

CROSSING LENSES: POLICING’S NEW VISIBILITY AND THE ROLE OF “SMARTPHONE JOURNALISM” AS A FORM OF FREEDOM-PRESERVING RECIPROCAL SURVEILLANCE

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Abstract

Citizens recording police, a form of action that has been termed “sousveillance” (surveillance from underneath) or the “participatory panopticon,” has become increasingly common in recent years. Citizen media can have a substantial impact on policing and police image management—and thus affect public perceptions of police legitimacy. On the other hand, police departments are increasingly utilizing sophisticated visual surveillance technologies, such as officer-mounted wearable cameras, to document police-citizen encounters. In some states, eavesdropping statutes have been applied against citizens attempting to record encounters with police officers, often while these same statutes contain exemptions for officer-initiated recordings. Courts have begun to weigh in on the legal rights of citizens documenting police action—and the constitutionality of the state eavesdropping laws that prohibit such conduct—and have generally begun to recognize a First Amendment constitutional right to film police in public spaces. However, the continued proliferation of recording devices and smartphone applications designed to allow citizens to covertly record encounters with police officers in efforts to hold public officials accountable puts some users (perhaps even unwittingly) at serious legal risk. This situation presents a distinct problem—a problem of one-sided surveillance power and limited transparency that potentially threatens the constitutional rights and freedoms of American

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citizens. This Article examines, theoretically, the role that citizen media should play as a liberty-preserving form of reciprocal transparency, what forms of respect ought to be owed by camera-wielding citizens to the police officers and other subjects of their recordings in public spaces, and what moral and legal obligations citizen journalists may have (or may not have) to respect and obey wiretapping laws that prohibit recording in public spaces without all-party consent.

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I. INTRODUCTION

In recent years, police officers and law enforcement agencies have been conducting increasingly sophisticated (and intensive) information gathering through visual and spatial surveillance of citizens in public spaces. Law enforcement’s past reliance on public and private CCTV for visual evidence of criminal conduct or officer-citizen encounters has now been augmented by the widespread adoption of officer-mounted wearable cameras and dashboard cameras mounted in patrol vehicles. At the same time, however, law enforcement has also been forced to respond to new forms of police visibility enabled by increased citizen-initiated video surveillance of police officers in these same public areas—an example of “sousveillance” (surveillance from underneath)¹ or the “participatory panopticon”² discussed in the surveillance

1. See Jean-Gabriel Ganascia, *The Generalized Sousveillance Society*, 49 SOC. SCI. INFO. 489, 489

studies literature. On one hand, the ubiquity of handheld video recording has led to increased visibility of police officer misconduct—such as officers spraying pepper spray into the faces of non-violent protesters on the UC Davis campus,³ the shooting of Oscar Grant on a San Francisco subway platform,⁴ and the death of Ian Tomlinson during the London Riots in 2011⁵—but it has also provided law enforcement with a great source of citizen-sourced evidence after unlawful events (such as in the post-event investigations of the Boston Marathon bombings in 2013⁶ and the Vancouver Stanley Cup Riots of 2011⁷) that has led to a number of important criminal prosecutions.⁸ Thus, rampant citizen-initiated surveillance—mostly of the type I refer to herein as “smartphone journalism”—poses a threat to law enforcement image management and promises both a method of holding individual officers accountable for misconduct and for crowd-sourcing visual surveillance to aid in investigating crime and terrorism.

As the proliferation of high-resolution smartphone and wearable cameras (including technologies like Google Glass with embedded cameras, WiFi connectivity, and information rich data presentation on its lenses) continues, these problems will only increase in importance and visibility. The powerful promise of citizen media to expose state wrongdoing is also underscored by the potential for such footage to go viral on video-sharing websites such as YouTube and on online social media networks. The increased, even ubiquitous, rise in the number of video recording devices regularly recording

(2011); Steve Mann et al., *Sousveillance: Inventing and Using Wearable Computing Devices for Data Collection in Surveillance Environments*, 1 SURVEILLANCE & SOC’Y 331, 332 (2003), available at <http://library.queensu.ca/ojs/index.php/surveillance-and-society/article/view/3344/3306>.

2. Jamais Cascio, *The Rise of the Participatory Panopticon*, WORLD CHANGING (May 4, 2005), <http://www.worldchanging.com/archives/002651.html>; Mark A.M. Kramer et al., *MobiMundi: Exploring the Impact of User-Generated Mobile Content—The Participatory Panopticon*, PROC. 10TH INT’L CONF. ON HUM. COMPUTER INTERACTION WITH MOBILE DEVICES & SERVICES 575–77 (2008).

3. See *Federated Univ. Police Officers Ass’n v. Superior Court*, 159 Cal. Rptr. 3d 541, 543 (Cal. Ct. App. 2013); Anupam Chander & Madhavi Sunder, *Foreword: Occupying Our Hearts*, 45 U.C. DAVIS L. REV. 1585, 1605 (2012); Steven A. Lutt, Note, *Sunlight Is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 WASHBURN L.J. 349, 376–77 (2012).

4. Mary Grace Antony & Ryan J. Thomas, *‘This Is Citizen Journalism at Its Finest’: YouTube and the Public Sphere in the Oscar Grant Shooting Incident*, 12 NEW MEDIA & SOC’Y 1280, 1280–81 (2010).

5. Chris Greer & Eugene McLaughlin, *We Predict a Riot? Public Order Policing, New Media Environments and the Rise of the Citizen Journalist*, 50 BRIT. J. CRIMINOLOGY 1041, 1049 (2010).

6. Spencer Ackerman, *Data for the Boston Marathon Investigation Will Be Crowdsourced*, WIRED (Apr. 16, 2013, 1:18 PM), <http://www.wired.com/dangerroom/2013/04/boston-crowdsourced/>; Tarun Wadhwa, *Lessons from Crowdsourcing the Boston Bombing Investigation*, FORBES (Apr. 22, 2013, 9:32 AM), <http://www.forbes.com/sites/tarunwadhwa/2013/04/22/lessons-from-crowdsourcing-the-boston-marathon-bombings-investigation/>.

7. See VANCOUVER POLICE DEP’T, 2011 STANLEY CUP RIOT REVIEW 14, 71, 75, 92 (2011), available at <http://vancouver.ca/police/assets/pdf/reports-policies/vpd-riot-review.pdf> (“[N]umerous citizens identified people in photos and videos on the Internet and forwarded the information to the [Vancouver Police Department] for their investigation within hours of the riot.”).

8. See, e.g., Press Release, Vancouver Police Dep’t, IRIIT Recommends Charges Against 350th Suspected Rioter (July 23, 2013), <http://mediareleases.vpd.ca/2013/07/23/irit-recommends-charges-against-350th-suspected-rioter/> (charging woman with assault because of civilian video evidence).

in public spaces has generated sometimes fierce objection by officers who do not wish to be recorded, and it has also altered the way in which the traditional media reports on policing activity (often with negative implications for police organizations and individual officers).⁹ However, the ability of citizens to record the official, public actions of police officers and other state actors may also serve an important oversight purpose and, ultimately, help preserve individual liberty more broadly. As such, this action ought to be protected by the First Amendment in a way that also preserves personal privacy.

The rise of citizen media (and the related concept of citizen journalism) has also brought about a wealth of discussion about how existing laws do, or should, protect the rights of citizens acting as journalists, how to define journalist and journalism, and whether (and when) the traditional news media should be afforded greater legal protections than citizen journalists.¹⁰ These debates have ranged from issues regarding bloggers' rights to shield sources,¹¹ state and local statutory definitions of "journalist,"¹² and the rights of citizens to record police officers and other public officials engaged in carrying out their official duties.¹³ In some states, the act of recording an officer in public may violate state wiretapping laws and put the offender at risk of criminal charges, even when an officer has no reasonable expectation that the conversation is private.¹⁴ In other states, overtly recording officers in public spaces is generally allowed, whether by judicial decisions or more lenient statutory frameworks.¹⁵ In recent years, the increase in citizen media production and the proliferation of camera enabled mobile technologies, like cellphones, has

9. See Greer & McLaughlin, *supra* note 5, at 1050–51 (noting that the media relied on civilian captured video to report on cases of police misconduct).

10. See, e.g., *Bloggers' Rights*, ELECTRONIC FRONTIER FOUND., <https://www EFF.org/bloggers> (last visited Jan. 21, 2014) (discussing efforts to extend journalistic protection to bloggers).

11. See Obsidian Finance Group, LLC v. Cox, No. CV-11-57-HZ, 2011 WL 5999334, at *1 (D. Or. Nov. 30, 2011) (declining to extend Oregon Shield Laws to bloggers); Order on Motion for Reconsideration, Johns-Byrne Co. v. TechnoBuffalo, LLC, No. 2011 L 009161 (Ill. Cir. Ct. July 13, 2012), available at <http://www.dmlp.org/sites/citmedialaw.org/files/2012-07-13-Order%20on%20motion%20for%20reconsideration.pdf> (discussing conflicting legal precedent on extending journalistic shield laws to bloggers).

12. See Gregg Leslie, *Who Is a "Journalist?" And Why Does It Matter?*, NEWS MEDIA & L., Fall 2009, at 4 (discussing reasons for statutory definitions of journalist).

13. See, e.g., ACLU of Illinois v. Alvarez, 679 F.3d 583, 586 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012) (invalidating portions of Illinois eavesdropping statute that criminalizes audio recording of police officers in public space); Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011) (affirming citizen journalist filming a police officer is within established First Amendment rights).

14. See, e.g., 720 ILL. COMP. STAT. 5/14-1(d) (2012) (applying eavesdropping statute to communication of a "private nature"); Alvarez, 679 F.3d at 595 ("[T]he statute sweeps much more broadly, banning all audio recording of any oral communication absent consent of the parties regardless of whether the communication is or was intended to be private. The expansive reach of this statute is hard to reconcile with basic speech and press freedoms.").

15. See Smith v. City of Cumming, 212 F.3d 1332, 1334 (11th Cir. 2000) ("[The public] ha[s] a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."); Fordyce v. City of Seattle, 55 F.3d 436, 438 (9th Cir. 1995) (affirming right to videotape police office on public sidewalk); State v. Flora, 845 P.2d 1355, 1357–58 (Wash. Ct. App. 1992) (holding that police arrests are not private and therefore not subject to Washington eavesdropping statute).

impacted the public perception and media portrayal of policing tactics used during large-scale protests and riots, as well as in more ordinary policing situations.¹⁶

Video filmed by citizen journalists has found its way into the popular discourse about accountability of policing and government, and millions have witnessed shocking events of alleged police misconduct via online video-sharing websites, the websites of traditional media and press outlets, blogs, and social media. Conflicts between police officers and citizen journalists leading to police arresting citizens for violations of state wiretapping and eavesdropping laws in some states (felony offenses in some cases)¹⁷ have become quite common.¹⁸ Reports of these occurrences have continued to come to light even in some jurisdictions where police departments have explicitly promulgated department policies that recognize that citizens have constitutional rights to film officers and that have instituted or increased officer training.¹⁹

As a consequence, state and federal courts have begun to weigh in on the legal rights of citizens documenting police action—and the constitutionality of the state wiretapping laws that prohibit such conduct—and have generally begun to recognize a First Amendment constitutional right to film police in public spaces.²⁰ However, the continued proliferation of smartphone applications designed to allow citizens to *covertly* record encounters with police officers in efforts to hold public officials accountable may place some users (perhaps even unwittingly) at serious legal risk. Indeed, activists and organizations such as the New York Civil Liberties Union and the American Civil Liberties Union (ACLU) of New Jersey have been distributing smartphone applications designed to allow citizens to covertly record encounters with police officers as part of law enforcement accountability programs, while also actively pursuing litigation (along with other organizations like the National Press Photographer Association) on behalf of photographers and citizen journalists arrested for recording officers.²¹ Police agencies are also increasingly adopting their own video recording policies and

16. Antony & Thomas, *supra* note 4, at 1292.

17. See, e.g., 720 ILL. COMP. STAT. 5/14-4(a) (“Eavesdropping, for a first offense, is a Class 4 felony and, for a second or subsequent offense, is a Class 3 felony.”).

18. Stephanie Claiborne, *Is It Justice or a Crime to Record Police?: A Look at the Illinois Eavesdropping Statute and Its Application*, 45 J. MARSHALL L. REV. 485, 501–04 (2012) (highlighting the prevalence of arrests for violations of state wiretapping and eavesdropping laws in Illinois).

19. See, e.g., Justin Fenton, *Claim: Woman Arrested, Camera Destroyed After Recording Baltimore Police*, BALT. SUN (May 15, 2013), http://articles.baltimoresun.com/2013-05-15/news/bal-claim-woman-arrested-camera-destroyed-after-recording-baltimore-police-20130515_1_christopher-sharp-camera-phone-wbal-tv.

20. See, e.g., *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011).

21. See generally Eunice Lee, *N.J. ACLU Unveils ‘Stealth’ App Allowing Citizens to Secretly Record Police*, N.J. ONLINE (July 3, 2012, 6:30 AM), http://www.nj.com/news/index.ssf/2012-07/nj_aclu_unveils_stealth_app_al.html (discussing ACLU’s release of “stealth” app for citizens’ smartphones).

practices, such as the utilization of dashboard cameras or body-mounted cameras, as a way to dispel potential violence and document police-citizen encounters (both to provide evidence and to protect officers from false complaints).²²

Because of the overlap and potential inconsistency between state laws and judicial interpretations of the First Amendment, at least in the states that criminalize the recording of conversations without the consent of all parties to the conversation, the production and practice of citizen media—whether covert or not—may force citizens to consider what Martha Nussbaum calls the “tragic question.”²³ Counter to the “obvious question” (which action should I take?), the tragic question forces us to consider whether “any of the options open to us [are] free from serious moral wrongdoing.”²⁴ In Nussbaum’s estimation, the purpose of confronting the tragic question is to make us think about “how we might design a society where such unpalatable choices do not confront people, or confront them less often.”²⁵ Whether citizen journalists are ultimately faced with the tragic question may turn on whether we can equate legal obligations with moral obligations. At first glance, common intuitions would support the proposition that, in general, we have some moral obligation to obey the law, at least in the aggregate, to avoid civil anarchy. But I would also suggest that in everyday life we generally tend to improperly conflate legal obligations with moral obligations.

In this Article, I set out to examine the relationship between privacy, liberty, and security implicated by government surveillance (in the form of officer-mounted wearable cameras) and citizen-initiated efforts to cast the gaze back at the government through filming police officers carrying out their official duties in public places. In particular, I aim to explore how both liberal and neo-republican conceptions of liberty,²⁶ privacy,²⁷ and free speech²⁷ can

22. See, e.g., Andrea Noble, *Police Now Armed with Video: Recording Can Protect Officer, Citizen Through Visual Proof*, WASH. TIMES (Feb. 25, 2013), <http://www.washingtontimes.com/news/2013/feb/25/police-now-armed-with-video/?page=all> (citing opinions from law officers and public officials on the issue of recordings of police activity).

23. See Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1005 (2000) (discussing the author’s views on the questions individuals face in given situations).

24. *Id.*

25. *Id.*

26. See, e.g., Philip Pettit, *Freedom as Antipower*, 106 ETHICS 576 (1996) [hereinafter Pettit, *Freedom as Antipower*] (proposing a neo-republican, or neo-Roman, theory of freedom as non-domination). Other versions of this theory have been discussed and promoted in PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1999); QUENTIN SKINNER, *HOBBS AND REPUBLICAN LIBERTY* (2008); QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998); Philip Pettit, *Keeping Republican Freedom Simple: On a Difference with Quentin Skinner*, 30 POLITICAL THEORY 339–56 (2002); Philip Pettit, *The Instability of Freedom as Noninterference: The Case of Isaiah Berlin*, 121 ETHICS 693 (2011); and Quentin Skinner, Address at Harvard University at Tanner Lectures on Human Values: The Paradoxes of Political Liberty (Oct. 24 & 25, 1984).

27. See, e.g., Kent Greenawalt, *Rationales for Freedom of Speech*, in INFORMATION ETHICS: PRIVACY, PROPERTY, AND POWER 278 (Adam D. Moore ed., 2005); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (Harper 1960); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM*

inform the way we think about the proper relationship between these competing values. Thus, the nature, quality, security, and amount of information implicated in these situations can have important ramifications for how we think about freedom—and how much freedom we ought to let slip away for the sake of security. I also conclude that current wiretapping laws and policies that restrict the First Amendment rights of citizens to document and report governmental abuses of power in public spaces, especially when officers are granted the right to film the public without similar restrictions, poses a threat to free speech rights and individual freedom more broadly.

This Article also explores how, and whether, citizen journalists are in fact faced with tragic questions in this context and, if so, how they may go about navigating solutions and decision-making when confronted with these moral dilemmas. I propose a theory of information privacy that recognizes some legitimate expectations of privacy in public spaces while also respecting First Amendment rights to gather and disseminate information about government conduct. I will also address questions related to respect (particularly what respect should be owed to the police officers and other subjects of recordings in public spaces), and what moral obligations citizen journalists may (or may not) have to respect and obey the law.

In addition, defining informational privacy as the right to control access to and uses of personal information²⁸ provides one philosophically defensible way to protect some privacy rights in public spaces. This definition explicitly recognizes that individuals should have some rights to control not just access to personal information, but also some subsequent uses of that information,²⁹ even after some disclosures to third parties or voluntarily entering a public space. However, defining privacy this way also forces us to consider when (or whether) a person's physical presence in a public space ought to act as an explicit or implied waiver of certain privacy rights (as well as which rights ought to be waived and which ought to be retained in particular circumstances), and whether we should reach a different conclusion when the person is acting in an official capacity as a police officer.

Even if personal information privacy rights ought to protect individual activity in public spaces to some degree (and I argue they should), the

OF FREE SPEECH (Free Press 1993); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); Jack M. Balkin, *The First Amendment Is an Information Policy*, 41 HOFSTRA L. REV. 1 (2013); Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2009); William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1–20 (1965); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245–66 (1961); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You*, 52 STAN. L. REV. 1049 (2000); Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011).

28. See ADAM D. MOORE, *PRIVACY RIGHTS: MORAL AND LEGAL FOUNDATIONS* 16 (2010); Adam D. Moore, *Toward Informational Privacy Rights*, 44 SAN DIEGO L. REV. 809, 813 (2007).

29. *Id.*

importance of citizen oversight, personal liberty, and First Amendment rights to gather and access information about government conduct weigh in favor of a conclusion that public officials engaged in their official duties (especially in public spaces) have effectively waived certain privacy interests that ordinary citizens ought to maintain by virtue of their positions as public servants. This conclusion is particularly important when applied to law enforcement and other government agents who have the power to coerce, detain, arrest, and otherwise interfere significantly with personal liberty interests.

II. CITIZEN MEDIA, PARTICIPATORY JOURNALISM, AND THE RIGHT TO RECORD

In the early hours of the morning on March 3, 1991, George Holliday, from his nearby apartment, covertly recorded Los Angeles Police Department officers beating Rodney King with batons.³⁰ After Holliday sent a copy of the nine-minute video recording to a local television station, it became a media sensation.³¹ The public outcry over the incident and claims of race-based police brutality—driven in large part by the widespread distribution and consumption of the recording—ultimately contributed, a year later (after the officers were acquitted of all state law charges), to large-scale riots in Los Angeles and smaller demonstrations in other locations around the country.³² Since 1991, the availability of low-cost handheld video cameras has skyrocketed, as have the number of citizen-produced recordings of alleged police brutality.³³ In many cases, these videos quickly find their way onto prime-time television as well as video-sharing websites like YouTube and are discussed in a wide variety of traditional and emerging media, from print and online newspapers to blogs, Twitter feeds, and Facebook pages.³⁴

More recently, in the early morning hours of January 1, 2009, a number of Bay Area Rapid Transit passengers recorded Officer Johannes Mehserle shooting a young man named Oscar Grant in the back while Grant was lying on the subway platform, supposedly resisting restraint while the officers were

30. Juan Gonzalez, *George Holliday, the Man with the Camera Who Shot Rodney King While Police Beat Him, Got Burned, Too*, N.Y. DAILY NEWS (June 19, 2012, 11:58 PM), <http://www.nydailynews.com/news/national/george-holliday-man-camera-shot-rodney-king-police-beat-burned-article-1.1098931>.

31. Steve Myers, *How Citizen Journalism Has Changed Since George Holliday's Rodney King Video*, POYNTER (Mar. 3, 2011, 12:51 PM), <http://www.poynter.org/latest-news/top-stories/121687/how-citizen-journalism-has-changed-since-george-hollidays-rodney-king-video/>.

32. *Id.*

33. See generally Kyle Vanhemert, *Are Cameras the New Guns?*, GIZMODO (June 2, 2010, 5:00 PM), <http://gizmodo.com/5553765/are-cameras-the-new-guns> (citing numerous occasions of citizens using video cameras to record alleged police brutality).

34. See Antony & Thomas, *supra* note 4, at 1284 ("[R]ecent technological developments such as Web 2.0 subvert the 'vertical, top-down, passive, one-way flow of information' that is characteristic of conventional media, allowing for alternative discourse through blogs, podcasts, virtual reality (e.g. Second Life), collaborative technology (e.g. Wikipedia), social networking sites (e.g. Facebook, Myspace), and video-sharing sites (e.g. YouTube).") (internal citation omitted).

attempting to place handcuffs on him.³⁵ Multiple recordings of the killing were uploaded to YouTube, despite officer attempts to confiscate cameras in the vicinity, and the reaction to the videos and news reports fueled both peaceful and violent protests in the days following the incident.³⁶ In 2010, when Mehserle was convicted of involuntary manslaughter rather than the murder to which he was accused, additional riots broke out across the city of Oakland.³⁷

In a dozen U.S. states, wiretapping (or eavesdropping) statutes prohibit citizens from making audio or audio-visual recordings of conversations without getting consent from all parties to the recorded conversations.³⁸ These state laws vary in their scope, but have been used frequently in recent years to arrest, detain, and harass photographers, including citizens and members of the credentialed press.³⁹ Apparently, the purpose for which officers or prosecutors invoke these statutes to stop citizens from recording their encounters with police officers is driven by a desire to restrict subsequent disclosure, and potential misuse, of information that might subject an officer to possible censure. Appeals to privacy in public encounters are fairly far-fetched, and because some of the statutes cover activity in public as well as private spaces, their reach is much broader than needed to protect against invasions of privacy. Many of these laws would have made recordings like those described above illegal (at least as far as conversations or speech were part of the recordings). In the United Kingdom, an anti-terrorism law similarly used by police officers to detain and question photographers has recently been held to be in violation of the European Convention for Human Rights and Fundamental Freedoms.⁴⁰

In a landmark case in 2011, the First Circuit held that the First Amendment clearly gave citizens the right to record police officers and other public officials while they were performing their official duties in public spaces, as long as the citizens did not interfere with the police officer's

35. *Id.* at 1281.

36. See Jesse McKinley, *Officer Guilty in Killing That Inflamed Oakland*, N.Y. TIMES (July 8, 2010), www.nytimes.com/2010/07/09/us/09verdict.html ("City officials were worried about a reprise of the 2009 riots that erupted in downtown Oakland . . . after Mr. Grant's shooting, which was captured on cellphone video and widely disseminated on the Internet.")

37. See Ewen MacAskill, *Oakland Riots After Verdict in Police Shooting of Oscar Grant*, GUARDIAN (July 9, 2010, 12:35 PM), www.theguardian.com/world/2010/jul/09/oakland-riots-oscar-grant-shooting-verdict (discussing how rioters trashed parts of Oakland in protest against the verdict).

38. *E.g.*, CAL. PENAL CODE § 632 (West 2009); DEL. CODE ANN. tit. 11, § 1335(a) (2010); FLA. STAT. § 934.03 (2010); HAW. REV. STAT. § 711-1111 (2010); 720 ILL. COMP. STAT. 5/14-2 (2010); KAN. STAT. ANN. § 21-4001 (2010); MASS GEN. LAWS ch. 272, § 99 (2010); MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2010); MICH. COMP. LAWS § 750.539c-d (2010); MONT. CODE ANN. § 45-8-213(1)(c) (2009); N.H. REV. STAT. ANN. § 570-A:2 (2010); 18 PA. CONS. STAT. ANN. § 5704(4) (West 2010); WASH. REV. CODE § 9.73.030 (2010).

39. See John Vibes, *MD Cops Assault Man for Filming and Say "You Have No Freedom of Speech,"* INTELLIHUB NEWS (Feb. 25, 2014 6:38 PM), <http://intellihub.com/md-cops-assault-man-filming-say-freedom-speech/> (discussing how a man was arrested for filming police assault several individuals).

40. Gillan v. The United Kingdom, 2010 Eur. Ct. H.R. 28.

legitimate work and made the recordings overtly (not secretly).⁴¹ In that case, *Glik v. Cunniffe*, a Boston attorney named Simon Glik was walking through the Boston Common when he saw officers using what he thought was unnecessary force to affect an arrest.⁴² As a consequence, Glik pulled out his smartphone and made a video recording of the incident.⁴³ When one of the officers approached him, asking whether he was taking photographs, Glik indicated that he was actually recording video and audio of the events.⁴⁴ Subsequently, the officers arrested Glik and charged him with a number of crimes, including violation of the Massachusetts state wiretapping statute.⁴⁵ After the public prosecutor dropped the charges against him, Glik filed a civil rights lawsuit against the city, officers, and the police department.⁴⁶ The court found that the right of individuals to film public officials in public spaces was a “fundamental and virtually self-evident” right under the First Amendment.⁴⁷ According to the court, “though not unqualified, a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.”⁴⁸

A year after *Glik*, the Seventh Circuit enjoined the Cook County State’s Attorney from using the Illinois wiretapping law to arrest members of the ACLU for recording police officers as part of a police accountability program.⁴⁹ The Illinois statute prohibits audio recordings even where officers do not maintain any expectation of privacy in their conversations, and carries steep criminal penalties as a class 1 felony—equivalent to sexual offenses such as rape.⁵⁰ In that case, *ACLU of Illinois v. Alvarez*,⁵¹ the court held that the statute, as written and applied to the facts of the case, “likely violates the First Amendment’s free-speech and free-press guarantees” and remanded the case to the district court.⁵² A few other decisions in other parts of the country also protect the public’s right to record officers in public,⁵³ but reports of officers arresting photographers on eavesdropping charges continue to proliferate

41. *Glik v. Cunniffe*, 655 F.3d 78, 86–88 (1st Cir. 2011).

42. *Id.* at 79–80.

43. *Id.* at 80.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 85.

48. *Id.*

49. *ACLU v. Alvarez*, 679 F.3d 583, 583 (7th Cir. 2012).

50. 720 ILL. COMP. STAT. 5/14-2 (2012).

51. *Alvarez*, 679 F.3d at 583.

52. *Id.* at 586–87.

53. See generally *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995) (finding that recording in public places may be protected under the First Amendment); *State v. Flora*, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992). New Jersey state courts have also recognized a right of citizens to record police. *Ramos v. Flowers*, 56 A.3d 869, 879–80 (N.J. Super. Ct. App. Div. 2012).

around the country⁵⁴—in some cases, even in jurisdictions where police department orders have expressly stated that officers should not arrest citizens for recording.⁵⁵ In one case, a citizen recorded a conversation with an official while making a public records request and when the citizen brought the recording to the department's attention, claiming the recording showed that his request was inappropriately handled, the police department arrested him for violating the eavesdropping law.⁵⁶ Citizens have also frequently been arrested for filming their encounters with police during traffic stops or while witnessing arrests in a variety of situations.⁵⁷

Recent controversy surrounding recordings made in public spaces—and the eventual posting of such recordings to the Internet—have not been limited to recordings of police officers. Reports of online vigilantism and public shaming of private individuals have also begun to claim widespread notoriety.⁵⁸ So-called Internet vigilantes have recorded images and video of people doing stupid things and posted them to the Internet, or have identified individuals from already-posted videos or images.⁵⁹ The subjects of these recordings have been publicly shamed, in many cases their personal and contact information has been posted online, resulting in harassment, embarrassment, or detention by government authorities.⁶⁰ In one case, a young South Korean woman was nicknamed the “dog poop girl” after she was

54. E.g., Emily Gumon, *Little Canada Man Must Stand Trial in Videotaping of Ambulance Crew*, TWINCITIES.COM (Aug. 20, 2013), http://www.twincities.com/crime/ci_23902450/little-canada-man-who-videotaped-medical-call-will; Tal Kopan, *Another Lawsuit Filed Over Police Recording*, POLITICO (Jan. 17, 2013), <http://www.politico.com/blogs/under-the-radar/2013/01/another-lawsuit-filed-over-police-recording-154488.html>; Press Release, ACLU-PA, ACLU-PA Files First in Series of Lawsuits Over Illegal Arrests for Observing and Recording Philadelphia Police (Jan. 16, 2013), available at <http://www.aclupa.org/news/2013/01/16/aclupa-files-first-series-lawsuits-over-illegal-arrests-for-observing-and-recording-philly-police>; Press Release, ACLU-PA, ACLU Files Suit On Behalf of Fayette County Man Arrested for Recording Police Officer (July 19, 2012), available at <http://www.aclupa.org/news/2012/07/19/aclu-files-suit-behalf-fayette-county-man-arrested-recording-police-officer>.

55. See Fenton, *supra* note 19 (discussing how Charles Grapski was arrested for tape-recording an interview with the city manager).

56. See Margaret Kohn, *Unblinking: Citizens and Subjects in the Age of Video Surveillance*, 17 CONSTELLATIONS 572, 572–88 (2010) (discussing the Grapski case).

57. See *Cops Arrest Priest For Filming Them*, CBS NEWS (Mar. 13, 2009), <http://www.cbsnews.com/news/cops-arrest-priest-for-filming-them> (discussing the case of a Roman Catholic priest who was confronted and arrested by an officer for using a video camera to record the officer's actions).

58. See Bronwen Clune, *Digital Vigilantism: Think Before Putting Pictures of 'Wrongdoing' Online*, GUARDIAN (Nov. 28, 2013), <http://www.theguardian.com/commentisfree/2013/nov/29/digital-vigilantism-think-before-pictures-of-wrongdoing-online> (“There are thousands of Facebook pages and many standalone websites dedicated to accusing people of just about anything you care to think about.”).

59. See Alexis C. Madrigal, *Hey Reddit, Enough Boston Bombing Vigilantism*, ATLANTIC (Apr. 17, 2013), <http://www.theatlantic.com/technology/archive/2013/04/hey-reddit-enough-boston-bombing-vigilantism/275062/> (“[V]igilantes have organized themselves on Reddit for a manhunt. They want justice served. And they're openly debating suspects on the site. They're gonna solve the case!”).

60. See Samer Kalaf, *Hackers Take Over Steubenville High School Football Team's Website, Threaten to Release Personal Information of People Involved in Alleged Rape Case*, DEADSPIN (Dec. 25, 2012), <http://deadspin.com/hackers-take-over-steubenville-high-school-football-tea-5971165> (discussing how hackers intended to release addresses, social security numbers, and phone numbers of the alleged attackers if they refuse to apologize to the alleged victims).

photographed refusing to clean her dog's mess on the floor of a subway car.⁶¹ The image was posted online, and within days the woman's name and address were posted as well. She was subjected to vicious online ridicule and apparently also withdrew from university and considered suicide because of the impact the story had on her personal life.⁶²

Thus, questions about what conduct is morally acceptable when recording others in public spaces—and what one should do with captured footage or images—is a much broader question than that answered in this Article. However, the conflict between certain state wiretapping laws and a growing body of First Amendment case law provides an important context within which to frame this discussion. Filming police officers and other public officials raises additional and important constitutional issues about what rights citizens should have to document and disseminate information about government conduct and the state's ability to prohibit recordings by private citizens. These recordings have proved to be an important and vital tool to hold officials accountable for gross misconduct and the violation of citizens' rights, but the remaining legal and practical uncertainty and patchwork nature of this state law problem means that citizens remain at substantial risk when deciding whether to pull out their smartphone and record the scenes unfolding around them. This is a risk that also implicates an improper intrusion into individual liberty.

III. PRIVACY AND EXPRESSION AS ASPECTS OF POLITICAL LIBERTY

In the following Part, I outline and contrast the basic parameters of two competing conceptions of political liberty, the liberal notion of negative liberty influenced by Isaiah Berlin and the neorepublican conception espoused by Philip Pettit and Frank Lovett.⁶³ I then explain my preferred approach to conceptualizing freedom.⁶⁴ In the subsequent Parts, I explain why I believe both privacy and First Amendment values are most appropriately protected as aspects of liberty.

61. Jonathan Krim, *Subway Fracas Escalates Into Test of the Internet's Power to Shame*, WASH. POST (July 7, 2005), www.washingtonpost.com/wpdyn/content/article/2005/07/06/AR20050706-01953.html.

62. *Id.*

63. Republican and neorepublican political philosophy, of course, have no necessary connection to the Republican political party or its politics.

64. This analysis builds off of and draws from the author's other research examining various aspects of surveillance against the requirements of the neorepublican conception of freedom. *E.g.*, Bryce Clayton Newell, *Local Law Enforcement Jumps on the Big Data Bandwagon: Automated License Plate Recognition Systems, Information Privacy, and Access to Government Information*, 66 ME. L. REV. (forthcoming 2014) [hereinafter Newell, *Local Law Enforcement*]; Bryce Clayton Newell, *The Massive Metadata Machine: Liberty, Power, and Secret Mass Surveillance in the U.S. and Europe*, 9 I/S: J. L. & POL'Y FOR INFO. SOC'Y (forthcoming 2014) [hereinafter Newell, *Massive Metadata Machine*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2339338.

A. *Liberty*

In Isaiah Berlin's seminal essay on the topic of political liberty, *Two Concepts of Liberty*,⁶⁵ Berlin outlines the trajectory of two different conceptions of liberty, what he calls "negative" and "positive" liberties. On one hand, negative liberty "is simply the area within which a [person] can act unobstructed by others."⁶⁶ A person's *degree* of freedom rests on whether, or how thoroughly, that person is prevented from doing something by another person.⁶⁷ A certain level of interference by another with one person's freedom to do something, in Berlin's view, can equate to coercion or slavery, and thus ought to be avoided.⁶⁸ On the other hand, Berlin defines positive liberty as a form of self-mastery; to have one's decisions depend on no other person or any other force.⁶⁹ Despite some claims that this distinction (sometimes referred to as "freedom from" and freedom to") doesn't hold up,⁷⁰ Berlin provides an insightful tracing of the use of positive ideas about liberty that informed the development of totalitarian regimes like the Nazis and former USSR.⁷¹

Berlin's conception of negative liberty has provided the basis for much contemporary work on philosophical liberty in the liberal tradition.⁷² Berlin himself noted that his version of negative liberty was not "logically . . . connected with democracy or self-government," although democratic self-government may admittedly guarantee liberty better than other forms of rule.⁷³ "The answer to the question 'Who governs me?'" Berlin states, "is logically distinct from the question 'How far does the government interfere with me?'"⁷⁴ Other writers have distinguished between "effective freedom" and "formal freedom," as a way to clarify Berlin's distinctions between positive and negative and to make the point that the absence of restraint (defined in terms of *legal* restraints) does not always guarantee the actual ability of an individual to do something he or she is legally entitled to do (for example, a person may not be able to take an expensive international vacation because of economic hardship).⁷⁵ On one hand, negative freedom is concerned with the absence of restraint (or interference), while positive freedom is concerned with equalizing the effective freedoms of everyone in a society (e.g., international vacations

65. ISIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (Oxford Univ. Press 1969); see also ADAM SWIFT, *POLITICAL PHILOSOPHY: A BEGINNER'S GUIDE FOR STUDENTS AND POLITICIANS* 52–54 (Polity 2006).

66. BERLIN, *supra* note 65, at 122.

67. *Id.*

68. *Id.*

69. *Id.* at 146.

70. SWIFT, *supra* note 65, at 254.

71. BERLIN, *supra* note 65, at 144; SWIFT, *supra* note 65, at 51.

72. See generally Marshall Cohen, *Berlin and the Liberal Tradition*, 10 *PHIL. Q.* 216, 216–27 (1960) (discussing Berlin as an influence for liberal tradition approach to philosophy).

73. BERLIN, *supra* note 65, at 177.

74. *Id.*

75. SWIFT, *supra* note 65, at 55.

might be assured by a state mandating a certain level of basic income). Some forms of positive freedom might also privilege the value of political engagement and self-government, as opposed to viewing laws as an interference—whether justified or not—on personal liberty.⁷⁶

In recent decades, republicanism, as an alternative to liberalism, has received renewed academic attention. Philip Pettit, a champion of one form of republicanism, often termed neorepublicanism, conceptualizes freedom as the opposite of “defenseless susceptibility to interference by another”—or put more simply, non-domination.⁷⁷ The power to remove the potential for domination is Pettit’s notion of “antipower.”⁷⁸ This proposition is part of a larger neorepublican research agenda based on three primary tenants: (1) individual freedom (conceptualized as freedom of nondomination); (2) limited government power over its citizens based on a mixture of constitutionalism and the rule of law (with an emphasis on the importance of the free state promoting the freedom of its citizens without dominating them); and (3) a vigilant commitment by citizens to preserve the freedom preserving structure and substance of their government through active democratic participation.⁷⁹

Contrary to Berlin’s account of negative liberty—that a person is free to the extent that no other entity actually interferes with that person’s activity—Pettit’s neorepublican position does away with the requirement of actual interference, focusing on eliminating the danger (or potential danger) of arbitrary interference from others.⁸⁰ Rather than predicating freedom on ideas of self-mastery, autonomy, or a person’s ability to act in accordance with their higher-order desires, an account of Berlin’s positive liberty, neorepublican theory is more concerned with ensuring the ability of the people to self-govern, by reducing domination.⁸¹

Pettit bases his account on the idea that the opposite of freedom is slavery (or the subjugation to arbitrary exercise of power).⁸² Pettit is concerned that a conception of liberty limited to noninterference restricts our potential for appropriate emancipation from domination because it views the slave under a benevolent master as having a high degree of liberty.⁸³ Additionally, the noninterference view problematizes the application of law, as even general, freedom-preserving restrictions built into the rule of law constitute interference

76. *Id.* at 64.

77. Pettit, *Freedom as Antipower*, *supra* note 26, at 576–77.

78. *Id.*

79. Frank Lovett & Philip Pettit, *Neorepublicanism: A Normative and Institutional Research Program*, 12 ANN. REV. POL. SCI. 11, 11 (2009).

80. Frank Lovett, *Republicanism*, STAN. ENCYCLOPEDIA PHIL. (May 18, 2010), <http://plato.stanford.edu/archives/spr-2013/entries/republicanism/>.

81. *Id.*

82. Pettit, *Freedom as Antipower*, *supra* note 26, at 577; Lovett, *supra* note 80, at 5.

83. Pettit, *Freedom as Antipower*, *supra* note 26, at 577–78.

with absolute liberty (for example, the penalization of premeditated murder).⁸⁴

According to its proponents, neorepublican political theory owes its origins to the experiences of the early Roman republic, and has been influenced and adopted by early figures such as Machiavelli, Jefferson, and Madison, and, more recently, by writers like Quentin Skinner and Philip Pettit,⁸⁵ although the precise historiography is still somewhat controversial.⁸⁶ Frank Lovett and Philip Pettit argue that their version of neorepublicanism has been adapted from what has been called “classical republicanism” to distinguish it from other, more communitarian, approaches.⁸⁷ Lovett also states that since political liberty ought to be “understood as a sort of structural relationship that exists between persons or groups, rather than as a contingent outcome of that structure,” freedom is properly seen “as a sort of structural independence—as the condition of not being subject to the arbitrary power of a master.”⁸⁸

In response to this conception of domination as the antithesis of liberty, the neorepublican project places a great premium on emancipation—through balancing power and limiting arbitrary discretion—and active political participation. Importantly, reversing roles would not solve the problem of domination, but would merely relocate it.⁸⁹ Fairly allocating power to both sides, on the other hand, does not just merely equalize the subjugation; if both sides—say the people and their government—may interfere with the other’s affairs, then neither may act with impunity since the other may exact something in return.⁹⁰ Thus, “neither dominates the other.”⁹¹ This is an exemplification of what Pettit terms “antipower.”⁹² According to Pettit, “[a]ntipower is what comes into being as the power of some over others—the power of some over others in the sense associated with domination—is actively reduced and eliminated.”⁹³ Antipower, then, subjugates power and, as a form of power itself, allows persons to control the nature of their own destiny.⁹⁴ In this sense, the “person enjoys the noninterference resiliently” because they are not dependent on the arbitrary use of power, precisely because they have the power to “command noninterference.”⁹⁵

Against this backdrop of political philosophy, I argue that both privacy

84. *Id.*

85. Lovett & Pettit, *supra* note 79, at 12 (“Neorepublicanism has its origins in the historiographic works of Fink (1945), Robbins (1959), Pocock (1979), Sellars (1975), and Sellars (1994) . . .”). Neorepublicanism also has origins in the works of Skinner. *Id.* at 13.

86. *Id.* at 13.

87. *Id.* at 12.

88. Lovett, *supra* note 80, § 1.2.

89. Pettit, *Freedom as Antipower*, *supra* note 26, at 588.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 589.

95. *Id.*

and First Amendment values are important aspects of liberty because of their ability to shield individuals and groups from both actual interference and domination. That is, they are each distinctly valuable as independent rights insofar as they are instrumental to effectuating and preserving liberty. Informational privacy rights restrict the ability of others (including the state) to collect and use personal information about a person (a form of power), thus reducing the possibility for interference. Robust rights of free speech, belief, and association, with their associated limits on the state's ability to interfere with individual choice and action, similarly support this view of freedom. However, because I am defining these values as aspects of liberty, with an emphasis on limiting domination, the benefits of protecting these individual rights are tied directly to the structural institutions and processes that allow for self-governance by the people and, ultimately, render government action non-arbitrary (or, at least, less arbitrary). Privacy rights and First Amendment protections are much less meaningful if the public has no ability to command noninterference in the first place (i.e. government could alter these rights on a whim without fear that the people could overrule the government action). On a related note, this view also leaves some room for a society to determine for itself, through democratic deliberation, how to best balance speech and privacy interests, especially in regard to prospective intrusions by private actors, as opposed to state actors. This is true because, for example, a society could establish a number of balancing tests that would solve the problem of *arbitrary* interference (domination).

B. Privacy

Fundamentally, I agree with Westin that, “the achievement of privacy for individuals, families, and groups in modern society has become a matter of freedom rather than the product of necessity.”⁹⁶ Privacy has been defined in a multitude of ways, both normatively and descriptively.⁹⁷ Solove goes so far as to claim that defining privacy is a fruitless task because, like liberty, privacy means so many things to different people.⁹⁸ The umbrella term “privacy” contains both the concept of what privacy is and how it should be valued, as well as a (generally) narrower right to privacy which outlines the extent to

96. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 21–22 (Atheneum 1968).

97. See MOORE, *supra* note 28, at 16 (explaining that the meaning of privacy changes depending on whether one gives a descriptive or normative definition of privacy); DANIEL SOLOVE ET AL., *INFORMATION PRIVACY LAW* 40–51 (Aspen Publishers 2d ed. 2006) (includes drawing from examples and additional citations).

98. See Daniel Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 480 (2006) (explaining how the ambiguous definition of privacy often creates policy problems because it is difficult to articulate what the right of privacy is); see also Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2087 (2011) (explaining that the value of privacy is so complex that he wonders if it can be explained at all); ANITA L. ALLEN, *PRIVACY LAW AND SOCIETY* 3 (West 2011).

which privacy is legally protected.⁹⁹ Westin stated that “privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve.”¹⁰⁰ Privacy has also been conceptualized in reductionist (privacy as an element of another more fundamental right) and non-reductionist (privacy as a distinct right in itself) terms.¹⁰¹

In response to this ambiguity, Allen has described five different meanings of privacy (physical, informational, decisional, proprietary, and associational),¹⁰² and Solove has developed a taxonomy of informational privacy violations (broken into four major categories: collection, processing, dissemination, and invasion).¹⁰³ These classifications are undoubtedly helpful in understanding the broad scope of what is meant by “privacy,” or how privacy has, in fact, been protected in the past. However, I believe a normative theory of privacy, or liberty for that matter, can be very useful for thinking about what privacy rights *ought* to encompass (or at least what a system of democratic governance should provide for an engaged citizenry to determine for themselves what choices regarding privacy they wish to live under).

In this project, I am committed to defining informational privacy as the right to control access to and uses of personal information.¹⁰⁴ This normative definition includes the right to control both initial and subsequent uses of personal information (e.g. a person may consent to the use of personal information for certain purposes by specified entities, but may object to further sharing and subsequent use for additional purposes outside the scope of the original consent). This right to privacy should also be considered a moral and a legal right. It should have legal “teeth,” and individuals should be provided opportunities to seek legal redress when the right is violated. Westin famously defined privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”¹⁰⁵ This definition is similar in many respects to the one I endorse, and Westin’s work contributes valuably to my conception of privacy.¹⁰⁶ On its face, Westin’s definition does not necessarily extend to subsequent use of information previously disclosed or communicated, but limiting the *extent* of communication could also arguably encompass more than just initial disclosure.¹⁰⁷ It is phrased in terms of a moral (or legal) claim

99. Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 36 (1976); DANIEL SOLOVE ET AL., *supra* note 97, at 39.

100. WESTIN, *supra* note 96, at 7.

101. MOORE, *supra* note 28, at 14–16.

102. ALLEN, *supra* note 98.

103. SOLOVE ET AL., *supra* note 97.

104. Moore, *supra* note 28, at 812.

105. WESTIN, *supra* note 96, at 7.

106. *Id.*

107. *Id.*

(a normative position), but its inclusion of groups and institutions places it beyond the ambit of merely an individual right.¹⁰⁸ Defining privacy in terms of control also supports self-development and autonomy.¹⁰⁹

As I stated earlier, I am claiming that privacy is most appropriately protected as an aspect of political liberty. This is admittedly reductionist. As such, I claim that privacy is largely a culturally relative socio-political choice *vis-à-vis* the legitimate exercise of power of the state (or other persons) over the individual. In practice, it is clear that the right to privacy (in some current instantiations) is instrumentally connected with restraining government power (e.g. consider the Fourth Amendment prohibition on unwarranted searches and seizures).¹¹⁰ Helen Nissenbaum has similarly noted that, “privacy is an important means by which individuals may sustain power, liberty, and autonomy against potentially overwhelming forces of government.”¹¹¹ This approach also extends to protecting individuals from domination by other private parties, and is not restricted to government domination.¹¹² However, Adam Moore suggests that a reductionist account of privacy “might mean jettisoning the idea” of a distinct right to privacy altogether in favor of focusing on the more fundamental concept—liberty, in this case.¹¹³ Frederick Davis has also argued that a reductionist account may also make advocating for privacy rights irrelevant as long as more fundamental rights are adequately protected.¹¹⁴ Moore is somewhat critical of the reductionist premise, suggesting that “it is unclear whether or not privacy is reducible to more ‘basic’ rights” (though he does not object outright), but he does note the “close connections” between privacy and liberty.¹¹⁵

In response to these critiques of reductionist thinking regarding privacy, I wish to note that my preference for protecting informational privacy as an element of liberty does not negate the possibility that a certain, core, and distinct fundamental right of privacy might exist. Indeed, as Alan Westin explains, humanity may share some basic universal need for privacy (although it may surface differently in various cultural contexts), and this might also extend to other animal species as well.¹¹⁶ This may well exist as an independent human value that ought to be protected by law (as a fundamental human right). However, this need for some basic level of privacy protections

108. *Id.*

109. MOORE, *supra* note 28, at 17.

110. U.S. CONST. amend. IV.

111. Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 L. & PHIL. 559, 569 (1998).

112. *See id.* (“[T]his form of privacy protection emphasize the importance of a realm to which people may go, from which others are excluded.”).

113. Moore, *supra* note 28, at 814.

114. *Id.* at 15; Frederick Davis, *What Do We Mean by ‘Right to Privacy’?*, 4 S.D. L. REV. 1, 20 (1959).

115. MOORE, *supra* note 28, at 15.

116. WESTIN, *supra* note 96, at 8–11; *see also* Adam D. Moore, *Privacy, Speech, and the Law*, 22 J. INFO. ETHICS 21, 22–23 (2013).

is arguably very limited in comparison to modern conceptions of privacy (and it is likely to be at least partially related to physical/spatial privacy concerns,¹¹⁷ which are outside my focus here on information privacy). In modern society, “our contemporary norms of privacy are ‘modern’ and ‘advanced’ values largely absent from primitive societies of the past and present.”¹¹⁸ These “advanced” values are more likely embedded in the “socio-political realm,”¹¹⁹ and, I would argue, most coherently protectable as elements of political liberty rather than as distinct human rights in and of themselves. This characterization allows us to agree on a possible core, universal, right to privacy (which humans may share with other animals, and across different cultures), while recognizing that most privacy interests are actually culturally and individually distinct choices about values. They are, then, essentially *socio-political choices* and are best protected by democratic civic participation, self-governance by the people, and the promotion of liberty (aka nondomination) buttressed by constitutional guarantees of equality, due process, and limits on pure majoritarian decision-making to preserve minority rights. In this way, these political protections are also likely to cover the more basic privacy rights. This result, in my view, also helps account for varying valuations of privacy across time and cultures.

That said, I disagree with Davis’s conclusion that reductionist thinking eliminates the need to advocate for privacy rights in and of themselves.¹²⁰ Privacy, as I define it, is a particular (and particularly useful) instrumental means to support the goal of maintaining individual liberty from government intrusion, interference, and/or domination (or from private actors, for that matter). Privacy is a “core value that limits the forces of oppression.”¹²¹ Thus, I agree wholeheartedly with Moore when he claims that “even if the reductionist were correct, it does not follow that we should do away with the category of privacy rights” or “dispense with talk of rights and frame our moral discourse in these more basic terms.”¹²² Talks of liberty, without including privacy as a specific element of concern, shortchange the very nature of such liberty itself. Thus, I believe this conception of privacy is consistent with the claim that “privacy . . . is a necessary condition for human well-being or flourishing.”¹²³ Conceptualizing privacy as a necessary and freedom-preserving right protects individuals from intrusions well beyond the basic privacy interests in territoriality and a need for space away from

117. See MOORE, *supra* note 28, at 22 (discussing the right to control “access to one’s body, capacity, and powers”); see generally WESTIN, *supra* note 96, at 9–13 (discussing privacy in the animal and primitive worlds).

118. WESTIN, *supra* note 96, at 11.

119. *Id.* at 21.

120. Davis, *supra* note 114, at 15.

121. MOORE, *supra* note 28, at 7.

122. *Id.* at 16.

123. *Id.* at 3.

overcrowding.¹²⁴ Tied to freedom, privacy rights should also be protected against expression to a greater extent than American law currently suggests.

C. *Free Speech/Expression and the First Amendment*

The First Amendment states, in part: “Congress shall make no law . . . abridging the freedom of speech”¹²⁵

Just as privacy is subject to numerous definitions and overarching theoretical accounts, the theoretical basis for a right to free speech and expression (and broader First Amendment rights, such as the rights of assembly, association, and belief) has also been much debated. Greenawalt provides a good account of the major bases for protecting free speech, categorized as consequentialist or non-consequentialist reasons.¹²⁶ Of these, a few consequentialist justifications are particularly relevant to my approach to understanding the proper role of the First Amendment’s free speech guarantee. There are more possible justifications than those presented below, as I have chosen to limit my discussion to those I feel are most clearly implicated by my overall theoretical commitments. I also note that these justifications are all consequentialist justifications, which should not be surprising given my reductionist account of privacy and free speech as instrumental to the political concept of liberty.

First, the basic consequentialist justification for free speech is the importance of “truth discovery.”¹²⁷ This justification, in my view, holds importance to both liberal and republican conceptions of free speech. The idea that an open marketplace of ideas, where individuals have the ability to present ideas without risk of censure, may stimulate debate, critical thought, and the eventual collective discovery of truth is obviously important, regardless of whether or not we ought to limit the protected sphere to only those ideas related to collective self-governance (and whether or not “truth” always rises to the top). Mill, in particular, was concerned with the potential for governments to suppress communication, because even attempts to suppress “false” information may well also capture true or partly true information and would hamper the development of the open marketplace of ideas.¹²⁸ To a great extent, this viewpoint has been captured by the liberal tradition, and Volokh’s passionate defense of free speech in the face of potential privacy restrictions

124. See WESTIN, *supra* note 96, at 8–9 (describing how both humans and animals require periods of individual seclusion and exhibit tendencies towards territoriality); MOORE, *supra* note 28, at 6.

125. U.S. CONST. amend. I.

126. Greenawalt, *supra* note 27, at 280–81.

127. *Id.* at 281; see also *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring); JOHN STUART MILL, *ON LIBERTY* 14 (Dover 2002) (1859) (“If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”).

128. MILL, *supra* note 127, at 14–15.

(which he largely sees as unwarranted and dangerous),¹²⁹ pushes this justification close to its limits. To others, such as Solove,¹³⁰ Meiklejohn,¹³¹ Post,¹³² Baker,¹³³ Sunstein,¹³⁴ and Reddish,¹³⁵ speech of merely private concern, that does not implicate or further efforts to effectuate democratic self-governance, may be appropriately limited. This view (or actually, views, as these authors do not always agree) also relies heavily on the truth discovery justification for free speech, but it places limits on the types of speech that ought to fall within Constitutional protections.¹³⁶

Closely connected to (and potentially contained within) the truth discovery rationale is a second line of reasoning: that free speech provides a check on abuses of (especially government) authority.¹³⁷ However, this checking power extends beyond checking abuse; it also rests on the assumption that the First Amendment should support the exposure of wrongdoing, which implicates the right to gather and access information as a predicate for actual speech. This theory also has ties to the democratic governance theories described below.

The idea that free speech contributes to the development and maintenance of democratic rule (as mentioned above) has also been very influential. Some of these theories can appropriately be termed republican in nature. The

129. Volokh, *Freedom of Speech and Information Privacy*, *supra* note 27, at 1122–23.

130. See generally Daniel Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 967 (2003) (responding “to two general critiques of disclosure protections: (1) that they inhibit freedom of speech, and (2) that they restrict information useful for judging others.”); DANIEL J. SOLOVE ET AL., *supra* note 97, at 147.

131. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* ix–xiv (Harper, 1948); MEIKLEJOHN, *supra* note 27, at 3–7; Meiklejohn, *supra* note 27, at 255–57.

132. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (Harvard Univ. Press 1995); see generally Robert C. Post, *Community and the First Amendment*, 29 AZ. ST. L.J. 473, 473 (1997) (discussing “the relationship between . . . the concept of community and the concept of the First Amendment”); Robert C. Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109 (1993) (arguing that “the view that the essential objective of the First Amendment is to promote a rich and valuable public debate” is subordinate to the collectivist theory).

133. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (Oxford Univ. Press 1989); see generally C. Edwin Baker, *The Scope of First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964 (1978) (discussing “three theories of the scope of speech protected by the First Amendment” including the “liberty theory”).

134. See SUNSTEIN, *supra* note 27 (elaborating on concepts of free speech under the First Amendment). See generally Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992) (defending the proposition of “the American tradition of free expression as a series of struggles to understand the relationship between this conception of sovereignty and a system of free speech”).

135. See generally MARTIN H. REDDISH, *THE ADVERSARY FIRST AMENDMENT 5* (Stanford Univ. Press 2013) (discussing First Amendment concepts which rely “on the concept of adversary democracy and the democratic theory of free expression that grows out of it”); Martin H. Reddish & Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1306 (2009) (critiquing Meiklejohn’s and Post’s theories “to illuminate the common understanding of democratic autonomy that underlies both free speech theories and to propose an alternative in its place”).

136. See *supra* notes 130–35 and accompanying text.

137. MOORE, *supra* note 28, at 135; Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 LAW & SOC. INQUIRY 521, 527 (1977); Greenawalt, *supra* note 27, at 282–83.

primary democratic theories of the First Amendment have been promulgated by Alexander Meiklejohn,¹³⁸ Robert C. Post,¹³⁹ C. Edwin Baker,¹⁴⁰ and Cass R. Sunstein.¹⁴¹ Martin Reddish has recently provided another democratic theory to the mix, sharply criticizing the prior two accounts as being too focused on collectivist cooperation, rather than protecting individual self-interest.¹⁴² Reddish advocates an individualistic account of the purposes of the First Amendment that specifically promotes the individual right to speech and organize in a person's own self-interest as a way to incentivize political participation.¹⁴³ Meiklejohn and Post, on the other hand, promote more collectivist and cooperative democratic participation, with differing emphases on voting and individuals recognizing themselves as self-governing, respectively, as the ends to be achieved.¹⁴⁴

Sunstein places great weight comparing Madison's conception of American sovereignty (in the People) with the right of free speech.¹⁴⁵ This right to "freely examin[e] public characters and measures, and of free communication among the people thereon" is "the only effectual guardian of every other right."¹⁴⁶ In his view, current First Amendment jurisprudence "protect[s] speech that should not be protected" because its theoretical basis is "off the mark" and even threatens democratic efforts of the people to self-govern.¹⁴⁷ Meiklejohn argued that "the First Amendment does not protect a 'freedom to speak,'" rather, "[i]t protects the freedom of those activities of thought and communication by which we 'govern.'"¹⁴⁸ Thus, the First Amendment right to free speech concerns "a public power [and] governmental responsibility" rather than "a private right."¹⁴⁹ Meiklejohn was primarily concerned with the power, and obligation, of the people to vote, but also found that "'people do need novels and dramas and paintings and poems because they will be called upon to vote.'"¹⁵⁰ In a similar vein, Justice Brandeis, in *Whitney v. California*, stated powerfully:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means . . . that without free speech and assembly discussion would be futile; that with them,

138. See sources cited *supra* note 131.

139. See sources cited *supra* note 132.

140. See sources cited *supra* note 133.

141. See sources cited *supra* note 134.

142. See sources cited *supra* note 135.

143. *Id.*

144. See sources cited *supra* notes 132–33.

145. Sunstein, *supra* note 134, at 256.

146. *Id.* at 257.

147. *Id.* at 315.

148. Meiklejohn, *supra* note 27, at 255.

149. *Id.*

150. *Id.* at 263.

discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.¹⁵¹

Jack Balkin argues that the First Amendment's free speech principle is about more than just democracy (qua voting), and he would extend it to encompass what he calls "democratic culture," meaning, "a culture in which ordinary people can participate, both collectively and individually, in the creation and elaboration of cultural meanings that constitute them as individuals."¹⁵² I read this claim as related to (and potentially consistent with) Meiklejohn's extension of free speech rights to the creation of novels, dramas, paintings, and poems—which Meiklejohn believes are necessary to educated and informed voting and political participation.¹⁵³ According to Balkin, democratic culture is "about individual liberty as well as collective self-governance."¹⁵⁴ However, if we extend free speech rights to democratic culture, which I think we should to some extent, rather than just democratic political participation, we also run the risk of having speech interests butt up against privacy more frequently.

Thus, in my view, the First Amendment, and freedom of speech in particular, is inextricably tied up in notions of self-government, truth discovery (at least when restricted to matters related to governing or, if not, those that do not invade another person's privacy), checking potential government abuse or domination, and, to some extent, allowing individuals to participate in the creation of culture and meaning within society. That said, we should recognize robust rights to gather information, the ability to withdraw and contemplate or discuss openly and debate ideas in public, to think and believe as each sees fit, and to assemble for these purposes, insofar as such activity does not violate another person's rights (including the right to privacy). However, speech that does not promote, facilitate, or relate to self-government may need to give way to privacy rights.

IV. POLICING'S NEW VISIBILITY(IES)

Citizen media and the presence of large numbers of recording devices in many public spaces (especially in densely populated urban areas) has increased the nature and amount of secondary visibility as more and more police-citizen encounters are being recorded and broadcast over the Internet to increasingly wider audiences around the world. This increase in secondary visibility has

151. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

152. Balkin, *Future of Free Expression*, *supra* note 27, at 438.

153. Meiklejohn, *supra* note 27, at 263.

154. Balkin, *Democratic Culture*, *supra* note 27, at 31.

been termed “policing’s new visibility.”¹⁵⁵ These recordings are available on many websites, including Youtube, and also include numerous videos recorded by police department cameras installed in patrol vehicles (“dash-cam” footage), obtained by citizens under public disclosure requests and uploaded to the Internet. Thus, as wearable cameras become more widely adopted, officers and departments will need to confront existing public disclosure laws and the prediction that such adoption will result in greater numbers of videos being uploaded to the Internet (this prediction is a simple one: as more footage is captured, more will get released through existing channels and subsequently uploaded to the Internet, as long as disclosure laws are not altered).

Traditionally, police (“the most visible of all criminal justice institutions”)¹⁵⁶ were generally visible only through direct interactions with citizens (and within the view of nearby onlookers). Goldsmith refers to this as “primary visibility.”¹⁵⁷ This visibility also included uniforms and marked vehicles as markers of official authority and legitimacy. However, the development of mass media led to a “secondary visibility”¹⁵⁸ that allowed individuals not spatially connected to the scene of original interaction to access photographic and narrative materials documenting and describing these distant encounters and subsequently pass judgment. The Rodney King video filmed by George Holliday in 1991 provides a clear (and now famous) example, causing outrage and reaction across the United States, as well as internationally. The shooting of Oscar Grant in San Francisco¹⁵⁹ and killing of Ian Tomlinson in London¹⁶⁰ (both captured by citizens wielding cameras embedded in cellphones and later made available on Youtube, and other websites), and numerous other examples, demonstrate the increasing power of these recordings to spread widely and influence public perception and media coverage of police related events.¹⁶¹ Many of the proposed benefits of officer-mounted cameras, as well as significant causes for concern, are tied to the concept of police visibility: its potential to change the dynamics of police-citizen encounters, to either exonerate or implicate officers in wrongdoing, or to provide evidence of citizen misconduct.

Police departments have “a clear interest in *how* their personnel and activities become visible to others and in *what* is revealed as a result to outsiders.”¹⁶² This claim has played out in practice. For example, in recent

155. Andrew J. Goldsmith, *Policing’s New Visibility*, 50 BRIT. J. CRIMINOLOGY 914, 918 (2010) (citing John B. Thompson, *The New Visibility*, 22 THEORY, CULTURE & SOC’Y 31 (2005)).

156. S. Chermak & A. Weiss, *Maintaining Legitimacy Using External Communication Strategies: An Analysis of Police–Media Relations*, 33 J. CRIM. JUST. 501, 502 (2005); Goldsmith, *supra* note 156, at 914.

157. Goldsmith, *supra* note 155, at 914.

158. *Id.*

159. Antony & Thomas, *supra* note 4.

160. Greer & McLaughlin, *supra* note 5.

161. *See id.* (explaining how recent investigations on media have increased public awareness of police).

162. Goldsmith, *supra* note 155, at 915 (citing R. MAWBY, *POLICING IMAGES: POLICING, COMMUNICATION AND LEGITIMACY* (Willan 2002); A. ADUT, *ON SCANDAL: MORAL DISTURBANCES IN*

years the Seattle Police Department (SPD) was engaged in a series of lawsuits where they objected to the release of dash-camera footage to local news organizations, attorneys, and private citizens.¹⁶³ On their face, these refusals were based on interpretations of state privacy laws, out of concern for invading the privacy of innocent bystanders captured on tape.¹⁶⁴ The SPD also initially claimed the ability to seal footage for three years (unless relevant to current litigation), and then to destroy footage at that point (the expiration for the statute of limitations), effectively exempting footage from public disclosure except in certain narrow circumstances.¹⁶⁵ Secrecy, despite certain legitimate justifications, has been a “familiar protective practice[]” used by police to avoid “public embarrassment and formal accountability.”¹⁶⁶ Thus, it would be naïve to believe officers (and departments) would: (1) record all encounters judiciously; (2) preserve all recordings properly; and (3) properly release all footage related to public requests under state disclosure laws (especially when the footage is damning), unless strict laws and regulations were in place—including, potentially, forms of independent citizen oversight.¹⁶⁷ These practices are also evidence of agency-level resistance to surveillance (e.g. public records requests).

Goldsmith has also argued that any value for the police in increased visibility was contingent “upon maintaining ‘normal appearances’ and delivering ‘proper performances.’”¹⁶⁸ The possibility that misconduct, then, might become more visible as a result of increased recording poses a serious problem for law enforcement image management. As mentioned above, the recording of non-arrest, “peace keeping” activities may also subject officers to oversight from a variety of sources that may diminish their ability to “act alternatively” in situations where they might otherwise have chosen not to make an arrest; for example, to merely give a warning in a situation where an offense was not patently illegal.¹⁶⁹ In the case of officer-mounted cameras, however, the police fulfill a gatekeeper role that is not available when confronted with the lenses of citizen media. This gatekeeping, as evidenced in

SOCIETY, POLITICS, AND ART (Cambridge Univ. Press 2008)).

163. Bryce Clayton Newell, *Privacy v. Public Access in the Emerald City*, DIGITAL MEDIA L. PROJECT (Apr. 16, 2012), <http://www.dmlp.org/blog/2012/privacy-v-public-access-emerald-city>.

164. *Id.*

165. *Id.*

166. Goldsmith, *supra* note 155, at 915 (citing W. Westley, *Secrecy and the Police*, 34 SOC. FORCES 254 (1956); M. PUNCH, *CONDUCT UNBECOMING: THE SOCIAL CONSTRUCTION OF POLICE DEVIANCE AND CONTROL* (Tavistock 1985); M. PUNCH, *POLICE CORRUPTION: DEVIANCE, ACCOUNTABILITY AND REFORM IN POLICING* (Willan 2009)).

167. See SAMUEL WALKER, *POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT* 179–80 (Wadsworth Publishing 2000) (recommending the most effective form of citizen oversight).

168. Goldsmith, *supra* note 155, at 915 (citing E. GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* (Basic Books 1971); E. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (Penguin Goffman 1990)).

169. See EGON BITTNER, *ASPECTS OF POLICE WORK* 36 (Northeastern Univ. Press 1990) (discussing the ability of police officers to use discretion where the law is ambiguous enough to allow alternative actions).

the SPD example, potentially threatens the public's ability to conduct effective citizen oversight, especially when combined with certain efforts and laws that would restrict the ability of citizens to conduct 'reciprocal surveillance' by filming officers in public spaces or during other police-citizen interactions. On the other hand, if additional research bears out the findings of one recent study¹⁷⁰ that the use of these systems significantly lowers the rates of officer use of force and citizen complaints, then *some* of these concerns may be alleviated to some degree in practice.

V. WEARABLE CAMERAS, POLICE WORK, AND OFFICER ACCOUNTABILITY

If policing is a means to an end—a means to create social order through the application of power¹⁷¹—then the addition of wearable cameras to the officer's toolkit must be examined for its potential to quell or instigate violence. The use of wearable cameras also has the potential to alter or disrupt the nature of non-reported, so-called "peace keeping," aspects of policing and the attendant discretion that officers have historically had for their activities not resulting in arrests. Wearable cameras may serve to exacerbate the compromised position of the patrol officer, who is often under the "dual pressure[s] to 'be right' and to 'do something,'" even in stressful or dangerous situations.¹⁷² The use of officer-mounted wearable cameras is a double-edged sword. It promises some benefits, but also poses important problems. In this Part, I suggest that the use of such systems is not necessarily inimical to freedom (and its attendant privacy and speech concerns), but that significant checks need to be employed to ensure against the possibility of arbitrary interference and the improper use of power generated through the accumulation of information and potential intimidation implicit in these surveillance practices. In a modern society where surveillance has become a stable and accepted element of everyday life, I also think it appropriate to consider the role of research "to make surveillance strange again, and therefore open to rigorous examination and possibly change."¹⁷³

170. See Barak Ariel & Tony Farrar, *Report: Self-Awareness to Being Watched and Socially-Desirable Behavior: A Field Experiment on the Effect of Body-Worn Cameras on Police Use-of-Force*, POLICE FOUND. (Mar. 2013), available at <http://www.scribd.com/doc/130767873/Self-awareness-to-being-watched-and-socially-desirable-behavior-A-field-experiment-on-the-effect-of-body-worn-cameras-on-police-use-of-force> (attributing an over fifty percent reduction in police use of force to the experimental placement of video cameras on the uniforms of officers in a municipal California police department); see also Randall Stross, *Wearing a Badge and a Video Camera*, N.Y. TIMES (Apr. 6, 2013), <http://www.nytimes.com/2013/04/07/business/wearable-video-cameras-for-police-officers.html> (reporting a nearly sixty percent reduction in police use of force during the same study).

171. See, e.g., BITTNER, *supra* note 169, at 94–97 (discussing how police work is, and is not, a tainted occupation).

172. *Id.* at 97.

173. David Murakami Wood & C. William R. Webster, *Living in Surveillance Societies: The Normalisation of Surveillance in Europe and the Threat of Britain's Bad Example*, 5 J. CONTEMP. EUR. RES. 259, 260 (2009).

The deployment of officer-mounted cameras may only serve to support citizen oversight and law enforcement accountability when: (1) the cameras are either always on (that is, officers have no discretion as to when/whether the cameras are recording); or (2) officers adhere to strict guidelines requiring activation during every citizen encounter (unlikely); and (a) citizens are provided adequate *ex post* access to recorded footage to dispute charges or challenge officer conduct; (b) access to recorded footage is strictly regulated to information relevant to active official investigations and to proper personnel; and (c) footage is consistently and routinely destroyed in a manner that respects the above requirements.

Additionally, the use of these officer-mounted camera systems does have the obvious effect of documenting more encounters, which can then serve as evidence for or against officer or citizen misconduct. However, too much reliance on audio-visual evidence could also decontextualize events and also, possibly, diminish the recognition given by the public and courts to the realities that confront police officers on the ground. In short, it may lead to judgments about the wrongness/rightness of police action based on small windows of reality that ignore some relevant context. This may also affect policing by further diminishing the amount of discretion available to officers. Indeed, as Bittner found, police have historically kept few records of procedures that do not involve making arrests¹⁷⁴ and the nature of their work has unavoidably led to officers having a great deal of discretionary freedom.¹⁷⁵ These facts, combined with the reality that police work has long been divided into both law enforcement and peace keeping activities (which involves officer discretion and action outside the domain of making arrests),¹⁷⁶ suggests that always-on wearable cameras might begin to document wide swaths of police conduct that have heretofore been largely left to the officers themselves. Thus, in the context of skid row policing investigated by Bittner, the fact that officers use force to effectuate arrests on the basis of risk (considered in the aggregate for the area) and personal knowledge, rather than mere individual culpability, may be antithetical to the wider public's notions about legitimate police work. Bittner has stated:

When arrests are made, there exist, at least in the ideal, certain criteria by reference to which the arrest can be judged as having been made more or less properly, and there are some persons who, in the natural course of events, actually judge the performance. But for actions not resulting in arrest there are no such criteria and no such judges.¹⁷⁷

However, with the rise in the number of cameras present in public, and the advent of the officer-mounted wearable camera, these non-arrest situations

174. BITTNER, *supra* note 169, at 192–96.

175. *Id.* at 48.

176. *Id.* at 31–32.

177. *Id.* at 37.

are becoming increasingly documented and, as a consequence, there are potentially numerous judges (police administrators, elected officials, or the public) and a variety of criteria against which individual officer conduct may begin to be judged. These realities are exacerbated by the ease of uploading footage to the Internet and the availability of police records under public disclosure and freedom of information laws.

The resultant footage could be viewed, searched, and analyzed by superiors, and if accessible to the public under state disclosure laws, could provide broad-ranging access to records of such police work. This reality also suggests that what it means to do a good job “keeping the peace” could be defined more by outside forces than by the officers themselves. This will likely create tensions between the officers’ self-perception as separate and distinct “skilled practitioners” and the public’s preferred perception of police as subservient to society.¹⁷⁸ Additionally, whether officers engage in forms of resistance to mandated surveillance or citizen-initiated surveillance (e.g. by selectively recording interactions with citizens, confiscating cameras/cellphones, and/or destroying footage) also poses some fascinating, and important, empirical research questions that bear heavily on any attempts to normatively define proper policies, laws, or regulations.¹⁷⁹

Some argue that wearable cameras promise to document police abuse and also preserve evidence to exonerate officers falsely accused of improper conduct.¹⁸⁰ A transparent monitoring system, these arguments suggest, would encourage proper behavior on both sides and would restore trust in policing.¹⁸¹ Others argue that police would only behave more appropriately under

178. See *id.* at 33 (discussing the “peace-keeping practice as a skilled performance”); Steve Herbert, *Tangled Up in Blue: The Elusive Quest for Police Legitimacy*, 10 THEORETICAL CRIMINOLOGY 481, 481–82 (2006).

179. See generally Andrew Grenville, *Shunning Surveillance or Welcoming the Watcher? Exploring How People Traverse the Path of Resistance*, in SURVEILLANCE, PRIVACY, AND THE GLOBALIZATION OF PERSONAL INFORMATION 70, 70 (Elia Zureik ed., 2010) (positing “a model to explain why some [people] resist surveillance, whereas others accept or ignore it”); Kevin D. Haggerty & Richard V. Ericson, *The New Politics of Surveillance and Visibility*, in THE NEW POLITICS OF SURVEILLANCE AND VISIBILITY 3, 3 (Kevin D. Haggerty & Richard V. Ericson eds., 2006) (studying the factors that are “driving the expansion of surveillance” and “demonstrating both the multiplicity of influences on surveillance and the complexity of the political implications of these developments”); Gary Marx, *A Tack in the Shoe: Neutralizing and Resisting the New Surveillance*, 59 J. SOC. ISSUES 369, 388 (2003) (discussing “behavioral techniques of neutralization intended to subvert the collection of personal information”); Torin Monahan, *Counter-Surveillance as Political Intervention?*, 16 SOC. SEMIOTICS 515, 515 (2006) (theorizing on the political implications of counter-surveillance practices); Lisa A. Shay et al., *Beyond Sunglasses and Spray Paint: A Taxonomy of Surveillance Countermeasures*, 2013 IEEE INT’L SYMP. ON TECH. & SOC. 191, 191 (2013) (providing a taxonomy for analyzing successfully employer countermeasures to networked surveillance systems); Dean Wilson & Tanya Serisier, *Video Activism and the Ambiguities of Counter-Surveillance*, 8 SURVEILLANCE & SOC. 166, 166 (2010) (examining “the use of video by protesters as a form of ‘counter-surveillance’”).

180. See, e.g., Neill Franklin, *Cameras Could Restore Trust in Police*, N.Y. TIMES (Oct. 22, 2013, 4:44 PM), <http://www.nytimes.com/roomfordebate/2013/10/22/should-police-wear-cameras/body-cameras-could-restore-trust-in-police> (discussing the effects of camera surveillance on police behavior).

181. E.g., *id.* (“[B]y adopting an objective, transparent monitoring system that allows us to defend those unjustly accused and correct or punish those caught abusing their power, we can prove to the public we believe no person should be above the law, particularly those sworn to uphold it.”).

surveillance if they know someone is actually going to watch what their cameras record (i.e. active monitoring/oversight) and that wearable cameras shouldn't replace written reports, including legal justifications for officer actions.¹⁸² On the other hand, preserving the rights of citizens to conduct reciprocal surveillance is also an important aspect of this overall question.¹⁸³ Significant questions also remain about whether (and to what extent) these cameras could also be used to intimidate or chill legitimate speech and other protected activities. Additionally, long-term storage and archiving of police footage could pose a threat to privacy interests of innocent citizens, as the release of such footage under state disclosure laws threatens to “embarrass” innocent bystanders caught on tape (while also serving the ends of citizen oversight as a form of reciprocal surveillance). Despite these concerns, the ACLU claims wearable police cameras are a “win-win” situation, stating that “[a]lthough we [the ACLU] generally take a dim view of the proliferation of surveillance cameras in American life, police on-body cameras are different because of their potential to serve as a check against the abuse of power by police officers.”¹⁸⁴ This is not a claim that should be made lightly without a deeper empirical understanding of the effect of these systems in society (and the forms of police officer resistance that may emerge from such research).

Research has indicated that the use of officer-mounted wearable cameras, at least in the city of Rialto, California, has reduced instances of officers using force (a sixty percent reduction over a twelve-month period ending in February 2013) and the number of citizen complaints (an eighty-eight percent reduction over the same time period).¹⁸⁵ Earlier research investigating the effects of in-car cameras claimed substantial value to law enforcement, including enhancing officer safety, improving agency accountability, reducing agency liability, simplifying incident review, enhancing new recruit and in-service training (post-incident use of videos), improving community/media perceptions, strengthening police leadership, advancing prosecution/case resolution, enhancing officer performance and professionalism, increasing homeland

182. See Nancy La Vigne, *It's One Smart Step, Not a Solution*, N.Y. TIMES (Oct. 23, 2013, 3:22 PM), <http://www.nytimes.com/roomfordebate/2013/10/22/should-police-wear-cameras/body-cameras-for-police-could-be-one-smart-step> (“Whether routine or random, this review is most effective when conducted by supervisors who hold officers accountable for any evidence of misconduct captured on film. If that doesn't happen, then officers will come to view cameras as an empty threat, much as criminals view crime cameras that are not actively monitored.”).

183. See, e.g., Andy Sellars, *Focus Instead on Empowering Civilians*, N.Y. TIMES (Oct. 22, 2013), <http://www.nytimes.com/roomfordebate/2013/10/22/should-police-wear-cameras/empower-civilians-to-record-the-police> (“[A] person should have a right to the government's evidence when addressing unfair or unlawful police treatment.”); see also Newell, *Local Law Enforcement*, *supra* note 65 (balancing concerns for personal information privacy with the efficacy of law enforcement); Newell, *The Massive Metadata Machine*, *supra* note 65 (“[R]eciprocal surveillance . . . grants citizens greater power to check government abuse and force even greater transparency.”).

184. Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU (Oct. 9, 2013), <https://www.aclu.org/technology-and-liberty/police-body-mounted-cameras-right-policies-place-win-all>.

185. Ariel & Farrar, *supra* note 170, at 8; Stross, *supra* note 170.

security, and upgrading technology policies and procedures.¹⁸⁶

The proper role of officer-mounted wearable cameras is also informed by an understanding of some of the power dynamics implicated by police-citizen encounters. Steve Herbert provides a useful articulation of three dynamics that structure police efforts to legitimize themselves to the citizenry they serve.¹⁸⁷ This three-pronged analysis provides an important theoretical basis for critiquing and exploring the risks and benefits of implementing these systems in actual police practice, as well as police officers' reactions to being surveilled themselves (whether by citizens or through the use of these wearable systems or dash-cam systems). First, democratic government institutions must be subservient to the public to some degree.¹⁸⁸ As such, police must be responsive to citizen oversight.¹⁸⁹ Wearable cameras and citizen media both plainly hold the promise of exposing wrongful action (one purpose of oversight). However, as stated above, police have a clear interest in controlling the extent of their visibility in this regard.¹⁹⁰ Because of this, there is a direct tension between police subservience to the citizenry and the second dynamic, separation. This dynamic may also help explain why officers often react negatively to citizens recording their public activities.

Second, Herbert argues that the police's desire for separation is implicated both by the legal order (their ability to engage in coercive action is in some conflict with a purely subservient role, albeit regulated by formal law) and their desire for professional status¹⁹¹ (the "skilled practitioner" discussed by Bittner¹⁹²). That is, as professionals, they have special knowledge and training, can make appropriate decisions that could not be made by ordinary civilians, are distinct from the citizenry, and should be sheltered from citizen meddling.¹⁹³ Separation is also sought as officers feel the need to "possess unquestioned authority, particularly in situations where danger may be present," often as a consequence of their desires to remain safe in dangerous circumstances and to receive deference because of their professional skills and training, and because they are putting themselves in harm's way for a higher purpose.¹⁹⁴ The recording of these potentially dangerous encounters also threatens to expose the use of force, even when arguably appropriate or necessary under the circumstances, to heightened levels of scrutiny. This may be one cause for the significant drop-off in the use of force by the Rialto police

186. Int'l Ass'n of Chiefs of Police, *The Impact of Video Evidence on Modern Policing*, U.S. DEP'T JUST. (2005), http://www.cops.usdoj.gov/Publications/video_evidence.pdf.

187. See Herbert, *supra* note 178, at 481 ("Three key articulations are critical to the relationship between the police and the citizenry, what I term subservience, separation and generativity.").

188. *Id.* at 482.

189. WALKER, *supra* note 167, at 7.

190. Goldsmith, *supra* note 155, at 915.

191. Herbert, *supra* note 178, at 482.

192. BITTNER, *supra* note 169, at 33.

193. Herbert, *supra* note 178, at 487-88.

194. *Id.* at 488.

officers¹⁹⁵—and it is possible that it signals an unwillingness by the officers to engage physically on camera, even when to do so might be appropriate, and not only when force is unwarranted.

Third, these questions of police epistemology and morality inform Herbert's third mode: generativity.¹⁹⁶ Police practices and policies have the potential to shape social life, and the use of officer-mounted cameras poses an obvious challenge to the status quo of officer-citizen interactions and, likely, the perception citizens form of officers in general. In any case, there is a certain disconnect between public sentiment and officers' self-recognition as "deeply virtuous . . . risk-taking protectors of society"¹⁹⁷ that is likely to play out in interactions post-adoption of these surveillance systems. In particular, if officers are enabled to use these wearable camera systems, any attempts to prohibit the public from likewise recording their encounters with police become even less legitimate (if a case for their illegitimacy can even be made in the first place). If the use of these systems contributes to special exemptions for law enforcement to record conversations under varying state wiretapping and/or eavesdropping laws, the non-reciprocal nature of these legal exemptions may constitute a form of impermissible domination and further illegitimate such policies in the sight of the public.

Relatedly, research on resistance to surveillance has also become an area of interest within the surveillance studies community.¹⁹⁸ Gary Marx has developed, through a variety of empirical studies, a taxonomy of eleven forms of resistance or non-compliance: "discovery moves, avoidance moves, piggybacking moves, switching moves, distorting moves, blocking moves, masking (identification) moves, breaking moves, refusal moves, cooperative moves, and counter-surveillance moves."¹⁹⁹ Others, such as Grenville, have extended some of Marx's work, finding that awareness of and experience with surveillance are strongly correlated with forms of resistance to preserve privacy (although these results also vary significantly by country).²⁰⁰ Given numerous news reports of officers failing to activate in-car cameras during potentially problematic interactions, it can be expected that officers may also find ways to resist the gaze of body-mounted cameras as well.

A. *The Privacy Implications of Officer-Mounted Cameras*

In addition to the concerns expressed above, officer-mounted wearable cameras also potentially invade personal privacy. In public spaces, the use of

195. See *supra* note 170 and accompanying text.

196. Herbert, *supra* note 178, at 489–91.

197. *Id.* at 491.

198. See *supra* note 179 and accompanying text (discussing whether officers engage in forms of resistance).

199. Marx, *supra* note 179, at 374.

200. See Grenville, *supra* note 179, at 75 (comparing awareness and experience across several countries).

these systems poses fewer problems than when used by police within homes, businesses, or other non-public spaces, but important problems still remain. When these systems would be worn and activated during the execution of search or arrest warrant within another person's home or other non-public place, serious privacy implications arise. The benefits of having a record of police conduct to serve oversight goals may, for the sake of argument, override the individual privacy interests at stake—at least as far as the initial capture of the recording is concerned. However, if subsequent access to and use of the recordings extends beyond these purposes, or is even available to any member of the public upon filing a public disclosure request, such use poses a serious invasion of personal privacy. As such, to ensure the use of the information by the state is non-arbitrary, the state must be restricted to using such footage only as evidence, the state must destroy all copies when such use is no longer needed, and access to the footage must be limited to the persons claiming privacy interests (to allow them to challenge the government's representation of events). The use of wearable, or other, cameras during the execution of a warrant in a person's home should also be authorized (or not) by a judge, on a case-by-case basis, as part of the initial warrant determination. If not explicitly authorized by warrant and supported by probable cause, I suggest a recording made inside a person's home during a search or arrest may likely violate that person's right to privacy.

Additionally, the increasing effectiveness of facial recognition software, even in consumer products like Facebook, means that simply recording an image of a person (in a private or public space) can lead to further identification. These realities implicate an increased ability of state surveillance to gather, collect, combine, and analyze personal information, and this reality suggests that the state is capable of exercising a greater amount of power over the individual. Officer-mounted wearable cameras, paired with facial recognition, could easily become much like the current crop of automated license readers, constantly reading thousands of faces (license plates), interpreting identity (plate number), and cross-checking this information against national and local crime databases in real-time. Officers could then respond to information instantly pushed to a heads-up display (e.g. Google Glass-like glasses or visors) and react appropriately by detaining, questioning, or arresting the unsuspecting individual. This power itself is not necessarily inimical to individual liberty (e.g. the public may have, with proper informed consideration and deliberative democratic action, approved the surveillance), but it should be treated with suspicion.

The proposition that a person has waived any and all privacy interests in all of this "public" information can be made, but the situation is qualitatively different when the government or other individuals have such easy access to vast amounts of historical and aggregated information that can be used to determine patterns or even potentially predict future action or movements statistically. Of course, nothing is stopping a police officer from trailing X and recording X's movements in public (as long as the trailing does not constitute harassment). However, the likelihood that an officer (or team of officers) would trail X continuously for months at a time making constant notes about

precise locations and movements, including time spent at each location, was extremely low when cases like *United States v. Knotts*²⁰¹ and *United States v. Miller*²⁰² were decided. Presumably it remains so today.²⁰³ Additionally, as we increase the duration, extent, and means of the intrusion facilitated by the various mechanisms of surveillance on the scene, we are further undermining the “voluntariness” of a person’s waiver based merely on their presence in public. If information privacy rights revolve around the right to control access to and uses of our personal information, the additional and automatic information flow from lens to screen to hard disk to long-term archive (and, potentially, the Internet) encroaches on our right to control the use of the information for temporally restricted purposes. This loss of ability to control the “use” of our personal information is caused by the mere fact of technological intervention and innovation.

As such, the initial waiver (of access) to the fact that a person is in a (specific) public place can be sustained, but this should not extend to a waiver allowing the state to subsequently store and utilize that information into the future absent reasonable grounds (probable cause; perhaps individualized suspicion) to believe the person has harmed another or broken agreed-upon social constraints (e.g. committing a crime). The nature of the recording technologies may generally necessitate some storage in order to cross check for evidence of criminal action (e.g. use of facial recognition to determine if a person is suspected of criminal wrongdoing; use of automated license plate readers to check databases of suspected offenders), but after no match (or “hit”) occurs, the state must be under an obligation to destroy the information prior to any further use. This conclusion, that a person’s presence in public may waive their right to object to another accessing that information, is also consistent with Westin’s claim that individuals must constantly balance their desire for privacy with their interest in social participation and stimulation.²⁰⁴ According to Westin, an individual must do this “in the face of pressures from the curiosity of others and from the processes of surveillance that [society] sets in order to enforce its social norms.”²⁰⁵

If the structural and political realities in play allow the state to arbitrarily wield this power over its citizens, it is impermissible as a form of domination. However, society should have no claim upon a person’s public movements unless they infringe another’s rights.²⁰⁶ Under this approach, law enforcement, as an institution of the state, has no business collecting, storing, and mining

201. See *United States v. Knotts*, 460 U.S. 276, 283–84 (1983) (dismissing the concern that “twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision”).

202. See *United States v. Miller*, 425 U.S. 435, 443 (1976) (determining that a bank’s twenty-four hour access to financial information undermines citizens’ privacy interests).

203. See Frank Bannister, *The Panoptic State: Privacy, Surveillance and the Balance of Risk*, 10 INFO. POLITY 65, 68 (2005) (describing the logistical and manpower difficulties of physical surveillance).

204. WESTIN, *supra* note 96, at 10–11.

205. *Id.* at 7.

206. See MILL, *supra* note 127, at 63–64.

this information except for legitimate official purposes directly related to investigating actions by individuals that infringe upon another person's rights.

B. Transparency and Access to Government Surveillance Footage

Despite decades of increasingly safer streets and fewer instances of serious police-citizen violence in America,²⁰⁷ the police continue to hold a highly criticized role in society (this is not a new phenomenon).²⁰⁸ Indeed, most recent press about police use of new technologies has focused on the negative implications that these developments have on citizen privacy—which is an important concern—but less attention has been given to balancing these privacy interests with the important societal interest in promoting effective and efficient police work. The tensions between these competing—and legitimate—aims is substantial and, in the context of police use of wearable camera systems, limiting the scope of law enforcement data collection and retention to protect citizen privacy might also protect the privacy of the police officers using these systems, as disclosure of the resultant footage to the public under freedom of information laws can allow citizens to track the historical policing patterns of individual officers and scrutinize officer conduct, especially if the systems are always on.²⁰⁹ Thus, wearable cameras become a useful means of watching the officers themselves. In this context, the more recognizable tensions between protecting privacy and ensuring efficacious policing are compounded by a direct tension between privacy interests and freedom of information as citizen oversight—as an important form of freedom-preserving reciprocal surveillance. The term reciprocal surveillance as used here, of course, refers to the idea that if the state can watch the people, the people should likewise be enabled to watch the state. This is one form of checking government power that resists the reification of potential domination. One possible response, limiting public access to footage, protects the privacy of innocent individuals and police officers, but it also limits the ability of the public to conduct oversight. Such oversight, with its attendant right to access information about government action, in my opinion, also serves important First Amendment interests in facilitating informed speech and enhancing democratic governance.

There are a few variables that must be accounted for to properly determine whether footage should be publicly accessible through FOI mechanisms. First, access should always be granted to the individual(s)

207. U.S. Department of Justice, Community Relations Service, *Principles of Good Policing: Avoiding Violence Between Police and Citizens* (rev. Sept. 2003), available at <http://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf> (last visited Jan. 21, 2014).

208. See BITTNER, *supra* note 169, at 89–102 (discussing the functions of police in modern society).

209. See Newell, *Local Law Enforcement*, *supra* note 64 (providing an example of a related phenomenon, in the context of tracking officers through querying publicly disclosed automated license plate reader databases).

depicted in the footage, especially those who are subjects of the police-citizen interactions depicted. This rule serves two primary purposes: it allows those charged with crimes or claiming police misconduct to bring evidence to light that may (or not) help prove their case and it also respects the rights of individuals to be informed about what information the state's surveillance has captured about them so that they can exercise their right to control subsequent use of such information. Thus, blurring or otherwise obscuring identifiable information about innocent bystanders prior to further disclosure may also be a positive option, and requests to do so by the depicted individual(s) should be honored.

Second, excluding wider public access to the recorded footage may sometimes restrict the ability of the public and news media to serve important functions as watchdog. When the footage is captured in public spaces, because of the claim that presence in public involves a waiver of the right to access such information, the public's interest in access to footage may outweigh the privacy interests of the innocent bystanders. This concern can also be limited by anonymizing faces of those individuals whose identities are not key to the oversight purposes of such access (e.g. innocent bystanders).

Third, footage captured within a person's home (or other private area) should be protected more stringently. I do not discuss the notion of property much at all in this Article, but I believe property rights, like speech and privacy, also serve important liberty interests. Property rights also encapsulate privacy interests—and in this case, the spatial property rights also protect informational privacy interests. These limits protect individuals from interference and domination by states or private agents. Thus, as argued previously, warrants allowing state access to a person's home must also allow or exclude the ability of the state to record footage, or else such recording is an improper and unreasonable intrusion. Likewise, because of the enhanced claim to privacy in a person's home as opposed to in a public space (e.g. a park or public sidewalk), public access to such footage under FOI laws should only be allowed when the person whose property and privacy interests are at issue consents to such disclosure.

VI. THE COSTS OF TRAGEDY

We are often confronted with situations where we must determine which of the alternative actions available to us constitutes the best or most appropriate choice, guided by our preferred method or theory of determining what we ought or ought not to do. This question about what we should do is what Nussbaum calls the "obvious question."²¹⁰ However, Nussbaum argues that we should also face what she calls the "tragic question" by asking whether any of the alternative choices available to us are free of serious moral

210. Nussbaum, *supra* note 23, at 1006.

wrongdoing—not just which alternative is the best or most appropriate choice.²¹¹ Nussbaum argues that facing and considering the tragic question allows us to think critically and imaginatively about what sort of society we could—and should—design to avoid forcing people to confront such “unpalatable” choices.²¹² Of course, this assessment and the very possibility of a tragic question only exist if we presume a non-consequentialist approach to answering normative ethical questions.

By Nussbaum’s account, people are often forced to consider the obvious question when confronted with a variety of alternative choices, along with a methodological question about how one should determine the answer to the obvious question.²¹³ Often, considering and confronting the tragic question as well, even if only briefly when one of the available options appears free of any serious moral wrongdoing, is important because doing so: (1) clarifies our ethical alternatives; (2) helps us to recognize the existence of a tragic dilemma in appropriate cases; (3) helps us to recognize that tragedy and our own dirty hands obligate us to make appropriate reparations for our bad act(s); and (4) allows us to consider how the situation might have been avoided by better planning, and to actually plan—as a society—to avoid such problems in our future as we improve our society.²¹⁴ Nussbaum recognizes a “capabilities” approach based on recognition of basic human entitlements found in her analysis of the U.S. Constitution, as well as the possibility for other approaches, such as a human rights approach.²¹⁵ In the end, she concludes that while cost-benefit analyses help us to decide the obvious question, the approach outlined above allows us to better answer the tragic question.²¹⁶ Explicitly stated within her analysis is her feeling that “we badly need an independent theory of basic entitlements to guide us in making public policy choices.”²¹⁷ This theory is needed, Nussbaum argues, because “we need to figure out . . . what entitlements shall be treated as central and matters of tragedy should they be denied.”²¹⁸

A. *Facing the Obvious Question*

In the context of the crossing lenses of police surveillance and citizen-initiated surveillance of police officers in public spaces, the obvious question must be considered in a variety of situations. Essentially, this question requires us to ask, in whatever situation we find ourselves, “what should we do?” The question is normatively loaded and, at least in Nussbaum’s account,

211. *Id.*

212. *Id.* at 1005.

213. *Id.* at 1016.

214. *Id.* at 1016–17.

215. *Id.* at 1022.

216. *Id.* at 1036.

217. *Id.*

218. *Id.*

it requires a consideration of the consequences of our available actions. Determining how to answer this question is not always easy, as it requires us to weigh and consider all the alternatives available to us (including inaction), and to choose the alternative that would be the least morally blameworthy and that would bring about the best consequences. The following situational examples, presented here to highlight some of the various considerations that may need to be taken into account, are based on actual real-life events and cases.

In 2009, during protests following the G20 in London, England, a short video filmed by a bystander found its way into the popular press and online media by way of the Guardian newspaper.²¹⁹ The video depicted an officer purposefully knocking Ian Tomlinson (who was not directly involved in the protests) to the ground with his baton without any apparent provocation. Tomlinson died at the scene shortly thereafter. This example of citizen journalism (in concert with promotion by the established press) dramatically changed the way the mass media reported the riots and policing tactics employed by the local police,²²⁰ and it has now been viewed nearly a million times on the popular video-sharing website, YouTube.²²¹ The release of the video also resulted in a number of official investigations of the incident and the eventual firing of the officer for gross misconduct, although he was acquitted of manslaughter.²²² In the cases of *Glik* and the Oscar Grant shooting, discussed previously, the recordings were made by a citizen walking through the Boston Common or while standing in a nearby subway car.²²³ Out of concern for what they observed, these individuals began to film the arrests with their smartphones from a safe distance. And, in Simon Glik's case, this also led to his arrest for filming the incident for violation of the Massachusetts state wiretap statute.²²⁴

Imagine the position of the citizen wielding a camera in either of these cases. A number of "obvious" questions appear in sequence. First, suppose the camera is not already recording when the citizen sees what she feels is abuse or unlawful use of force by a police officer (the case in the *Glik* example). Within a jurisdiction that requires all-party consent before recording, pulling out the camera and pressing record (without gaining the officer's consent) might very well violate state law. However, failing to act might allow the abusive conduct to go unverified and potentially unnoticed by

219. Paul Lewis, *Ian Tomlinson Death: Guardian Video Reveals Police Attack on Man who Died at G20 Protest*, GUARDIAN (Apr. 8, 2009, 4:46 PM), www.theguardian.com/uk/2009/apr/07/ian-tomlinson-g20-death-video.

220. Greer & McLaughlin, *supra* note 5, at 1041–42.

221. The Guardian, *Video of Police Assault on Ian Tomlinson, Who Died at the London G20 Protest*, YOUTUBE (Apr. 8, 2009), <https://www.youtube.com/watch?v=HECMVdl-9SQ> (over 970,000 views as of Jan. 6, 2014).

222. Peter Walker, *Ian Tomlinson Case: PC Simon Harwood Sacked For Gross Misconduct*, GUARDIAN (Sept. 17, 2012), <http://www.guardian.co.uk/uk/2012/sep/17/simon-harwood-sacked-gross-misconduct>.

223. *See supra* Part II.

224. *See supra* Part II.

those in a position to remedy wrongs or provide justice to the abused. A number of legal and ethical conflicts also further complicate this situation, such as the conflict between the potential First Amendment right to record and the state law prohibition, the privacy rights of the various subjects of the recordings (including innocent bystanders), the property rights of the camera owners, and the context of a public space.

Alternatively, let us imagine that the camera was recording prior to the noticed abuse (or alleged abuse) by the officer, and the initial officer conduct was unintentionally captured (such as in the Tomlinson case). The camera-wielding citizen must now decide whether to continue recording (in potential violation of state law), move the camera so as to avoid capturing any more of the incident, or turn the camera off (with similar consequences as noted above in the first example). Admittedly, it is not clear that violating the law in this example is immoral (unlike murder, for example) or that the decision does in fact have moral import. However, the potentially adverse consequences to the citizen—arrest and punishment—would be substantial. Additionally, if we entertain Nussbaum's approach to moral reasoning, the law's denial of the citizen's First Amendment rights would create a tragic situation, making the government's role in restricting the citizen's basic entitlements morally significant.

In either of these two cases, if the recording captures any of the alleged abuse, the citizen must also decide what to do with the footage. She could turn it over to the police department to use for internal investigation (although, in real-life, this option has actually resulted in the citizen being charged with a crime and the footage used as the evidence of the unlawful recording at issue for prosecution of the eavesdropping offense), keep the footage to herself, or she could destroy the footage. Alternatively, she could also post the video to the Internet, although the reality here is that any expectation of anonymity would unlikely be justified, and this option could very well subject her to the same risk of prosecution as turning the footage over to the department. Destruction in this case could be considered unlawful destruction of evidence and obstruction of justice, should the abuse be prosecuted by local authorities, and keeping the evidence hidden could mean, again, that the offense go unpunished at the expense of justice.

It seems evident that these scenarios suggest that the "obvious" question does not always have an obvious answer, regardless of whether the situation is necessarily "tragic"—that is, that none of the available actions would actually be morally blameless. However, as Nussbaum notes,²²⁵ the obvious question must be addressed. It cannot be escaped, since inaction itself is an answer. Additionally, it is important to also determine the answer to the tragic question, since doing so allows us, as a society, to work toward addressing and fixing the situation our laws and policies have created. The possibility does exist,

225. Nussbaum, *supra* note 23, at 1009.

however, that each of the various ethical traditions (consequentialist, deontological, Aristotelian) would lead us to the same conclusion about which available action would be most appropriate—and presumably also morally blameless (aside from whether the action ought or ought not to be done). Presumably, the documentation of the abuse of government power—even in violation of state law—could be seen as morally permissible under both consequentialist and deontological accounts of normative ethical theory. If we accept Nussbaum’s claim that certain costs—based on violations of basic human entitlements as set forth in our Constitution—are distinctively bad such that “no citizen should have to bear them,”²²⁶ then we can begin to see how our policy choices have created tragic situations for members of our society, and that such policies therefore have some moral import because they involve the violation of basic entitlements, regardless of whether our citizens are actually confronted with “tragic” situations.

B. Facing the Tragic Question

The tragic question is not necessarily so obvious, and it is also very difficult to answer. To answer the tragic question, we must determine whether any of the available alternatives are morally acceptable—not just which alternative produces the best consequences, but whether any of the alternatives are free from serious moral blame. In the first scenario, the initial set of alternatives consists of choosing to begin recording or to refrain from documenting the incident. At first glance, choosing to record would not necessarily appear to involve morally blameworthy conduct, except that such action would potentially be in violation of state criminal law—something our intuitions might tell us is generally morally suspicious. To commit a crime, we might say, is morally blameworthy. But what of the (un)justness of the law itself, or our actual moral obligation to obey the law (whether perceived as just or unjust), or the potential that the state law is potentially in violation of a higher law, the U.S. Constitution and First Amendment of the Bill of Rights?

On the other hand, choosing not to record, as we have said, might allow the abusive conduct to go unverified and potentially unnoticed by those in a position to remedy wrongs or provide justice to the abused. Audio-visual and photographic materials are, after all, important and very powerful sources of evidence. Allowing an act of injustice to go unpunished (or at least failing to act to prevent such an outcome when one could have done differently), can also be seen as a violation of our moral obligations to the abused or to society generally. Morally significant questions might also be raised should such a choice violate our own deeply held moral convictions, affecting our autonomy and integrity. We might also say that, as citizens, we have some obligation to prevent and report unlawful and abusive conduct on the part of our

226. *Id.* at 1036.

government, or to hold our government accountable for its wrongs and violation of its citizens' rights. In the second example, the situation is compounded by the additional question about what to do with footage already obtained (whether purposefully or unwittingly). The considerations are similar, however, and not necessarily any easier to answer. Obstruction of justice and destruction of evidence of serious wrongdoing can easily be seen, intuitively, as morally suspicious actions.

One might object to my characterization of these situations as potentially tragic on the basis that documenting state conduct—in any circumstance—should be a fundamental right in a democratic society with such lofty ideals of free speech and free press as we have in the United States. Alternatively, an objection to my reasoning above could discount the argument that legality implies morality, and that citizens should be morally free to disregard unjust law in the pursuit of justice. Indeed, many of these situations might not require the individuals to make morally repugnant choices, and I do not hold that morality requires adherence to any law merely because it is codified. However, regardless of whether a morally acceptable answer is available within these options, I argue that the proper choice is not always obvious, especially in the split second when the individual must make their decisions. Additionally, it is in some (different) sense tragic that we (as a society) have designed some of our laws and policies in a way that subject citizens to situations where they must struggle with these questions in the first place (regardless of their strictly moral import). The fact that portions of our society subject their citizens to having to struggle with these difficult questions on a regular basis—decisions that must also be made without time for reflection and deliberation—is itself a very undesirable reality.

Considering whether, and when, violation of law might be morally justified and acceptable appears fraught with difficulty and competing considerations of significant import, despite the importance of that endeavor. Additionally, when police surveillance—in the form of wearable cameras, et al.—is broadly allowed by the law, based on the idea that citizens have no reasonable expectation of privacy in public spaces, any legal restraints (e.g. eavesdropping statutes) on citizens looking back and conducting reciprocal surveillance in these same public spaces becomes very problematic as, potentially, a form of codified state domination that strikes at the core values of the First Amendment.

In the following section, I approach this conceptual space from a different position, and aim to explore what type of respect, and what qualitative aspects of respect, should be owed to police officers or other subjects of video recordings in public spaces by the citizen journalist, as I believe that discussion can inform (though not necessarily answer) some of the open questions we've just addressed.

VII. THE ROLE OF RESPECT IN CONDUCTING “SOUSVEILLANCE”

In this section, I am primarily concerned with what respect ought to be owed by citizen media producers to the subjects of their recordings. To a

lesser extent, as mentioned above, I am also interested in addressing the proper respect that should be owed to the rule of law (or moral obligation to obey the law). In *Two Kinds of Respect*,²²⁷ Stephen Darwall argues that most general accounts of respect in philosophical literature fail to account for two different types of respect, namely “recognition” and “appraisal”, that encompass two qualitatively different ways in which persons might be the object of respect (either of another or the individual herself). In this Article, I aim to address both of these types of respect to varying degrees.

Darwall argues that the first type of respect, recognition respect, consists of “a disposition to weigh appropriately in one’s deliberations some feature of the thing in question and to act accordingly.”²²⁸ Thus, a person may have more or less recognition respect for various types of features of the thing in question, but recognition respect is not an appraisal of an individual’s character, and it cannot vary between things so long as the features are the same. This is the general respect for persons that we should have for all persons *simply because they are moral agents*, and it delineates the boundaries of permissible moral action in regard to the thing respected. On the other hand, appraisal respect is concerned with an appraisal of the person herself, or of that person engaged in some particular pursuit. Darwall concludes that his two-part conception of respect allows us to see that “there is no puzzle” in the idea that all persons are worthy of respect as persons, but that some persons are deserving of more or less respect because of their personal characteristics.²²⁹

Of particular relevance to our present inquiry, is the conclusion by Darwall that “various ways of regarding and behaving toward others, and social arrangements which encourage those ways, are inconsistent with the respect to which all persons are entitled.”²³⁰ Thus, in our present context, certain social arrangements (particular forms of enforcement of eavesdropping laws and policies, for example) and certain behaviors that are encouraged or forced by these situations (the actions demanded by confronting the obvious question) may run the risk of withholding the proper respect due to various persons involved (officers, bystanders, or the citizen journalist herself). This conclusion then, if true, should provide strong reason to consider these issues when confronted with obvious or tragic questions in the context of citizen/government interaction.

227. Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36 (1977).

228. *Id.* at 38.

229. *See id.* at 46 (“[T]here is no puzzle at all in thinking both that all persons are entitled to respect just by virtue of their being persons and that persons are deserving of more or less respect by virtue of their personal characteristics.”).

230. *Id.* at 36.

A. *Respect for Subjects of Recordings*

The premise that all persons are entitled to respect is, as Darwall notes,²³¹ a proposition that has received quite a bit of scholarly attention over the years. Despite some controversy, some have claimed that Immanuel Kant's argument that all persons should be treated as ends in and of themselves expressed, or should have expressed, confirmation of this proposition.²³² John Rawls and other influential philosophers have also argued—or at least recognized—that all persons are owed some sort of respect as rational moral agents.²³³ This basic respect for persons simply by virtue of the fact that they are persons is what Darwall calls “recognition respect.”²³⁴ The other type, or “appraisal respect,” is a type of respect that can be deserved, gained, or lost.²³⁵ This is the respect we refer to when we say something like, “I respect X because she does Y so incredibly well, despite all the obstacles she has overcome.” We can also easily conceive of a valid form of appraisal respect due to police officers simply because of the vitally important office, and role in society, that they have voluntarily chosen to undertake, and in the form of service they provide to society. Darwall himself also posited that the law itself can be the subject of recognition respect.²³⁶

Assuming the truth of the premise that all persons are worthy of respect, police officers and others (including the citizens recorded by officer body-cameras) potentially subject to being recorded while physically present in public spaces, should be owed, at the very least, recognition respect by those who would film or record them (and when considering what use to make of the resulting recordings). If we assume even non-persons, such as the law itself, are worthy of recognition respect. What exactly do these assumptions mean, in the context of citizen-initiated surveillance, and how does (or should) this change what a citizen journalist should consider when confronting the obvious or (potentially) tragic questions presented above?

Darwall states that recognition respect entails “giving appropriate consideration or recognition” to an object and then “deliberating about what to do.”²³⁷ What action is appropriate, based on this form of respect is somewhat controversial, however, since this is really a question of what moral obligations

231. *Id.* (“An appeal to respect as something to which all persons are entitled marks much recent thought on moral topics. The appeal is common both in writings on general moral theory and in work on particular moral problems.”).

232. *Id.*

233. *E.g., id.* at 36 (citing JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press 1971); Bernard Williams, *The Idea of Equality*, in MORAL CONCEPTS 158–61, (Joel Feinberg, ed., Oxford Univ. Press 1970); DAVID GAUTHIER, PRACTICAL REASONING 119–20 (Oxford Univ. Press 1963); R. S. DOWNIE & ELIZABETH TELFER, RESPECT FOR PERSONS 15–17 (Allen & Unwin 1969)).

234. *Id.* at 38.

235. *Id.* at 39.

236. *Id.* at 38 (“The law, someone’s feelings, and social institutions with their positions and roles are examples of things which can be the object of this sort of respect.”).

237. *Id.*

we have to each other generally. At a minimum, it appears uncontroversial that for a person, such as a police officer, recognition respect would require the citizen journalist to “take seriously and weigh appropriately the fact that” the police officer is a person (whatever this means).²³⁸ On the other hand, appraisal respect for an officer would be an “attitude of positive appraisal of that person either as a person or as engaged in some particular pursuit.”²³⁹ Intuitively, a person voluntarily serving in an important societal role, at less than minimum risk of bodily harm to themselves, should be the object of some appraisal respect for being engaged in that sort of pursuit. However, since appraisal respect can be lost or gained based on whether the object deserves such respect, an officer allegedly abusing their position or violating the rights of another person can lose most (if not all)²⁴⁰ of the appraisal respect they might otherwise be owed.

In context, then, a citizen journalist recording (or considering whether to record) a situation that allegedly appears to be a case of unlawful or unnecessary use of force by a police officer against another citizen, should at least consider (and base her behavior on) the fact that the officer (and others within the frame of the camera’s lens) deserve some respect, namely recognition that they are persons. This conclusion, however, may not necessarily limit any right to record, and may merely create an obligation to not violate the officer’s basic human entitlements. Presumably, we can conclude without too much controversy that this means we should not violate a moral right vested in the officer by virtue of being a person, unless such violation was necessary to prohibit equal or greater violation against a more innocent person (the person subject to the officer’s abuse). This exception might be justified on the basis that the officer, by violating another’s basic rights, has waived their own. For example, I suggest this would require us to conclude that killing the officer to stop the abuse would not be a morally appropriate response, absent some cause to believe the officer’s abuse would very likely kill or very seriously injure another person.

Similarly, I would suggest that because of this respect, and potentially the officer’s position, citizen onlookers should refrain from assuming lightly that the officer was engaged in applying an inappropriate measure of force, especially in cases when the detainee might pose a significant threat to the life or body of the officer (though this conclusion doesn’t necessarily mean that the citizen ought to refrain from recording the incident). On the other hand, when it is clear that an officer is abusing a person, and not acting within a permissible range of self-defensive response, the recognition respect owed to the detained person might provide greater incentive to responsibly document

238. *Id.*

239. *Id.*

240. I do not attempt to discuss here whether the officer itself is deserving of some appraisal respect, regardless of the actions of the officer, and what impact this consideration might have on the citizen’s decision-making process.

and report the incident—although, as noted above, this decision might not be without any moral (or at least other forms of personal) cost in all circumstances. Instances of “virtual vigilantism” and public shaming have also begun to appear abundantly online, and a proper consideration of recognition respect would likely limit the number of inappropriate disclosures of embarrassing information that was not of any public interest in furtherance of self-government or government accountability. That is, moral choices might appropriately limit some speech in cases where the law will not (and should not) actually restrict such speech.

Throughout this analysis, however, I do not intend to discount the nature and amount of power and authority that a law enforcement officer holds in our society. One might object to my analysis of what respect is owed, based on a claim that such power tilts the balance so heavily in favor of the officer when potential abuse is taking place that the citizen should be able to more freely record the incident without such a serious consideration of what respect is owed to the officer(s) involved. Indeed, the recordings of officers routinely discussed by the press and citizen media community have generally documented abusive and inappropriate state action, and have not generally been found to be false, manipulated or distorted so as to vilify officers without cause. However, in response to this objection, I believe that officers do deserve appraisal and recognition respect by virtue of their professional positions and as persons. The positions that they must confront are often fraught with tension and danger, and they are forced to make decisions in these situations very quickly. The possibility that citizen media documenting police action might begin to look more like the cases of virtual vigilantism described above remains a very real possibility, and I think that seriously considering the issue of respect will promote more fruitful use of the power wielded by citizen journalists in the coming years.

B. Respect for Law

Finally, what moral obligation, or respect, does a camera-wielding citizen owe to the law (if any)? What effect might our appraisal of the law (whether subjective or objective) as unjust mean to our moral obligations? In his analysis, Darwall states that to have respect for law is to be disposed to regard the class of actions prohibited by the law as immoral.²⁴¹ This claim allows for the idea that breaking an unjust law could be morally right choice, but also requires that we be disposed, generally, to consider illegal conduct morally impermissible in the first instance. I believe that someone can be said to have respect for the law (construed broadly; perhaps the rule of law), even though that respect may lead to fighting against or violating certain law-on-the-books

241. See Darwall, *supra* note 227, at 40 (“To have such respect for the law, say, is to be disposed to regard the fact that something is the law as restricting the class of actions that would be morally permissible.”).

in order to promote change. Martin Luther King, Jr. was obviously deeply concerned with what he saw was the unjustness of laws allowing slavery and segregation, or the use of otherwise valid laws for an unjust purpose.²⁴² To quote from Dr. King more substantially:

Sometimes a law is just on its face and unjust in its application. For instance, I have been arrested on a charge of parading without a permit. Now, there is nothing wrong in having an ordinance which requires a permit for a parade. But such an ordinance becomes unjust when it is used to maintain segregation and to deny citizens the First-Amendment privilege of peaceful assembly and protest.

I hope you are able to see the distinction I am trying to point out. In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.²⁴³

Just as Darwall makes a distinction between different types of respect,²⁴⁴ that respect for law can be—and should be—bifurcated. A general disposition to consider illegal conduct as morally suspicious upholds the intuitively attractive notion that having a law abiding citizenry and government promote a healthy society. However, positive legal change could not exist without a willingness to identify and discuss, and potentially even break, laws that are manifestly unjust, or that are unjust as applied in a particular set of circumstances. In particular, laws that provide one party with dominating authority over another—in the sense described above in our discussion of neorepublican political philosophy—are ripe for democratic and individual challenge.

VIII. CONCLUSION

In conclusion, it is important to reiterate that the aim of this Article has not been to conclusively resolve the tragic, or even the obvious, questions confronting citizen journalists in the field. Rather, I hope that this discussion will help make the case that the current situation, brought about by the conflict

242. Martin Luther King, Jr., *Letter from a Birmingham Jail*, AFR. STUD. CENTER – U. PA. (Apr. 16, 1963), available at http://www.africa.upenn.edu/Articles_Gen/Letter-Birmingham.html (“The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws.”).

243. *Id.*

244. See Darwall, *supra* note 227, at 38 (“The two different ways in which a person may be respected provide but one instance of a more general difference between two attitudes which are both termed respect.”).

between First Amendment ideals, as announced by the First Circuit in *Glik v. Cunniffe* and Seventh Circuit in *ACLU v. Alvarez*, and the enforcement of eavesdropping laws against citizens filming officers carrying out official duties in public spaces is untenable. I have argued that confronting the tragic question in this context is important because facing that question allows us to think critically and imaginatively about what sort of society we could—and should—design to avoid forcing citizens to confront such “unpalatable” choices. Even if these situations are not ultimately “tragic” in the sense Nussbaum uses the term, this thought process can be valuable in planning for positive future change, in law or policy. When considered against state use of mobile, officer-mounted, video cameras, the need to limit the unbalanced possibility of domination made possible by increased state information collection and analysis is pronounced.

By facing the set of choices our current policies force upon (sometimes unwitting) citizens, we are continuing this conversation in a new and important way, rather than just simply focusing on promoting an interpretation of the First Amendment without considering the moral costs and questions involved. The First Amendment analysis in legal scholarship is undoubtedly important and useful to courts and lawmakers. However, considering and confronting the tragic question and the other important moral issues involved will allow us (as a society, bar, judiciary, academy, or as individual citizens) to better understand what situations our policies have engineered and what ethical alternatives are available to us (and to the individual citizens who face these obvious and tragic questions regularly). This debate will also help us to recognize the potential existence of tragic dilemmas that our policies have brought about, and will help us recognize that our own dirty hands obligate us to make appropriate reparations for our bad acts. Most importantly, facing the tragic question allows us to consider how this situation might have been avoided by better planning, legislative drafting, or the promulgation of appropriate departmental policies, and to actually plan—as a society—to avoid such problems in the future as we improve our society.

In the end, persons (including police officers) ought to enjoy certain rights to privacy in public spaces. The right to control how our personal information is accessed and used (for example, through aggregation from multiple sources into large databases) is vitally important if we are to care about personal privacy at all. Entering a public space may necessarily imply a waiver of certain types of information related to our presence in that space, but such a waiver need not encompass all future uses, analysis, and aggregation of such information over time (especially by government agents). However, the public interest in ensuring our political liberty and effective citizen oversight of government agents, along with First Amendment rights to gather and access information, points to the conclusion that police officers and other public officials have, by virtue of their public roles, effectively waived certain of their rights to privacy while carrying out their official duties in public spaces. As such, the right to conduct reciprocal surveillance of state agents conducting their official duties in public spaces (a form of “smartphone journalism”) is an important aspect of reducing domination and preserving individual liberty.