free to sue on the contract

162. See RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

163. See *supra* Section II.A.

164. See Rick Newman, *How the Bad Guys Build Fake Accounts on Facebook*, YAHOO FIN. (Oct. 23, 2017), <https://finance.yahoo.com/news/bad-guys-build-fake-accounts-facebook-211820178.html> (detailing the elaborate steps that must be taken to create a fake Facebook profile). Newman first noticed that he could buy an account for relatively cheap from third parties. *Id.* The process of creating a fake profile himself, however, took many steps, and Facebook's facial recognition software caught his photos within forty-eight hours. *Id.*

165. RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

166. See Ghodoosi, *supra* note 148, at 735.

167. See *Richardson v. Mellish* (1824) 130 Eng. Rep. 294, 303 (HL).

because they are intended third-party beneficiaries. If the provision is voided, cities and police departments would be subject to great liability.

2. The Communications Decency Act Renders the Provision Unnecessary

If courts do not decide that Facebook's provision stating there are no third-party beneficiaries to the terms of service contract is void against public policy, Facebook could do the "right" thing and remove the burdensome provision. If Facebook truly wishes to stop police impersonators from using fake accounts, the company needs to remove the provision from the terms of service to give the non-criminal political activists legal recourse against the police departments. Facebook is already robustly protected by section 230 of the Communications Decency Act ("CDA"),¹⁶⁸ so the provision is unnecessary to protect the company from third-party claims. For the company's practices to become consistent with its stated goals, Facebook should remove the provision.

Section 230 of the CDA states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."¹⁶⁹ Facially, the language of the CDA would only protect Facebook from publisher liability, and third-party liability could still attach.¹⁷⁰ Courts have, however, generally concluded section 230 "confers broad immunity on operators."¹⁷¹ *Zeran v. America Online, Inc.*¹⁷² is the leading case on the CDA.¹⁷³ In *Zeran*, the Fourth Circuit read the CDA's protection broadly, and courts have continued to hold that the CDA provides a broad grant of immunity for internet services.¹⁷⁴

168. See 47 U.S.C. § 230(c)(1) (2018).

169. *Id.*

170. See Koch, *supra* note 33, at 255.

171. Lynn C. Percival, IV, *Public Policy Favoritism in the Online World: Contract Voidability Meets the Communications Decency Act*, 17 TEX. WESLEYAN L. REV. 165, 170 (2011).

172. 129 F.3d 327 (4th Cir. 1997).

173. See Koch, *supra* note 33, at 255.

174. *Id.*

One of many examples following *Zeran* is *Goddard v. Google, Inc.*¹⁷⁵ *Goddard* involved alleged third-party beneficiaries of contracts between Google and AdWords advertisers.¹⁷⁶ The court held the claims were barred because “they would hold Google responsible for third-party content, in violation of [section] 230(c)(1).”¹⁷⁷ The court reasoned that because Google did not “encourage illegal content, or design [its] website to require users to input illegal content,” the company was immune under the CDA.¹⁷⁸ Because Google did not actively do anything illegal, it was protected by the CDA, regardless of whether *Goddard* was a third-party beneficiary to the contracts between Google and AdWords.¹⁷⁹

More specifically to the online impersonation issue, the Ninth Circuit extended CDA immunity to an online dating company when one of the company’s users created a fake account.¹⁸⁰ An online dating site user created an account posing as actress Christianne Carafano.¹⁸¹ The profile never explicitly named the actress, but it used her image and movies she appeared in on the profile.¹⁸² The court allowed the dating website to use CDA immunity because the independent user was the wrongdoing party who created the fake profile.¹⁸³

The scope of protection the CDA provides to internet service providers is immense. Facebook is generally protected from suit for

175. *Goddard v. Google, Inc.*, No. C 08-2738-JF (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008).

176. *Id.* at *1.

177. *Id.* at *5.

178. *Id.* at *3.

179. *Id.*

180. Koch, *supra* note 33, at 255–56 (detailing the litigation); *see also* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1120–21 (9th Cir. 2003).

181. *See Carafano*, 339 F.3d at 1121.

182. Koch, *supra* note 33, at 255–56 n.153. The practice of impersonating a real person online to become romantically involved with another person is known as catfishing. *Id.* at 237. Although sometimes good-spirited, *see* John Oliver, *Last Week Tonight with John Oliver - 3 Chechnyan Women Catfished Isis*, YOUTUBE (Aug. 3, 2015), <https://www.youtube.com/watch?v=lh9oWUEzrT4>, online impersonations actually have a large impact on Americans and the economy. *See* Niraj Chokshi, *Happy Valentine’s Day! Online Dating Scams Cost Americans \$143 Million*, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/business/ftc-online-romance-scams.html> (showing the incredible cost catfishing has on the American economy).

183. *Carafano*, 339 F.3d. at 1124.

anything a third-party posts to its platform. Because the overwhelming majority of content on Facebook is third-party generated, the CDA protects the company from litigation that arises from user actions. Facebook could decide to update its terms of service to align more closely with the company's stated goals and beliefs. If it does, police departments will be subject to much more liability.

IV. CONCLUSION

Political activism is a defining characteristic of the United States,¹⁸⁴ so much so that courts are extremely hesitant to place obstacles in front of political processes.¹⁸⁵ Through Facebook, police are able to surveil non-criminal political activists, potentially violating their constitutional rights.¹⁸⁶ Groups like Black Lives Matter that use Facebook to organize rallies and protests need the confidence that their conversations will be free from police intrusion unless the police obtain the required warrants.

Because governmental immunity often hinders plaintiffs' claims against the police in this context, activists need to find other avenues for legal action. The third-party beneficiary principle is well-established in American jurisprudence.¹⁸⁷ The principle has expanded in scope to the point that political activists on Facebook who have been spied on potentially have a cause of action. If a suit arises, courts will likely recognize these activists as third-party beneficiaries to the contract between police departments and Facebook.¹⁸⁸ After they are recognized as third-party beneficiaries, the harmed activists will be able to sue the government without regard to sovereign immunity.¹⁸⁹

Recognizing political activists as third-party beneficiaries will be a deterrent to police departments using fake Facebook accounts to surveil non-criminals. It will also solve the problem of police chilling political dialogue by engaging in surveillance of so-called subversive groups. Recognizing political activists as third-party beneficiaries would be a policy statement that tells police departments that they are

184. See Inazu, *supra* note 53, at 566.

185. See *supra* Section II.A.

186. See *supra* Section II.A.

187. See *supra* Section III.A.

188. See *supra* Section III.B.

189. See *supra* Section II.B.

not allowed to continue to abuse their power. If political activists are recognized as third-party beneficiaries to the contract between Facebook and police departments, then police departments and local governments would be liable to all those who they surveil. The amount of potential liability will undoubtedly cause police departments to reform their current tactics.

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