

We have the right to be ignored

Privacy cannot be treated as a luxury

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“The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. ... They conferred against the Government the right to be let alone — most comprehensive of rights and the right most valued by civilized men.”

— Justice Louis D. Brandeis (1856-1941)

The rapid spread of public surveillance cameras represents something far more consequential than a new piece of police technology. It represents a fundamental change in the relationship between the individual and the state.

These cameras allow government agents to record, identify, catalog and retroactively track the movements of people who have committed no crime, are suspected of no wrongdoing and have done nothing to invite government scrutiny. That’s not public safety. It’s an assault upon individual privacy.

Privacy is not a privilege granted by the government. It is an aspect of personal liberty that government exists to protect. It is a natural human right protected from the government in the Bill of Rights. The fact that a person leaves his home and travels upon a public road does not mean that he has surrendered that right.

There is an enormous moral and constitutional difference between a police officer who happens to observe a person in public and government surveillance that automatically and systematically records that person’s vehicle, location and movements; and stores that information for future use.

A free society doesn’t just protect people from crime; it protects them from arbitrary government. The presumption is liberty. Government is the negation of liberty. A person should not have to establish his innocence before the government leaves him alone. The burden always belongs to the government to justify all intrusions into personal liberty.

Police cameras reverse that principle. They collect information about everyone the camera views and leave it to individuals to challenge the collections afterward.

The Constitution requires articulable suspicion connecting the person being surveilled to a legitimate law-enforcement objective to justify public surveillance. A vague assertion that the technology might someday help solve a crime or enhance public safety does not meet that standard.

The view that personal privacy and public safety are in equipoise — that they are merely two competing interests of equal moral and legal weight from which government officials are entitled to choose their preferred balance subjectively — is the core of authoritarianism.

Safety is one of the legitimate purposes for which government exists. Privacy is among the personal liberties that government exists to protect. It cannot be taken away without judicial approval. Government cannot justify violating a natural right merely by asserting that doing so might make people safer. If that were so, there would be no meaningful boundary on any governmental power.

There is a profound difference between investigating a specific crime through constitutionally authorized surveillance and constructing a permanent infrastructure of suspicionless surveillance. The former begins with evidence and seeks information relevant to a particular governmental purpose. The latter begins with everyone and waits for the evidence.

When 7,000 American police departments have these systems without legislative approval, we have the police making policy judgments. They are deciding that the government should possess a new capacity to observe innocent people, what information should be collected, how long it should be retained, who should have access to it and what purposes may justify searches — all irrespective of the Constitution.

Those are not merely administrative questions; they are questions about personal liberty.

If elected legislators believe that such surveillance is necessary, then they should publicly debate it, enact specific legislation mandating warrants, establish meaningful limitations and accept responsibility before the voters. The decision should not be buried in a police procurement process or treated as an ordinary equipment purchase.

Liberty cannot depend upon the benevolence, restraint or good intentions of government employees. The premise of the Constitution is that government power must be limited, checked and divided because government officials are human beings who possess power and will inevitably have incentives to abuse it.

The answer is not better government surveillance. The answer is what the Fourth Amendment requires: no government surveillance without a search warrant.

The constitutional question cannot be reduced to whether someone was physically standing in a public place. A police officer seeing a car pass by is one thing. A government

database capable of reconstructing months of a person's movements is something fundamentally different.

The difference is the difference between observation and surveillance. A free people should be profoundly suspicious of any governmental system that makes surveillance the default position. No person should have to fear that every trip down the street is being permanently recorded, whether his movements can later be reconstructed or whether a government official can search his history without individualized suspicion. The Constitution mandates that the government leave people alone unless it has a legitimate, articulable reason to interfere with their liberty. That principle is not an obstacle to public safety. It is one of the defining characteristics of a free society. Police cameras embody the opposite philosophy: Collect first, investigate later; monitor everyone, suspect someone later; expand governmental capacity and trust officials to exercise restraint afterward. That's not the philosophy of a constitutional republic. It's the philosophy of a surveillance state.

The constitutional objection is not that fighting crime is unimportant. It is the government's responsibility to fight crime chained down by the Constitution, to paraphrase Thomas Jefferson. Safety cannot become the magic word that dissolves every constitutional limitation.

Privacy cannot be treated as a luxury available only when the government deems it convenient. And police departments cannot be permitted to acquire, deploy and normalize technologies that fundamentally alter the balance of power between individuals and the state.

If the police could track all movements, stop anyone on a whim, search and take photos as they pleased, would we have less crime? Perhaps. But who would protect us from the criminals in uniform? And who would want to live in such an authoritarian state?