WATCHING THE WATCHERS

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The tension between individual freedom and collective security has been and always will be difficult to resolve.[1] Quite appropriately, this discussion forum focuses on the threat that increasingly sophisticated technology can pose to individual privacy. However, I would like to provide the "yin to the yang" and point out the obvious: technology itself is not the culprit, because it is a double-edged sword, a tool that can be used to protect as well as invade privacy. We need not endorse the single-minded approach of WikiLeaks to recognize the benefits that occur when technology discloses government cover-ups or simply provides accurate information where none previously existed.

I. STREET ENCOUNTERS BETWEEN POLICE AND CITIZENS

An example of how both the government and individual citizens could benefit from increased use of technology is reflected in an ongoing debate being waged in the editorial pages of the *New York Times*. Several diametrically opposed op-ed pieces were prompted by the New York City Police Department's release of statistics regarding stop-and-frisk[2] incidents within New York

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[1] The issues raised under the Fourth Amendment to the U.S. Constitution "bring into sharp focus the classic dilemma of order versus liberty in the democratic state." JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 13 (1966).

[2] In America, "stop and frisk" is legal shorthand for encounters between police and citizens where the citizen may be stopped, interrogated, and patted down for weapons. *See* Terry v. Ohio, 392 U.S. 1, 12 (1968).

City. One opinion piece entitled *The Shame of New York* referred to these statistics as establishing the city's "degrading, unlawful and outright racist stop-and-frisk policies."[3] It noted that "[b]lacks were nine times more likely than whites to be stopped by the police, but no more likely than whites to be arrested as a result of the stops."[4]

A counter-opinion piece in the same newspaper was entitled *Fighting Crime Where the Criminals Are*.[5] This title invokes the famous line from Willie Sutton, the successor to Bonnie and Clyde in bank robbing folklore. Sutton would rob a bank, the police would catch him and put him in prison, Sutton would escape, rob another bank, and the cycle would repeat itself. This was the age when the FBI was just beginning to compile profiles of career criminals. The FBI asked Sutton: "Why do you rob banks?" His answer was, "[B]ecause that's where the money is." The modern variation on this theme asserts that the police are conducting stop and frisk operations in ethnic neighborhoods because that's where the crime is.[6] "Based on reports filed by victims, blacks committed [sixty-six percent] of all violent crime in New York in 2009, including [eighty percent] of shootings and [seventy-one percent] of robberies."[7]

The editorials in the *New York Times* reacted to the same statistical report on stop and frisk practices by putting two very different spins on the raw data. These contrasting views are possible and perhaps unavoidable because the statistical summaries do not reveal what those underlying street encounters between police and citizens actually looked like. One possible way to get beyond the mere statistics is to focus on the kind of concrete

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[3] *See* Bob Herbert, *The Shame of New York*, N.Y. TIMES, Oct. 30, 2010, at A23 (discussing New York's unlawful and racist stop-and-frisk policy); Charles M. Blow, *Escape from New York*, N.Y. TIMES, Mar. 19, 2011, at A23 (discussing "the hyper-aggressive police tactics that have resulted in a concerted and directed campaign of harassment against the black citizens of this city").

[4] *See* Herbert, *supra* note 3.

[5] *See* Heather MacDonald, *Fighting Crime Where the Criminals Are*, N.Y. TIMES, June 26, 2010, at A19 (stating that allegations of racial bias ignore how much crime influences police department operations).

[6] *See id.* ("Such stops happen more frequently in minority neighborhoods because that is where the vast majority of violent crime occurs—and thus where police presence is most intense.").

[7] *See id.*

facts that are becoming more readily available in our technologically advancing society. Modern technology may enable us to accurately record police-citizen encounters unfiltered by traditional post-hoc reconstructions of the events.

At present, a court reviews a challenged stop and frisk by listening to witnesses testify as to their memory of what occurred. Most often the available witnesses are limited to the citizen who was stopped and the police officer that initiated the stop. Their testimony, like all testimony, has weaknesses ranging from outright perjury to less blatant "slanting" of facts to make them more favorable to the party with a stake in the proceedings.[8] Because the police and the citizen have very different stakes in how a court will perceive their encounter, it is not surprising that they relate very different accounts of what transpired. Aside from this tendency to consciously or unconsciously shape the facts, what is particularly troublesome about reconstructing police-citizen encounters is that such encounters are very stressful for all participants. The citizen often feels threatened and harassed, while the police officer often suspects that a crime is about to occur and the suspect is armed and dangerous.[9] This type of stressful situation is hardly conducive to detached and objective reporting of what actually occurred.

Separating the true facts from biased and faulty reconstructions of those facts is further complicated by the very real tendency of all of us, including police officers, to react instinctively to threatening and stressful situations. Our rational

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[8] As the Fourth Circuit Court of Appeals recently cautioned:

> We also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity. . . . [A]n officer and the Government must do more than simply label a behavior as 'suspicious' to make it so. . . . [W]e find it particularly disingenuous of the Government to attempt to portray these arm movements as ominous. . . . Moreover, we are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception. . . . [T]he Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband.

United States v. Foster, 634 F.3d 243, 248-49 (4th Cir. 2011).

[9] *See generally* Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (permitting a police officer to execute a search for weapons where the officer reasonably believes that his safety or that of others is in danger).

justifications for those reactions often come only after the crisis has passed, and those justifications rarely capture the need for rapid action in a stress-filled environment. Thus, when an officer is asked why he confronted a particular person, the honest answer may be: "There was no smoking gun, but something was not right about this guy and this whole situation. I could not stand by and just ignore a potentially dangerous condition." While police may admit to fellow officers that they acted on their instincts,[10] they have been taught that they must provide a more rational explanation to a judge.[11] It is hardly surprising that police tend to fall back on familiar language that the courts have accepted in prior cases[12]—such as a police report that the suspect made "furtive gestures"; the encounter occurred in a "high crime area"; or the locale was a well-known "open-air drug market." On the other side, the citizen challenging the stop and frisk will often invoke terminology-describing encounters that courts had previously condemned—for example, "I was a victim of racial profiling." When all of these factors are combined—an emotionally stressful situation, each participant's distinct stake in the outcome, and the tendency of both parties to invoke conclusory legal terms rather than purely factual descriptions—the court is not likely to get a completely accurate picture of the disputed incident.

The solution to the multiple weaknesses of the current approach may lie in bypassing a witness's memory and credibility by invoking the cry of sports commentators—"Let's go to the tapes." In America, the National Football League uses instant

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[10] "'I know it when I see it' has a bad reputation in legal circles, but the reputation is undeserved. Sometimes, consider-all-the-circumstances standards work tolerably well in spite of their linguistic muddiness—for all the muddiness, bottom lines may be reasonably predictable." William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2175 (2002).

[11] *Terry*, 392 U.S. at 21-22 (1968) ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.").

[12] Craig S. Lerner, *Judging Police Hunches*, 4 J.L. ECON. & POL'Y 25 (2007) ("The legal system in practice rewards those officers who are able and willing to spin their behavior in a way that satisfies judges . . . .").

replay to monitor an official's judgment; on a world-wide basis, the professional tennis circuit uses "shot spot" to review a close call by a linesman. In similar fashion, courts can and should use videotapes to review a police officer's judgment to impose an encounter on an unwilling citizen. Video-photography has become so commonplace that, even if none of the suspects or bystanders on the street had a cell phone camera handy, we could require police officers walking city streets to be equipped with a camera to record all they see and do. Such cameras are becoming standard equipment on police squad cars, and the images they record frequently turn up on YouTube. Perhaps the most famous video of a confrontational clash between police and citizen is the video in the *Hiibel*[13] case, where the U.S. Supreme Court reviewed a scenario involving a police officer demanding identification from a motorist that insistently refused to provide it.[14]

The video in *Hiibel* was available for judicial review because cameras in police squad cars have become fairly standard equipment. It is only a small step forward to recognize that technology is at the point where we can equip officers on the beat with miniature video cameras in their badge or on their shoulder. It is not just James Bond or Batman who can have all those wonderful gadgets. With a video record of what actually took place out there on the street, a court is no longer totally dependent on the citizen testifying one way about the facts and the police testifying the other way.

II. INTERROGATION

In addition to recording street encounters between police and citizens, videos of police interrogation of suspects can be, and have

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[13] *See* Hiibel v. Sixth Jud. Dist. Court, 542 U.S. 177, 189 (2004) (finding that the arrest of a *Terry* stop suspect for refusal to identify himself, in violation of Nevada law, did not violate the Fourth Amendment prohibition against unreasonable searches and seizures, and that defendant's conviction for refusal to identify himself did not violate his Fifth Amendment right against self-incrimination).

[14] *See id*. at 181, 188 (stating that a Nevada statute requiring identification is reasonable after balancing the intrusion on the individual's Fourth Amendment rights against the legitimate government interest); *see also* Felix Tam, *Encounter Between Larry Hiibel and Nevada Highway Patrol*, YOUTUBE (May 2, 2007), http://www.youtube.com/watch?v=APynGWWqD8Y (showing a Nevada Highway Patrol officer encountering a rancher and arresting him because he refuses to cooperate).

proven in the past to be, devastating evidence when they are produced in court. When the U.S. Supreme Court began reviewing police interrogation practices in the 1950s and 1960s, one troubling aspect for the Court was its inability to reconstruct exactly what happened in an isolated interrogation room where the suspect had been cut off from all contact with the outside world. Even more so than street encounters, which may be observed by bystanders, only the suspect and the police could offer their version of what transpired during an interrogation inside the police station. In the years leading up to the *Miranda* decision, much of the defense bar urged the Supreme Court to ban police-dominated interrogations and permit the police to question suspects only in the presence of a lawyer or magistrate.[15] When the Court crafted the *Miranda*[16] decision, it continued to permit unsupervised interrogations but cautioned that because the police were responsible for creating the isolated interrogation, the burden rightly fell on them to offer some *objective* evidence of a crucial aspect of the interrogation[17]—i.e., that the suspect had been properly warned of his constitutional rights and made a voluntary decision to waive those rights and submit to interrogation. For decades, the objective evidence usually consisted of a written *Miranda* waiver form signed by the defendant. Today, these forms are increasingly being replaced by videos of the entire interrogation.[18] The videos, unlike the written waiver forms, disclose not only what was said, but also the manner in which the *Miranda* warnings were delivered.

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[15] The A.C.L.U.'s amicus brief in *Miranda* proposed that only "the presence of counsel in custodial interrogation" would provide adequate protection to an arrested person. RUSSELL L. WEAVER ET AL., CRIMINAL PROCEDURE: CASES, PROBLEMS, AND EXERCISES 481 (West 4th ed. 2009).

[16] *See* Miranda v. Arizona, 384 U.S. 436, 445 (1966) (finding that statements obtained from defendants during "incommunicado interrogation . . . in a police-dominated atmosphere . . . without full warnings of constitutional rights" are inadmissible as a violation of the Fifth Amendment protection against self-incrimination).

[17] *Id.* at 475 ("Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.").

[18] Some states require the police to electronically record interrogations. Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 528 (2006).

When I discuss the *Miranda* decision with my law students, I point out statistics indicating the confession rate has not declined in the years following *Miranda*. Students often look incredulous and ask, "Why would anyone confess after being given the *Miranda* warnings?" The answer can lie in form over substance because of the varied manner in which those *Miranda* warnings are delivered. Suppose the police dispassionately and carefully explain:

> You have the right to remain silent, what you say can be used against you, so are you sure that you want to talk to us? And you can have a lawyer free of charge. Are you sure you do not want to talk to a lawyer before answering our questions?

If the warnings were given in this fashion there might well be a significant drop in the number of voluntary confessions given by suspects. But that is not the way *Miranda* warnings are typically given in the real world. Many police grudgingly comply with the letter of the law by giving the warnings in a rapid-fire, staccato form, with run-on sentences that sound something like this:

> You have the right to remain silent anything you say can and will be used against you in a court of law you have the right to an attorney if you cannot afford one, one will be appointed for you, why did you do the crime?[19]

When I suggest this kind of delivery to my students, they sometimes wonder if I am exaggerating to make an academic point. I then bring the "real world" into the classroom by playing an actual video of officers giving "rapid-fire" *Miranda* warnings to a suspect in Richmond, Virginia. When that tape was played in the courtroom, the judge viewing it asked: "Is [the officer] speaking in tongues?"[20] So, "going to the tape" and objectively

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[19] A run-on sentence which combines the *Miranda* warnings with immediate questioning—"Why did you do it?"—is possible because the Supreme Court has moved from its initial requirement that the police obtain a waiver, to its current approach of placing the burden on the suspect to cut off questioning by invoking his right to silence or to a lawyer. *See generally*, Laurent Sacharoff, Miranda*'s Hidden Right*, 63 ALA. L. REV. 535 (2012).

[20] *See* Commonwealth v. Benjamin, 507 S.E.2d 113, 115 (Va. Ct. App. 1998) ("The manner in which the detective read the statement to [the defendant] was so

viewing the actual interrogation that took place eliminates the weaknesses inherent in attempts of police and suspects to verbally reconstruct the scenario. Again, technology itself is neutral because the same recording that reveals how the police conducted the interrogation will also disclose how the suspect behaved.

Certainly the most famous videotapes of interrogations were the 2002 interrogations of two men believed to be top al Qaeda operatives—Abu Zubaydah and Abd al-Rahim al-Nashiri—at a clandestine CIA prison in Thailand.[21] The men were detained on suspicion of conspiracy in the September 11, 2001 attacks and other terrorist activities. They were subjected to "enhanced interrogation" tactics, including waterboarding (simulated drowning).[22] In determining whether or not the waterboarding techniques used constituted torture,[23] the videotapes would have been the best evidence. However, the videotapes were destroyed before the courts could examine them, and there were no prosecutions of the interrogators or the officials who destroyed the tapes. [24]

In contrast to the missing record of "enhanced interrogation" techniques, videos and photographs played a major role in bringing criminal charges against the prison guards at Abu Ghraib. When visual evidence of their abuse of prisoners surfaced, both officers and enlisted personnel were officially reprimanded, court martialed, and dishonorably discharged from the military.[25]

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unintelligible that it was functionally equivalent to not reading to [the defendant] the *Miranda* rights.").

[21] *See Times Topics: Abu Zubaydah*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/z/abu_zubaydah/index.html?8qa (last updated Apr. 20, 2009); *Times Topics: Abd al-Rahim al-Nashiri*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/n/abd_alrahim_al_nashiri/index.html?8qa (last updated Oct. 25, 2012).

[22] *Id.*

[23] The Bush Administration maintained that the enhanced interrogation techniques were not torture, but after World War II, the United States and its allies prosecuted some Japanese soldiers for torture involving simulated drowning. *Id.*

[24] The former head of the CIA's clandestine service, Jose Rodriguez, admitted that he authorized the destruction of ninety-two interrogation tapes. He defends that decision and the use of the enhanced interrogation methods in his recent memoir. *See* JOSE A. RODRIGUEZ JR., HARD MEASURES: HOW AGGRESSIVE CIA ACTIONS AFTER 9/11 SAVED AMERICAN LIVES (2012).

[25] For example, Colonel Thomas Pappas was relieved of his command and received a General Memorandum of Reprimand that effectively ended his military career. *See*

Watching the watchers brought the culprits to justice and, just as importantly, should have a strong deterrent effect on potential government misconduct. Certainly one would expect that in the future, prison guards will think twice about abusing prisoners when the guards realize that their abuse might eventually turn up on television and on the front pages of the world's newspapers.

III. USING TECHNOLOGY TO PROTECT PRIVACY

As earlier noted, individual freedom and government efforts to promote collective security often conflict. However, there are at least some instances when technology can further both interests. For example, technology can enhance government efforts to protect against security threats, while simultaneously lessening the intrusion upon individual rights. Just a few months ago, the U.S. Supreme Court decided *Florence v. Board of Chosen Freeholders*,[26] holding that strip searches of arrestees to be placed in the general population of a detention facility are constitutional even in the absence of reasonable suspicion that the arrestees possess either weapons or contraband.[27] Apparently, the Supreme Court felt compelled to make an all-or-nothing choice and thus concluded that keeping prisons secure from the introduction of weapons and drugs outweighed an individual's privacy rights.[28]

Abu Ghraib US Colonel Reprimanded, BBC NEWS (May 12, 2005, 3:59 AM), http://news.bbc.co.uk/2/hi/americas/4539033.stm.

Specialist Charles Graner was found guilty of conspiracy to maltreat detainees, failing to protect detainees from abuse, cruelty, and maltreatment, as well as charges of assault, indecency, adultery, and obstruction of justice. He was sentenced to ten years in prison, dishonorable discharge, and reduction in rank to private. *See Graner Gets 10 years for Abu Ghraib Abuse*, MSNBC (Jan. 16, 2005, 8:34:42 AM), http://www.msnbc.msn.com/id/6795956/ns/worl_news-mideast_n_safrica/t/graner-gets-years-abu-ghraib-abuse.

Staff Sergeant Ivan Frederick pled guilty to conspiracy, dereliction of duty, maltreatment of detainees, assault, and committing an indecent act in exchange for other charges being dropped. He was sentenced to eight years in prison, forfeiture of pay, and a dishonorable discharge. *See Soldier Gets 10 Years for Abu Graib Prison Abuse*, ARMY NEWS SERV. (Jan. 19, 2005), http://web.archive.org/web/20050916090659/http://www4.army.mil/ocpa/print.php?story_id_key=6764.

[26] Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012).

[27] *Id.* at 1523.

[28] *Id.* at 1520-23.

An all-or-nothing choice between prison security and personal privacy might not have been necessary if the Court had been willing to examine the type of surveillance technology used to screen passengers at airports. Instead, the Court distained consideration of modern technology while sanctioning primitive methods of carrying out security searches at prison facilities. The dissent in *Florence* pointed out how extensive—if not extreme—those searches are as described in a prison manual detailing how to conduct such searches:

> [A] visual inspection of the inmate's naked body. This should include the inmate opening his mouth and moving his tongue up and down and from side to side, removing any dentures, running his hands through his hair, allowing his ears to be visually examined, lifting his arms to expose his arm pits, lifting his feet to examine the sole, spreading and/or lifting his testicles to expose the area behind them and bending over and/or spreading the cheeks of his buttocks to expose his anus. For females, the procedures are similar except females must in addition, squat to expose the vagina.[29]

This extensive sacrifice of individual privacy and dignity is particularly troubling because these extreme measures protect against a threat that may be minimal. A study of 23,000 persons admitted to the Orange County correctional facility between 1999 and 2003 reported that "[o]f these 23,000 persons . . . [police] encountered three incidents of drugs recovered from an inmate's anal cavity and two incidents of drugs falling from an inmate's underwear during the course of a strip search."[30] This translates into a .0001% success rate achieved at the expense of humiliating 23,000 people.

The trade-off between individual privacy and institutional security might be better resolved by utilizing technology that adequately serves the government's purpose with less intrusion upon individual rights. For example, in place of a physical examination of body cavities, metal detectors, specifically the Body Orifice Screening System (BOSS) chair, could be used to

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[29] *Id.* at 1525 (Breyer, J., dissenting).
[30] *Id.* at 1528.

identify metal hidden within the body.[31] Combine such technology with highly reliable drug sniffing dogs, and protection against both weapons and drugs can be achieved without the need for dehumanizing body cavity searches.

CONCLUSION

We can no more stop the advance of technology than we can stem the ocean's rising tide. We can, however, pick our battles. Courts can be asked to ban or limit the most egregious technological threats to personal privacy.[32] In the same manner that legislation commonly prohibits arming police helicopters, an aroused electorate can legislate against excessive surveillance such as banning an all-seeing air force of drones. Lastly, we can seek out opportunities for using technology to enhance individual rights. The same aerial drone that records a citizen's private conduct may also disclose a rogue cop's racist encounter with minority citizens. In the end, utilizing technology to watch the watchers may be the best revenge.

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[31] *Id*.

[32] *See* United States v. Jones, 132 S. Ct. 945 (2012) (holding that police cannot, without judicial approval, place a GPS device on a citizen's automobile).