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## Wherever We Go, We Leave A Trail: Surveillance And Sousveillance in the United States and United Kingdom

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**WHEREVER WE GO, WE LEAVE A TRAIL:  
SURVEILLANCE AND SOUSVEILLANCE  
IN THE UNITED STATES AND UNITED  
KINGDOM**

*Allison Amatuzzo\**

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I. THE AGGREGATION OF INFORMATION RESULTING IN A DIGITAL FOOTPRINT AND THE CORRESPONDING PRIVACY PROTECTIONS IN THE UNITED STATES AND UNITED KINGDOM

Routine. Wake up. Shower. Get ready. Go to Starbucks. Guzzle coffee. Text. Drive to school. Walk to class. Leave class. Drive home for lunch. Text. Check social media. Drive back to school. Walk to class. Leave class. Get into the car. Drive home. Arrive home. Send Snapchats. Text. Go back to school for meetings. Arrive back home. Post picture on Instagram. Read for class. Make dinner. Text. Read for class. Listen to music. Get ready for bed. Sleep. Do it all over again.

If a law enforcement official wanted to determine an individual's identity or trace the individual's movements, the official would be able to create a decently accurate profile within a day. Since one's movements are generally the same everyday with little deviation, physically following someone would provide a wealth of information. In addition, since our society extensively uses technology, each of us generates a digital footprint that the officer could track by getting access to the following: car GPS, iPhone location, internet history, social media accounts, video surveillance footage from street cameras, etc.<sup>1</sup> From just this aggregation of information collected in a short period of time, the officer would be able to determine, among other things, the individual's name, address, school, classroom location within the building, friends, family members, stores frequented, model of car, and credit card information. Besides these typical forms of government surveillance, individuals in public are also exposed to sousveillance,<sup>2</sup> a term used to describe citizens' ability to record events

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<sup>1</sup> Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. ANN. SURV. AM. L. 553, 554 (2017).

<sup>2</sup> See Jascha Hoffman, *Sousveillance*, THE NEW YORK TIMES MAGAZINE, Dec. 10, 2006, <https://www.nytimes.com/2017/01/26/books/why-1984-is-a-2017-must-read.html> (The etymology of surveillance and sousveillance is as follows: "Surveillance, from the French for 'watching over,' refers to the monitoring of people by some higher authority—the police, for instance. Now there's sousveillance, or 'watching from below.' It refers to the reverse tactic: the monitoring of authorities.").

on their cellphones or other devices and their capability to disseminate the recording to a wide network.<sup>3</sup>

Although surveillance produces several advantages including risk assessment, deterrence, data collection, and crime solving, the aforementioned scenario does call to mind Orwell's Big Brother and Bentham's panopticon.<sup>4</sup> This dystopian feeling of always being watched is only one of many issues to consider in addition to data storage, anonymity issues, and privacy rights.

This reduction of privacy, the ability to be free from government intrusion and the view of others<sup>5</sup> draws to the forefront several questions: (1) what is considered public, and (2) what protections are in place to keep the intimate details of our lives private? This comment will discuss how the rapid advancements in technology "blur the distinction between private space and the public domain," which complicates the framework on which the courts rely.<sup>6</sup> The law needs to keep pace with technological advancement so that discretion to create baseline rules is not left completely in the hands of law enforcement.<sup>7</sup>

The privacy protections offered to citizens depend upon the country being discussed. This is due to varying societal values, constitutions/laws/acts that are in place, legal systems, and population

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<sup>3</sup> See Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 406 (2016).

<sup>4</sup> See GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Houghton Mifflin Harcourt, 1949) (*Nineteen Eighty-Four* is a dystopian novel that illustrates an omnipotent government which extensively watches and controls the lives of the citizens of Oceania through the use of CCTV and the limitation of available information). Bentham's *Panopticon* was originally implemented in prisons, which allowed around the clock surveillance from a central viewing point for guards. Fan, *supra* note 3, at 407. The panopticon promoted compliance and deterred bad behavior as inmates did not know when or if they were being watched. *Id.* This notion has since been applied to outside situations with regard to the feeling of being watched. *Id.*

<sup>5</sup> See Bryce Clayton Newell, *Crossing Lenses: Policing's New Visibility and the Role of "Smartphone Journalism" as a Form of Freedom-Preserving Reciprocal Surveillance*, 14 U. ILL. J.L. TECH. & POL'Y 59, 95 (2014).

<sup>6</sup> Donohue, *supra* note 1, at 582.

<sup>7</sup> See Fan, *supra* note 3, at 402.

sizes. Although the United States and United Kingdom share “[t]he fundamental common law principles . . . traced back to the Magna Carta,”<sup>8</sup> the American and United Kingdom approaches to privacy differ. The implications of these approaches to privacy will be seen later in the comment through a discussion of surveillance and sousveillance and their impact on individuals’ objective and subjective privacy rights while in public.<sup>9</sup>

Although the United Kingdom’s system may provide some useful techniques for employing surveillance that could be used to help balance the crime control agenda and the constitutional privacy issues faced by the United States, the United States would be unable to implement the extensive United Kingdom mass surveillance system effectively. Several factors would significantly inhibit this implementation, namely size and the opposition the government would face. Because of the concerns mentioned above, the United States requires a different approach to surveillance; a balance needs to be struck between the government’s disclosure obligations and citizens’ privacy rights in order for the system to be effective.

This comment proceeds in seven parts. Part I served as a brief introduction to the topic of surveillance and its relevance to our everyday lives and rights. Part II of this comment explains the development of surveillance since its inception as well as its intersection with privacy rights. Part III of this comment compares the United States and the United Kingdom’s interpretations of the right to privacy through history, laws and regulations currently in place, and case law. Part IV of this comment debates the advantages and disadvantages of surveillance by analyzing its various methods such as Closed Circuit Television, Policy Body Cameras, and Sousveillance. Part V of this comment evaluates and scrutinizes the possibility of implementing the UK system in the US due to several problems. Part VI of this comment suggests several potential ways in which clarity can

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<sup>8</sup> Nadia Shamsi, *The Search for Truth: A Comparative Look at Criminal Jury Trials in the United States and England*, 22 U.C. DAVIS J. INT’L L. & POL’Y 203, 203 (2016).

<sup>9</sup> See Fan, *supra* note 3, at 406 (stating that, today, sousveillance is when “the power of recording people or events is put in the hands of everyday people who can cheaply acquire a small sousveillance device, such as a cell phone camera, and disseminate the recordings and images all over the world via the Internet”).

be provided to subside some of the confusion surrounding privacy rights and surveillance. Finally, Part VII summarizes and concludes the comment.

## II. WHAT IS SURVEILLANCE: A TIMELINE OF PROGRESSION AND ITS INTERSECTION WITH PRIVACY

Surveillance is everywhere and infiltrates our everyday lives. Some examples given by acclaimed Georgetown Professor of Law, Laura Donohue, include: “Wi-Fi and Bluetooth signals; GPS chips; . . . automated license plate readers; network collection data; . . . Internet protocol databases; financial transactions; consumer purchases; closed circuit television; remote biometric identification; and unmanned aerial systems.”<sup>10</sup> These methods of collecting information about individuals raise privacy concerns because “locational data, collected in bulk, yields deep insight into individuals’ lives.”<sup>11</sup> This data reveals personal information, including where we have been, who we were with, and places we frequent, to name a few.

Although technology has allowed for new forms of surveillance in addition to a new set of privacy rights challenges, surveillance is not a new issue; these issues “can be dated back to the times of the Magna Carta in 1215, when it became desirable for nobles to monitor and check the wealth of the English King John.”<sup>12</sup> The types of government mass surveillance that will be discussed later on also are not a new phenomenon; these programs began around the time of “the First and Second World Wars” including national databases as well as census registration which were used as modes of obtaining and recording information about individuals in society.<sup>13</sup> Before the proliferation of advanced technology, gathering records and surveilling the public required “a great deal of manpower.”<sup>14</sup> The

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<sup>10</sup> Donohue, *supra* note 1, at 613.

<sup>11</sup> *Id.*

<sup>12</sup> Briana Sojeong Lee, *Security over Surveillance in the US*, in 4 THE PPE REVIEW: PHILOSOPHY, POLITICS, AND ECONOMICS 8, 13 (Michelle Beauchamp et al. eds., 2017).

<sup>13</sup> *Id.* at 11, 13.

<sup>14</sup> Jeramie D. Scott, *Social Media and Government Surveillance: The Case for Better Privacy Protection for Our Newest Public Space*, 12 J. BUS. & TECH. L. 151, 154 (2017).

mobility, cost, and ease with which these devices can be used changed the perspective of those utilizing surveillance and those being watched because surveillance placement no longer required significant cost-benefit analysis.<sup>15</sup> In contrast, the intrusive nature of these advancements has led to changing perspectives on privacy as well. The “traditional theories of privacy . . . focus was on actual threats to privacy,” but after these technological advancements, “a perceived threat to privacy in public” came to light.<sup>16</sup> An actual threat to privacy would be individuals intruding into one’s home—therefore literally invading their privacy—while perceived threats to privacy are subjective feelings of invasion while in public.

Due to the widespread reach of social media and the Internet, surveillance has been placed in the hands of anyone who possesses a cell phone with the ability to take pictures or record video. As technology advances and surveillance increases, what society’s expectation of privacy encompasses changes as well because surveillance and sousveillance have the ability to impede privacy rights while in public.<sup>17</sup> Whenever the topic of surveillance is mentioned, the references to Orwell’s Big Brother and Bentham’s Panopticon are not far behind.<sup>18</sup> These concepts reflect the idea of being constantly watched—Orwell’s about citizens being watched by the government and Bentham’s about prisoners being watched by the guards.<sup>19</sup> Technology has resulted in a dramatic shift in policing values and methods and has “thereby both raised the stakes and lowered the barriers to intensive, intrusive surveillance.”<sup>20</sup>

### III. PRIVACY AND SURVEILLANCE IN THE UNITED STATES AND THE UNITED KINGDOM

Although the United States and United Kingdom share “the fundamental common law principles . . . traced back to the Magna

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<sup>15</sup> Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 EMORY L.J. 527, 562 (2017).

<sup>16</sup> Scott, *supra* note 14, at 154.

<sup>17</sup> See Donohue, *supra* note 1, at 680.

<sup>18</sup> See GEORGE ORWELL, *supra* note 4; see Fan, *supra* note 3, at 407.

<sup>19</sup> *Id.*

<sup>20</sup> Levinson-Waldman, *supra* note 15, at 562.

Carta,” the American and United Kingdom legal systems “diverge in terms of jury selection, the jury process, roles of the barristers, judges, and defendants, and the use of evidence.”<sup>21</sup> These systematic dissimilarities have resulted in differing approaches to surveillance and privacy rights.

#### A. Privacy and Surveillance in the United Kingdom

##### 1. Progression of Surveillance in the United Kingdom

The United Kingdom has become the “most watched citizenry in Europe” and possibly the world.<sup>22</sup> According to the former Director of the National CCTV<sup>23</sup> Users Group, “there are ‘more cameras here in proportion to the population than anywhere else, including the United States.’”<sup>24</sup> These CCTVs were installed in the 1990s under the crime control model.<sup>25</sup> Before the invention of CCTV to monitor public areas, law enforcement typically relied on “street patrols, undercover officers, informants, and members of the general public” to gather intelligence about the community.<sup>26</sup> As of 2011 data, there were “approximately 1.85 million public CCTV cameras operating in the United Kingdom, with the average Briton caught on camera approximately 70 times each day.”<sup>27</sup> The number has since grown to

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<sup>21</sup> Shamsi, *supra* note 8, at 203, 225.

<sup>22</sup> BENJAMIN J. GOOLD, *CCTV AND POLICING: PUBLIC AREA SURVEILLANCE AND POLICE PRACTICES IN BRITAIN* 1, n.3 (Per-Olof Wikström et al. eds., 2004).

<sup>23</sup> *Id.* at 12. (Closed Circuit Television, colloquially known as CCTV, is defined as “a system in which a number of video cameras are connected in a closed circuit or loop, with the images produced being sent to a central television monitor.”)

<sup>24</sup> Dipesh Gadher, *Smile, you're on 300 candid cameras . . .*, SUNDAY TIMES (LONDON) (February 14, 1999); *See also* Goold, *supra* note 22, at 1–2, 1 n.3.

<sup>25</sup> *See* Brandon C. Welsh, David P. Farrington & Sema A. Taheri, *Effectiveness and Social Costs of Public Area Surveillance for Crime Prevention*, 11 ANN. REV. L. & SOC. SCI. 111, 112 (2015); *see generally* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, UTAH L. REV. 289, 292-93 (1999). (The crime control model is a methodology of law enforcement, which predominantly values efficiently reducing crime. In contrast, there is the due process model, which values the importance of individual rights and liberties as well as limiting government power.).

<sup>26</sup> Goold, *supra* note 22, at 3, 96.

<sup>27</sup> Welsh, *supra* note 25, at 112.

produce a “network of four million closed-circuit cameras” even before the “deployment of an estimated 2,000 additional cameras worn by police officers.”<sup>28</sup>

This dramatic increase in surveillance in the United Kingdom was introduced with surprisingly limited backlash.<sup>29</sup> At the time of its implementation, there were a number of factors that contributed to the easy transition of surveillance into everyday life including: (1) a general societal “shift in thinking about crime and issues relating to criminal justice” and (2) “politicians and policy-makers were in search of a new solution to the problem of crime and . . . a way of convincing the public that they were serious about crime prevention.”<sup>30</sup> The desire for change and solutions for crime brought about an overall approval of surveillance by the government and the public where they “accept[ed] at face value claims about the CCTV’s supposed benefits.”<sup>31</sup> Additionally, it was decently well known and implied that criticism of CCTV and its implementation were not welcomed by the Home Office, a department of the government which funded a significant portion of the surveillance program.<sup>32</sup>

CCTV and other forms of surveillance have evolved and now allow the police to have equipment to aggregate large quantities of information on a constant basis.<sup>33</sup> Technology, specifically the abundance of CCTVs, has influenced the methodology and practice of policing and how law enforcement allocates their resources in the United Kingdom.<sup>34</sup>

## 2. Laws and Regulations in Place

Because the United Kingdom lacks a written constitution that explicitly lists the rights to which citizens are entitled, privacy

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<sup>28</sup> Fan, *supra* note 3, at 419.

<sup>29</sup> Goold, *supra* note 22, at 19–21.

<sup>30</sup> *Id.* at 20, 27.

<sup>31</sup> *Id.* at 24, 26. *See also* Fan, *supra* note 3, at 419–20.

<sup>32</sup> Goold, *supra* note 22, at 26.

<sup>33</sup> *See* Goold, *supra* note 22, at 96, 167.

<sup>34</sup> *Id.* at 167–177.

protection has encountered several foundational issues.<sup>35</sup> Traditionally, UK law has “failed to recognize the existence of any general right to privacy,” but there are “legal protection[s] for the freedom of expression, the protection of reputation, and the right to privacy.”<sup>36</sup> The courts have drawn from several different sources “to develop a notion of privacy, in each case extending the scope of the existing law by way of analogy and implication.”<sup>37</sup> For example, “trespass, nuisance, breach of copyright, and defamation” are some of the causes of action that have been utilized in an effort to promote a right to privacy.<sup>38</sup> Thus, creating a right through a compilation of sources and laws ad hoc, rather than through a binding document, has therefore proven difficult.

The Humans Rights Act was adopted by the United Kingdom in 1988.<sup>39</sup> This Act “provides for the incorporation of the European Convention on Human Rights into domestic law.”<sup>40</sup> The European Convention on Human Rights recognizes “a citizen’s right to ‘respect for his private and family life, his home and his correspondence.’”<sup>41</sup> Although this may seem to explicitly provide a right to privacy, the interpretation of this provision does not convey the application to public spaces.<sup>42</sup>

As previously mentioned, the United Kingdom is the “most watched citizenry in Europe.”<sup>43</sup> Despite this widespread use of surveillance, the “central government has been reluctant to impose legal restraints on the use of this technology by the police and local authorities.”<sup>44</sup> Because of this void of restraints or explicit rights, the

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<sup>35</sup> *Id.* at 90.

<sup>36</sup> *Id.* at 90. *See also* Alexandra Paslawsky, *The Growth of Social Media Norms and Governments’ Attempts at Regulation*, 35 FORDHAM INT’L L.J. 1485, 1500 (2012).

<sup>37</sup> Goold, *supra* note 22, at 91.

<sup>38</sup> *Id.*

<sup>39</sup> Paslawsky, *supra* note 36, at 1500–01.

<sup>40</sup> *Id.*

<sup>41</sup> Goold, *supra* note 22, at 92; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (Nov. 4, 1950), <http://www.refworld.org/docid/3ae6b3b04.html>.

<sup>42</sup> *See* Goold, *supra* note 22, at 92.

<sup>43</sup> *Id.* at 1 & n.3.

<sup>44</sup> *Id.* at 89.

“legitimate use of CCTV and the limits that should be placed on public area surveillance has fallen to local officials and police officers.”<sup>45</sup> The typical justification for the use of surveillance has been the security rationale which is a very generalized, expansive power regarding public safety concerns.<sup>46</sup> However, such a rationale could very easily be manipulated and be made applicable to many different situations. Allowing vast discretion with little to no supervision or limit is grounds for abuse.

The United Kingdom has implemented its own FOIA, Freedom of Information Act 2000, which “creates a right of access to information held by public authorities, subject to exemptions.”<sup>47</sup> The notions and rights presented in this Act have promoted the idea of transparency and have allowed for the use of CCTV video recordings as evidence in criminal trials.<sup>48</sup>

### 3. Case Law

In *Friedl v. Austria* (1996), the European Court of Human Rights grappled with the concept of surveillance and infringement on privacy rights.<sup>49</sup> The plaintiff in this case, Friedl, was attending a public demonstration in Vienna when he was photographed by police, which he claimed violated Article 8 of the European Convention on Human Rights that recognizes “a citizen’s right to ‘respect for his private and family life, his home and his correspondence.’”<sup>50</sup> He argued that his

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<sup>45</sup> *Id.*

<sup>46</sup> See Paslawsky, *supra* note 36, at 1535.

<sup>47</sup> Fan, *supra* note 3, at 422; Freedom of Information Act 2000 c. 36 (UK), [https://www.legislation.gov.uk/ukpga/2000/36/pdfs/ukpga\\_20000036\\_en.pdf](https://www.legislation.gov.uk/ukpga/2000/36/pdfs/ukpga_20000036_en.pdf).

<sup>48</sup> See Shamsi, *supra* note 8, at 223.

<sup>49</sup> See *Friedl v. Austria*, 21 Eur. Ct. H.R. 83 (1996).

<sup>50</sup> Goold, *supra* note 22, at 92. Article 8 of the European Convention of Human Rights states in its completion:

Right to respect for private and family life[:]

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or

privacy rights were violated by “the taking of the photograph, the establishing of his identity, and the recording of his personal data, as well as the storing of this material.”<sup>51</sup> The Court dismissed the case, explaining that Article 8 of the Convention applied only to private spheres of life, not public life, so he was not extended those privacy protections.<sup>52</sup> As a result of this case, the Court began to discuss the dichotomy of private versus public life. Civil liberties groups and academics alike have argued that the court’s discussion can be interpreted to mean that “privacy rights may in certain circumstances, be asserted in public places.”<sup>53</sup>

In *Peck v. United Kingdom* (2003), the European Court of Human Rights considered privacy rights and the role of Article 8 of the Convention which reinvigorated the discussion of private versus public life and the corresponding expectations of privacy.<sup>54</sup> In this case, the plaintiff argued that his Article 8 Right to Respect of Privacy was violated when a local authority disclosed CCTV recordings and photographs, “which resulted in images of himself being published and broadcast on a local and national level.”<sup>55</sup> He also contested this disclosure because “no effective remedy existed in relation to the violation of his Art. 8 right” so this action also violated Article 13 of the Convention, which identifies the right to an effective remedy.<sup>56</sup> The Court acknowledged “meaningful distinctions can be drawn between different types of public activities and circumstances.”<sup>57</sup> However, in

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crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Council of Europe, *European Convention of Human Rights* (Nov. 4 1950), [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>51</sup> Goold, *supra* note 22, at 92.

<sup>52</sup> *Id.* at 93.

<sup>53</sup> Goold, *supra* note 22, at 94.

<sup>54</sup> *See generally* Peck v. United Kingdom, 36 Eur. Ct. H.R. 41 ECHR (2003).

<sup>55</sup> *Id.* at 41.

<sup>56</sup> *Id.*; Council of Europe, *European Convention of Human Rights* (Nov. 4, 1950), [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf). (stating the following in Article 13: “[r]ight to an effective remedy[:] [e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”).

<sup>57</sup> Goold, *supra* note 22, at 94–95, 94 n.17.

this case, the problem was with the disclosure, not with the surveillance; the surveillance was justified by the legitimate aim of public safety.<sup>58</sup> Therefore, although this case discussed privacy and acknowledged its application to different circumstances, its aim was disclosure. Ultimately, Article 8 only requires a “‘respect’ for an individual’s private life” and it has yet to be interpreted “to give rise to a general right of privacy.”<sup>59</sup>

The death of Ian Tomlinson at the G20 British riots in London, England in 2009 and the ensuing investigation and trial provided an important new piece of surveillance: citizens’ media.<sup>60</sup> Tomlinson was a bystander of the riots and was struck by a police officer with a baton “without any apparent provocation.”<sup>61</sup> He eventually succumbed to the injuries he sustained.<sup>62</sup> All of this was unintentionally captured on the cell phone of another individual at the riot, and the video “has now been viewed nearly a million times on . . . YouTube.”<sup>63</sup> This incident provoked an investigation and eventually led to a trial for the officer.<sup>64</sup> The officer was acquitted of manslaughter, but the recognition of citizens’ media and its ability to hold the police accountable had lasting effects.<sup>65</sup> Citizens’ media has now led to a new method of surveillance called sousveillance, which permits individuals to record interactions with police for accountability purposes.<sup>66</sup>

## B. Privacy and Surveillance in the United States

### 1. Progression of Surveillance in the United States

The surveillance system in the United States combines many different sources of information, including traffic cameras, police body cameras, CCTV, and individuals’ cellphone recordings/social media.

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<sup>58</sup> *Id.* at 95.

<sup>59</sup> *Id.*

<sup>60</sup> *See* Newell, *supra* note 5, at 95.

<sup>61</sup> *Id.* at 95.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *See* Newell, *supra* note 5, at 95.

Over the course of the “past decade, the United States experienced a rather dramatic growth in the use of CCTV cameras in a wide array of public places.”<sup>67</sup> The increased use of sousveillance augmented the increase in CCTV. Sousveillance explains “how recording is no longer conducted overhead by someone with power over the subject, a directionality formerly denoted by the French preposition *sur* in surveillance.”<sup>68</sup> Citizens now have their own form of surveillance through technology to serve as a remedy for the uneven balance of surveillance capabilities between the government and the public. This form of surveillance is seen when “the power of recording people or events is put in the hands of everyday people who can cheaply acquire a small sousveillance device, such as a cell phone camera and disseminate the recordings and images all over the world via the Internet [*sic*].”<sup>69</sup> This recording and distribution ability changes the power dynamic between law enforcement and citizens by promoting checks and balances where each is able to hold the other accountable. Since approximately two-thirds of Americans use social media accounts, social media has served as an effective platform to allow citizens to use their cellphones and other devices to record or photograph and then subsequently disperse the content to a widespread network of people around the world.<sup>70</sup> These changes in technology have “blurred the lines between private citizen and journalist” because “many of our images of current events come from bystanders with a ready cell phone or digital camera, rather than a traditional film crew.”<sup>71</sup>

## 2. Law in Place

The United States has a written constitution, which dictates through several avenues that individuals in the United States have a fundamental right to privacy. The Fourth Amendment states:

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<sup>67</sup> Welsh, *supra* note 25, at 112.

<sup>68</sup> Fan, *supra* note 3, at 406.

<sup>69</sup> *Id.*

<sup>70</sup> See Scott, *supra* note 14, at 151.

<sup>71</sup> Kermit V. Lipetz, *The First Amendment and the Police in the Digital Age*, 69 ME. L. REV. 215, 221 (2017).

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>72</sup>

The Fourth Amendment protects individuals from unreasonable searches and seizures and establishes a person's right to privacy; the Supreme Court in *Griswold v. Connecticut* explained that the right to privacy could be inferred through the "zones of privacy," or areas safe from government intrusion, found and protected within the penumbra of several different amendments.<sup>73</sup>

Thus, the right to privacy has been deemed a fundamental right and is deeply rooted in our society's values and consciousness.<sup>74</sup> There have been various cases on the topic of privacy and its potential for infringement, which have led to many discussions on the dichotomy of private and public spaces. The general understanding is that "privacy is 'dead' once you walk out your front door or expose your activities to anyone else."<sup>75</sup> The Fourth Amendment and the Third Party Doctrine<sup>76</sup> have led the Supreme Court to utilize the "assumption of risk" concept, where once information is revealed to a third party, it is no longer protected by the Fourth Amendment and the individual

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<sup>72</sup> U.S. CONST. amend. IV.

<sup>73</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . Various guarantees create zones of privacy").

<sup>74</sup> See Paslawsky, *supra* note 36, at 1538.

<sup>75</sup> Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1675 (2017).

<sup>76</sup> Orin S. Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009) ("The 'third-party doctrine' is the Fourth Amendment rule that governs collection of evidence from third parties in criminal investigations. The rule is simple: By disclosing to a third party, the subject gives up all of his Fourth Amendment rights in the information revealed.").

assumes the risk of disclosure.<sup>77</sup> But this concept of losing one's right to privacy upon exiting their front door or revealing something to a third party does not coincide with our technologically dependent society. The way we communicate and live our lives leaves us with "no meaningful choice in today's world as to whether or not a digital footprint" is created, which complicates further the interpretation of public and private.<sup>78</sup> Even in public, people have expectations of privacy—expectations that have since been acknowledged as protected by the Supreme Court dependent upon the location and the circumstances.

The disclosure and dissemination of the recordings that are a product of surveillance or sousveillance require a balance between the "two revered democratic values of transparency and privacy."<sup>79</sup> The Freedom of Information Act ("FOIA") was enacted to "give people the right to demand access to records held by the government to facilitate transparency, guard against abuses, and build public trust."<sup>80</sup> Each state now has a freedom of information law permitting citizens to request records.<sup>81</sup> For example, the Pennsylvania Right to Know Law is a "series of laws designed to guarantee that the public has access to public records of governmental bodies."<sup>82</sup> Another example is the New York Freedom of Information Law, "a series of laws designed to guarantee that the public has access to public records of governmental bodies in New York."<sup>83</sup>

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<sup>77</sup> Skinner-Thompson, *supra* note 75, at 1680–81 (explaining that assumption of risk means "when individuals volunteer information to others" they are assuming the risk that what they reveal may be exposed to the public).

<sup>78</sup> *Id.* at 1679. See Donohue, *supra* note 1, at 647.

<sup>79</sup> Fan, *supra* note 3, at 401.

<sup>80</sup> *Id.* at 411. See The Freedom of Information Act, 5 U.S.C.S. § 552 (LexisNexis 2017).

<sup>81</sup> Fan, *supra* note 3, at 411.

<sup>82</sup> *Pennsylvania FOIA Laws* (National Freedom of Information Coalition, 2017), <http://www.nfoic.org/pennsylvania-foia-laws>; 65 Pa. Stat. Ann. § 67.101 (LexisNexis through 2017).

<sup>83</sup> *New York FOIA Laws* (National Freedom of Information Coalition, 2017), <http://www.nfoic.org/new-york-foia-laws>; N.Y. Pub. Off. Law § 86 (Lexis Advance through 2017).

FOIA has had vast courtroom implications due to the act permitting the disclosure of the recordings and photographs produced from surveillance and sousveillance.<sup>84</sup> These photographs and recordings could be used as evidence in a criminal trial, which “can bring that outside event directly into the courtroom to support or contradict [] testimony.”<sup>85</sup> The display of surveillance or sousveillance footage can eliminate the “built-in credibility gap”<sup>86</sup> where bias is given in favor of the police officer’s testimony. On the other hand, to protect privacy, the Stored Communications Act (“SCA”), contained within the Electronic Communications Privacy Act (“ECPA”), “prohibits unauthorized access to stored communications, such as email, and disclosure of their contents.”<sup>87</sup> Both of these acts in conjunction with one another are somewhat effective ways of “balancing these privacy interests with the important societal interest in promoting effective and efficient police work.”<sup>88</sup>

### 3. Case Law

There were “no major Fourth Amendment cases for 100 years” until the Supreme Court decided *Boyd v. United States* in 1886.<sup>89</sup> In *Boyd v. United States*, the topic of informational security and infiltration into one’s “privately held . . . information” was discussed.<sup>90</sup> The Supreme Court in *Boyd* dictated a far-reaching Fourth Amendment protection.<sup>91</sup> Over time, the “trespass doctrine” began to be used more frequently, which had more specific language that “focused on the textual language of ‘persons, houses, papers, and effects.’”<sup>92</sup>

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<sup>84</sup> Lipez, *supra* note 71, at 226.

<sup>85</sup> *Id.* at 226.

<sup>86</sup> *Id.*

<sup>87</sup> Paslawsky, *supra* note 36, at 1497–98; *See Electronic Surveillance*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 175, 177 (2017); 18 U.S.C.S. § 2701 (LexisNexis through 2017); Pub. L. No. 99–508, 100 Stat. 1848.

<sup>88</sup> Newell, *supra* note 5, at 92.

<sup>89</sup> Andrew Guthrie Ferguson, *The “Smart” Fourth Amendment*, 102 CORNELL L. REV. 547, 568 (2017).

<sup>90</sup> *Id.* at 569.

<sup>91</sup> *Id.* at 569–70.

<sup>92</sup> *Id.*

The Supreme Court decision in *Katz v. United States* in 1967 yet again altered the expectation of privacy standard.<sup>93</sup> In *Katz*, law enforcement officials placed a listening device on the exterior of a telephone booth, which the defendant argued was a violation of the Fourth Amendment as it was a constitutionally protected area.<sup>94</sup> The Court in *Katz* established that the “reasonable expectation of privacy test has controlled the threshold analysis of whether a Fourth Amendment search has occurred.”<sup>95</sup> The test contains two parts: (1) “that a person have exhibited an actual (subjective) expectation of privacy,” and (2) “that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>96</sup> This analysis was significant because it acknowledged a presence of a “constitutionally protected interest separate from any place and distinct from tangible property.”<sup>97</sup>

*United States v. Jones* was decided by the Supreme Court in 2012 and is yet another significant case in the establishment of a balance between privacy and surveillance.<sup>98</sup> In *Jones*, the government installed a GPS tracking device on Jones’ vehicle and tracked it for twenty-eight days.<sup>99</sup> The concurrences in this case addressed the privacy and surveillance balance within the *Katz* “reasonable expectation of privacy” doctrine, which “found that the GPS tracking constituted a search under the Fourth Amendment.”<sup>100</sup> The Court revealed a growing concern for the increase of technology in our digital society and how it has the potential to aggregate and impact our fundamental rights and expectations of privacy.<sup>101</sup>

As society’s expectations have developed over time and technology has advanced, citizens’ media and sousveillance have made their way to the forefront of the discussion on surveillance and privacy. Recent cases, such as the cases of Rodney King and Oscar Grant,

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<sup>93</sup> *Katz v. United States*, 389 U.S. 347, 360 (1967).

<sup>94</sup> Scott, *supra* note 14, at 158.

<sup>95</sup> Ferguson, *supra* note 89, at 571.

<sup>96</sup> Scott, *supra* note 14, at 158.

<sup>97</sup> Ferguson, *supra* note 89, at 570 n. 125 (quoting Timothy Casey, *Electronic Surveillance and the Right to be Secure*, 41 U.C. DAVIS L. REV. 977, 996 (2008)).

<sup>98</sup> *United States v. Jones*, 565 U.S. 400 (2012).

<sup>99</sup> *Id.* at 402–03. See Scott, *supra* note 14, at 159–60.

<sup>100</sup> Scott, *supra* note 14, at 160.

<sup>101</sup> *Id.* at 160–61.

reveal the role of media—specifically the role of media in police accountability and evidence in criminal trials. In the Rodney King case in 1991, a bystander used a Sony Camcorder to record police officers beating Rodney King with batons.<sup>102</sup> The video recording was then publicized on a local television station, which resulted in a public outcry against police brutality.<sup>103</sup> Thus, the ability to record and the capability to access a wide network of people through the use of technology illustrates how digital advancement influences our thoughts on police and privacy. The Oscar Grant case in 2009 involved passengers recording an officer shooting Oscar Grant “while Grant was lying on the subway platform, supposedly resisting restraint.”<sup>104</sup> Unlike the Rodney King case, these recordings were subsequently uploaded to the platform of YouTube, which led to its use as evidence resulting in the officer’s conviction of involuntary manslaughter in 2010.<sup>105</sup>

In the landmark case *Glik v. Cunniffe*, decided in the First Circuit, Simon Glik used his cellphone to record police officers using what he thought was “unnecessary force to affect an arrest.”<sup>106</sup> When the police questioned Glik as to his actions, he responded that he was recording the events and he was arrested “for unlawful audio recording in violation of the Massachusetts wiretap statute” as well as “disturbing the peace and aiding in the escape of a prisoner.”<sup>107</sup> The case was eventually dismissed, so Glik brought a civil suit.<sup>108</sup> The Court’s analysis in this suit constitutes the legacy of the *Glik* case.<sup>109</sup> The First Circuit recognized the “First Amendment right to record police conduct in public places” and the Seventh Circuit echoed this.<sup>110</sup> Before this right was established, if a “citizen visibly wrote down an officer’s shield number, the result was often an arrest for interfering

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<sup>102</sup> Newell, *supra* note 5, at 66; Lipez, *supra* note 71, at 223.

<sup>103</sup> Newell, *supra* note 5, at 66.

<sup>104</sup> *Id.* at 66–67.

<sup>105</sup> *Id.* at 66–67.

<sup>106</sup> *Id.* at 68. *See generally* *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

<sup>107</sup> Lipez, *supra* note 71, at 217.

<sup>108</sup> Newell, *supra* note 5, at 68; *See generally* *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

<sup>109</sup> *See Id.* at 218–19.

<sup>110</sup> *Id.* at 223–24.

with a police officer or disorderly conduct.”<sup>111</sup> This right to record changed the “role of the citizen journalist” and along with the aid of advancing technology, “fundamentally changed the nature of policing.”<sup>112</sup>

#### IV. ADVANTAGES AND DISADVANTAGES OF SURVEILLANCE

One’s opinion toward surveillance will inevitably color the way they describe the advantages and disadvantages so this section will provide both sides to be evaluated and balanced for several common methods of surveillance: CCTV, police body cameras, and sousveillance.

##### A. Closed Circuit Television

Closed Circuit Television (CCTV) allows for the constant and efficient aggregation of images and information.<sup>113</sup> As technology became more sophisticated, the capabilities and functions of the equipment that utilize these programs expanded exponentially.<sup>114</sup> Many of the cameras now used for CCTV “are now fitted with full pan, tilt, and zoom capabilities, and record in high-resolution colour, while a small but gradually increasing number also utilize sophisticated night vision, motion detection, and automatic tracking technologies.”<sup>115</sup> Despite the benefits provided to law enforcement, these technological advancements have some troubling consequences.

CCTV allows law enforcement to install cameras, which collect data about the movements of citizens over a span of time, without having to utilize vast amounts of manpower as required in the past.<sup>116</sup> This has resulted in “improved response times” and has promoted officer safety due to advanced knowledge of the situation to which an officer is responding.<sup>117</sup> Thus, this promotion of efficiency reveals a

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<sup>111</sup> *Id.* at 224.

<sup>112</sup> *Id.* at 223–24.

<sup>113</sup> Goold, *supra* note 22, at 1-2.

<sup>114</sup> *Id.* at 8.

<sup>115</sup> *Id.* at 18.

<sup>116</sup> *See* Scott, *supra* note 14, at 154.

<sup>117</sup> Goold, *supra* note 22, at 172.

departure from the previous method of surveillance: the collected footage permits law enforcement to analyze the data and subsequently evaluate where to allocate their resources, rather than relying on officers' discretion and observations. Law enforcement no longer has to weigh the "value and intrusiveness of the surveillance against the resources required to carry it out" because the equipment is cheaper now because of quantity and availability.<sup>118</sup> Although the efficiency and price remove several barriers for law enforcement, these can be portrayed as disadvantages as well because it has consequences for the public. As a result of this removal of the requirement to balance due to the price, the threshold for justification of CCTV placement is lowered and removes the need to contemplate resource management carefully, which can lead to an abundance of cameras being arbitrarily installed.<sup>119</sup>

Although the "cameras are not in and of themselves intrusive,"<sup>120</sup> the availability and placement, as well as the way in which they are used and operated, have the potential to impact the general public sentiment toward surveillance as well as the privacy rights of citizens. With regard to use, the constant watch of CCTV cameras possibly infringes on privacy rights deemed fundamental to the public; with regards to operation, the ability to continuously record, collect, and store CCTV footage and data through the use of technology also poses some privacy issues. Data storage, the "archiving of police footage," has the potential to infringe upon the privacy interests of innocent bystanders indirectly involved with the crime or disturbance at hand because "the release of such footage under state disclosure laws threatens to 'embarrass' innocent bystanders caught on tape."<sup>121</sup> Data storage also complicates citizens' public expectation of privacy because, although they might understand that what they expose to the public is not private, "what they do not expect is that each of those moments will be recorded and kept in perpetuity for later discovery and analysis."<sup>122</sup> This contrast between an officer's and a citizen's memory of an event versus permanent recordings presents both

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<sup>118</sup> Levinson-Waldman, *supra* note 15, at 565.

<sup>119</sup> *Id.*

<sup>120</sup> Goold, *supra* note 22, at 210.

<sup>121</sup> Newell, *supra* note 5, at 87.

<sup>122</sup> Levinson-Waldman, *supra* note 15, at 570.

advantages and disadvantages.<sup>123</sup> Footage is permanent and will not fade or become distorted, like a memory can, and footage can be reviewed more than once “to yield the big picture.”<sup>124</sup> However, the “recording may pick up single, highly sensitive moments in time that would otherwise be essentially anonymous,”<sup>125</sup> and the public has the opportunity to retrospectively scrutinize the actions of law enforcement who must act with their discretion in the moment.

Deterrence is a widely used justification for surveillance; CCTV allows the “police greater control over information and their environment” by allowing them to assess the recordings and place the cameras in areas where crime is frequent and they are needed.<sup>126</sup> The knowledge that cameras are present has the potential to deter crime out of fear of being caught and having the recording used as evidence, but it is a double-edged sword: the awareness of the ever-recording cameras can create a false sense of security where citizens lower their vigilance while in public, making themselves more susceptible to crime.<sup>127</sup> Additionally, research suggests that “evidence that surveillance cameras deter crime is mixed at best.”<sup>128</sup>

As previously mentioned, CCTV’s ability to constantly record aids law enforcement’s resource management, but consider the fact that “one camera recording constantly over a 24-hour period will produce 1,440 minutes of surveillance data, and if that camera is located on a central shopping street, on a busy day it could conceivably record the movements of literally thousands of people.”<sup>129</sup> This depiction prompts the common reference to George Orwell’s novel, *1984*.<sup>130</sup> Orwell notes this dystopian feeling that instills images of Big Brother constantly watching their every move in the minds of the public, which results in fear and skepticism of law enforcement and

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<sup>123</sup> *Id.* at 571.

<sup>124</sup> *Id.* at 568.

<sup>125</sup> *Id.* at 569.

<sup>126</sup> Goold, *supra* note 22, at 3.

<sup>127</sup> *See* Welsh, *supra* note 25, at 115.

<sup>128</sup> Levinson-Waldman, *supra* note 15, at 541.

<sup>129</sup> Goold, *supra* note 22, at 15.

<sup>130</sup> *See* GEORGE ORWELL, *supra* note 4.

government.<sup>131</sup> Orwell's depiction of government intrusion and surveillance has provided a "benchmark against which actual efforts to establish a 'surveillance society' can be measured."<sup>132</sup>

The right to privacy and anonymity while in public are "instrumentally connected with restraining government power."<sup>133</sup> Measures must be in place for citizens to combat this interference or to have "the ability to command non-interference in the first place," which would enable a balance between the conflicting interests.<sup>134</sup>

## B. Police Body Cameras

Police body cameras are a newly developed form of technology used by law enforcement which has come swiftly into the purview and vernacular of the public due to the wide exposure these devices have received from several of the high-profile cases mentioned above. They have become known for their function of accountability and transparency, but there are also drawbacks to police body cameras as well.<sup>135</sup> These devices are similar to CCTV but have different implications for privacy due to their size, mobility, and proximity.<sup>136</sup> Because of the intrusive recordings of the encounters and how detailed the body camera recording is, disclosure could have "more egregious results."<sup>137</sup>

One of the main balances faced when using police body cameras is the "clash between transparency and privacy."<sup>138</sup> The camera is placed on the officer's body and records the encounters the officer is involved in; this promotes accountability, transparency, and increased police visibility because the recording is evidence which diminishes the deference given to police narratives, protects police

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<sup>131</sup> *Id.*

<sup>132</sup> Goold, *supra* note 22, at 209.

<sup>133</sup> Newell, *supra* note 5, at 76.

<sup>134</sup> *Id.* at 74.

<sup>135</sup> Fan, *supra* note 3, at 398.

<sup>136</sup> See Richard Lin, *Police Body Worn Cameras and Privacy: Retaining Benefits While Reducing Public Concerns*, 14 DUKE L. & TECH. REV. 346, 350, 355 (2016).

<sup>137</sup> *Id.* at 355, 357.

<sup>138</sup> Fan, *supra* note 3, at 398.

from false complaints, and serves to remind police that they are being monitored and need to act accordingly to avoid the repercussions.<sup>139</sup>

The footage from police body cameras can be used as evidence “for or against officer or citizen misconduct.”<sup>140</sup> The footage provides accuracy and can be replayed, but this can also decontextualize events and lead to “judgments about the wrongness/rightness of police action based on small windows of reality that ignore some relevant context.”<sup>141</sup> These body cameras’ “recording encounters can help rebuild public trust, improve public as well as officer behavior, and protect against false complaints,”<sup>142</sup> but that depends upon whether they are being utilized properly. Whether the body camera is always on or not also matters because there are corresponding issues, including “[i]f body worn cameras are set to record as a default, they can also take on a constant, pervasive monitoring role”<sup>143</sup> versus leaving it to the officer’s discretion.

Several other facets of body cameras need to be taken into account including: they are “expensive to purchase and deploy, increase administrative burdens, require both rigorous review and supervisor action to reap accountability benefits, and their use may decrease the quality of public-police interaction.”<sup>144</sup> These recordings have led to a turbulent relationship between law enforcement and the public, so law enforcement image management has been made more difficult because their actions are now subject to outside scrutiny.<sup>145</sup> There is also a dystopian feeling that is invoked by the cameras because not only are the police officer’s eyes on citizens, but the encounter is being recorded as well. The relationship between the police officer with the body cameras and the public was equated with prisoners in Bentham’s Panopticon prison where they are have the potential to be

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<sup>139</sup> *Id.* at 399.

<sup>140</sup> Newell, *supra* note 5, at 85.

<sup>141</sup> *Id.*

<sup>142</sup> Fan, *supra* note 3, at 399.

<sup>143</sup> Lin, *supra* note 136, at 353.

<sup>144</sup> *Id.* at 349.

<sup>145</sup> Newell, *supra* note 5, at 83.

constantly surveyed by guards so they unaware when they are not under the watchful eye.<sup>146</sup>

These body cameras also give rise to various privacy concerns. They “exact a privacy price” and may chill communications and inhibit victims from speaking freely to officers because of the fear of recording and data storage.<sup>147</sup> The “risk of deterring victims from seeking help at all”<sup>148</sup> is not the goal of these devices, so the risk should be considered in the overall balancing of interests in the use of these devices. Another privacy concern involves innocent bystanders and data storage—again, because the “people who, unwittingly, and perhaps with no involvement in the incident being investigated, are revealed on a widely distributed video” have privacy interests, too.<sup>149</sup> All of these factors and interests need to be balanced when considering when and how to employ police body cameras.

### C. Sousveillance

Sousveillance is a term used to describe citizens’ ability to record events on their cellphones or other devices and their capability to disseminate the recording to a wide network.<sup>150</sup> Sousveillance, meaning “watching from below,”<sup>151</sup> contrasts with surveillance which “evok[es] a watchful gaze over or above the subject.”<sup>152</sup>

Sousveillance has been utilized by citizens for privacy self-defense in order to battle back against the concept of Big Brother as well as to hold police accountable.<sup>153</sup> This “ever-widening gaze of the public” has the potential to promote deterrence by exposing the police to public scrutiny and increasing officers’ awareness that their actions

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<sup>146</sup> Fan, *supra* note 3, at 407.

<sup>147</sup> *Id.* at 438, 399.

<sup>148</sup> Fan, *supra* note 3, at 438.

<sup>149</sup> Lipez, *supra* note 71, at 227–28.

<sup>150</sup> *See* Fan, *supra* note 3, at 406.

<sup>151</sup> Jascha Hoffman, *Sousveillance*, THE N.Y. TIMES MAGAZINE (Dec. 10, 2006), <https://www.nytimes.com/2006/12/10/magazine/10section3b.t-3.html>.

<sup>152</sup> *Id.*

<sup>153</sup> Julie E. Cohen, *Surveillance: Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 199 (2008).

may be recorded.<sup>154</sup> The goal is to force the police to reflect on their behavior and may result in an “increase [in] internal monitoring of its behaviors and legal compliance” which may have long-term effects.<sup>155</sup>

Our societal dependence on technology results in citizens being recorded on camera an alarming amount of times whether it is “in selfies, in group photos, in recorded events, and more.”<sup>156</sup> A statistic from 2014 shows that, on average, “every day people uploaded 1.8 billion digital images—a total of 657 billion photos a year.”<sup>157</sup> This abundance of sousveillance has the potential to be used as evidence in a trial; as mentioned above, FOIA allows for the disclosure of the recordings and photographs produced from surveillance and sousveillance.<sup>158</sup> Although these photographs and recordings can be used for the purpose of police accountability and transparency, constant exposure not only to government surveillance but also to other citizens’ sousveillance compounds the dystopian feeling of being constantly watched, both knowingly and unknowingly.

Similar to body cameras, those citizens using sousveillance must also recognize the privacy interests of innocent bystanders “who, unwittingly, and perhaps with no involvement in the incident being investigated, are revealed on a widely distributed video.”<sup>159</sup>

Another factor to consider regarding sousveillance is the uncertainty of protection for citizens who record the police and the potential risk of prosecution they face when they do record. Because of the rapidly changing field of technology, additional constitutional issues are being raised “about what right citizens should have to document and disseminate information about government conduct

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<sup>154</sup> Dustin F. Robinson, *Bad Footage: Surveillance Laws, Police Misconduct, and the Internet*, 100 GEO. L.J. 1399, 1420 (2012).

<sup>155</sup> *Id.* at 1432.

<sup>156</sup> Fan, *supra* note 3, at 406.

<sup>157</sup> *Id.*

<sup>158</sup> Lipez, *supra* note 71, at 226. (FOIA’s allowance of the disclosure of these recordings and photographs “can bring that outside event directly into the courtroom to support or contradict the testimony,” being given. The display of surveillance or sousveillance footage can eliminate the “built-in credibility gap” where bias is given in favor of the police officers testimony).

<sup>159</sup> Lipez, *supra* note 71, at 227–28.

and the state's ability to prohibit recordings by private citizens."<sup>160</sup> Since there is no consensus among states on this topic, "citizens remain at substantial risk when deciding whether to pull out their smartphone and record the scenes unfolding around them."<sup>161</sup> Because the legality to record police varies by state, citizens may choose not to act out of fear of prosecution, which will allow "abusive conduct to go unverified and potentially unnoticed by those in a position to remedy wrongs or provide justice to the abused."<sup>162</sup> If the citizen does record the events, then they have several choices of what to do with the footage: (1) they could turn it over to the police and potentially face prosecution; (2) they could post it to the Internet and also potentially face prosecution; (3) they could destroy the footage which could be considered unlawful destruction of evidence and obstruction of justice, or (4) they could keep it to themselves and allow the abuse to go unpunished.<sup>163</sup> Therefore, this uncertainty surrounding citizens' ability to record, yet again, places citizens in a questionable spot requiring them to balance their rights and justice against the risk of prosecution and allowing abuse to go unpunished.

The advantages and disadvantages of sousveillance such as accountability, transparency, use as evidence, risk of prosecution, third party privacy interests all need to be considered when deciding whether or not to record, in the split-second the event is occurring.

#### V. THE POSSIBILITY OF IMPLEMENTING THE U.K. SYSTEM IN THE U.S.

Although the United Kingdom's system may provide some useful techniques for employing surveillance that can be used to help balance the crime control agenda and the constitutional privacy issues faced in the United States, the United States would be unable to utilize the exact United Kingdom's mass surveillance system. This would be the case because of a number of contributing factors, namely (1)

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<sup>160</sup> Newell, *supra* note 5, at 70.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 95–96.

<sup>163</sup> *Id.*

implementation, (2) no comprehensive option, and (3) size and centralization.

#### A. Potential Problem #1: Implementation

Implementation of the United Kingdom's system in the United States poses a problem because of the timing and the nature in which it was installed in the United Kingdom.<sup>164</sup> Crime was a major concern in the United Kingdom, so "politicians and policy-makers were in search of a new solution to the problem of crime and, perhaps more importantly, a way of convincing the public that they were serious about crime prevention."<sup>165</sup>

This shift in mentality with regard to crime needed to be in the minds not only of motivated politicians and those in power, but also of the general public.<sup>166</sup> Thus, a centralized front needed to be put forth on the pending problem of crime. This shift in mentality resulted in the proposal of CCTV, which provided the assurance of crime prevention/deterrence as well as a more effective way to analyze where resources were needed.<sup>167</sup> Only in the United Kingdom "did government and the public accept at face value claims about the CCTV's supposed benefits. . . ."<sup>168</sup> This blind acceptance, whether it was because of the fear of crime or that it was pretty well known that the Home Office did not welcome criticism of CCTV, allowed for the rapid implementation and expansion of CCTV throughout the United Kingdom.<sup>169</sup> This quick, widespread employment of CCTV left limited time for backlash and came at a time where crime was running

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<sup>164</sup> Goold, *supra* note 22, at 20.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 27.

<sup>167</sup> *Id.* at 27, 172.

<sup>168</sup> *Id.* at 24.

<sup>169</sup> *Id.* at 26; *About us*, GOV.UK, <https://www.gov.uk/government/organisations/home-office/about> (describing The Home Office as "the lead government department for immigration and passports, drugs policy, crime, fire, counter-terrorism and police.") (last visited Apr. 4, 2019).

rampant.<sup>170</sup> The shift in rationale with regard to crime allowed CCTV to become an engrained part of life in the United Kingdom.<sup>171</sup>

While the United States and United Kingdom share “[t]he fundamental common law principles . . . traced back to the Magna Carta,”<sup>172</sup> the American and UK approaches to privacy differ. In the United States, a balance between disclosure and privacy rights needs to be kept. The values and concerns about crime and privacy concerns in the United Kingdom when CCTV became widespread during the 1970s and 1980s were different, and technology has marched on.<sup>173</sup> Today, in the United States, if there was a rapid installment of CCTV around the country, there would be many bureaucratic steps to satisfy prior to installation and use, and an opposition would likely form almost immediately because of the instantaneous access to and spread of information. Therefore, there would not be as smooth of a transition in the United States as the United Kingdom experienced.

#### B. Potential Problem #2: No Comprehensive Option

Transparency and privacy are deeply rooted in the United States and are considered “two revered democratic values.”<sup>174</sup> Protecting privacy is exemplified in the Constitution in several places, and vivid examples of trying to protect it can be seen as far back as preventing the quartering of soldiers in one’s home during peacetime.<sup>175</sup> Today, advancements in technology have brought privacy, disclosure, and transparency to the forefront. But this is just how the issue has developed in the United States; the development of privacy, disclosure, and transparency “will rely on the legal system,

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<sup>170</sup> Goold, *supra* note 22, at 19–21.

<sup>171</sup> *Id.* at 26.

<sup>172</sup> See Shamsi, *supra* note 8.

<sup>173</sup> Goold, *supra* note 22, at 16–17.

<sup>174</sup> Fan, *supra* note 3, at 401.

<sup>175</sup> Steven I. Friedland, *The Third Amendment, Privacy and Mass Surveillance*, WAKE FOREST L. REV., 6–7 (Feb. 16) (stating that the reason for drawing this parallel is the Third Amendment has implications beyond its literal meaning: “the Amendment’s check on government tyranny should be viewed as restricting cybersoldiers from focusing surveillance instrumentalities on and around private residences or businesses in an intrusive way—or using proxies to do so—that would serve as the functional equivalent of military quartering in the civil community”).

practice and culture of each country.”<sup>176</sup> Each country has a different history and different values which lead to privacy being an “inherently contextual, culturally dependent concept.”<sup>177</sup> An attempt to impose the values and system from the United Kingdom into the United States would not result in a seamless transition because “[l]awmakers often create problems when they attempt to impose one country or culture’s privacy sensibilities across cultures and individuals” because one size does not fit all.<sup>178</sup>

The United Kingdom has no written constitution and no general right to privacy, whereas the United States has a written constitution and a fundamental right to privacy grounded in several sources, including the penumbra of rights cited in *Griswold*.<sup>179</sup> Because the United Kingdom does not have explicit rights and there has not been a lot of government restraint on surveillance, the “legitimate use of CCTV and the limits that should be placed on public area surveillance has fallen to local officials and police officers.”<sup>180</sup> In the United States, each state’s laws dictate much of the restrictions on surveillance in order to protect citizens’ right to privacy.<sup>181</sup> Sousveillance has become more of a common method utilized by citizens for privacy self-defense to battle back against the concept of Big Brother and to hold police accountable.<sup>182</sup> The prevalence of sousveillance changes the power dynamic between police and citizens in the United States while in the United Kingdom much of the decision-making is left in the hands of police.

The phrase “to preserve public safety” is often the rationale used as a justification for government action.<sup>183</sup> In the United

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<sup>176</sup> Molalign Asmare Jemberie, *Enhanced Forms of Criminal Investigation: Analysis on its Potential Risks to Human Rights*, 7 BEIJING L. REV. 33, 39 (2016).

<sup>177</sup> Woodrow Hartzog, *The Inadequate, Invaluable Fair Information Practices*, 76 MD. L. REV. 952, 958 (2017).

<sup>178</sup> *Id.* at 958.

<sup>179</sup> See Goold, *supra* note 22, at 90; *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>180</sup> Goold, *supra* note 22, at 89.

<sup>181</sup> *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U ILL. L. REV. 215, Introduction (1989).

<sup>182</sup> See Cohen, *supra* note 153, at 199.

<sup>183</sup> Paslawsky, *supra* note 36, at 1535.

Kingdom, the typical justification for the use of surveillance has been the “security rationale” regarding public safety concerns.<sup>184</sup> But especially in the United States, this security rationale has been considered “not persuasive, as freedom of expression and privacy concerns have consistently trumped security considerations since the dawn of the Internet. . . .”<sup>185</sup> The public safety and security rationale can be very easily manipulated and can be molded to apply to many different situations. To allow the government vast discretion, with little to no supervision or limit, is grounds for abuse. Therefore, more evidence would be needed to bolster the reasoning for surveillance systems in the United States.

The United Kingdom also has its own version of FOIA for disclosure purposes, but the United States’ version of FOIA is significantly more extensive: the federal government has one act and each individual state has its own FOIA.<sup>186</sup> This illustrates the emphasis the United States places on the balance between transparency and privacy.

### C. Potential Problem #3: Size and Centralization

The size and centralization of the United Kingdom’s system differ significantly from those of the United States. According to the United States Census Bureau, the United Kingdom has a population of approximately 65 million while the United States has a population of approximately 326 million.<sup>187</sup> To put into perspective just how massive the difference in size between these two countries truly is, California alone has a population of approximately 39 million, which is more than half the population of the United Kingdom.<sup>188</sup>

Because the size of the population of the countries and the cities within them are so drastically different, trying to implement the

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1534.

<sup>186</sup> Fan, *supra* note 3, at 411–412.

<sup>187</sup> UNITED STATES CENSUS BUREAU, UNITED KINGDOM, <https://www.census.gov/popclock/world/uk> (last visited Jan. 10, 2018).

<sup>188</sup> UNITED STATES CENSUS BUREAU, U.S. AND WORLD POPULATION CLOCK, <https://www.census.gov/popclock/> (last visited Jan. 10, 2018).

system and extrapolate it to such a degree would present great difficulty. Even if the system could be executed, the effectiveness would be significantly diminished because of the increased expense of materials and resources needed to cover more territory—not to mention the increased amount of potential opposition that could be faced.

The United States' system of surveillance is much more decentralized than the United Kingdom's due to its structure and organization of government; for example, "[b]ody camera policies are much more decentralized in the United States compared to the United Kingdom, reflecting the view that criminal law enforcement is a 'traditional state function[.]'"<sup>189</sup> Implementation of the United Kingdom's system of surveillance would be near impossible in the United States without centralizing all the power over decisions regarding surveillance to the federal government which would infringe on the states' powers and place federalism in question.<sup>190</sup> Not only do American values pose a problem for utilizing the United Kingdom's surveillance system, the size of the United States and the structure and organization of the government do as well.

#### D. Potential Problem #4: Further Clarification Needed

In the international context, no overarching standards exist that deal "with or that strike the balance between the use of those enhanced investigative tools for crime prevention, detection and investigation on one hand and the protection of the private life of individuals and other related rights on the other."<sup>191</sup> Because of the lack of legal safeguards and differences between each countries' approach to the subject, there is limited clarity on the topic. A possible remedy to this could possibly be achieved by developing some form of

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<sup>189</sup> Fan, *supra* note 3, at 422 (alteration in original) (quoting Mary De Ming Fan, *Reforming the Criminal Rap Sheet: Federal Timidity and the Traditional State Functions Doctrine*, 33 AM. J. CRIM. L. 31, 33–49 (2005)).

<sup>190</sup> *Id.*

<sup>191</sup> See Jemberie, *supra* note 176, at section 37.

“common language of privacy” to provide some stability and clarity within privacy laws in different countries.<sup>192</sup>

As evidenced earlier, some of the case law in the United States and the United Kingdom, including *Friedl v. Austria*, *Peck v. United Kingdom*, and *Katz v. United States*, demonstrates how the lines are still blurred with respect to privacy rights and what is considered public versus private.<sup>193</sup> This lack of clarity leads to a lot of discretion being left in the hands of the courts because without standards or precedent to follow, the court must conduct a fact specific analysis on a case-by-case basis. As technology continues to advance, these lines will only become blurrier and the docket of the courts will become increasingly inundated if something does not change. The law must keep pace with technology.<sup>194</sup>

In order for the law to keep pace with technology, “nations should aim to model future legislation within their countries on existing internet norms such as freedom of expression, transparency, and privacy.”<sup>195</sup> The Third Party Doctrine and the Assumption of Risk notion,<sup>196</sup> which are currently used to determine when privacy rights are lost, are both outlooks on privacy that are somewhat outdated because they are not applicable to the very interconnected and accessible way people live their lives now.<sup>197</sup> These notions do not allow their concepts to transcend through time because they did not account for technology’s evolution. As previously mentioned, if the citizen does record the events, then they have several choices of what to do with the footage: (1) turning it over to the police and potentially face prosecution; (2) posting it to the Internet and also potentially face prosecution; (3) destroying it which could be considered unlawful destruction of evidence and obstruction of justice; or (4) keeping it to

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<sup>192</sup> See Hartzog, *supra* note 177, at 960.

<sup>193</sup> See generally *Friedl v. Austria*, 21 Eur. Ct. H.R. 83 (1996); *Peck v. United Kingdom*, 36 Eur. Ct. H.R. 41 ECHR (2003); *Katz v. United States*, 389 U.S. 347, 360 (1967).

<sup>194</sup> Paslawsky, *supra* note 36, at 1541.

<sup>195</sup> *Id.* at 1490.

<sup>196</sup> Kerr, *supra* note 76 at 561; Skinner-Thompson, *supra* note 75, at 1680–81.

<sup>197</sup> Paslawsky, *supra* note 36, at 1490, 1534–39.

themselves and allow the abuse to go unpunished.<sup>198</sup> These choices place a lot of pressure on citizens and force them to decide whether or not to record in the split-second the event is occurring.<sup>199</sup> Currently, citizens are left with limited suitable options, and many common citizens do not fully understand the nuances of sousveillance law and its potential ramifications due to the lack of clarity and unification on the subject.<sup>200</sup> Thus, promoting a more centralized, unified view, as opposed to each state differing, would be more beneficial. Therefore, if countries aim to model their future legislation on existing internet norms, not only will this allow the countries to adapt to the changing expression of privacy rights but these norms will allow for the development of the aforementioned “common language of privacy.”<sup>201</sup>

Another rapidly advancing feature of the privacy discussion that needs to be addressed in order for the law to keep pace with technology is citizens’ media. Citizens’ media, if used correctly, allows citizens to better hold police officers accountable, but it is a double-edged sword.<sup>202</sup> On one hand, it allows citizens to utilize their individual forms of technology to promote deterrence of police officer misbehavior, while the government is able to watch the citizens via CCTV, body cameras, etc.<sup>203</sup> On the other hand, it increases the dystopian feeling of constantly being watched and a large cloud of uncertainty also surrounds citizens’ media when it comes to the protection available for citizens who record the police and the potential risk of prosecution they face when they do record.<sup>204</sup> Both arguments can be seen in the above-mentioned cases of the deaths of Ian Tomlinson, Rodney King, Oscar Grant, and *Glik v. Cunniffe* to name a few instances.<sup>205</sup> Therefore, proper channels for reporting citizens’ media footage and sousveillance need to be developed in order to make this feature more effective and reduce the uncertainty.

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<sup>198</sup> Newell, *supra* note 5, at 95–96.

<sup>199</sup> *Id.* at 96–97.

<sup>200</sup> *Id.* at 96–98, 104.

<sup>201</sup> Hartzog, *supra* note 177, at 960; Paslawsky, *supra* note 36, at 1490.

<sup>202</sup> Newell, *supra* note 5, at 81–82.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 95–96; Fan, *supra* note 3, at 407.

<sup>205</sup> Newell, *supra* note 5, at 66. *See generally* *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

This sousveillance not only impacts those recording and the subjects of the recording, it also impacts innocent bystanders who happen to be included in the footage.<sup>206</sup> Because of the balance of privacy rights and disclosure as well as the level of archiving involved with the footage recorded, citizens media that is reported has the potential for infringing upon the privacy interests of innocent bystanders indirectly involved with the crime or disturbance at hand because “the release of such footage under state disclosure laws threatens to ‘embarrass’ innocent bystanders caught on tape. . . .”<sup>207</sup> Although they understand that they are in public, they do not necessarily comprehend that they will be “recorded and kept in perpetuity for later discovery and analysis. . . .”<sup>208</sup> This may be considered an unavoidable by-product of citizens’ media because it is a split second decision to record the action at hand so one is unable to obtain permission from all those in the area, but perhaps there is a solution yet to be discovered.

An additional element to consider is the intrusive nature of body cameras. When police officers wear these cameras, a dystopian feeling may be invoked because not only are the police officer’s eyes on citizens, but the encounter is being recorded as well.<sup>209</sup> When police officers come to an individual’s door wearing these body cameras, it allows them to record and store details about that person’s home that is normally considered private.<sup>210</sup> The awareness of these devices recording everything in their purview, both video and sound, may result in citizens’ fear to speak, which will chill the communications between citizens and police.<sup>211</sup>

## VI. POTENTIAL SUGGESTIONS FOR CHANGE

Although implementation of the United Kingdom system does not appear plausible in the United States, there are other suggestions of how to provide some clarity to privacy rights in the United States.

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<sup>206</sup> Newell, *supra* note 5, at 87; Levinson-Waldman, *supra* note 15, at 568.

<sup>207</sup> Newell, *supra* note 5, at 87.

<sup>208</sup> Levinson-Waldman, *supra* note 15, at 570.

<sup>209</sup> Goold, *supra* note 22, at 174, 186.

<sup>210</sup> Lin, *supra* note 136, at 353–4.

<sup>211</sup> *Id.*; Fan *supra* note 3, at 399.

Listed below are several ways to categorize data, consider the Fourth Amendment implications in the digital age, and balance privacy rights and disclosure, but none are without their respective flaws.

A. Suggestion 1: Houses, Papers, and Effects

The first suggestion to providing some clarity and adapting to the changing times would be to consider a textual reading of the Fourth Amendment. “Underlying the [Fourth Amendment’s] protection of persons, papers, homes, and effects and behind the expectation of privacy lies a desire to guard personal information from government intrusion.”<sup>212</sup> When looking at the wording of this text, these recordings can be considered protected by the Fourth Amendment because of the application of “persons,” “papers,” or “effects.”<sup>213</sup>

To analyze this under the category of “persons,” one would have to consider, as previously mentioned, that on a daily basis we each create a digital footprint, or “digital self,” which reveals many personal details about ourselves such as places we frequent, people we speak with, photographs, etc.<sup>214</sup> This record of information can be considered to be a representation of us as a person and therefore that information is placed within the realm of protection.<sup>215</sup>

To analyze this under the category of “papers,” one would have to consider that digital information is the modern day equivalent of papers.<sup>216</sup> “Whether the data is physical or digital should have little bearing on whether or not it is considered private.”<sup>217</sup>

To analyze this under the category of “effects,” one would have to consider factors other than the digital nature of the documents or files and their location, such as “the nature of the item, its

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<sup>212</sup> Ferguson, *supra* note 89, at 552. See Donohue, *supra* note 1, at 678; U.S. CONST. amend. IV.

<sup>213</sup> Ferguson, *supra* note 89, at 552. See Donohue, *supra* note 1, at 678.

<sup>214</sup> Donohue, *supra* note 1, at 679.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 678–79.

<sup>217</sup> *Id.* at 679.

relationship to other items, and whether the owner has taken steps to shield the information from public scrutiny.”<sup>218</sup>

Although these categorizations propose compelling arguments, the argument would need to be solidified in writing with concrete yet malleable language to attend to our changing technological landscape and the individualized nature of these cases requires an in depth analysis from the court system which could potentially lead to an influx of cases.

#### B. Suggestion 2: Informational Curtilage

Another suggestion to “guide future Fourth Amendment analysis” is the theory of “informational curtilage.”<sup>219</sup> This theory would allow the analysis to be appropriate for the digital age in which we live instead of the “physical intrusion/trespass test and the reasonable expectation of privacy test currently in use.”<sup>220</sup>

Curtilage is “a protective area around the home that secures the area from outside interference or observation.”<sup>221</sup> This is typically applied to porches or other areas that are so closely associated with the home that they receive the same protections. The theory of informational curtilage considers “the proximity/derivative connection to the constitutional source, the steps taken to mark out or protect the information, and the nature of the uses of that information.”<sup>222</sup> Factors would need to be developed in order to apply this theory, such as what constitutes the home and what the parameters of the surrounding protected area would be, and as previously mentioned, the law needs to catch up to technology so it would take time to implement this theory.<sup>223</sup>

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<sup>218</sup> *Id.*

<sup>219</sup> Ferguson, *supra* note 89, at 617.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 618; *Florida v. Jardines*, 569 U.S. 1, 7 (2013) (“This area around the home is ‘intimately linked to the home, both physically and psychologically,’ and is where ‘privacy expectations are most heightened’”).

<sup>222</sup> Ferguson, *supra* note 89, at 618.

<sup>223</sup> *Id.* at 627–628; Paslawsky, *supra* note 36, at 1541.

### C. Suggestion 3: Multiple Factor Test

The United States faces the somewhat unique problem of balancing privacy rights and disclosure. This has proven very difficult and fact driven in the several cases discussed in this comment.<sup>224</sup> The constant advancement of technology has changed the amount of information available and the speed at which one can obtain it.<sup>225</sup> A five-factor test using factors from existing case law to maintain the necessary balance may bring some clarity to the dilemma.<sup>226</sup> The five factors include:

(1) the duration of the surveillance; (2) the lowering of structural barriers to pervasive surveillance, reflected in the greatly reduced cost of tracking; (3) the recording of an individual's or group's movements; (4) the elicitation of information from within a protected space such as a home; and, as appropriate, (5) whether the technology undermines core constitutional rights and (6) whether surveillance technologies are piggy-backed on each other.<sup>227</sup>

These factors allow the courts to use previously identified factors, which creates less work from them and allows them to analyze their particular case within an already established framework.<sup>228</sup> They also have precedent to rely on when making the decisions for each individual factor.<sup>229</sup>

### D. Suggestion 4: Limiting Video Retention and Automatic Redaction

The previously implemented possibilities of dealing with the potential infringements of privacy rights due to body camera footage were individual consent, officer discretion, statutory exclusion, which

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<sup>224</sup> See *supra* notes 49, 54, 73, 93, 98, 106, 221 and accompanying text.

<sup>225</sup> Levinson-Waldman, *supra* note 15, at 529.

<sup>226</sup> *Id.* at 529–30.

<sup>227</sup> *Id.* at 530.

<sup>228</sup> *Id.* at 550.

<sup>229</sup> *Id.*

are all problematic and flawed.<sup>230</sup> A better balance needs to be struck between privacy and disclosure.

To promote a better balance, law enforcement should reduce “the amount of video retained, by shortening retention periods and narrowing long-term retention to videos showing use of force and other events of public interest. . . .”<sup>231</sup> Shorter retention periods will place a time limit on the availability of information which will promote a more fluid system and the narrowed long term retention time will require officers to provide valid, evidence backed reasons to justify why the footage should be kept.<sup>232</sup> The problem this poses is similar to that of the advancements with DNA now being applied to unsolved cases in the past; if these videos are disposed of after a certain period of time has elapsed, they will not be available in the future if technology changes to increase our capabilities.<sup>233</sup>

Alternatively, “improving the way videos are stored and deploying rapidly-improving software aids can reduce the administrative burden of complying with Open Government/Records Acts.”<sup>234</sup> Although this does promote the balance of privacy and disclosure, the use of software to perform tasks is not completely unflawed when bearing in mind innocent bystanders and their privacy concerns, which have the potential to be distributed on a widespread video, the suggestion of automatic redaction rather than enacting exemptions was broached.<sup>235</sup> It was eventually deemed problematic because “the current limits of software and technology make redacting a herculean task” and quite burdensome for those involved.<sup>236</sup> The use of software will promote the connection between law and technology but it still requires officers to attempt to predict future controversies of which videos to retain which is also problematic.<sup>237</sup>

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<sup>230</sup> See Lin, *supra* note 136, at 360.

<sup>231</sup> *Id.* at 360–61.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 361.

<sup>235</sup> See Fan, *supra* note 3, at 433.

<sup>236</sup> Lin, *supra* note 136, at 352.

<sup>237</sup> *Id.* at 363.

## VII. CONCLUSION

When making decisions regarding privacy, disclosure, and surveillance, there are many things to consider. Surveillance and sousveillance pose double-edged swords with the benefits of risk assessment, data collection, deterrence and solving crime as well as the concerns of anonymity and privacy, the dystopian feeling, and data storage. How surveillance is utilized and how the privacy of citizens is protected varies by country, as evidenced by the United Kingdom and United States. Each country needs a system of surveillance that is tailored to the rights, needs, and circumstances of their citizens, but overarching standards should be clarified so that they can be utilized as guides. For the United States, a balance needs to be struck between the government's disclosure obligations and citizens' privacy rights in order for the system to be effective. Although I do not believe the United Kingdom's entire system of surveillance could be implemented in the United States for several reasons, I do think that by examining surveillance systems other than our own, we are able to learn things from other methodologies and could potentially implement or integrate some of the useful techniques into our surveillance model to improve.

The amount of traceable information we generate increases daily so safeguards need to be put into place properly to adequately balance the availability of information with privacy rights and the law needs to keep pace with the advances in technology. Michiko Kakutani discussed a relevant example of this in a New York Times article when she said, “[a] world in which Big Brother . . . is always listening in, and high-tech devices can eavesdrop in people's homes” and referenced the Amazon Alexa device (“Alexa”).<sup>238</sup> This device is one that has infiltrated many homes and businesses within the last five years and has many different features and capabilities that update frequently. Alexa has voice recognition and is able to be connected to control

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<sup>238</sup> Michiko Kakutani, *Why '1984' is a 2017 Must Read*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/books/why-1984-is-a-2017-must-read.html>.

various other technologies in one's home, including the lights.<sup>239</sup> The abilities of this device are reminiscent of Orwell's 1984 in terms of potential government intrusion and listening devices if not monitored properly and the implications of data storage remain unclear.<sup>240</sup> This potential source of surveillance is only one example of the digital footprint we, intentionally or unintentionally, produce every day.<sup>241</sup>

Another example can be found in China where "170 million CCTV cameras are already in place and an estimated 400 million new ones will be installed in the next three years."<sup>242</sup> Although the sheer number is overwhelming, this camera network is truly distinguished from others due to its capabilities; the extent of the pervasiveness of these CCTV cameras equipped with artificial intelligence and facial recognition was seen in Guiyang, China when a BBC reporter "was located and captured by the Chinese police in just seven minutes in a stunt to demonstrate the power and effectiveness of the government's surveillance systems."<sup>243</sup> The rapid proliferation of these devices can be seen all over the world but privacy and retention are several issues to be mindful of.

Because of this rapid advancement of technology and how often individuals interact with it on a daily basis not only in public but in their homes as well, future legislation cannot be static; it needs to be malleable in order for it to allow the law to keep pace with technological advancement.

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<sup>239</sup> Amelia Tait, *Amazon Echo: How 2016 Tech is Bringing Us Closer to 1984*, NEWSTATSMAN (Sept. 14, 2016), <https://www.newstatesman.com/science-tech/privacy/2016/09/amazon-echo-how-2016-tech-bringing-us-closer-1984>.

<sup>240</sup> *Id.*

<sup>241</sup> Donohue, *supra* note 1, at 679.

<sup>242</sup> Joyce Liu, *In Your Face: China's All-Seeing State*, BBC (Dec. 10, 2017), <https://www.bbc.com/news/av/world-asia-china-42248056/in-your-face-china-s-all-seeing-state>.

<sup>243</sup> *Id.*; Christina Zhao, *China Used Its Vast CCTV Surveillance Network to Track Down Reporter in Just Seven Minutes*, NEWSWEEK (Dec. 14, 2017, 6:54 AM), <http://www.newsweek.com/tasked-trying-remain-undetected-long-possible-sudworth-filmed-himself-selfie-747843>.