

## Appearing Unsuspiciously: Surveillance and Citizen Photography

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Abstract: This article explores the uneasy relationship between surveillance cameras and camera phones in America post-9/11. In my Introduction to Philosophy course, I ask students to turn the two against each other by taking pictures of security cameras. Their reflections on this assignment provide insight into the mood of a nation obsessed with security, on the one hand, and with avoiding suspicion, on the other. I argue recent court decisions are teaching Americans they have no right to look back at a government that constantly looks at them, but that looking back is precisely the practice needed for a robust democracy.

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*“It almost feels like you are guilty of doing something wrong until you are proven innocent by the videotape.”*

In my Introduction to Philosophy course, I give students a seemingly innocuous assignment: take a picture of a security camera with your smartphone and write to me about the experience. Some students are not fazed by this and describe the experience as if I had asked them to go take a picture of a fire hydrant or a stop sign. But, for the majority of them, this assignment raises notable anxiety. The ACLU maintains, “When in public spaces where you are lawfully present you have the right to photograph anything that is in plain view. That includes pictures of federal buildings, transportation facilities, and police.”<sup>1</sup> However, in theory as well as practice, the status of this right remains unclear to many Americans. Incidences of citizen photographers being confronted, questioned, detained, and even arrested for attempting to photograph elements of public infrastructure, law enforcement officials, or public protests have become more prevalent over the last decade.<sup>2</sup>

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<sup>1</sup> “Know Your Rights: Photographers,” American Civil Liberties Union, July 2014, accessed May 15<sup>th</sup>, 2015, <https://www.aclu.org/know-your-rights-photographers>.

<sup>2</sup> All images are my own, taken with my smartphone.



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At the heart of this conflict is our love/fear relationship with photographs. Humans are creating a greater pictorial history of each day on earth than was ever thought possible. In 2016, Instagram receives upwards of 80 million uploads a day, and over half of its 100 million monthly American users are Millennials, aged 18-29.<sup>3</sup> In other words, my students are no strangers to the practice of photography. While the rate of citizen photography rises, so does the rate of government and commercial surveillance. In the decade following

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<sup>3</sup> “Instagram: Stats”, accessed Apr. 8, 2016, <https://www.instagram.com/press/?hl=en>. Maeve Duggan et al., “Mobile Messaging and Social Media 2015,” Pew Research Center, August 19, 2015, accessed Apr. 8, 2016, <http://www.pewinternet.org/files/2015/08/Social-Media-Update-2015-FINAL2.pdf>.

September 11<sup>th</sup>, an estimated 30 million security cameras were sold in the US, and there is little reason to believe this statistic (the last complete count available is from 2011) is on the decline.<sup>4</sup> By now, we can safely estimate there is one security camera for every Millennial photographer in this country. Yet, there is a tension between these two forms of photography—a tension many of my students felt keenly when they turned one upon the other. “My initial feeling was that it seemed wrong and I would get in trouble because it felt like I was vandalizing something,” one student wrote. “I feel like I made myself stand out in a crowd because I felt like everyone was looking at me, to see what I was doing. My biggest fear was that I was going to get in trouble by someone watching the camera.”

While completing the assignment, the majority of my students reported one or more of the following: a feeling of anxiety or nervousness, a feeling of having done something wrong, reflection upon past legal or moral transgressions and guilt for those actions, reflection upon whether they may have transgressed some legal boundary in the past without ever having recognized it, a feeling of being watched by those around them, of being watched by ‘whomever’ is behind the camera, of acting suspiciously, and

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<sup>4</sup> Allison Linn, “Post 9/11, Surveillance Cameras are Everywhere,” NBC News, accessed May 16, 2015, [http://www.nbcnews.com/id/44163852/ns/business-us\\_business/t/post-surveillance-cameras-everywhere/#.VVOM-Oud5UQ](http://www.nbcnews.com/id/44163852/ns/business-us_business/t/post-surveillance-cameras-everywhere/#.VVOM-Oud5UQ).

perhaps most strangely, the feeling they were actively working against the security that surveillance cameras are supposed to represent and ensure. In short, standing squarely toward a camera that watches their actions on a daily basis and committing themselves to watching back, if only for a moment, made them feel transgressive. As another student wrote: "Overall I did not enjoy this experience of taking a picture of a surveillance camera; it was similar to a feeling of embarrassment and I felt as if I had to justify to myself and to others that I was taking a picture for a class and not for some criminal reason." This should be both surprising and troubling.

My students are polite, mostly upper middle class individuals, and I doubt that any of them have ever been accused or convicted of the most mundane misdemeanor. But, even if I were wrong about any given student, the prevalence of their anxiety could not be explained by their personal histories. I ask: How do they see themselves and those around them such that they believe this assignment codes them as suspicious? And why?

Among those who value security, this growth in the American surveillance complex is greeted with affirmation. If you are doing nothing wrong, the argument goes, you have nothing to hide. But this ignores the paradoxical phenomenon I observe in my students: the ubiquity of surveillance mechanisms can induce a *feeling* of guilt even when one *knows* one has done

nothing wrong. The problem is not a problem of the moment, but of possible past or future transgressions, the fear of being misinterpreted by others, of becoming the 'random' target of scrutiny by a watchful law enforcement official.

I believe it is a red herring to turn, at this point, to a discussion of the conflict between security and privacy in American society, as so many authors have done. Although there are many instances, courts have deemed, in which citizens have a reasonable expectation of privacy both in their homes and in certain public spaces (e.g. public restrooms), this has never been guaranteed as a right. A friend of mine recently remarked that she almost *expects* there is someone watching her in the restroom. In fact, very few of my students expressed an expectation of privacy or anonymity when in public spaces. Those days, it seems, are gone. They know they *appear* when they present themselves in public, and it might even be said that one of the primary desires of Millennials is to *appear publically*. The incessant flow of images, audio and video from their lives on social media is self-produced because they want to be seen, and most students are wise to the fact that what shows up online can never be fully deleted. The main issue instead seems to be with *how* they appear.

Initially, I asked how and why my students feel *suspicious* when pointing a camera at a surveillance device, but the question gains precision when framed as one of how they do (or do not) have a right to appear before others. Image

management is a large part of Millennial life and, while everyone arguably wants to appear unique, no one wants to stand out too far. “Almost every part of our lives are being documented,” one student reflects. “Even though this idea should bring a feeling a safety, it actually instills a feeling of fear, and as someone who doesn't do anything to get in trouble with the law, that is very disturbing.” I think it is time for Americans to begin insisting on their right to appear publically without feeling suspicious.



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What accounts for this atmosphere of suspicion, even among the good and law-abiding, and why can it be evoked so readily in their minds? Broadly, it comes from the notion that we live in a society under attack by invisible enemies. This

is perhaps the most frightening condition for a society obsessed with appearance. A war on terror that cannot be seen requires *effort* to sustain and propagate itself, and it achieves this by enlisting the citizen's help in trying to detect these invisible threats. The opening paragraph of the DHS site entitled, "Preventing Terrorism and Enhancing Security," provides a glimpse of the narrative that sustains our anxiety and desire for security. It does this by asking us to direct that anxiety outward, upon the actions of others:

Today's threats do not come from any one individual or group. They may originate in distant lands or local neighborhoods. They may be as simple as a home-made bomb or as sophisticated as a biological threat or coordinated cyber attack. More and more, state, local, and tribal law enforcement officers, as well as citizens, businesses, and communities are on the front lines of detection and prevention...Homeland security starts with hometown security—and we all have a role to play.<sup>5</sup>

According to this narrative, watchful suspicion becomes the highest form of citizenship. Giorgio Agamben, an Italian philosopher and political theorist (who, in 2008, indefinitely suspended all academic engagements within the United States because of the DHS's increased security measures), has written that America "has made the citizen into the suspect par excellence—to the point that humanity itself has become a dangerous class."<sup>6</sup> This narrative has staying

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<sup>5</sup> "Preventing Terrorism and Enhancing Security," Department of Homeland Security, accessed May 15, 2015, <http://www.dhs.gov/preventing-terrorism-and-enhancing-security>.

<sup>6</sup> Giorgio Agamben, "No to Biopolitical Tattooing," *Communication and Critical/Cultural Studies* Vol. 5, No. 2, June 2008, pp. 201-202.



power. According to a Fox News poll conducted in May 2015, 60% of Americans surveyed believe that it is likely that terrorists are living in their city or hometown, an even higher figure than in June 2002.<sup>7</sup>

The “If You See Something, Say Something™” campaign provides the political *ethos* to accompany this narrative. “Your every day,” reads the campaign’s tagline, “is different than your neighbor’s—filled with the moments that make it uniquely yours. So if you see something you know shouldn’t be there—or someone’s behavior that doesn’t seem quite right—say something. Because only you know what’s supposed to be in your everyday.”<sup>8</sup> The narrative is seductive; *everybody is unique and should not question her judgment, but the way to exercise this uniqueness is through the suspicion of others, not the expression of her views.* Citizenship involves actively looking for what makes one uncomfortable, and this notion elevates people’s discomfort with difference into a space where it becomes politically justified. As if this does not raise enough red flags, the logic goes one step further, rebounding on itself. For every citizen living under this narrative, the essential problem comes to be this: if my everyday is different from everyone else, how can I be sure I am not suspicious to you? I am almost

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<sup>7</sup> “Fox News Poll: Voters believe WH incompetent, US still in recession, ISIS has moved next door, want Congress to continue investigating Benghazi,” Fox News, May 14, 2015, accessed May 16, 2015, <http://www.foxnews.com/politics/interactive/2015/05/14/fox-news-poll-voters-believe-wh-incompetent-us-still-in-recession-isis-has/>.

<sup>8</sup> “If You See Something, Say Something,” Department of Homeland Security, accessed May 16 2015, <http://www.dhs.gov/see-something-say-something>.

bound to be, as long as I stand out to you. “I kept looking around to see if anyone was looking at me while I took the picture,” one student wrote. The assignment I gave to my class produced anxiety because students were forced to act in a manner that made them stand out as questionable before the law to those around them. A number of them became cognizant of this fact.



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The notion of security has a long tradition within political philosophy. Machiavelli is perhaps the first to place the feeling of suspicion at the heart of human interaction. Hobbes, writing just over a century later during the English Civil War, argues that the pursuit of security is the foundation of civil society because security alone can abolish these feelings of suspicion. Recent

advancements in recording devices have radically changed what it means to pursue security; as Foucault points out in his 1977-78 *Lectures at the Collège de France* (only recently available to an English speaking audience), the practice of surveillance can be understood apart from the aim of disciplining law breakers. Discipline and security, he argues, are separate modes and manifestations of governmental power, each with a different aim. The aim of disciplinary power is to capture and punish individuals, while the aim of security power is to guide and distribute the behavior of entire populations.<sup>9</sup> To be sure, any given security camera may serve both purposes at once; it may be used to target an individual who commits an overt criminal act, and so it has a disciplinary potential. The 2014 case in North Philadelphia concerning the kidnap of a young woman (who was recovered unharmed thanks to a combination of private security cameras, ATM records, and traffic cameras) is but one clear example.<sup>10</sup> However, as Foucault argues, the ability to catch ‘bad guys’ is only an incidental effect of these measures. They are designed to monitor the whole range of behaviors in a population largely without interference. The goal is to create a safer society, not

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<sup>9</sup> Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-78*, edited by Michel Senellart, translated by Graham Burchell (New York: Picador, 2007), 5-6.

<sup>10</sup> Greg Botelho, “Trail of videos, receipts, tips lead police to Philadelphia woman, alleged abductor,” CNN News, November 6, 2014, accessed May 16, 2015, <http://www.cnn.com/2014/11/06/justice/philadelphia-abduction/>. Cf. Foucault, *Security, Territory, Population*, 6-7.

by fleecing out the bad guys, but by slowly reformulating public policy, minimizing the kinds of social tensions that make disruptive actions more probable.<sup>11</sup> It is not a matter of deception, therefore, when security measures are purported to serve relatively mundane purposes and are implemented without seeking public comment. NYC's use of E-ZPass scanners to devise ways of mitigating traffic jams is a good example.<sup>12</sup> They exist for the obvious betterment of society on a number of levels, the argument goes, and those who are too suspicious of them must not ultimately share this aim.

My students are not completely off the mark, then, when they feel anxious about interacting with security mechanisms directly, but this anxiety, I would argue, comes less from the possibility of being targeted personally for their actions than it does from the logic of security itself. As Foucault argues, the aim of security power is the assessment of risk. However, this means the very pursuit of security as a social aim does not allow for a society in which there is no risk, and so requires a situation in which a certain atmosphere of anxiety in order to function. In the months following September 11<sup>th</sup>, the DHS, in one of its first actions, created the Homeland Advisory Security System, a color-coded scale that displayed the threat level of terrorism, denoting its

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<sup>11</sup> Michel Foucault, *Security, Territory, Population*, 46-47.

<sup>12</sup>“Your E-ZPass may be tracking your every move,” WPIX, accessed May 15, 2015, [http://launch.newsinc.com/share.html?trackingGroup=90962&siteSection=csmonitor\\_nws\\_no\\_n\\_sty\\_dynamic&videoId=28936741](http://launch.newsinc.com/share.html?trackingGroup=90962&siteSection=csmonitor_nws_no_n_sty_dynamic&videoId=28936741).

probability within the population generally. This is a textbook manifestation of security power for Foucault. The scale, coded green to red, never in fact reached green—not because it did not *happen to*, but because it *could not*. Achieving a green status would invalidate the justification of the scale completely.

This scale was replaced in 2011 by the National Terrorism Advisory System, an incidental alert system that only promised to broadcast information in the case of an imminent threat to a particular location.<sup>13</sup> The change, while doing away with the overt national threat level, did not invalidate the general feeling that the American population was at some level of risk. Knowledge of this level, however, became **implicit** and colorless. In other words, the NTAS maintained the sense of risk, essential for the security mechanism to function, but asked it to recede and be accepted into the cultural background. ‘Nowhere is safe in principle,’ the DHS seemed to say ‘but when and where we determine things are really unsafe, we will say something.’ Currently, the normal citizen has only a vague idea of how to assess her own public safety in light of this constant, invisible risk. She has little if any idea what kinds of information might be being collected and archived, for whom, or when, or with what right, though she knows this occurs. Given a lack of transparency about the aims and

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<sup>13</sup> “National Terrorism Advisory System,” Department of Homeland Security, accessed May 15, 2015, <http://www.dhs.gov/national-terrorism-advisory-system>.

means of national and state-level security programs, she has all the more reason to hold her beliefs about her own actions in suspension. I *know* I have done nothing wrong, but I can't *feel* sure. The logical result of a security state, then, is the production of an eerie sense that any of us might wind up under suspicion at any moment—unless, that is, we look harder for the *real* terrorists.



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We hold in our pockets devices that can make us suspects, but camera phones should be regarded as *pharmakon* rather than simple political poison. In the same root lie both the problem and the cure. However, recent legislation and law enforcement practices have been gnawing away at the root of the camera's social healing power. This comes, I argue, not in spite of our first amendment

protections, but in fact *because* we have so far been unable to understand that the first amendment does not provide a wide enough constitutional basis on which a helpful bill of photographer's rights could stand. Citizen photography, when and where it is protected, is protected by the freedom of expression and freedom of the press. The Supreme Court, however, while never ruling directly on a citizen photographer's rights, has placed significant qualifications on them.

As Bill Kenworthy points out, the courts have thus far ruled against the idea that "private recreational photography that is for one's own personal use" is a protected form of speech.<sup>14</sup> In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group* (1995), the court ruled that in order for photography to be protected under the first amendment, the photographer must be able to establish that she had "(1) a message to be communicated; and (2) an audience to receive that message, regardless of the medium in which the message is to be expressed."<sup>15</sup> Expression, in other words, means being deliberately communicative. This interpretation has been upheld in numerous instances, most recently in *Fields v. City of Philadelphia, et al., Geraci v. City of Philadelphia, et al.* (2016), where the US District Court for Eastern Pennsylvania determined: "...we find no basis to craft

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<sup>14</sup> Bill Kenworthy, "Photography and the First Amendment", *First Amendment Center*, January 1, 2012, accessed May 13 2015, <http://www.firstamendmentcenter.org/photography-the-first-amendment>.

<sup>15</sup> "Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston (94-749), 515 U.S. 557 (1995)," *Legal Information Institute*, accessed May 14, 2015, <https://www.law.cornell.edu/supct/html/94-749.ZO.html>.

a new First Amendment right based solely on “observing and recording” without expressive conduct...”.<sup>16</sup>

However, this requirement sits in tension with one of the most basic tenets of artistic photography, which is to engage explicitly with that which one does not fully understand. And, it renders impotent one of the most powerful contributions of photojournalism, which, in its best moments, finds itself present for the unfolding of events not yet fully understood by those who are present. Perhaps the most troubling aspect of this expressivity requirement comes into relief when we are able to recognize that it is the exact inverse of the blanket surveillance practices. The citizen is expected to produce and defend, at the time of capture, both the purpose and public relevance of her photographs or recordings, while the security camera is never expected to.

To this restriction, we should add that photography protected under both the freedom of expression and the freedom of the press is limited to certain places and times. Many government buildings, for instance, have been labeled as ‘sensitive sites’ and prohibit photography. Different Circuit Courts interpret these limitations quite differently, and the ambiguities produced would seem to apply the question of photographing something like a security camera as well

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<sup>16</sup> “Richard Fields v. City of Philadelphia, et al, Amanda Geraci v. City of Philadelphia, et al (2016)”, accessed Apr. 8, 2016, [http://www.aclupa.org/files/1014/5635/0320/Memorandum\\_Opinion\\_2.19.2016.pdf](http://www.aclupa.org/files/1014/5635/0320/Memorandum_Opinion_2.19.2016.pdf)



(an act that has no clear message or audience—or, at least to law enforcement officials, no non-furtive one). The Supreme Court, in *Perry Education Ass'n. v. Perry Local Educators' Ass'n.* (1983), has established the right of citizens to photograph and record in spaces deemed to be 'public forums,'<sup>17</sup> but despite this, various incidences have occurred in which citizens photographing around government buildings, mass transit stations, and public protests have been detained for their activities.<sup>18</sup>

The question at hand becomes more complicated when we consider the status of a security camera: it is at once, strictly speaking, both a piece of public infrastructure and tool of law enforcement officials. To photograph a security camera is not only to photograph a sensitive site, it is to photograph law enforcement in progress. Many of my students expressed anxiety, not about the camera itself, but about what kind of official may be watching through the device. Regarding the right to photograph the presence or activities of law enforcement officials while on duty, only the 1<sup>st</sup> and 11<sup>th</sup> Circuit Courts have ruled favorably.<sup>19</sup> The other courts have not been so forthcoming. In the 9<sup>th</sup>

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<sup>17</sup> "Perry Education Association v. Perry Local Educators' Association (1983)," accessed May 14, 2015, [http://www.bc.edu/bc\\_org/avp/cas/comm/free\\_speech/perry.html](http://www.bc.edu/bc_org/avp/cas/comm/free_speech/perry.html)

<sup>18</sup> cf. Bill Kenworthy, "Photography and the First Amendment."

<sup>19</sup> See notably: "Glik v. Cunniffe, 655 F.3d 78 (1<sup>st</sup> Cir.2011)," accessed Apr. 8, 2016, <http://caselaw.findlaw.com/us-1st-circuit/1578557.html>, and "Smith v. City of Cumming, 212 F.3d 1332, 1333 (11<sup>th</sup> Cir.2000)", accessed Apr. 8, 2016, <http://caselaw.findlaw.com/us-11th-circuit/1418743.html>

Circuit Court, for instance, it has been established that there is some protection for citizen photographers when the activity is considered “a matter of public interest,” but this right has not been clearly extended to direct encounters with law enforcement officials.<sup>20</sup> The 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Circuit Courts have actively ruled against the protection of citizen photographers in their encounters with law enforcement, while the remaining Courts have thus far decided against ruling on the issue.<sup>21</sup>

In those instances where photography has been prohibited, citizens have been arrested or detained under various statutes. To take one example that is solidifying itself as precedent, the 3<sup>rd</sup> Circuit Court has employed the Pennsylvania Wiretapping and Electronic Surveillance Control Act <sup>22</sup> in combination with the notion of “qualified immunity” for law enforcement officials in order to detain photographers without thereby infringing on their

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<sup>20</sup> “Fordyce v. City of Seattle, 55 F. 3d 436, Court of Appeals, 9th Circuit (1995),” accessed May 14, 2015, [https://scholar.google.com/scholar\\_case?case=1203486802498511272&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=1203486802498511272&hl=en&as_sdt=2&as_vis=1&oi=scholar).

<sup>21</sup> *Gilles v. Davis* (3<sup>rd</sup> Cir.) has concluded that “videotaping or photographing the police in the performance of their duties on public property may be protected activity.” “*Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3<sup>rd</sup> Cir.2005)”, accessed Apr. 8<sup>th</sup>, 2016, <http://caselaw.findlaw.com/us-3rd-circuit/1036922.html>. Despite this, *Fields v. City of Philadelphia, et al, Geraci v. City of Philadelphia, et al* (2016) recently decided against the citizen’s right to “observing or recording police” in isolation from “criticism or challenge” expressed in direct, unambiguous speech at the same time. This decision is currently being appealed in the 3<sup>rd</sup> Circuit Court.

<sup>22</sup> “Wiretapping and Electronic Surveillance, 18 PA. CONS. STAT. §§ 5701-82”, accessed Apr. 8, 2016, <http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=18&div=0&hpt=57>

first amendment rights.<sup>23</sup> The notion of qualified immunity, established in *Harlow v. Fitzgerald* (1982)<sup>24</sup> and upheld in *Malley v. Briggs* (1986), rests on an extension of probable cause: a law enforcement official may detain a citizen photographer without fear of retribution in civil court “if officers of reasonable competence could disagree” as to whether some statute, such as the Wiretap Act, could be invoked on the officer’s behalf. In other words, the Court does not require that officer *know* he or she is acting in accord with this statute, only that he or she *may be* while acting with “objective reasonableness”.<sup>25</sup> The 3<sup>rd</sup> Circuit Court case of *Kelly v. Borough of Carlisle* (2010) recently upheld this standard regarding the arrest of a man who was recording a traffic stop. Brian Kelly began filming when he believed the officer was acting with undue malice toward the driver of the car in which he was a passenger. He was arrested under the Wiretap Act, essentially as a spy, despite the fact that the officer, too, had been taping the traffic stop without either the driver or passenger’s knowledge.

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<sup>23</sup> “*Matheny v. County of Allegheny Pennsylvania et all* (2009),” accessed May 14, 2015, <http://dockets.justia.com/docket/pennsylvania/pawdce/2:2009cv01070/93537/>. Also, “*Kelly v. Borough of Carlisle*, 622 F. 3d 248, Court of Appeals, 3rd Circuit (2010),” accessed May 14, 2015,

[https://scholar.google.com/scholar\\_case?case=16745214870858628586&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=16745214870858628586&hl=en&as_sdt=2&as_vis=1&oi=scholar).

<sup>24</sup> “*Harlow v. Fitzgerald*, 457 US 800, Supreme Court (1982),” accessed May 14, 2015, [https://scholar.google.com/scholar\\_case?case=13486920831186038844&hl=en&as\\_sdt=6,39&as\\_vis=1](https://scholar.google.com/scholar_case?case=13486920831186038844&hl=en&as_sdt=6,39&as_vis=1).

<sup>25</sup> “*Malley v. Briggs*, 475 U.S. 335, Supreme Court (1986),” accessed Apr. 8, 2016, <https://supreme.justia.com/cases/federal/us/475/335/>.

Ambiguities and disagreements that stem from these rulings have recently led to many murky clashes between citizen photographers and law enforcement officials. What is more anxiety provoking, however, is the extent to which these sorts of encounters are extending even to members of the free press. During the protests in Ferguson in the fall of 2014, eleven journalists were arrested for venturing outside the police-defined 'press pen.'<sup>26</sup> The protests in Baltimore in the spring of 2015 saw several reports of credentialed photographers being knocked down, detained, or arrested despite having identified themselves to officials, ostensibly for interfering with a police action.<sup>27</sup> These are just some of the ways the use of the first amendment in legal battles over citizen photography can actually become restrictive to citizens. The ambiguities within law as to the proper time, manner, and place for protected photography are being used to shut down journalists' efforts in the exact times and places where the public needs them the most. If this trend continues, the only view of events we will be able to receive is from the police themselves, and

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<sup>26</sup> Brian Stelter, "6 more journalists arrested in Ferguson protests," CNN News, August 19, 2014, accessed May 18, 2015, <http://www.cnn.com/2014/08/19/us/ferguson-journalists-arrested/>.

<sup>27</sup> Kevin Rector, "Photojournalists 'taken down,' detained by police in Baltimore protests," Baltimore Sun, April 26, 2015, accessed May 15, 2015, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-protest-journalists-20150426-story.html>. Also, "Photographer says Baltimore police beat him during protest, arrested another photographer, Fox News, April 26, 2015, accessed May 17, 2015, <http://www.foxnews.com/us/2015/04/26/photographer-says-baltimore-police-beat-him-during-protest-arrested-another/>.

we should be forgiven if the events of past year and a half lead us to doubt whether this view clearly serves the public interest.

What I believe I have learned from my students is that we do not feel that the net of government surveillance belongs to the citizens themselves—that they may not ‘look back’ with any assurance they are not exposing themselves to danger. This is a highly imbalanced situation. The private citizen, who attempts to film a protest, traffic stop, or any such thing, risks her own personal security more than any security camera operator does, but she is automatically coded as suspicious when she *appears* to ‘survey’ the scene. By pointing her camera phone at the law, she is seen to be questioning what she is supposed to believe is the mechanism of *her own* safety. At this point, the narratives of both criminality and terrorism kick in and probable cause can be established: the only reason one would pay attention to that which documents for the safety of the law-abiding citizen is to concoct a plan for *destroying it* or *avoiding its view*. Sublimate or terrorize: these appear to be our two options.

Judith Butler’s essay, “Explanation and Exoneration, or What We Can Hear” (2004), is now dated in certain respects. There has been over a decade of the war on terror since its composition, but I think her essential point still rings true. “In a strong sense,” she writes, “the binarism that Bush proposes in which only two positions are possible—“Either you’re with us or you’re with the

terrorists”—makes it untenable to hold a position in which one opposes both and queries the terms in which the opposition is framed.”<sup>28</sup> In a surveillance state with an ever-increasing and increasingly militarized police presence, there is little room in the logic of our conscience for open critique. Someone or something has taught us that it is wrong to take pictures of security mechanisms, even if only to learn something more about one’s self and society. Had anyone noticed my fifty students carrying out this assignment on a single day in April, I wonder if I would have been understood?



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<sup>28</sup> Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (New York: Verso, 2004), 2.

It is unconscionable that a citizen who uses his camera in an attempt to protect himself or those around him from the actions law enforcement officials should be reasonably assumed to be a spy, and the same goes for taking a picture of a building, a train, or a security camera in plain view. As one student wrote: "They do not know what I was doing or what my motives were, but after watching the video of me taking a picture they may judge me. I do not like this because they do not have a right to judge me because they do not know me or my motives!" Again, it is time for Americans to insist upon their right to appear before these blanket mechanisms as unsuspecting.

This will only occur once we can secure broader constitutional protection for the citizen photographer (i.e. everybody). Some protection has already been provided for the contents of one's phone and camera by the fourth amendment's prohibition on illegal search and seizure.<sup>29</sup> But, despite this, many incidences of law enforcement officials simply grabbing and breaking citizens' camera phones have been reported. The ACLU's Mobile Justice CA app allows those in an encounter with law enforcement officials to record and quickly upload the video

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<sup>29</sup> "Riley v. California, 573 U.S. \_\_\_ (2014)," accessed Apr. 11, 2016, [http://www.supremecourt.gov/opinions/13pdf/13-132\\_819c.pdf](http://www.supremecourt.gov/opinions/13pdf/13-132_819c.pdf). See: Adam Liptak, "Major Ruling Shields Privacy of Cellphones," New York Times, June 25<sup>th</sup>, 2014, accessed May 18 2015, [http://www.nytimes.com/2014/06/26/us/supreme-court-cellphones-search-privacy.html?\\_r=0](http://www.nytimes.com/2014/06/26/us/supreme-court-cellphones-search-privacy.html?_r=0).

of their interaction, preserving it in case of future legal action.<sup>30</sup> This, however, is only a stopgap measure. The enshrinement of the right to photograph must come from an altered perception of the function of the citizen camera in society. It must begin to be able to be seen, like the security camera, as a protective mechanism, as well as an expressive one. Although utterly lacking in legal ground and precedent, shifting the debate from one about first amendment rights to one more closely resembling those about second amendment rights would be a good initial step.

Like the pen and the sword, the camera and the gun have an inner sympathy with one another. To be sure, the second amendment, which guarantees the citizen her right to defend herself specifically when and where the government cannot, has its own set of limitations regarding the place, time, and manner for carrying firearms. However, the virtue of relying upon the second amendment rather than the first is that, unlike the first amendment, the second actually gains strength and justification during moments of crisis. If a citizen feels threatened—the same feeling that serves now as the condition for an officer pulling his sidearm in the field—she should have sufficient warrant to record something. These two events, the necessity of filming and the necessity

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<sup>30</sup> Jon Wiener, “New ACLU Cellphone App Automatically Preserves Video of Police Encounters,” *The Nation*, May 1 2015, accessed May 18, 2015, <http://www.thenation.com/blog/205889/new-aclu-cellphone-app-automatically-preserves-video-police-encounters>.



of threatening force, ought to be co-constituting in any transparent democracy, especially those under invisible threats. Some might argue that new legislation requiring body cameras for police is just such a marriage of film and force, and that this requirement should be sufficient.<sup>31</sup> However, in the end, this only serves to justify the officer's viewpoint, and the victim will never truly appear as anything but a suspect from this 'official' point of view. While I am skeptical of the radical position that America would be safer were everyone to carry a gun, I think this argument is absolutely right when applied to the camera. Robust protection for the citizen photographer would better ensure we *feel* our right to appear as we *know* we are, and to appear before the law unsuspectingly.

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<sup>31</sup> Jay Stanley, "Police Body-Mounted Cameras: With Right Policies in Place, A Win for All," ACLU, March 2015, accessed May 16, 2015, <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all>.