

# Photography's Transformation: Its Influence on Culture and Law

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## I. Introduction

This era's revolutionary remaking of cameras and picture-taking dramatically deepened photography's influence on diverse aspects of our culture and institutions, from popular habits and expectations all the way to fine points of constitutional law. That broad reach embraces both private and public phenomena within contexts as varied as family celebrations and prevention of terrorism. This essay selects two subjects to illustrate the radically different ways in which photography's technological transformation has stamped or may stamp prominent facets of our personal lives and political-legal system.

The essay first speculates about plausible consequences of the new digital photography in enabling people to record life's events from the ordinary to the startling, through devices as commonplace today and as easy to operate as the smartphone. A few decades or even centuries later, members of new generations may consult those recordings to deepen their knowledge about their ancestors' lives, and indeed more broadly about their family history. They may do so recurrently, perhaps as part of family or religious celebrations, to stay in touch with their past. Through videos (audio and visual devices) that have become today's standard fare, descendants could deepen the understanding of family history that earlier still photography had offered.

Such pictures were generally posed and formal, and often taken at special occasions with cumbersome photographic equipment. Picture-taking became an "event," an interruption of the normal flow of family life that frequently was thought about in advance by those involved. The people photographed were very aware of what was happening. Today's ubiquitous and automatic digital cameras can be transported in pockets and rapidly deployed. They seem likely to capture more casual, unplanned and perhaps revealing behavior and interactions.

What consequences might flow from such novel and easy access to prior generations? What effect would such encounters with the past have on people's sense of their relationship to the departed, or indeed of their own identity? Ranging beyond the family, what information might the availability of such recordings bring to bear on the understanding of social and political history?

The second subject addresses a radically different phenomenon: the influence of modern photography and related technologies on public policy, personal rights, and the legal system. Unlike the earlier discussion exploring some possible effects of digital photography on people who view it decades or centuries later, this topic explores its current effect on those who (perhaps unknowingly) are being photographed or who are aware of the possibility of their being photographed. We shift our attention from the viewers to the viewed.

While including both private and public parties, this discussion will focus on governmental operation of systems of surveillance that monitor public spaces in an effort to curb common crimes and terrorism. Walking on streets or in parks, among occasional others or even within crowds, an individual may feel alone, ignored by and even oblivious of surrounding strangers, and free of interference with his privacy by photographic recordings that may later become widely available. Current means of surveillance such as closed circuit television (CCTV), together with the uses to which government can put the information thereby gathered, clearly impinge on privacy.

Today the commonplace encounters between pedestrians or cars and surveillance cameras – sometimes concealed, but in any event not readily observable - have stirred public argument over the appropriate breadth of an individual's "right" to privacy in public spaces. Such argument lies at the core of a developing strand of constitutional adjudication. Unlike the first topic, judicial decisions here play a significant role. The same issues have come to figure in the business of Congress and state legislatures.

In this essay, these two independent topics serve to illustrate selective features and applications of the new technology, particularly digital photography. Other important features unexamined by the essay readily come to mind. For example, surveillance by private parties that is random and adventitious may usefully complement systematic and ongoing surveillance by governmental authorities. Individuals who just happen to be in a certain place at a certain time have been able to record on their smartphones a growing number of interactions between police officers and private citizens that have involved violence, ended in injuries or deaths, and raised questions of racial discrimination by the police. Numerous public authorities now require police officers to wear body devices that photograph all interactions. This accelerating use of digital cameras assists both law enforcement and the protection of individual rights.

Although the essay focuses on photography, its illustrations draw on other advances in technology that may complement photography or function independently of it. The first discussion includes audio as well as visual recordings; seeing and hearing through digital devices have become companion experiences. In the second discussion, investigative strategies of government such as surveillance reach well beyond photographic devices such as CCTV to include other technologies like Global Positioning System (GPS) tracking devices.

## II. Cameras, Memory and History

In a strikingly short period, the digital camera has permeated the everyday rhythms of life by instituting fresh practices. Its benefits are perhaps more widely perceived than concerns stemming from its use. The camera reaches the market at prices that many can afford, attracting a vast body of consumers. Together with other novel features of modern life like GPS devices and the worldwide web (all of which completely elude most users' understanding of their principles of operation), smartphones have come to seem indispensable to people's personal and working lives.

Given its recent arrival, the most startling feature of the digital camera may be its ubiquity. These cameras are likely to be embedded in smartphones, tablets and related devices, as one among an abundance of those devices' offered services. In this new world we inhabit, we are all photographers, we are all photographed. Grandchildren, whose grasp of smartphones dates from their kindergarten year, learn to their astonishment that their grandparents have managed to enjoy a well-informed life even without them.

Compared with the more deliberative process of picture-taking a generation ago, how effortlessly one photographs today. The comprehensive programming of highly automated digital cameras demands of the user no more than to "point and shoot." Photography does not stand alone in this regard. Our modern capacity to photograph on the spur of the moment parallels our heightened capacity to listen to music almost at will and wherever we want, itself an abrupt departure from millennia of hearing music only when the listener made it or was within earshot of those who did. The modern appetite for prompt and effortless realization of so many desires, in this case merely by the agency of one pocket-size device, seems insatiable.

The uses of the camera extend as far as the photographer's imagination. It readily yields the adequate image desired by most amateur photographers who take pictures as a matter of course, upon their slightest whim, almost reflexively. Smartphones' capacity to take videos expands the photographer's repertoire to include the flow of an entire event and ongoing human interaction rather than only isolated fragments of that event through still pictures. Human memory no longer has to bear the full burden of recalling yesterday's or last year's adventure. On the threshold of its third century of use, photography has assumed a far larger part of that task.<sup>1</sup>

Let me illustrate my speculation about some of the consequences of our digital world by recollecting a family event long ago. My mother, nephew and I were having great fun playing impromptu roles in a radio drama that we were in the process of inventing. The effort, we thought, merited a recording. While commonplace today, sound recorders were then rare in households, and surely couldn't fit in a pocket. Good-quality recordings generally required bulky reel-to-reel machines. After our escapade, I put the reels away and forgot about them.

Years after my mother's death, I came across the reels and recalled our fun-making. Of course, I immediately wanted to hear the recording, but strong second thoughts took hold. My generation and far earlier ones were accustomed to seeing still photographs of deceased relatives and friends. Of course, for centuries before photography became prominent, many people could view ancestors in paintings or sculpture – even if portraits were carefully posed and often expressed more the artistic ambitions of the painter than the character of the ancestor. Such pictures complemented traditional ways of remaining in touch with the dead – memory, memorials, observance of a death's anniversary by visiting the cemetery, and rereading ancestors' intimate diaries and letters.

But my generation was not accustomed to "hearing" its ancestors. The novelty of the intimate experience that I was considering gave me pause. Perhaps I felt that my mother's

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<sup>1</sup> For illuminating essays on photography's earlier development and relationship to culture and politics, see Susan Sontag, *On Photography* (Farar, Straus and Giroux, 1973).

voice would provoke a more vivid and emotional reaction than would merely seeing her picture. It might suggest her very presence. Whatever the reasons, I decided not to listen to the recording but rather to honor the boundary established over the years between my life and my mother's death.

In these circumstances, the significance of devices like sound recorders for remembrance of the dead would depend on the stage of technological development and the degree of popular familiarity with that development. What are our habits and experiences at a given time? What practices are habitual and thus unlikely to raise a novel issue? What strikes us as a novel experience that may generate unease and make us hesitate? The viewing today by younger people of videos showing deceased loved ones may offer them no more dramatic or distinctive an experience than did my own browsing decades earlier through the family album.

Devices like smartphones (not to mention their successors-to-be) may vastly expand our knowledge of the past, surely including our ancestry. Perhaps these devices will partly fill the void in our knowledge left by the near disappearance of personal writing. Diaries or intimate correspondence of a probing and self-examining character were long a prime means of enlightening their authors' descendants – and sometimes the literary public as well.

Today videos might generate fresh thoughts about a family's past as they portray people in comfort and in poverty, as educated and uneducated, as self-assured and subservient, in conversations and play, smiling and glowering, celebrating and mourning, connecting with others or guarding their distance. Perhaps viewing such recordings would figure in annual rituals of remembrance to complement the lighting of a memorial candle or the visit to an ancestor's gravesite. Perhaps patients would consult these videos to stimulate their own memories before the start of the therapeutic hour.

How might we apply these speculations to more remote ancestors? Suppose that our present technology and cameras had become available by the mid-19<sup>th</sup> century. How much richer could our knowledge about family history become as we watch videos carrying us back at least to our great grandparents, observing and listening to them in their familial, social and cultural environments. Within an immigrant country like the United States, that capacity to explore history would transport Americans to their ancestors' pre-emigration lives in foreign countries, tongues and cultures.

We can modify my image by trying to imagine life 150 years ahead, when our great-great-grandchildren will be observing events in our lives with some incredulity. The videos handed down over generations might become a familiar part of a family's legacy and education, deepening awareness of historical roots, and likely influencing how family members would understand their own identity. Perhaps such videos would expand family trees to include more remotely connected people who would previously have been seen as strangers, thereby strengthening feelings of human connectedness. Perhaps observing and hearing ancestors participating in ceremonies that survive to this day would reinforce particular identities such as religious ones: saying grace at table, attending a baptism, celebrating the Seder, breaking the Ramadan fast.

Such imagined consequences of the new video photography seem to be plausible, but surely not inevitable. The thoughts and feelings stemming from the viewing of much earlier family recordings might be polar to what has just been suggested. Perhaps a viewer will be appalled by aspects of what the recordings reveal and distance herself more deliberately from the world of ancestors. Perhaps observing earlier family participation in religious rituals will reinforce the viewer's secular orientation. The felt urge may be to escape the past rather than to imitate and conform to it.

Moreover, predictions that the expanding reach of modern photography will affect people's views about their ancestors rest on a problematic assumption. The enthusiastic, indeed profligate use of today's cameras may create an unmanageable mass of videos. The abundant photographers may lack the skill, ambition or energy necessary to bring order to that mass, in order to pass on to their children a collection sufficiently informative and brief to hold their attention.

Of course, the appeal of today's video cameras extends well beyond family boundaries. Consider formal education. Instruction in American history, for example, now assigns a modest role to photography. If we again imagine that today's sophisticated devices were broadly available by the mid-19<sup>th</sup> century, our present teachers could complement books and lectures with videos: haying the fields, discussions among foot soldiers or slaves during the Civil War, a factory production line, a high school class learning American history. Perhaps the public media of the earlier period produced documentaries and newscasts about such classic events as the Lincoln-Douglas debates. What different insights into the past might such teaching materials generate by endowing study with an immediacy and fresh sense of discovery?

### III. Public Surveillance and Privacy

The essay's focus here shifts from digital photography's effect on its viewers to its effect on the people being photographed. Devices like smartphones or CCTV make it possible for people to be routinely photographed in public spaces without their consent or even their knowledge. Such uninvited and perhaps unwanted picture-taking has become so ordinary a feature of urban life that a high percentage of people expect it. No longer can we speak confidently of disappearing into a crowd. It is ironic that one of the reasons for prior generations to flee rural life and relocate to the booming cities was to escape the ever-present constraints of smaller communities and achieve greater privacy in their personal lives. The anonymity conferred by city life could expand freedom of action. Today, however, the individual in cities' public spaces loses some of that privacy,

The common justifications for governmental surveillance are broadly understood: enhance public safety, particularly through monitoring a vast number of people in public spaces in order to reduce the likelihood of criminal conduct, as well as to assist in identifying the criminals. Increasingly, surveillance also aims at thwarting terrorism.<sup>2</sup> In public places,

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<sup>2</sup> See Fergal Davis, Nicola McGarrity and George Williams (eds.), *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (Routledge, 2014)

the operation of a surveillance system is predominantly governmental, although devices like CCTV may be privately owned and placed at entrances to and inside stores and offices. Urban dwellers who simply leave home, commute to their places of work, have lunch, and perhaps shop before returning home may have their pictures taken dozens of times by an integrated network of cameras. The practice was not born yesterday. More than a decade ago, about 100,000 fans were photographed as they entered a stadium to enjoy the annual “superbowl” game. These face shots were speedily checked against government files with the help of biometric and other modern means of identification.

Now that government has entered the surveillance business with ambitious goals, do we regret the loss of an earlier feeling that in public spaces we were unlikely to have our actions monitored and recorded? Complaints have escalated that “Big Brother” may be snooping into what were once our private lives as we go about our daily affairs. From the perspective of erosion of privacy, what can be done to keep the diverse strategies for surveillance in appropriate check?<sup>3</sup>

One might argue that public spaces -- by which I mean principally places open to the public -- are fair game for surveillance by any governmental agency or private person or institution. Those present in the public arena, the argument asserts, must know that they have left any right to privacy at home. People are aware of their exposure to the eyes of countless strangers when in streets or parks or at government agencies, as well as at privately owned institutions attracting customers seeking goods, services or entertainment.

Quite a range of such places comes to mind: gay bars, commercial stores, churches, theatres and stadiums, psychiatrists’ offices, headquarters of associations, abortion clinics, investment advisers, massage parlors, and sites for mass demonstrations for a political cause. At certain locations, the likelihood of being photographed by a public authority may soar. Street cameras, for example, may target the entrances to institutions whose activities and visitors may interest governmental security services. Of course constitutional issues other than privacy may arise in these last circumstances, such as governmental surveillance’s interference with individuals’ freedoms of expression and association.

The U.S. Government’s role in gathering information through surveillance, and determining the uses to which it will be put, spurs intense political debate. Legislative investigations and massive unauthorized disclosures fuel that debate as we learn how fragile our privacy has become in other everyday activities such as making phone calls, dispatching emails, or searching for information on the web. Federal and state legislation and judicial decisions wrestle with the implications for individual privacy of myriad forms of surveillance. Much new law, together with new institutions to administer and enforce it, are in the making.

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<sup>3</sup> The spreading practice of photography raised concerns about its effects on individual privacy in the very century of its invention. A landmark, extremely influential article about a right to privacy in the American legal system was published in 1890: Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193. The United States Constitution makes no mention of such a right. The authors note concerns about interferences with privacy stemming from photography, referring for example to “instantaneous photographs” invading the “sacred precincts of private and domestic life”. They argue that “existing law” affords a principle supporting protection of individual privacy from invasion by the photographer. They caution that the “latest advances” in photographic art have made it possible to take pictures “surreptitiously”.

In some familiar contexts such as the wiretapping of telephonic communications, a network of statutory regulation has developed that spells out the governing rules and thereby lessens demands on the courts to develop the law in this area through constitutional adjudication. The present discussion, however, concentrates on judicial participation in the broad national debate at the constitutional level. It illustrates today's problems by examining the 2012 decision of the United States Supreme Court in *United States v. Jones*.<sup>4</sup> Although this case does not involve photography, it examines another modern mode of surveillance posing analogous issues of privacy.

Although the U.S. Constitution does not mention a right to privacy, that right nonetheless figures importantly in a well-known field of constitutional litigation. The Fourth Amendment to the Constitution declares that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." As expounded in judicial decisions and scholarly writings, the amendment forbids governmental action that is found to constitute an "unreasonable" search and seizure in order to protect a right to privacy against governmental intrusion. The home is the paradigmatic place to be protected against (unreasonable) intrusion. The "right" to privacy articulated by courts in these cases is understood to inform and underlie, or to be derived from, the Fourth Amendment's provision.

The amendment's primary application has involved governmental investigation of crimes and the related enforcement of the criminal law. In most cases, the law-enforcement officer making the search or seizure must have secured an official and valid warrant ("search warrant") authorizing it. Absent the necessary warrant, the search or seizure is judged unreasonable.

The decision in *United States v. Jones* illustrates the interplay of different lines of reasoning used by the Justices to address privacy, even though each of the three opinions in that case accepted the Fourth Amendment as the constitutional point of departure. The opinions follow familiar methods of interpreting constitutional text, and of developing different tests or standards for handling the many questions that stem from the amendment's application. More generally, the three opinions wrestle with the dilemma of applying a centuries-old constitutional text to a modern society in the grip of rapid technological advances that raise issues implicating that text.

Prominent among the methods of surveillance is the GPS unit. When the unit's receiver is carried, knowingly or unknowingly, by a person or vehicle under investigation, it enables the governmental monitor to track the movements of that person or vehicle. GPS may be used as an alternative to or a complement of photographic surveillance through such standard devices as video cameras and CCTV. Depending on the context, each system offers distinctive advantages.

In *Jones*, a federal government agency secretly installed a GPS tracking device on the underbody of defendant's car, and thereby monitored the car's movements for 28 consecutive days. The agency failed to obtain a proper warrant to engage in this conduct. Partly on the

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<sup>4</sup> 565 U.S. 400.

basis of evidence derived from this surveillance, the government won a conviction in federal court for the trafficking of drugs. An appellate court reversed the conviction on the ground that the surveillance violated the Fourth Amendment. The case then came to the Supreme Court. All nine Justices agreed that the conviction should be reversed, but for differing reasons. The case produced one opinion for the Court itself, and two concurring opinions.

The Court's opinion, written by Justice Scalia and joined by four other Justices, followed a traditional path of reasoning in such cases. Understanding the car itself to constitute an "effect" within the terms of the Fourth Amendment, it viewed the attachment of the GPS device as an illegal "trespass" (the government had not obtained a proper warrant to engage in this conduct) on defendant's property. The attachment therefore constituted an "unreasonable search" within the meaning of the amendment. For that reason, evidence gathered through the surveillance had to be excluded from the trial. Justice Scalia quoted approvingly from an earlier decision based on the Fourth Amendment to the effect that the Court must preserve "that degree of privacy against government that existed when the Fourth Amendment was adopted."

Well before the decision in *Jones*, Supreme Court opinions had become more nuanced and complex in their consideration of both the kind of conduct that constituted a "search" and the notion of privacy. The use of electronic devices to investigate a suspect could not be readily fitted into the familiar reasoning of judges in cases of physical intrusion (a trespass), reasoning to which the fundamental notion of the protection of property rights was germane. In the new circumstances of electronic devices, what property was being protected against what kind of intrusion? Did government's operation of these devices amount to a "search" under the Fourth Amendment? Confronted with such vexing questions, Justices had reached beyond the notions of physical intrusion and trespass to develop a different test for determining if the amendment had been violated: whether the government's conduct violated a person's "reasonable expectation of privacy."

Justice Scalia stressed that the "reasonable expectation" test was an additional rather than exclusive way to determine whether a search had occurred. Without a search warrant, physical trespass to a "home" or an "effect" continued to be sufficient to find a search unreasonable. The opinion did however speculate about how the law might develop if the government tracked a person through electronic means without any tangible interference with property, so that no claim of a traditional trespass (such as the attachment in *Jones*) was possible: "It may be that achieving the same results [of collecting incriminating evidence by following a person's movements] through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question." Note that this potentially far-reaching observation suggests neither what legal argument might lead to such an imagined decision, nor what constitutional provision would serve as its foundation.<sup>5</sup>

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<sup>5</sup> All three opinions can be read to open to one or another degree the question whether judicial decisions in this field of electronic surveillance in public spaces should continue to rest on the Fourth Amendment as the only foundation for arguments about privacy and constitutionality. The Supreme Court has developed arguments and doctrine independent of the Fourth Amendment to declare a constitutional right to privacy – though in limited and very different contexts. Those decisions, mostly involving states and state action rather than the federal government, are sometimes grouped within the

In her concurring opinion, Justice Sotomayor agreed with the Court that the trespass was sufficient to find a violation. Nonetheless, she criticized the Court's opinion as too formal and technical in its effort to adhere to traditional notions of trespass to property. In the present world of electronic surveillance, she urged a different approach. Contemporary modes of surveillance that do not require physical intrusion into privately-owned space may nonetheless violate a person's "subjective expectation of privacy that society recognizes as reasonable," particularly if the surveillance is designed by the government to learn more about the conduct of a specific person or institution, rather than to cover a public place (like a park) in the interest of general safety. For example, a surveillance camera might focus on the entrance to the headquarters of a particular organization in order to learn more about its membership. Or surveillance may track a particular car's movements through the use of license plate readers.

When referring to the range of facts about private lives that long-continuing surveillance of a specific person or a small group might reveal, Justice Sotomayor asks "whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government" to learn such information – for example, religious and political commitments or sexual practices. In deciding whether the government has unconstitutionally invaded privacy, Justice Sotomayor would consider "the existence of a reasonable societal expectation of privacy in the sum of one's public movements."<sup>6</sup>

In exploring such issues, a broader range of constitutional issues becomes relevant. For example, people being surveilled or fearing surveillance about some aspect of their lives may become more cautious about engaging in "public" activities that could enable others to learn more about their private lives: the company they keep, the meetings they attend, the institutions they join, their sexual partners, their place of worship. Long-term surveillance compounds the problem, for it casts a wider net and enables operators of a monitoring system to draw important links among what otherwise might appear as unrelated actions. As Justice Sotomayor notes, an awareness that government is watching "chills associational and expressive freedoms." Her opinion opens the possibility that such kinds of public surveillance

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rubric "substantive Due Process," referring to the Due Process Clause of the Fourteenth Amendment that applies to state governments. The leading decisions involve primarily issues related to marriage, family, procreation and sexual relations. They locate the source of a constitutional right to privacy in several related but distinct ways, referring to or explicitly relying on: the Liberty clause of the Fourteenth Amendment, particular provisions of the Bill of Rights (the first ten amendments) such as the First Amendment (freedom of expression) and the Fourth Amendment, and a "penumbral" area formed by emanations from several rights declared in the Bill of Rights. Some statements in the Jones opinions could be understood to express sympathy with or at least openness to consideration of this approach. Leading decisions that found restrictive state regulation to be unconstitutional and that were based on such a right to privacy include *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to use contraceptives) and *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion, subject to stated conditions).

<sup>6</sup> Following the Jones decision, and based partly on comments such as those of Justice Sotomayor, several scholars have suggested that the Court may be moving towards a "mosaic theory" of the Fourth Amendment under which courts, when inquiring whether the surveillance at issue constituted a "search" within the meaning of that amendment, would look not for one discrete act that amounted to a search (such as the attachment to a car of the GPS device, as in this case) but to the surveillance in its totality, including elements such as relationships among its different components and the duration of such monitoring. That is, the court might find a "search" in the aggregate of the government's acts, in a sequence of discrete acts which in their totality led to important information and constituted a search. See Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311 (2012); Monu Bedi, *Social networks, Government Surveillance, and the Fourth Amendment Mosaic Theory*, 94 B.U.L. Rev. 1809 (2014).

might be found to violate a constitutional right to privacy, wherever its source in the Constitution might be located.

Justice Alito (joined by three members of the Court) wrote the other concurring opinion. He too criticized the Court's opinion for drawing on the long-established doctrine of trespass in an artificial and unconvincing way. In this case, it was preferable to inquire whether reasonable expectations of privacy were violated by such long-term monitoring. The tracking of the car for a month "involved a degree of intrusion that a reasonable person would not have anticipated." The opinion notes that public concern about these technologically sophisticated intrusions into areas of privacy may lead to political pressure for legislative regulation offering some degree of precision and protection.

Many countries now practice public surveillance and confront these problems, including numerous parties to the European Convention on Human Rights. Not surprisingly, the European Court of Human Rights has been called upon several times to determine the practice's legality. Its decisions, delivered as the judicial organ within a regional organization of considerable political diversity, offer fruitful comparisons with *Jones*. In both of the following cases, the European Court focuses on Article 8 of the Convention, which provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." No interference by a public authority with this right is permitted unless it is "necessary in a democratic society" in the interests of national security and public safety, for prevention of disorder or crime, or for the protection of the rights and freedoms of others.

A 2003 decision, *Peck v. the United Kingdom*,<sup>7</sup> explores these issues. A borough Council in the U.K. operated a CCTV system in public areas, and maintained the tapes for a set period before destroying them. The applicant, a U.K. citizen, suffered from depression. One night, while carrying a kitchen knife, he walked down a street monitored by a camera. In an unsuccessful attempt at suicide, he cut his wrists. In view of its placement, the camera did not record this act, although the tapes did show the applicant soon afterwards while he was still holding the knife. The monitoring operator notified the police who soon arrived, released him without charge, and brought him home.

Over the following months, the CCTV footage including the applicant's picture was shown several times on TV in order to demonstrate to the public the effectiveness of this surveillance system in alerting the police to potential crimes. Those in charge of the CCTV tapes did not take adequate steps to mask the applicant's face before releasing the tapes for broadcast. To his shame, family, friends, and neighborhood residents were able to recognize him acting in a way that he had assumed would never be observed by others. The applicant initiated administrative and judicial proceedings, alleging an unwarranted infringement of his privacy through the public disclosure on television. Failing to gain the relief he sought in the U.K., he brought the case to the European Court of Human Rights.

That Court's decision turned on its interpretation of Article 8's justifications for interference with the right to privacy, particularly the justifications concerning national security and public safety, and the prevention of disorder and crime. The opinion referred to

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<sup>7</sup> ECHR, Application No. 44647/98, Judgment 28 January 2003

the Court's observations in its earlier decisions that facts about a person such as his name and sexual life, as well as his rights to personal development and to establish relationships with other human beings are "important elements of the personal sphere protected by Article 8. . . . There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life.'" The opinion noted that governmental photographing of events in a public place like a street does not itself constitute an interference with the protected right if the visual data is not recorded and preserved. Recording with the possibility of later use of the footage "may give rise to such considerations." Indeed, in this case the applicant complained neither of being photographed by the CCTV camera nor of the creation of a record, but only of the later public broadcasting without his consent and without an effort to conceal his identity.

Given the context of a nighttime walk and the applicant's mental distress, the opinion concluded that the governmental authority's conduct leading to the applicant's public identification went beyond any expectation the applicant might have had. The disclosure of the relevant footage constituted a "serious interference" with the right to privacy. The government's justifications for this interference failed to satisfy the conditions stated in Article 8. The Court awarded damages to the applicant.

In *Uzun v. Germany*,<sup>8</sup> the applicant's movements and relationships were tracked through a combination of high-technology methods, but the applicant challenged only the lawfulness of surveillance by means of GPS. That surveillance, which led to the government's storing the collected data, continued for about three months. Information thereby gathered was used to prosecute the applicant. Stressing such factors as the long period of tracking, the Court found that the government authorities had interfered with the applicant's "private life." However, taking into account the seriousness of the crimes investigated as well as the limitations on surveillance that German legislation imposed in the interests of privacy, the Court decided that the interference was justified under Article 8.

Note in these cases the relatively straightforward reasoning of the European Court of Human Rights, interpreting and applying a treaty that explicitly provides a right to privacy and that indicates in general terms what justifications for interference with that right are permitted. Opinions of the Court within this legal structure can follow an ordained sequence of thoughts, moving from a statement of facts to the issue of interference, and finally (if there is found to have been an interference) to the question of justifications. Compare this characteristic structure of opinions of the European Court with opinions of Justices of the U.S. Supreme Court who, lacking guidance from authoritative constitutional or statutory provisions about the structure of an opinion and about what justifications are relevant, compose their opinions in freer and more diverse ways. Moreover, in this case, the Justices do not restrict their views to the question of privacy. Rather they feel constrained to use the very different constitutional text about "search and seizure" as the formal point of departure for addressing the problem of modern technology's threats to privacy.

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<sup>8</sup> ECHR, Application No. 35623/05, Judgment 2 September 2010

## IV. Conclusion

I view as dramatic and significant the changes in our popular culture and legal system emphasized in this essay: the paths that individuals may follow to explore the past, and the paths that governments are following to monitor the present. Digital photography has been instrumental for both developments.

To be sure, the essay illustrates only a few fields in which the current era's brilliant inventions may work pervasive social change, for good and for bad. With elation or concern, we have heard numerous predictions of substantial changes in our culture stemming from the new technology. Merely a few decades of cell phones, email, the web and social media have begun to transform not only economic and political life, but also deep aspects of our personal lives. Photography is but a sliver of this vast domain.

My remarks about these developments merely touch the proverbial tip of the iceberg. Scientists, economists, authors of utopias or dystopias, and venture capitalists may have a clear vision of where we are heading. I surely do not. All seems possible, in this brave new world breathlessly awaiting self-driving cars and all-purpose robots. Pop culture is in for some shocks. The legal system will necessarily engage with inventions whose applications challenge fundamental values.