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## Crime, Surveillance, and Communities

I. Bennett Capers

*Brooklyn Law School*, [bennett.capers@brooklaw.edu](mailto:bennett.capers@brooklaw.edu)

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# CRIME, SURVEILLANCE, AND COMMUNITIES

*I. Bennett Capers\**

## ABSTRACT

We have become a surveillance state. Cameras—both those controlled by the state, and those installed by private entities—watch our every move, at least in public. For the most part, courts have deemed this public surveillance to be beyond the purview of the Fourth Amendment, meaning that it goes largely unregulated—a cause for alarm for many civil libertarians. This Article challenges these views and suggests that we must listen to communities in thinking about cameras and other surveillance technologies. For many communities, public surveillance not only has the benefit of deterring crime and aiding in the apprehension of criminals. It can also function to monitor the police, reduce racial profiling, curb police brutality, and ultimately increase perceptions of legitimacy. The question thus becomes not how we can use the Fourth Amendment to limit public surveillance, but rather: “How can we use the Fourth Amendment to harness public surveillance’s full potential?”

Introduction .....	960
I. Watching You .....	960
II. The Fourth Amendment Problem .....	964
A. A Conventional Reading of the Fourth Amendment.....	965
B. A Non-Conventional Reading of the Fourth Amendment .....	969
III. The Fourth Amendment Solution .....	977
Conclusion.....	989

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\* Professor of Law, Brooklyn Law School. B.A. Princeton University; J.D. Columbia Law School. E-mail: bennett.capers@brooklaw.edu. © 2012 I. Bennett Capers.

## INTRODUCTION

Quite simply, we have become a surveillance state. Cameras—both those controlled by the state, and those installed by private entities—watch our every move, at least in public. For the most part, this public surveillance is unregulated, beyond the scope of the Fourth Amendment. To many civil libertarians, the extent of public surveillance infringes upon our rights of privacy and anonymity, and as such should be cause for alarm. On the other side of the debate, law and order advocates argue that mass surveillance is a necessary tool in deterring crime and apprehending criminals.

The goal of this Article is not to settle this debate, but rather to call attention to the benefits of mass surveillance that are too often left out of the discussion. This Article also urges that we listen to communities. For many communities, public surveillance not only deters crime and aids in the apprehension of criminals; it can also function to monitor the police, reduce racial profiling, curb police brutality, and ultimately increase perceptions of legitimacy. The question thus becomes not how we can use the Fourth Amendment to limit public surveillance, but rather, how can we use the Fourth Amendment to harness public surveillance's full potential?

This Article proceeds as follows: Part I gives a brief overview of the extent to which we already live in a state of perpetual surveillance. Part II then turns to the Fourth Amendment and to the general consensus that surveillance cameras in public are not subject to Fourth Amendment regulation. It then offers another reading of Fourth Amendment cases, one that suggests that mass surveillance should be subject to constitutional regulation. Although my argument is one for regulation, I am in fact in favor of more surveillance, not less. I make the reasons for this stance clear in Part III.

## I. WATCHING YOU

To say that we are now being watched is to put it mildly. Consider New York City, which recently partnered with Microsoft Corporation to roll out a new public surveillance device called the Domain Awareness System.<sup>1</sup> Described as something “straight out of a sci-fi

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1. See Rocco Parascandola & Tina Moore, *NYPD Unveils New \$40 Million Super Computer System that Uses Data from Network of Cameras, License Plate Readers and Crime Reports*, DAILY NEWS, Aug. 8, 2012, <http://www.nydailynews.com/new-york/nypd-unveils-new-40-million-super-computer-system-data-network-cameras-license-plate-readers-crime-reports-article-1.1132135>;

novel,”<sup>2</sup> the Domain Awareness System aggregates and analyzes information from approximately 3,000 surveillance cameras around the city and allows the police to scan license plates, cross-check criminal databases, measure radiation levels, and more.<sup>3</sup> Moreover, this surveillance system operates continually—twenty-four hours a day, seven days a week.<sup>4</sup> As New York City Mayor Michael Bloomberg said when he announced the new surveillance system—which in fact had already been in use for perhaps a year<sup>5</sup>—“We’re not your mom-and-pop’s Police Department anymore.”<sup>6</sup>

The Domain Awareness System is just the latest example of New York’s use of surveillance technology. The use of video surveillance as a crime prevention and detection tool dates back to at least 1973, when cameras were installed in Times Square.<sup>7</sup> By 1983, there were approximately seventy-six cameras monitoring Columbus Circle in New York City, and another 136 in Times Square.<sup>8</sup> By 1997, as part of then-Mayor Rudy Giuliani’s broad crime-prevention program, cameras also dotted Central Park, subway stations, and numerous “high crime” public housing projects.<sup>9</sup> As of 2006, there were nearly 4,200 public and private surveillance cameras in lower Manhattan alone, a five-fold increase from 1998.<sup>10</sup> By 2010, the number had

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Joe Coscarelli, *The NYPD’s Domain Awareness System Is Watching You*, NY MAG. DAILY INTELLIGENCER (Aug. 9, 2012, 8:50 AM), <http://nymag.com/daily/intelligencer/2012/08/nypd-domain-awareness-system-microsoft-is-watching-you.html>.

2. Coscarelli, *supra* note 1.

3. *Id.*

4. *Id.*

5. Although the Domain Awareness System was publicly announced in August 2012, there is at least one reference to the use of the system in 2010. See Bob Hennelly, *A Look Inside the NYPD Surveillance System*, WNYC NEWS (May 21, 2010), <http://www.wnyc.org/articles/wnyc-news/2010/may/21/a-look-inside-the-nypd-surveillance-system>.

6. Coscarelli, *supra* note 1.

7. Murray Schumach, *Police to Use TV to Scan Times Sq. Area for Crime*, N.Y. TIMES, June 20, 1973, at A1.

8. BILGE YESIL, VIDEO SURVEILLANCE: POWER AND PRIVACY IN EVERYDAY LIFE 41 (2009).

9. Randy Kennedy, *Police Cameras Planned for More Housing Projects*, N.Y. TIMES, Nov. 13, 1997, <http://www.nytimes.com/1997/11/13/nyregion/police-cameras-planned-for-more-housing-projects.html>; David Kocieniewski, *Television Cameras May Survey Public Places*, N.Y. TIMES, Oct. 6, 1996, <http://www.nytimes.com/1996/10/06/nyregion/television-cameras-may-survey-public-places.html>.

10. YESIL, *supra* note 8, at 43–44. The use of private surveillance cameras for government purposes is so common that the distinction is becoming irrelevant. As Jack Balkin recently noted, “the line between public and private modes of surveillance blurred if not vanished.” Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 7 (2008).

increased such that if you were in a public space in lower Manhattan, the odds would be “pretty good” that you were being watched.<sup>11</sup> The same is true of Times Square. As one journalist noted:

In Times Square, perhaps more than any other place in the city, our movements are being recorded a hundred different ways: from a few stories up the side of the Bertelsmann building, from inside the plate glass of the Bank of America branch, as we pass through turnstiles of a subway station, at the point of purchase in seemingly every store. . . .

[Cities] used to be places to lose yourself in the thrilling anonymity of a crowd. . . . It’s hard to adjust to the idea that cities—New York in particular, and Times Square most of all—are now places where unseen watchers can monitor your every move.<sup>12</sup>

The prevalence of surveillance technology is not unique to New York City. In Washington, D.C., the Metropolitan Police Department has plans to consolidate cameras owned by city agencies (estimated to number more than 5,200) into one network called the Video Interoperability for Public Safety.<sup>13</sup> The network will allow the police to monitor not only their own cameras, but also those belonging to other agencies such as the public school system, the public housing system, and the parks system.<sup>14</sup>

Chicago’s Operation Virtual Shield includes at least 2,250 cameras, 250 of which have biometric technology.<sup>15</sup> Baltimore’s CitiWatch had at least four hundred cameras equipped with low light, pan, tilt, and zoom capabilities by 2007.<sup>16</sup> Even small towns have turned to camera surveillance: according to a 2006 survey, at least two hundred towns and cities in thirty-seven states reported either actual use of video cameras, or plans for their use.<sup>17</sup> In addition to video cameras,

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11. Hennelly, *supra* note 5.

12. Ariel Kaminer, *Has the Big Apple Become the Big Eyeball?*, N.Y. TIMES, May 7, 2010, at MB1.

13. *D.C. Police Set to Monitor 5000 Cameras*, WASH. TIMES, Apr. 9, 2009, <http://www.washingtontimes.com/news/2008/apr/9/dc-police-set-to-monitor-5000-cameras/>.

14. *Id.*

15. YESIL, *supra* note 8, at 38.

16. *Id.* at 35.

17. Charlie Savage, *US Doles Out Millions for Street Cameras*, BOS. GLOBE, Aug. 12, 2007, [http://www.boston.com/news/nation/washington/articles/2007/08/12/us\\_doles\\_out\\_millions\\_for\\_street\\_cameras/](http://www.boston.com/news/nation/washington/articles/2007/08/12/us_doles_out_millions_for_street_cameras/); Lisa Hoffman, *Under Surveillance: Government Spy Cameras Proliferate*, FREEDOM WORKS (June 22, 2006), <http://www.freedomworks.org/news/under-surveillance-government-spy-cameras-prolifer/>.

municipalities may choose to employ license plate readers and automatic license plate recognition programs that incorporate GPS data. Financial support for such programs typically comes from the federal government, which is currently “the principal funder of car tracking.”<sup>18</sup>

This is not just an American phenomenon. By some estimates, Great Britain, “the champion of CCTV surveillance,”<sup>19</sup> has access to between “two and three million cameras . . . creating more video images per capita than any other country in the world.”<sup>20</sup> British civilians can even earn cash rewards by watching live-streamed CCTV footage on their home computers and assisting the police in apprehending criminals.<sup>21</sup>

Yet, the *number* of cameras tells only half the story. Cameras today go well beyond the grainy images we tend to associate with the cameras used on television programs like *America’s Most Wanted*. Today’s cameras are often enhanced by facial recognition technology.<sup>22</sup> As Laura Donohue recently explained:

Complex algorithms measure the size, angle, and distance between features, enabling identification based on facial characteristics. Paired with video, this technology allows governments to observe and record actions in public space and to recall this information for any number of reasons. Such remote tracking is not the equivalent of placing a tail on a suspect. It requires no suspicion of any individual; it functions as warrantless mass surveillance. It is inexpensive. It has perfect recall. And it generates terabytes of new knowledge.<sup>23</sup>

There is even a new device called MORIS—the Mobile Offender Recognition and Identification System—attachable to an iPhone. It

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18. David Rosen, *The Police Know Where You’re Driving*, SALON (Dec. 6, 2012, 10:24 AM), [http://www.salon.com/2012/12/06/the\\_police\\_know\\_where\\_youre\\_driving](http://www.salon.com/2012/12/06/the_police_know_where_youre_driving).

19. Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 220 (2002).

20. *Id.* at 220–21.

21. *Internet Eyes, Fighting Crime from Home*, ON THE MEDIA (Oct. 8, 2010), <http://www.onthemedial.org/2010/oct/08/internet-eyes-fighting-crime-from-home/transcript/>.

22. See, e.g., Noah Shachtman, *The New Security: Cameras that Never Forget Your Face*, N.Y. TIMES, Jan. 25, 2006, at G6 (discussing New York City’s use of facial recognition cameras).

23. Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407, 409 (2012).

allows an officer, with little more than a wave of his iPhone, to scan someone's iris and do facial recognition comparisons.<sup>24</sup>

For many, the widespread use of cameras conjures images of Big Brother in George Orwell's *1984*, though the surveillance in Orwell's dystopia may seem largely low-tech compared to what exists now. It is also suggestive of Foucault's re-imagining of Bentham's physical panopticon to a less visible but more oppressive one: that societal networks themselves are emblematic of a larger carceral society.<sup>25</sup>

Cameras are everywhere. The question is what to do about it.

## II. THE FOURTH AMENDMENT PROBLEM

The Fourth Amendment, which on its face protects individuals from government searches, is the source of numerous debates, many of which concern broad questions about the scope of government power. The Fourth Amendment "problem" regarding public surveillance, however, is actually quite specific. As the Supreme Court has interpreted the Fourth Amendment, monitoring individuals outside the sanctuary of their homes—as we take the dog for a walk, drive the kids to soccer practice, or pick up the dry cleaning—simply is not a "search" within the meaning of the Fourth Amendment.<sup>26</sup> This is true whether we are picking up the dry cleaning, running to a dental appointment, or in fact sneaking off to an adult bookstore or running drugs.

To fully understand the issue of the lack of regulation of public surveillance, some understanding of Fourth Amendment jurisprudence is useful. Part II.A accordingly provides a brief overview of Fourth Amendment cases that, at least under any conventional reading, would seem to leave surveillance cameras outside of the Fourth Amendment's purview. Part II.B then offers an unconventional alternative reading of the amendment.

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24. See Christopher R. Jones, "Eyephones": *A Fourth Amendment Inquiry into Mobile Iris Scanning*, 63 S.C. L. REV. 925, 926 (2012).

25. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 280 (Alan Sheridan trans. 1977). Balkin makes a similar point: "During the last part of the twentieth century the United States began developing a new form of governance that features the collection, collation, and analysis of information about populations both in the United States and around the world. This new form of governance is the National Surveillance State." Balkin, *supra* note 10, at 3. Balkin also argues that we have gone beyond Foucault's panopticon model: "The Government's most important technique of control is no longer watching or threatening to watch. It is analyzing and drawing connections between data." *Id.* at 12.

26. See *United States v. Karo*, 468 U.S. 705, 713–16 (1984); *United States v. Knotts*, 460 U.S. 276, 281–82 (1983).

### A. A Conventional Reading of the Fourth Amendment

That surveillance cameras in public are outside the purview of the Fourth Amendment seems so apparent from one line of Fourth Amendment cases that it often is accepted as a foregone conclusion.<sup>27</sup> Indeed, the proposition that the Fourth Amendment does not protect that which we expose to the public is traceable at least to *Katz v. United States*, where the Court in effect retired its trespass-dependent test in exchange for a reasonable expectation of privacy test.<sup>28</sup> As the Court put it in that case—which involved the police surreptitiously using a bug to listen to a private telephone conversation—“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>29</sup>

The line of cases that followed *Katz* clarified that almost any knowing exposure to a third party could defeat a claimed reasonable expectation of privacy.<sup>30</sup> Thus, an individual’s bank transactions are not subject to Fourth Amendment protections; since a third party (the bank) is necessarily privy to those transactions, an individual cannot possibly have a reasonable expectation that such transactions will remain private.<sup>31</sup> Similarly, the phone numbers one dials—and these days possibly texts as well<sup>32</sup>—are not protected by the Fourth Amendment; in dialing the numbers, a caller is necessarily communicating the numbers to a third party (the telephone company), defeating any reasonable expectation of privacy.<sup>33</sup> Nor is

27. See, e.g., Orin Kerr, *Do We Need a New Fourth Amendment?*, 107 MICH. L. REV. 951, 953 (“The Fourth Amendment does not apply to surveillance in public.”); Slobogin, *supra* note 19, at 215 (“If the Fourth Amendment is not implicated by technological surveillance of a car traveling on public thoroughfares, it is unlikely to apply to enhancement surveillance of a person walking the streets.”).

28. 389 U.S. 347 (1967).

29. *Id.* at 351.

30. While the reasonable expectation of privacy test has predominated since *Katz*, the Court has also left in place certain historical distinctions, such as that between the home (protected), the curtilage (somewhat protected), and open fields (not protected). See generally *United States v. Dunn*, 480 U.S. 294 (1987); *Oliver v. United States*, 466 U.S. 170 (1984).

31. *United States v. Miller*, 425 U.S. 435, 435 (1976). But see *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 87–90 (1974).

32. Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1315 (2012) (observing that “text-messaging systems store copies of what is said on each endpoint and on network servers in the middle, too”).

33. *Smith v. Maryland*, 442 U.S. 735 (1979). Of course, as Justice Sotomayor has recently observed, the premise that an individual can never have a reasonable



one's subscriber information or one's web browsing activity protected; again, the information is being provided to a third party (the system operator).<sup>34</sup> The government can even "search" through one's trash bags without having to comply with the Fourth Amendment.<sup>35</sup> As Justice White observed in *California v. Greenwood*,<sup>36</sup> by placing their rubbish on the curb for pick up by the municipality's trash collector, "respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."<sup>37</sup> The government may even observe one's activities in a bathroom stall by looking through a gap in a bathroom stall door, so long as a hypothetical member of the public could do the same.<sup>38</sup> One's conversations with a close but duplicitous friend are likewise outside the purview of the Fourth Amendment.<sup>39</sup> "[O]ne contemplating illegal activities must realize and risk that his companions may be reporting to the police."<sup>40</sup>

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expectation of privacy in information voluntarily disclosed to a service provider "is ill suited to the digital age," and as such may need to be reconsidered. *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

34. *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001) ("[C]omputer users do not have a legitimate expectation of privacy in their subscriber information because they have conveyed it to another person—the system operator."); *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2007) (ruling that government tracking of which websites a user visited and whom he exchanged emails with "are constitutionally indistinguishable from the use of a pen register . . ."). For a discussion of such surveillance, see generally Christian David Hammel Schultz, Note, *Unrestricted Federal Agent: "Carnivore" and the Need to Revise the Pen Register Statute*, 76 NOTRE DAME L. REV. 1215 (2001). Indeed, given the wealth of information available to the government from third parties, the government has access to "digital dossiers" for each of us. See Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1084, 1092 (2002); see also Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 829 (2004) (noting that "communications technologies allow owners and operators of communications networks to build complete dossiers on their users").

35. *California v. Greenwood*, 486 U.S. 35, 37 (1988); see also *United States v. Redmon*, 138 F.3d 1109, 1113 (7th Cir. 1998); *United States v. Hedrick*, 922 F.2d 396, 400 (7th Cir. 1991).

36. *Greenwood*, 486 U.S. at 37.

37. *Id.* at 40.

38. *United States v. White*, 890 F.2d 1012 (8th Cir. 1989).

39. *United States v. White*, 401 U.S. 745, 751–52 (1971).

40. *Id.* at 752.

Although the Court has not ruled specifically on the government use of surveillance cameras,<sup>41</sup> three cases are close enough that many scholars deem the issue settled.<sup>42</sup> In *United States v. Knotts*,<sup>43</sup> law enforcement officers investigating Armstrong, a suspected drug manufacturer, secretly installed a tracking device inside a five-gallon container of chloroform they expected Armstrong to pick up.<sup>44</sup> The officers then used the tracking device to monitor Armstrong's movements in his vehicle, which led the officers to Knotts.<sup>45</sup> The Court rejected Knotts' claim that the use of the tracking device amounted to a search, and thus required compliance with the Fourth Amendment.<sup>46</sup> A vehicle, the Court noted, "has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."<sup>47</sup> Because "[v]isual surveillance from public places"<sup>48</sup> along the route Armstrong took could have revealed the same information to the police, i.e., since the information was "voluntarily conveyed to anyone who wanted to look,"<sup>49</sup> there could be no reasonable expectation of privacy.<sup>50</sup> The Court added, clearly underestimating the technological advances that lay ahead, "Nothing in the Fourth Amendment prohibit[s] the police

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41. There is at least one analogous lower court case. In *United States v. Gonzalez*, the Ninth Circuit ruled that the use of a surveillance camera in a quasi-public space at a public hospital to monitor a subject was not a Fourth Amendment search, since the room had large windows through which the target's actions were also visible. The court added:

[The defendant] would have us adopt a theory of the Fourth Amendment akin to J.K. Rowling's Invisibility Cloak, to create at will a shield impenetrable to law enforcement view even in the most public places. However, the fabric of the Fourth Amendment does not stretch that far. He did not have an expectation of privacy in the public mailroom that society would accept as reasonable.

328 F.3d 543, 548 (9th Cir. 2003).

42. See, e.g., Balkin, *supra* note 10, at 20 ("Currently, governments are free to place cameras in public places like streets and parks because there is no expectation of privacy there."); see also Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1357 (2004) (noting that under contemporary Fourth Amendment jurisprudence, pervasive video surveillance "is not a 'search' at all").

43. 460 U.S. 276 (1983).

44. *Id.* at 278.

45. *Id.*

46. *Id.* at 285.

47. *Id.* at 281 (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974)).

48. *Id.* at 282.

49. *Id.* at 281.

50. *Id.*

from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.”<sup>51</sup>

The Court reached a similar conclusion in another public tracking case, *United States v. Karo*.<sup>52</sup> There, the government installed a tracking device in a can of ether that Karo had ordered from a government informant and then used the device to track Karo’s movement to his house and other locations implicating other co-conspirators.<sup>53</sup> While the Court ruled that using the device to track movements inside Karo’s house constituted a search subject to Fourth Amendment protections,<sup>54</sup> the use of the device to monitor travel outside the home, where one could have no reasonable expectation of privacy, was not.<sup>55</sup>

Most recently, in *United States v. Jones*,<sup>56</sup> which involved the use of a GPS tracking device to monitor a target’s movement for thirty days, the Court reiterated its view that the Fourth Amendment provides no protection for activities conducted in public. Though the Court reversed on other grounds—finding a Fourth Amendment violation because the government trespassed onto a constitutionally protected area when it attached the tracking device to the suspect’s car—the

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51. *Id.* at 282.

52. 468 U.S. 705 (1984).

53. *Id.* at 708–10.

54. *Id.* at 716. The Court has always extended the greatest Fourth Amendment protections to the home, whether it be in the form of requiring arrest warrants for an arrest in the home, *Payton v. New York*, 445 U.S. 573, 585–86 (1950), or in requiring a warrant for almost any search that involves the home. *See Kyllo v. United States*, 533 U.S. 27, 31 (2000) (“‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))); *Steagald v. United States*, 451 U.S. 204, 211–12 (1981) (requiring a search warrant to search third-party’s home for suspect). Of course, this enhanced protection of the home is not without consequences. David Sklansky observes that treating the home as private means that “leaving one’s home means losing some privacy—that the price of full privacy is not going out.” David Alan Sklansky, *Back to the Future: Kyllo, Katz, and the Common Law*, 72 *MISS. L.J.* 143, 192 (2002). He adds that this approach distributes privacy unequally, since those with more money and larger homes will necessarily have more privacy than those with small homes. *Id.* For more on the class implications of the distribution of privacy, see William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 *GEO. WASH. L. REV.* 1265 (1999).

55. *See Karo*, 468 U.S. at 713–14.

56. 132 S. Ct. 945 (2012).

Court left intact the general notion that what one exposes in public is not protected by the Fourth Amendment.<sup>57</sup>

Although many scholars have criticized this line of cases, they stand collectively for the proposition that the use of surveillance cameras to monitor activity that occurs in public is reasonable and therefore does not violate the Fourth Amendment.<sup>58</sup> Following the Supreme Court's analysis of the issue, the Tenth Circuit held in *United States v. Jackson*<sup>59</sup> that video cameras installed on telephone poles are not subject to Fourth Amendment oversight, since such cameras observe "only what any passerby would easily have been able to observe."<sup>60</sup> If a constable can stand at a busy intersection or a cop can walk a beat to make sure no criminal activity is afoot—in other words, if a law enforcement officer can use his or her eyes to observe things in public, such as Detective McFadden did in the other seminal Fourth Amendment case, *Terry v. Ohio*<sup>61</sup>—then certainly a surveillance camera (nothing more than a mechanical cop, a one-function Robocop<sup>62</sup>) can do the same thing. *Knotts, Karo, and Jones* support this conventional view. Of course, the problem with conventional thinking is that it tends to be, well, rather conventional.

### B. A Non-Conventional Reading of the Fourth Amendment

The clear implication of the line of Fourth Amendment cases just described is that the use of technology to monitor the activities of individuals in public spaces is not subject to the strictures of the Fourth Amendment. After all, there can be no reasonable expectation of privacy—which until recently was the *sine qua non* of

57. *Id.* at 951–52 (noting that the Court's decision does "not deviate[] from the understanding that mere visual observation does not constitute a search").

58. Cf. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 101 (4th ed. 2006) ("[T]he implication of *Knotts* is that as long as monitoring is limited to movements of persons in non-private areas, the government is free to conduct constant surveillance of citizens."); Slobogin, *supra* note 19, at 215 ("If the Fourth Amendment is not implicated by technological surveillance of a car traveling on public thoroughfares, it is unlikely to apply to enhanced surveillance of a person walking the streets.")

59. 213 F.3d 1269 (10th Cir. 2000), *vacated on other grounds*, 531 U.S. 1033 (2000).

60. *Id.* at 1281.

61. 392 U.S. 1 (1968).

62. I am thinking here of the 1980s film. See *ROBOCOP* (Orion Pictures 1987).

Fourth Amendment applicability<sup>63</sup>—where individuals are in public and, almost by definition, have “voluntarily conveyed [their activities in public] to anyone who wanted to look . . . .”<sup>64</sup> True, such data will disclose “trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.”<sup>65</sup> But because these trips are predicated on movement in public, they are constitutionally *unprotected*.

But this reading of the Fourth Amendment is not inevitable. This section offers an alternative reading to reach a different conclusion: that the use of surveillance cameras in public does implicate reasonable expectations of privacy, and thus *is* subject to Fourth Amendment regulation, requiring either a warrant or at least reasonableness. Of course, other scholars have argued that surveillance *should be* subject to Fourth Amendment regulation. Christopher Slobogin, for example, uses empirical evidence to argue that members of society actually do expect some level of privacy and even anonymity as they go about their affairs.<sup>66</sup> My argument reaches the same conclusion, but via a different route: through a line of Supreme Court cases that also begins with *Katz*, but moreover includes *Katz*'s other progeny, *United States v. White*<sup>67</sup> and *Alderman v. United States*.<sup>68</sup> In short, this reading gives weight to the distinction the Court makes between an invited ear (*White*) and an uninvited one (*Katz*). The argument is that it is one thing to be observed by a police officer, even one in plain clothes, who is physically present, but it is another thing entirely to be observed by a police officer via a remote video camera, particularly when one is unaware of the camera. The former scenario is analogous to an invited ear, reconceptualized as an invited eye. The latter is analogous to an uninvited ear, reconceptualized as an uninvited eye.

This line of cases also starts with *Katz*. Recall that in *Katz*, the police used an electronic listening device to eavesdrop surreptitiously

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63. Although the reasonable expectation test has predominated since *Katz*, last term in *United States v. Jones*, the Court appeared to revive the trespass test that predated *Katz*. See *United States v. Jones*, 132 S. Ct. 945, 953 (2012).

64. *United States v. Knotts*, 460 U.S. 276, 281 (1983).

65. *People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009).

66. See CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* (2007).

67. 401 U.S. 745 (1971).

68. 394 U.S. 165 (1969).

on Katz's private telephone conversations.<sup>69</sup> Rejecting its prior reliance on the issue of whether there had been a technical trespass onto a constitutionally protected area, the Court instead asked whether the agents "violated the privacy upon which [Katz] justifiably relied . . . ."<sup>70</sup> Or as more precisely formulated by Justice Harlan in his now-famous concurrence, whether the defendant had an expectation of privacy "that society is prepared to recognize as 'reasonable.'"<sup>71</sup> The Court concluded that Katz had such an expectation, and that accordingly, the FBI violated Katz's rights by not complying with constitutional standards and securing a warrant.<sup>72</sup>

What is significant is that the Court distinguished *Katz* just a few years later in a case that also involved the surreptitious recording of conversations. In *United States v. White*,<sup>73</sup> agents used a listening and recording device to record White's conversations. The crucial difference in the case was that, whereas Katz's conversations were monitored and recorded without the consent of any of the involved parties, White's conversations were monitored and recorded with the consent of one the participants—a government informant.<sup>74</sup> The Court thus distinguished between nonconsensual monitoring, which is subject to Fourth Amendment regulations, and consensual monitoring, which is not. The Court observed that when a person enters into a conversation, he assumes the risk that the listener may report the conversation to another person, including a police officer.<sup>75</sup> As such, there can be no legitimate expectation of privacy. Nor can there be any legitimate expectation that a listener would not also record the conversation:

Concededly, a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant, authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either

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69. *Katz v. United States*, 389 U.S. 347, 348 (1967).

70. *Id.* at 353.

71. *Id.* at 361 (Harlan, J., concurring).

72. *Id.* at 359.

73. 401 U.S. 745 (1971). *White*, in turn, was consistent with two earlier cases, *Hoffa v. United States*, 385 U.S. 293 (1967) and *On Lee v. United States*, 343 U.S. 747 (1952).

74. *White*, 401 U.S. at 746–47.

75. *See id.* at 750.

(1) simultaneously records them with electronic equipment which he is carrying on his person, (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.<sup>76</sup>

In short, the Court distinguished between the invited ear, for which citizens assume some risk, and the uninvited ear, for which citizens do not, though the term "invited" has never fully captured the relevant distinction. Eavesdropping is unregulated so long as a duplicitous ear is actually present. For example, if two criminals dine in a restaurant, it doesn't matter whether one of them is surreptitiously recording the conversation, or whether their waiter or an adjacent diner is recording what they can overhear of the conversation. Because the duplicitous ear is physically present, the recorded conversation will be deemed consensual and outside the regulation of the Fourth Amendment. By contrast, a bug simply planted in a vase on the table does trigger Fourth Amendment regulation, at least when no duplicitous ear is actually present. In other words, while Supreme Court precedent makes clear that citizens must assume the risk that any person in earshot will turn out to be duplicitous, amounting to a visible bug,<sup>77</sup> citizens need not assume the risk that there will be bugs even when no one around is duplicitous.<sup>78</sup> A majority of state courts make the same distinction.<sup>79</sup>

It is precisely this interstitial space that provides a foundation for subjecting covert public surveillance to Fourth Amendment

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76. *Id.*

77. The term "visible bug" comes from Dressler, who uses it to describe a false friend with an invisible purpose. *See* DRESSLER, *supra* note 58, § 7.05[A].

78. This is not to suggest that this distinction is logical or even inevitable. As Stephen Saltzburg and Daniel Capra rhetorically put it, "Why does a person assume the risk that a friend will record an incriminating conversation, but not the risk that the government will use a wiretap and record an incriminating conversation?" STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 475 (7th ed. 2004).

79. *See* *United States v. Dorfman*, 690 F.2d 1217, 1225 (7th Cir. 1982); *United States v. Stone*, 305 F. Supp. 75, 77 (D.D.C. 1969); *People v. Arno*, 90 Cal. App. 3d 505, 511-12 (Cal. Ct. App. 1979); *cf. Kee v. City of Rowlett, Tex.*, 247 F.3d 206, 213 (5th Cir. 2001); *United States v. Moore*, 562 F.2d 106, 112 (1st Cir. 1977).

protections. Even though the Court has made clear that a person must assume the risk that an ear is duplicitous, the Court has also drawn a line. The crucial factor in determining whether eavesdropping is a Fourth Amendment search is not only whether the ear was invited or not. It is also important to inquire whether the ear is actually, physically, or corporeally present. Thus, in *Alderman v. United States*,<sup>80</sup> the Fourth Amendment was violated when an informant, the proverbial invited ear, planted a listening device to monitor third-party conversations.<sup>81</sup> While the informant was permitted to record conversations in his presence without offending the Fourth Amendment, that permission ceased the moment he was no longer physically present.<sup>82</sup> The Ninth Circuit applied similar reasoning to non-consensual video surveillance, albeit in a non-public location, in *United States v. Nerber*.<sup>83</sup> There, informants used a hidden video camera to film a narcotics transaction, and the camera continued to record when they were absent from the room.<sup>84</sup> The audio portion of the recording clearly violated Title III, which governs interceptions of oral communications. Turning to the video portion, the court held that this recording violated the defendants' rights under the Fourth Amendment, since it is not reasonable to think that one will be subject to video surveillance by a false friend who is not actually present.<sup>85</sup>

I mention the line of cases from *Katz* to *Alderman* to *White* because their arc suggests a different outcome in any analysis of surveillance cases. It suggests that it is not the hypothetical presence of a law enforcement officer that should matter, but rather the actual presence. It suggests that just as citizens are not required to assume the risk that they will be monitored by a listening device when no duplicitous ear is actually present—indeed, the very situation in

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80. 394 U.S. 165 (1969).

81. *Id.* at 179–80.

82. *See also* *United States v. Yonn*, 702 F.2d 1341, 1347 (11th Cir. 1983) (approving use of fixed monitoring devices as long as they are only activated when a consenting party is present). This is consistent with the Wiretap Act, which regulates the law enforcement interception of wire, oral, and electronic communications. *See* 18 U.S.C. § 2511(2)(c) (2006); *see also* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-7.302 (2012). It should be noted that the Wiretap Act does not apply to silent video. *See* *United States v. Larios*, 593 F.3d 82, 90 (1st Cir. 2010); *United States v. Falls*, 34 F.3d 674, 679–80 (8th Cir. 1994); *United States v. Koyomejian*, 970 F.2d 536, 538 (9th Cir. 1992).

83. 222 F.3d 597 (9th Cir. 2000).

84. *Id.* at 599.

85. *Id.*



*Katz*—citizens are not required to assume the risk that they will be monitored by a watching device when no duplicitous eye is actually present. Instead of suggesting that a person on a public street does not have a reasonable expectation of privacy that society is prepared to recognize, the answer is the opposite.<sup>86</sup>

This is not to say that there are not other cases that might support a right to privacy in the public surveillance context. As others have noted, *Knotts* left open the possibility that “dragnet” surveillance would offend the Fourth Amendment.<sup>87</sup> In *Kyllo v. United States*,<sup>88</sup> which involved the government use of a thermal imaging device on a suspect’s home, the Court also expressed its concern about the growing use of technology to engage in surveillance.<sup>89</sup> Even Judge Posner, who has written that tailing a suspect and using video surveillance to do the same are functionally equivalent for Fourth Amendment purposes, has recognized that a different result might be compelled should the police engage in “wholesale surveillance,” writing:

It would be premature to rule that such a program of mass surveillance could not possibly raise a question under the Fourth Amendment—that it could not be a search because it would merely be an efficient alternative to hiring another ten million police officers to tail every vehicle on the nation’s roads.<sup>90</sup>

And based on the Court’s recent decision in *Jones*, it seems that the five members of the Court are open to reading the Fourth Amendment as imposing some limits on long-term, warrantless surveillance, at least when such surveillance is targeted at a particular individual.<sup>91</sup> My point here is not to preclude an argument for the regulation of public surveillance based on these cases. Rather, my

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86. Another analogy is to the restroom surveillance cases. Courts recognize a distinction between an officer peering through a bathroom stall door to observe illegal activity, and the use of a covert surveillance camera to observe illegal activity. The former, because an actual eye is present, is not a search within the meaning of the Fourth Amendment. *See, e.g.*, *United States v. White*, 890 F.2d 1012 (8th Cir. 1989). By contrast, the latter is a search subject to Fourth Amendment regulation. *See, e.g.*, *Kroehler v. Scott*, 391 F. Supp. 1114, 1116–17 (E.D. Pa. 1975); *People v. Triggs*, 506 P.2d 232 (1973).

87. *United States v. Knotts*, 460 U.S. 276, 284 (1983).

88. 533 U.S. 27 (2001).

89. *Id.*

90. *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007).

91. *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring) (“[L]onger term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”).

point is to suggest another route to privacy, one that flows naturally from *Katz*, *White*, and *Alderman*.

Of course, to say that camera surveillance is subject to Fourth Amendment regulation is only the first step. That statement neither answers whether probable cause or a warrant is required or whether such surveillance need only comply with the reasonableness clause of the Fourth Amendment. Several factors suggest that reasonableness will suffice. For one, mass surveillance neither restricts the movement of individuals nor interferes with any tangible property rights.<sup>92</sup> While it is true that overt surveillance may chill movement somewhat, that intrusion is de minimis.<sup>93</sup> And when such surveillance is covert, the intrusion is non-existent. By contrast, the surveillance serves a substantial public interest. Overt surveillance deters crime; covert surveillance aids in solving crime once it occurs. Moreover, it does so in a way that mere manpower, given limited resources, cannot. In addition, such surveillance responds to special needs beyond law enforcement, insofar as it serves the larger purpose of ensuring public safety—a concern that has become all the more acute since 9/11<sup>94</sup>—and is applied in a non-arbitrary or non-discriminatory manner. The Court has held that such special needs searches are almost by default reasonable.<sup>95</sup>

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92. It is straightforward that a camera does not have the ability to either stop you from walking or driving, or to seize something from your person. Maybe, in some Orwellian sense, a person might feel more inhibited in their movements, but I think the practical import of the situation supersedes any overly dystopic musings.

93. Indeed, overt surveillance may not constitute a Fourth Amendment search at all, since an individual who knows that he is being watched cannot have an expectation of privacy that society is prepared to recognize. To the extent that an individual has choice in whether to travel on roads that he knows to be subject to surveillance, the individual's consent would appear to further render any surveillance reasonable. *Cf. Illinois v. Rodriguez*, 497 U.S. 177, 183–84 (1990) (“There are various elements . . . that can make a search [reasonable]—one of which is the consent of the person . . . .”); *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (although voluntary consent does not function as a waiver, it does function to render a search reasonable).

94. It is telling that the Domain Awareness System in New York City emphasizes counterterrorism in its statement of purpose. *See* N.Y. POLICE DEP'T, DOMAIN AWARENESS SYSTEM PUBLIC SECURITY PRIVACY GUIDELINES (2009), available at [http://www.nyc.gov/html/nypd/downloads/pdf/crime\\_prevention/public\\_security\\_privacy\\_guidelines.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/crime_prevention/public_security_privacy_guidelines.pdf).

95. *See Illinois v. Lidster*, 540 U.S. 419 (2004); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (applying special needs test to permit highway sobriety checkpoint); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (permitting highway checkpoints to search for illegal aliens). For more on the “special needs” exception, see Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254 (2011).

What are the implications of this approach? It suggests that cities and towns would have some flexibility in using cameras as tools of crime control and public safety. Indeed, it suggests that one check, in addition to the judicial check, will be the democratic process itself.<sup>96</sup>

For example, using a reasonableness test, society might conclude that it is perfectly reasonable to maintain surveillance cameras in a location deemed to be a terrorist target, such as Times Square. Indeed, it was such surveillance cameras that contributed to the arrest of Faisal Shahzad, who attempted to detonate a bomb in Times Square in 2010.<sup>97</sup> Conversely, it may not be reasonable, in Fourth Amendment terms, to maintain surveillance cameras at a Lover's Lane. Cameras in high crime areas may be reasonable; cameras outside the local strip club, or inside public restrooms, likely are not reasonable.

In sum, while a conventional reading of Fourth Amendment cases—at least the line of cases from *Katz* to *Jones*—would suggest that the use of camera surveillance in public is not subject to Fourth Amendment regulation, a nonconventional reading suggests otherwise. By considering another line of cases, from *Katz* to *White*, a strong argument can be made that camera surveillance in public is in fact subject to Fourth Amendment regulation. In addition, a balancing of the intrusion to the individual and the needs of the public suggests that such surveillance will comply with the Fourth Amendment so long as such surveillance is reasonable.<sup>98</sup>

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96. On the role of the democratic process as providing a check on law enforcement overreach, especially when the “law-abiding” majority is affected, see Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107, 131 (2010); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 588 (1992) (“Fourth Amendment regulation is usually unnecessary where large numbers of affected parties are involved. Citizens can protect themselves in the same way that they protect themselves against most kinds of government misconduct—they can throw the rascals out.”). This is also consistent with Orin Kerr’s view that legislative bodies, not courts, should do the heavy lifting in terms of regulating the state’s use of technology vis-à-vis its citizens. See Kerr, *supra* note 34, at 806.

97. William Saletan, *Luck Tape: Surveillance Cameras and the Times Square Bombing*, SLATE (May 4, 2010, 1:39 PM), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2010/05/luck\\_tape.html](http://www.slate.com/articles/health_and_science/human_nature/2010/05/luck_tape.html).

98. Christopher Slobogin, in his thoughtful response to my argument, rightfully observes that my unconventional reading is predicated on the assumption that no actual duplicitous eye is present. This assumption is weaker, he points out, when in fact human eyes—albeit non-duplicious ones—are present, and when the surveillance system includes notice. In these situations, the mere presence of an actual eye, even if not duplicitous, or noticed, would seem to be enough to render the surveillance a non-search under the Court’s longstanding “assumption of risk”

In a way, of course, it is curious that I am pushing for any regulation of surveillance, since as the next Part makes clear, I am in favor of more surveillance, not less. Perhaps the best way of stating my position is this: I want more surveillance, but I want that surveillance to be reasonable. Why am I pushing for more public surveillance? To be sure, such surveillance can do significant work in preventing crime and apprehending criminals. Though contested, this work is well known and so I do not recite it here. But there is other work that surveillance does—work that has not been sufficiently attended to or factored into the equation. That work includes combating police abuses, whether such abuses are in the form of excessive force, or the repeated micro-aggressions that result from racial profiling.<sup>99</sup> There is yet another reason I am pushing for more public surveillance: because I believe in listening to communities.

### III. THE FOURTH AMENDMENT SOLUTION

It is now quite common for civil libertarians and Fourth Amendment scholars to decry this state of under-regulated mass surveillance. Slobogin describes mass surveillance as “an insidious assault on our freedom”<sup>100</sup> that threatens our ability “to express what we believe, to do what we want to do, to be the type of person we really are.”<sup>101</sup> The American Bar Association has proposed a range of

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rationale. See Christopher Slobogin, *Community Control over Camera Surveillance*, 40 *FORDHAM URB. L.J.* 993, 994 (2013). While I do not entirely disagree with Slobogin, I cannot but hope that the Court would look at mass surveillance cases differently. There is something fundamental about having to travel in public, rendering any suggestion that one “voluntarily” assumes the risk of being observed in public weak indeed. Put differently, imagine a city where surveillance cameras are literally everywhere. Can we really say the inhabitants of the city have assumed the risk of being observed in public, or is it more accurate to say that they have no choice? I am reminded here of a case I teach in my Criminal Law class, *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992), where the court enjoined the enforcement of laws that prohibited sleeping or bathing in public, where the laws were used to arrest the homeless, and the enforcement of such laws in effect penalized them for performing essential, life-sustaining acts. Just as sleeping or bathing in public ceases to be a choice for those who are truly homeless, going out in public (or directing someone else to go out in public on your behalf) ceases to be a choice for most of us.

99. I borrow this term from Peggy Davis, who uses it to describe the ways in which minorities often are subjected to “stunning, automatic acts of disregard that stem from unconscious attitudes of [superiority],” which in turn has led many minorities to view the legal system as biased. See Peggy C. Davis, *Law as Microaggression*, 98 *YALE L.J.* 1559, 1576 (1989).

100. SLOBOGIN, *supra* note 66, at ix (2007).

101. *Id.* at 4.

requirements that must be met before law enforcement agencies can use surveillance.<sup>102</sup> And civil liberties groups routinely criticize the use of such surveillance.<sup>103</sup> On the other side of the debate, law and order advocates argue that mass surveillance is a necessary tool in deterring crime and apprehending criminals.

The goal of this Part is not to settle the debate, but rather to call attention to other benefits of mass surveillance that should be considered. This Part also urges that we listen to communities.<sup>104</sup> For many communities, public surveillance has the potential to do more than simply deter crime and aid in the apprehension of law-breakers.<sup>105</sup> Public surveillance can also function to monitor the police, reduce racial profiling, curb police brutality, and ultimately increase perceptions of legitimacy. The issue thus becomes not how we can use the Fourth Amendment to limit public surveillance, but rather how we can use the Fourth Amendment to harness public surveillance's full potential.

The potential benefits of surveillance cameras become apparent when we consider two aspects of policing that I have written about previously: racial profiling and police brutality.<sup>106</sup> Consider racial profiling. As I have argued before, here the numbers *are* the issue.<sup>107</sup> Recent numbers from New York City's stop-and-frisk initiative are particularly revealing. In New York, African Americans and Hispanics constitute over 80% of the individuals stopped, a percentage far greater than their representation in the population.<sup>108</sup>

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102. See AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: ELECTRONIC SURVEILLANCE: PART B: TECHNOLOGY-ASSISTED PHYSICAL SURVEILLANCE (3d ed. 1999).

103. See, e.g., Hennelly, *supra* note 5 (noting NYCLU protests).

104. On the advantages of listening to communities, see Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197.

105. Of course, as Alafair Burke points out in her contribution to this Colloquium, identifying just one community is difficult and often contested. See Alafair Burke, *Policing, Protestors, and Discretion*, 40 FORDHAM URB. L.J. 999, 1014–15 (2013). For more on the problem of locating a “community,” see Regina Austin, *“The Black Community,” Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992).

106. I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835 (2008).

107. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 14 (2011).

108. Blacks and Hispanics make up approximately 54% of the New York City population. See *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36/3651000.html> (last updated Jan. 10, 2013).

Moreover, of the African Americans stopped, 95% were *not* engaged in activity warranting arrest.<sup>109</sup> When considered as a percentage of the population, the numbers are even more jarring. Stops of whites, if spread across the population of New York City, would amount to stops of approximately 2.6% of the white population during the period.<sup>110</sup> By contrast, stops of blacks, if spread across the population, would amount to stops of approximately 21.1% of the population.<sup>111</sup> Moreover, a significant number of these stops have been found to be unjustified,<sup>112</sup> prompting a class action lawsuit against the New York City Police Department.<sup>113</sup>

While the numbers above concern the racial profiling of pedestrians, the profiling that drivers suffer is perhaps even more well-known. In *Whren v. United States*,<sup>114</sup> the Supreme Court sanctioned such pretextual stops so long as a traffic violation could provide a legal justification.<sup>115</sup> A report compiled by the Maryland State Police revealed that, during the period examined, African Americans comprised 72.9% of all of the drivers stopped and searched along a stretch of Interstate 95, even though they comprised only 17.5% of the drivers violating traffic laws on the road,<sup>116</sup> and

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109. Between January 1, 2006 and September 30, 2007, the New York City Police Department completed stop-and-frisk forms for 867,617 individuals. Of that number, 453,042 were black, and another 30% were Hispanic, numbers grossly disproportionate to their representation in the general public. Only one in every 21.5 blacks stopped was engaged in activity warranting arrest. Put another way, of the 453,053 stop-and-frisk forms police officers completed for black suspects, approximately 402,943 were for stopping and frisking blacks *not* engaged in unlawful activity warranting arrest. See *Analysis of New NYPD Stop-and-Frisk Data*, ACLU (Nov. 26, 2007), <http://www.aclu.org/racial-justice/analysis-new-nypd-stop-and-frisk-data-reveals-dramatic-impact-black-new-yorkers>.

110. *Id.*

111. *Id.*

112. Al Baker & Ray Rivera, *Thousands of Street Stops by New York Police Were Legally Unjustified, a Study Finds*, N.Y. TIMES, Oct. 27, 2010, at A22.

113. Al Baker, *Judge Grants Class-Action Status to Stop-and-Frisk Suit*, N.Y. TIMES CITY ROOM (May 16, 2012, 11:23 AM), <http://cityroom.blogs.nytimes.com/2012/05/16/judge-allows-class-action-status-in-stop-and-frisk-lawsuit/>.

114. 517 U.S. 806 (1996). In *Whren*, the Court rejected a Fourth Amendment challenge to a pretextual car stop designed to search for drugs and other contraband, “conclu[ding] that so long as the stop itself was based on an actual traffic violation, the subjective motivation of an officer in singling out a particular motorist is irrelevant under the Fourth Amendment.” *Id.* at 862. By so holding, the Court essentially “green-lighted the police practice of singling out minorities for pretextual traffic stops in the hope of discovering contraband.” Capers, *supra* note 106, at 862.

115. *Whren*, 517 U.S. at 813.

116. See DAVID A. HARRIS, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION’S HIGHWAYS 14 (1999), available at <http://www.aclu.org/racial->

even though the hit rate for blacks, i.e., the rate at which contraband was found, was statistically identical to the hit rates for whites.<sup>117</sup> Similar findings have been made of traffic stops in Illinois,<sup>118</sup> Arizona,<sup>119</sup> and Los Angeles.<sup>120</sup> The Los Angeles study, spearheaded by Ian Ayres, is particularly noteworthy. Controlling for variables such as the rate of violent and property crimes, Professor Ayres found that the stop rate was 3,400 stops higher per 10,000 residents for blacks than for whites, and almost 360 stops higher for Hispanics than for whites,<sup>121</sup> notwithstanding the fact that blacks were 37% less likely to be found with weapons than searched whites, and 24% less likely to be found with drugs than searched whites.<sup>122</sup> Similar numbers were found for searched Hispanics: Hispanics were 33% less likely to be found with weapons than searched whites, and 34% less likely to be found with drugs than searched whites.<sup>123</sup>

Statistics also suggest that law-abiding minorities face the brunt of the additional discretionary decision-making permitted officers upon conducting a stop.<sup>124</sup> Traffic stops, which are already largely

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justice/driving-while-black-racial-profiling-our-nations-highways. But this is not to suggest that hit rates tell the whole story. For example, hit rates reveal nothing about the quantity (personal use or distribution use) or type of contraband seized. For critiques of the use of hit rates, see R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 585 (2003); Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089, 1098 (2005); Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 UNIV. OF CHI. L. REV. 1275, 1276-77 (2004).

117. John Knowles, Nicola Perisco & Peter Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 UNIV. OF CHI. J. POL. ECON. 203, 219 (2011).

118. See, e.g., ALEXANDER WEISS & DENNIS P. ROSENBAUM, UNIV. OF ILL. AT CHI. CTR. FOR RESEARCH IN LAW & JUSTICE, ILLINOIS TRAFFIC STOPS STATISTICS STUDY 2008 ANNUAL REPORT 5 (2009), available at <http://www.dot.state.il.us/trafficstop/results08.html>.

119. ACLU OF ARIZ., DRIVING WHILE BLACK OR BROWN (2008), available at <http://acluaz.org/sites/default/files/documents/DrivingWhileBlackOrBrown.pdf>. I use “pretextual traffic stops” here to refer to stops based on valid traffic violations where the primary purpose of the stop is to seek contraband or otherwise uncover criminal behavior.

120. IAN AYRES, RACIAL PROFILING AND THE LAPD: A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (2008), available at <http://www.aclu-sc.org/issues/police-practices/racial-profiling-the-lapd>.

121. *Id.* at 27.

122. *Id.* at 7-8.

123. *Id.* at 8.

124. David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 NW. U. J. CRIM. L. & CRIMINOLOGY

discretionary,<sup>125</sup> permit officers the further discretion to order occupants out of the vehicle,<sup>126</sup> to engage in questioning unrelated to the traffic stop,<sup>127</sup> to request consent to a search,<sup>128</sup> and without consent to conduct a canine sniff of the vehicle.<sup>129</sup> In certain jurisdictions, officers even have the discretion to make a custodial arrest based on the traffic violation.<sup>130</sup> Who is ordered out of a vehicle, who is subject to questioning unrelated to the traffic stop, who is searched, and so on, are strongly correlated to race.<sup>131</sup> As I have argued elsewhere, all of this is citizenship-diminishing, suggesting a racial hierarchy inconsistent with our professed goal of equal citizenship.<sup>132</sup> And yet racial profiling remains largely unaddressed.<sup>133</sup>

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544, 560–62 (1997); see also Barnes, *supra* note 116, at 1113 (police search vehicles driven by blacks 2.6 times more frequently than vehicles driven by whites).

125. Traffic codes grant officers both affirmative and negative choices. Most motorists drive above the speed limit. What this means in terms of affirmative and negative choice is that, setting aside resources and feasibility, law enforcement officers have the discretion to stop all motorists, some motorists, or indeed no motorists exceeding the speed limit. See Kim Forde-Mazrui, *Ruling out the Rule of Law*, 60 VAND. L. REV. 1497, 1516–30 (2007) (arguing that specific laws do not necessarily resolve the problem of discretion that plagues vague laws, since even specific laws continue to invest officers with negative choice, i.e., the choice not to enforce the law or make an arrest); see also Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 552 (1960) (“[P]olice decisions not to invoke the criminal process, except when reflected in gross failure of service, are not visible to the community.”).

126. See *Maryland v. Wilson*, 519 U.S. 408 (1997) (passengers); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (drivers).

127. See *Harris*, *supra* note 124, at 574; see also *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (“An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.”).

128. See *Harris*, *supra* note 124, at 546.

129. See *Illinois v. Caballes*, 543 U.S. 405 (2004); *United States v. Place*, 462 U.S. 696 (1983).

130. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

131. For extensive data on search (as opposed to stop) disparity, see Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 561, 663–69 (2002). In terms of how minority drivers and passengers are treated, see, e.g., Patrick McGreevy, *Question of Race Profiling Unanswered*, L.A. TIMES, July 12, 2006, at B3. In *Pennsylvania v. Mimms*, Justice Stevens anticipated that officers are likely to use race not only as a factor in deciding whom to stop, but also whom to order out of a vehicle. See 434 U.S. at 122 (Stevens, J., dissenting).

132. Capers, *supra* note 107, at 19; see also Wendy Ruderman, *Rude or Polite, City’s Officers Leave Raw Feelings in Stops*, N.Y. TIMES, June 26, 2012, at A1;



Consider, too, the police use of excessive force. Although there is no way to determine with mathematic certainty how often police use excessive or unnecessary force, studies suggest that such use is far from infrequent.<sup>134</sup> Furthermore, studies indicate that the police are more likely to engage in force when dealing with members of outgroups (those who are poor or minority or gender non-conforming) than when dealing with members of ingroups.<sup>135</sup> Social cognition research examining implicit biases and the use of force also suggests that police are more likely to open fire on minorities, and conversely withhold fire on whites, even when the suspects are engaged in identical behavior.<sup>136</sup> In addition, several high-profile

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Wendy Ruderman, *For Women in Street Stops, Deeper Humiliation*, N.Y. TIMES, Aug. 6, 2012, at A1.

133. See Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 25, 28 (2011).

134. Findings by the NAACP, based on hearings conducted in minority communities across the country following the police beating of Rodney King, indicate that many minorities do not file formal complaints against officers out of fear of reprisal, or discouragement, or the belief that their complaints will not be believed. See CHARLES OGLETREE ET AL., BEYOND THE RODNEY KING STORY 52–54 (1995). Studies by Human Rights Watch and Amnesty International confirm that police brutality is in fact widespread. See SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES, HUMAN RIGHTS WATCH available at [www.hrw.org/reports98/police/uspo06.htm](http://www.hrw.org/reports98/police/uspo06.htm); see also AMNESTY INTERNATIONAL REPORT 1998—UNITED STATES OF AMERICA (1998), available at <http://www.refworld.org/docid/3ae6aa0c38.html>. A study of Bronx residents reported that 25% of a cross-section of residents reported witnessing police brutality or harassment during an arrest. See James R. Davis, *A Comparison of Attitudes Toward the New York City Police*, 17 J. POLICE SCI. & ADMIN. 233 (1990).

135. There is evidence that police are more likely to use deadly force during encounters with minority suspects. Such evidence was brought to the Supreme Court's attention in *Tennessee v. Garner* in which the Court analyzed Fourth Amendment limitations on the use of deadly force. See Brief for Appellee-Respondent at 23–26, *Tennessee v. Garner*, 471 U.S. 1 (1985) (Nos. 83-1035, 83-1070), 1984 WL 566020 (citing statistical data showing “significant disparities in the use of deadly force based on the race of the shooting victim/suspect and that virtually all of this disparity occurs as a result of the Memphis policy that allows officers to exercise their discretion to shoot fleeing property crime suspects.”).

136. See Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–19 (2002). Significantly, there was no correlation between shooter bias and explicit bias, as determined by a questionnaire to ascertain the participant's personal views about blacks. There was, however, a correlation between shooter bias and implicit bias, as ascertained by the participant's assessment of how other whites viewed blacks. *Id.* at 1321; see also John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996). For further discussion of these and other social cognition experiments suggesting the

cases of excessive force—Rodney King,<sup>137</sup> Amadou Diallo,<sup>138</sup> Abner Louima,<sup>139</sup> and the shooting deaths of two men during Hurricane Katrina<sup>140</sup>—contribute to the perception, at least in minority communities,<sup>141</sup> that the use of excessive force against minorities is endemic.<sup>142</sup>

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pervasiveness of implicit racial bias in policing, see L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

137. Police officers beat King with billy clubs and stunned him with a Taser “stun gun” during a traffic stop. See Hector Tobar & Richard Lee Colvin, *Witnesses Depict Relentless Beating; Police Accounts of Rodney Glen King’s Arrest Describe Repeated Striking and Kicking of the Suspect. LAPD Officers Said King’s Actions Justified the Treatment*, L.A. TIMES, Mar. 7, 1991, at B1; Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1. As a result of this beating, King suffered nine skull fractures, a shattered eye socket and cheekbone, a broken leg, a concussion, injuries to both knees and nerve damage that left his face partly paralyzed.

138. Diallo, an unarmed immigrant from Guinea, was standing in the vestibule of his apartment building in the Bronx when he was shot forty-one times by an all-white squad of the NYPD’s Street Crime Unit. Evidence suggests that Diallo was reaching for his wallet to identify himself when he was shot. See Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed*, N.Y. TIMES, Feb. 5, 1999, at A1; Amy Waldman, *A Hard Worker with a Gentle Smile*, N.Y. TIMES, Feb. 5, 1999, at B5.

139. On August 9, 1997, Louima was arrested following a verbal altercation with a police officer, Justin Volpe, during which another individual struck Volpe, knocking him down. Volpe responded by striking Louima repeatedly en route to the police precinct, and by taking Louima into a bathroom where he forced a broken broomstick six inches into Louima’s rectum. Louima required three operations and two months of hospitalization. Officer Justin Volpe pleaded guilty to sodomizing Louima, and Officer Charles Schwarz was convicted by a jury of aiding in the assault. See David Barstow, *Officer, Seeking Mercy, Admits to Louima’s Torture*, N.Y. TIMES, May 26, 1999, at A1; Joseph P. Fried, *Volpe Sentenced to a 30-Year Term in Louima Torture*, N.Y. TIMES, Dec. 14, 1999, at A1.

140. See Shaila Dewan, *Police Officers Charged in Deaths in Hurricane’s Aftermath*, N.Y. TIMES, Dec. 29, 2006, at A18; Campbell Robertson, *Officers Guilty of Shooting Six in New Orleans*, N.Y. TIMES, Aug. 5, 2011, <http://www.nytimes.com/2011/08/06/us/06danziger.html>.

141. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1120 (2008) (discussing racialized “pools of knowledge”).

142. For example, a poll released by the Joint Center for Political and Economic Studies found that 43% of blacks believe police brutality and harassment are serious problems. Among the general public, the figure agreeing with this belief was only 13%. See Michael A. Fletcher, *Study Tracks Blacks’ Crime Concerns; African Americans Show Less Confidence in System, Favor Stiff Penalties*, WASH. POST, Apr. 21, 1996, at A11. This is not to suggest that blacks are the only minority group victimized by police brutality. See, e.g., COMMITTEE AGAINST ANTI-ASIAN VIOLENCE, *POLICE VIOLENCE IN NEW YORK CITY’S ASIAN AMERICAN COMMUNITIES, 1986–1995*, at 4–11 (1996) (noting the annual increase in reports of police violence against Asian Americans). Gays and lesbians, especially those of color and those who fail to conform to gender expectations, have also been the victims of police brutality.

Equally troubling, the use of excessive force tends to be under-policed. Even when indictments are brought, convictions are rarely obtained. The initial acquittal of the officers charged in the Rodney King beating is the rule, not the exception. Even when the officers were retried on federal charges, only two of the four were convicted, and at sentencing the court granted their motions for sentencing departures, which were affirmed in *Koon v. United States*.<sup>143</sup> The officers in the Diallo shooting were acquitted of all charges.<sup>144</sup> Despite overwhelming evidence of complicity by other officers, only two officers were convicted of charges related to the sodomy of Louima. This suggests, and certainly contributes to the perception, that officers themselves operate in a zone of underenforcement.

Now consider the work camera surveillance can do to address these issues. First, take the racial profiling of minority drivers. Cameras already monitor automated bridge and tunnel tolling systems,<sup>145</sup> and photo-radars already catch red-light violations.<sup>146</sup> But this is only the start. As Elizabeth Joh has explored, technology already exists to police almost all traffic violations.<sup>147</sup> Dedicated short-range communications technology (DSRC) means that cars are increasingly being equipped to communicate pertinent data to other devices, including data regarding the car's location and speed, and warnings regarding the car's mechanics or registration.<sup>148</sup> While DSRC is already being used to reduce collisions—by alerting a driver that another car is approaching, for example—this same technology can be used to generate automatic traffic tickets.<sup>149</sup> Clearly, such automated surveillance has the potential to free police to focus on actual policing. But more importantly, it has the advantage of being racially neutral.<sup>150</sup> Rather than using pretext stops to single out minority motorists, surveillance technology will “ticket” without regard to race. I have argued in other work that racial profiling does more than

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143. 518 U.S. 81 (1996).

144. Jane Fritsch, *4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1.

145. See, e.g., Mike Frassinelli, *Nearly 4 of 5 NJ Turnpike Drivers use E-ZPass, Officials Say*, NJ.COM, June 26, 2012 (referring to the use of video surveillance to ticket toll dodgers).

146. Steven Tafoya Naumchick, *Stop! Photographic Enforcement of Red Lights*, 30 MCGEORGE L. REV. 833, 834 (1999).

147. Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199 (2007).

148. *Id.* at 200.

149. *Id.* at 220–21.

150. *Id.* at 221–23.

simply impose a “racial tax,” as Randall Kennedy suggests.<sup>151</sup> In fact, racial profiling, as a marker of inequality, is citizenship-diminishing.<sup>152</sup> Cameras, by contrast, neither discriminate nor engage in arbitrary policing.<sup>153</sup> They treat all traffic offenders alike and therefore are citizenship-enhancing.

And this is only the start. Consider the issue of the racial profiling of pedestrians. Camera surveillance, to the extent it deters crime, reduces the justification frequently offered by the police for engaging in so many stops. Beyond that, cameras provide a record to either support the proffered basis for a stop and/or frisk, or to expose the proffered basis to be false.<sup>154</sup> It is telling that a “Stop and Frisk Watch” app, designed for the New York Civil Liberties Union, already helps individuals document citizen-police interactions.<sup>155</sup> Likewise, audio surveillance already has exposed inappropriate stop-and-frisk tactics.<sup>156</sup> Indeed, the use of surveillance cameras could do the work of ferreting out particular “bad apples” in police departments.<sup>157</sup>

151. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 159 (1998); see also JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 13–14 (1997) (discussing a “black tax”).

152. Capers, *supra* note 107, at 19–29.

153. I am setting aside the issue of discriminatory placement of cameras.

154. As Susan Sontag observed several decades ago, “Photographs furnish evidence. Something we hear about, but doubt, seems proven when we’re shown a photograph of it. . . . [There exists a] presumption of veracity that gives all photographs authority.” SUSAN SONTAG, *ON PHOTOGRAPHY* 5–6 (1977). Of course, this is not to suggest that photographs cannot be manipulated. See WILLIAM J. MITCHELL, *THE RECONFIGURED EYE: VISUAL TRUTH IN THE POST-PHOTOGRAPHIC ERA* (1992). Nor is it to suggest that observers will always agree on a photograph’s “truth,” as a recent study on how different groups interpreted a video of a high-speed chase shows. See Dan M. Kahan, et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 *HARV. L. REV.* 837 (2009). For more on how even surveillance footage “does not lie . . . [but also cannot] tell the whole story,” see Jessica Silbey, *Persuasive Visions: Film and Memory*, *L. CULTURE & HUMAN.* 3 (Jan. 19, 2012), <http://intl-lch.sagepub.com/content/early/2012/01/06/1743872111423175.full.pdf>.

155. Joshua Brustein, *Stop, Frisk, Record*, *N.Y. TIMES*, June 10, 2012, at MB4.

156. Ross Tuttle & Erin Schneider, *Stopped-and-Frisked: ‘For Being a F\*\*cking Mutt,’* *THE NATION* (Oct. 8, 2012), <http://www.thenation.com/article/170413/stopped-and-frisked-being-fking-mutt-video> (audio capture of officer refusing to give valid reason for stop, instead saying “For being a fucking mutt,” And later threatening, “I’m gonna break your fuckin’ arm, then I’m gonna punch you in the fuckin’ face”).

157. As Malcolm Gladwell has pointed out in his reporting on the Christopher Commission’s investigation into excessive violence by the LAPD, often a problem that seems endemic is in fact the result of a handful of “repeat offenders.” As Gladwell put it, if you were to graph the perpetrators of excessive force at the LAPD, “it wouldn’t look like a bell curve. It would look more like a hockey stick.” See

More importantly, just as cameras deter criminal and other inappropriate behavior, cameras likely will deter police from engaging in stops and frisks that cannot be justified by reasonable suspicion that can be well-articulated. In short, it may deter them from engaging in inefficient, racialized policing, and induce them to engage in more efficient policing.<sup>158</sup> Such surveillance can also play a role in encouraging efficient internalized regulations.<sup>159</sup> It can also contribute to what one scholar identifies as a “monitory democracy,” i.e., the production of accounts of police activities to facilitate public scrutiny of the state and its actors.<sup>160</sup> In short, camera surveillance has the potential to “increase the police’s *accountability* to the public, while decreasing their *account ability*,”<sup>161</sup> or their ability to “patrol the facts.”<sup>162</sup>

Camera surveillance has the potential to do similar work when it comes to the use of excessive force. Again, the presence of cameras will likely serve as a deterrent. Beyond that, camera surveillance can document the use of excessive force.<sup>163</sup> Indeed, one reason why several incidents of brutality entered the national conversation—including the Rodney King beating—is because eyewitnesses videotaped them.<sup>164</sup> Absent such contemporaneous visual

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Malcolm Gladwell, *Million-Dollar Murray: Why Problems Like Homelessness May Be Easier to Solve than to Manage*, NEW YORKER, Feb. 13, 2006, at 96, 98.

158. On racial profiling’s inefficiency, largely because of what he terms a “ratchet effect,” see BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING AND PUNISHING IN AN ACTUARIAL AGE* 145 (2007); Harcourt, *supra* note 116, at 1329–34.

159. This proposition is in line with an argument Mary Fan recently made. See Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 129 (2012) (“When police are subject to the watchful gaze of courts, the public, and self-surveillance, they behave in better conformity with expectations.”).

160. JOHN KEANE, *THE LIFE AND DEATH OF DEMOCRACY* 739 (2009).

161. Andrew John Goldsmith, *Policing’s New Visibility*, 50 BRIT. J. CRIMINOLOGY 914, 915 (2010) (emphasis in original). Goldsmith borrows the term “account ability” from R. Ericson. Richard V. Ericson, *The New Media and Account Ability*, in *ACCOUNTABILITY FOR CRIMINAL JUSTICE: SELECTED ESSAYS* 135 (Philip C. Stenning ed., 1995).

162. Richard V. Ericson, *Patrolling the Facts: Secrecy and Publicity in Police Work*, 40 BRIT. J. SOC. 205 (1989).

163. David Harris has made a similar argument in favor of body worn video devices. See David A. Harris, *Picture This: Body Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357 (2010).

164. The fatal beating of Nathaniel Jones in Cincinnati, captured on videotape, is but one example. See Brenna R. Kelly, *Man Dies After Brawl with City Police Officers*, CINCINNATI ENQUIRER, Dec. 1, 2003. More recent examples include the

documentation, the use of excessive force is difficult to prove, especially when the only witnesses are law enforcement officers and the complainant. Even when other witnesses are present, the Federal Rules of Evidence—particularly Rule 609—can function to tip the scales against the complainant.<sup>165</sup> Camera surveillance can become another tool in leveling the playing field. Again, they can either support the claim of excessive force, or undermine the claim.<sup>166</sup>

All of this points to another advantage: legitimacy. Legitimacy theory suggests that individuals are more likely to voluntarily comply with the law when they perceive the law to be legitimate and applied in a non-discriminatory fashion.<sup>167</sup> Camera surveillance, to the extent it does not discriminate, and to the extent it confirms or refutes police misconduct, is likely to increase perceptions of legitimacy. And as I

pepper spraying of sitting protesters in U.C. Davis, the fatal beating of a homeless man in Fullerton, California, and the assault of a cyclist. See Ian Lovett, *Death of Homeless Man After Beating by Police Stirs Outrage in California*, N.Y. TIMES, Aug. 4, 2011, at A17; Sewell Chan, *Police Investigate Officer in Critical Mass Video*, N.Y. TIMES CITY ROOM (July 28, 2008, 5:07 PM), <http://cityroom.blogs.nytimes.com/2008/07/28/police-investigate-officer-in-critical-mass-video/>; Brian Stelter, *Officers Placed on Leave after Pepper-Spraying Protesters*, N.Y. TIMES LEDE (Nov. 20, 2011), <http://thelede.blogs.nytimes.com/2011/11/20/officers-put-on-leave-after-pepper-spraying-protesters/>. Some of this implicates the right of individuals to record the police. For a discussion of this right, see 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 (2012).

165. See I. Bennett Capers, *Crime, Legitimacy, Our Criminal Network, and The Wire*, 8 OHIO ST. J. CRIM. L. 459, 465–67 (2011) (discussing impact of Federal Rule of Evidence 609 in police brutality cases).

166. Lolita Buckner Inniss makes a similar argument:

[V]ideo surveillance sometimes provides much needed valorization for . . . less regarded private people [those possessing little power or authority]. This is because private people are far more often lied about, lied to and deemed liars. Hence private people often lose in battles of opposing narratives with public people about what has occurred. In such cases, video surveillance becomes a mostly neutral, unlikely to lie, legitimizing witness. For many of these private people, especially women, people of color or other relatively powerless people in society, video surveillance is the modern day white witness.

Lolita Buckner Inniss, *Video Surveillance as White Witnesses*, AIN'T I A FEMINIST LEGAL SCHOLAR TOO? (Sept. 30, 2012, 5:27 PM), <http://innissfls.blogspot.com/2012/09/video-surveillance-as-white-witnesses.html>.

167. No scholar has been more influential in exploring the role that perceptions of legitimacy play in voluntary compliance than Tom Tyler. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002); Tom R. Tyler & Cheryl Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253 (2004).

have detailed elsewhere, the benefits of increased legitimacy are manifold.<sup>168</sup> Individuals will be more likely to voluntarily comply with the law.<sup>169</sup> And individuals will be more likely to “perform their duty as citizens” and voluntarily assist the police in maintaining an ordered society.<sup>170</sup>

Such surveillance can also serve to educate the public at large. Polls continue to show that minorities and non-minorities have very different perceptions about the police.<sup>171</sup> This is not to say that either group is wrong, but rather it suggests that it is difficult to be aware of what one does not see. Surveillance recording can make the use of excessive force or profiling “real” to those who, because of race or class, will likely never experience it.<sup>172</sup> This, in turn, can induce those individuals to “buy in” to increased reforms to make policing more egalitarian.

Finally, there is the fundamental issue of crime prevention. But my argument here is slightly different from the usual “law and order” argument of surveillance advocates. My argument turns to communities, especially those hit hardest by crime. To be sure, the complaint in such communities is about over-enforcement in the form of police harassment, profiling, and excessive force. But, as Alexandra Natapoff has pointed out, the complaint is also about *under-enforcement*.<sup>173</sup> The perception in these communities is that “whites generally benefit from more responsive law enforcement, whether it is the speed with which the police respond to a 9-1-1 call, or the number of officers assigned to a case, or having a police department offer a cash reward for information.”<sup>174</sup> All of this has the expressive effect of “send[ing] an official message of dismissal and devaluation.”<sup>175</sup> Moreover, these complaints have evidentiary

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168. Capers, *supra* note 106, at 877–78.

169. *Id.*

170. *Id.*; see also Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

171. For example, according to a recent survey, 56% of all blacks believe they have been treated unfairly by the police because of their race, and 46% believe racism against blacks by police officers is “very common.” By contrast, only 11% of whites share this belief. *Race and Ethnicity* (p. 2), POLLINGREPORT.COM, <http://www.pollingreport.com/race2.htm> (last visited Mar. 27, 2013).

172. Lutt, *supra* note 164, at 350–51.

173. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1716–17 (2006).

174. Capers, *supra* note 106, at 855.

175. Natapoff, *supra* note 173, at 1749.

support. For example, a study of policing in Boston found that police “offer less service to victims (they are less prone to offer assistance to residents and less likely to file incident reports)” in minority communities as compared to “higher status neighborhoods with lower crime rates.”<sup>176</sup> Not surprisingly, this issue has prompted Randall Kennedy to argue that “the principle injury suffered by African-Americans in relation to criminal matters is not over-enforcement but under-enforcement of the laws.”<sup>177</sup> Surveillance cameras, to the extent they can play a role in solving crime and identifying perpetrators, do some of the work of addressing this problem.<sup>178</sup> They certainly do the work of refuting any law enforcement claim that crime in these communities is too difficult to solve.

I began this Article by referencing the concern, voiced by many civil libertarians, of a world in which Big Brother watches us when we are in public. It is a frightening scenario. But it doesn’t have to be, if we can agree that public surveillance, to pass constitutional muster, must be reasonable in terms of time, location, execution, and notice. That citizens would have access to surveillance footage to challenge police actions should also be a factor in any reasonableness determination. But my larger point is this: the possibility that Big Brother will watch us does not have to be frightening. The task is to reimagine Big Brother so that he not only watches us; he also watches over us—to reimagine Big Brother as protective, and as someone who will be there to tell our side of the story.

### CONCLUSION

As the foregoing should make clear, I have been thinking about the work camera surveillance can do to not only reduce crime, but also to make the way we police fairer. I have been thinking about the work camera surveillance can do to make policing—which is currently very racialized and class-based—more egalitarian and race-neutral. I have been thinking about the work camera surveillance can do to ensure

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176. Sara E. Stoutland, *The Multiple Dimensions of Trust in Resident/Police Relations in Boston*, 38 J. RES. CRIME & DELINQ. 226, 231 (2001).

177. KENNEDY, *supra* note 151, at 19.

178. It is telling that the public largely supports the use of surveillance cameras in public spaces, with an approval rate of 71% as of 2007. See YESIL, *supra* note 8, at 3–4 (reviewing polling data). It is also telling that, in New York at least, cameras “appear least where they are desired most: in some of the city’s most crime-ridden neighborhoods, among residents of public housing who have been experiencing mounting violence and all of its attendant psychological disruption.” Gina Bellafante, *The Watchmen’s Misdirected Gaze*, N.Y. TIMES, Aug. 19, 2012, at B1.



that we are all equal citizens. In short, I have been thinking about the work camera surveillance can do, in James Baldwin's words, to "make America what America must become."<sup>179</sup>

Although cameras are not a cure-all, they can certainly make a difference in apprehending criminals. As I have already mentioned, we saw this possibility play out with the quick apprehension of Faisal Shahzad in connection with his plot to detonate explosives in Times Square.<sup>180</sup> Now multiply that by thousands. Every day, police are able to identify and apprehend law offenders through the use of surveillance footage. Indeed, the day that I began writing this Article, a seventy-three-year-old woman was raped, beaten, and robbed in Central Park.<sup>181</sup> Within twenty-four hours, the suspect, a drifter from Virginia, was in custody, thanks largely to video surveillance images of the suspect.<sup>182</sup>

But equally important, such surveillance can function to make sure that those who police us do so in a way that is fair and egalitarian. Just recently, a police officer in Philadelphia was captured on tape hitting a woman in the face.<sup>183</sup> But this is just one of many incidents that camera surveillance has made real. In Minnesota, an officer was filmed kicking a man in the face during an arrest.<sup>184</sup> In Davis, California, a police officer was captured on video pepper spraying sitting protestors.<sup>185</sup> In Los Angeles, two officers were caught on surveillance camera "slamming a nurse on the ground twice—and then fist bumping afterward—during a recent traffic stop."<sup>186</sup> In

179. JAMES BALDWIN, *THE FIRE NEXT TIME* 24 (1963) ("[G]reat men have done great things here, and will again, and we can make America what America must become.").

180. See *supra* Part II.B.

181. Wendy Ruderman & Andy Newman, *Woman, 73, Raped in Central Park in Broad Daylight*, N.Y. TIMES, Sept. 12, 2012, at C1.

182. Wendy Ruderman & Nate Schweber, *Drifter Known for Menace Is Charged with Raping Woman, 73, in Central Park*, N.Y. TIMES, Sept. 13, 2012, at A1.

183. Julia Dahl, *Philly Cop Caught on Video Hitting a Woman in the Face During the Puerto Rican Day Parade*, CBS NEWS (Oct. 1 2012, 11:25 AM), [http://www.cbsnews.com/8301-504083\\_162-57523534-504083/philly-cop-caught-on-video-hitting-a-woman-in-the-face-during-the-puerto-rican-day-parade/](http://www.cbsnews.com/8301-504083_162-57523534-504083/philly-cop-caught-on-video-hitting-a-woman-in-the-face-during-the-puerto-rican-day-parade/).

184. Philip Caulfield, *Video: Cop Caught Kicking Suspect in Face*, N.Y. DAILY NEWS (Aug. 30, 2012, 10:22 AM), [http://articles.nydailynews.com/2012-08-30/news/33504744\\_1\\_police-officer-youtube-cops-paul-police](http://articles.nydailynews.com/2012-08-30/news/33504744_1_police-officer-youtube-cops-paul-police).

185. Stelter, *supra* note 164.

186. Philip Caulfield, *Brutal LAPD Arrest Caught on Video*, N.Y. DAILY NEWS (Aug. 29, 2012, 11:05 AM), <http://www.nydailynews.com/news/national/brutal-lapd-arrest-caught-video-department-investigating-cops-bodyslamming-nurse-cell-phone-traffic-stop-article-1.1146962>.

Fullerton, California, video and audio captured the beating death of a homeless man by two police officers.<sup>187</sup> In Venice Beach, cameras captured four officers beating a skateboarder, who later received treatment for a concussion, a broken nose, and a fractured cheekbone.<sup>188</sup> In New York, Internal Affairs investigated four officers after they were captured on video “viciously pummeling and kicking” a suspect following a stop-and-frisk.<sup>189</sup> Surveillance cameras also caught two New York City police officers using their fists and a baton to beat a young man in a Jewish Community Center,<sup>190</sup> and caught a police officer assaulting a cyclist.<sup>191</sup> Of course, cameras also can capture instances of grace and compassion, such as when a tourist photographed a police officer in New York giving a pair of shoes to a homeless man.<sup>192</sup>

Of all of these uses of video surveillance, it is the quick apprehension of the drifter who raped the seventy-three-year-old woman in Central Park that sticks with me the most. Perhaps because in my mind, it takes me back to the case of the Central Park jogger, the rape that shocked New York City in 1989, prompting Donald Trump to run full page advertisements in four New York newspapers calling for the reinstatement of the death penalty,<sup>193</sup> and prompting a manhunt that resulted in the arrest, interrogation, prosecution, and conviction of five black and Hispanic teens.<sup>194</sup> It would be thirteen

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187. Kate Mather & Abby Sewell, *Fullerton Police Beating of Homeless Man Is Under Investigation*, L.A. TIMES, Aug. 2, 2011, at A1.

188. Colin Bane, *Protests Over Skateboarder's Beating*, ESPN.COM (Aug. 22, 2012, 1:11 PM), <http://espn.go.com/espn/print?id=8291142&type=story>.

189. Kirstan Conley & Erin Calabrese, *Cops Probed in Video Beating*, N.Y. POST (Feb. 1, 2012, 7:53 AM), [http://www.nypost.com/p/news/local/bronx/cops\\_probed\\_in\\_video\\_beating\\_q15YAP6i5LKg3FSNOAIXIO](http://www.nypost.com/p/news/local/bronx/cops_probed_in_video_beating_q15YAP6i5LKg3FSNOAIXIO).

190. Wendy Ruderman, *Charges Against Ehud Halevy Are Dropped After Video Appears*, N.Y. TIMES, Oct. 22, 2012, at B1.

191. Chan, *supra* note 164.

192. Anthony M. DeStefano, *Larry DePrimo, NYPD Cop, Buys Homeless Man Boots*, HUFFINGTON POST (Nov. 29, 2012, 7:44 AM), [http://www.huffingtonpost.com/2012/11/29/larry-deprimo-nypd-cop-gives-homeless-boots\\_n\\_2209178.html](http://www.huffingtonpost.com/2012/11/29/larry-deprimo-nypd-cop-gives-homeless-boots_n_2209178.html).

193. Michael Wilson, *Trump Draws Criticism for Ad He Ran After Jogger Attack*, N.Y. TIMES, Oct. 23, 2002, at A1.

194. For a fascinating analysis of the Central Park jogger case and the role the race of the victim played in media coverage, see JOAN DIDION, *AFTER HENRY* 253–319 (1992) and N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004). Of course, the rape prompted its own form of racial profiling. See Patricia J. Williams, *In-Laws and OutLaws*, 46 ARIZ. L. REV. 199, 206 (2004) (“All the young men were convicted, and their obligingly sullen faces were melded with a notion coined on the spot, a notion of ‘wilding,’ that is, of rampaging so-called young black males. That’s really the point at

years before the city realized that it had rushed to judgment. In 2002, a New York court vacated their convictions after DNA evidence and a confession linked the crime to a serial rapist, Matias Reyes, acting alone.<sup>195</sup> By then, the five youths had each spent between seven and thirteen years in prison.<sup>196</sup> Suppose we had surveillance cameras in Central Park then, in 1989?

For too long, conventional thinking has identified the Fourth Amendment as the problem when it comes to camera surveillance. Maybe, just maybe, we should start thinking of the Fourth Amendment as the solution.

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which that vocabulary became part of our national discourse. And these young black males were taking over the city. And that picture in turn justified a degree of racial profiling on an unprecedented and now national scale.”).

195. Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1. For an excellent discussion of the case, see SARAH BURNS, *THE CENTRAL PARK FIVE: A CHRONICLE OF A CITY WILDING* (2011).

196. See Saulny, *supra* note 195.