

2005

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Recommended Citation

Marc Jonathan Blitz, *THE DANGERS OF FIGHTING TERRORISM WITH TECHNOCOMMUNITARIANISM: CONSTITUTIONAL PROTECTIONS OF FREE EXPRESSION, EXPLORATION, AND UNMONITORED ACTIVITY IN URBAN SPACES*, 32 Fordham Urb. L.J. 677 (2005).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol32/iss4/1>

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THE DANGERS OF FIGHTING TERRORISM WITH TECHNOCOMMUNITARIANISM: CONSTITUTIONAL PROTECTIONS OF FREE EXPRESSION, EXPLORATION, AND UNMONITORED ACTIVITY IN URBAN SPACES

*Marc Jonathan Blitz**

The narrower the circle to which we commit ourselves, the less freedom of individuality we possess In a narrow circle, one can preserve one's individuality, as a rule, in only two ways. Either one leads the circle (it is for this reason that strong personalities like to be "number one in the village"), or one exists in it only externally, being independent of it in all essential matters.

— Georg Simmel, *Group Expansion and the Development of Individuality*¹

INTRODUCTION

The cult television series "The Prisoner" tells the story of a man who, after losing and then regaining consciousness, opens the blinds of his London flat to find that the world outside has undergone a Kafkaesque transformation: the skyscrapers and city streets visible from his window have been replaced with a small and serene village.² Accompanying this

* Assistant Professor, Oklahoma City University School of Law. The discussion in this paper grew out of, and benefited immensely from workshops and individual discussions with many law school faculty members and attorneys. Many of the proposals in this article originated in discussions with Chad Oldfather and Eduardo M. Peñalver regarding the respects in which emerging video surveillance systems resemble the natural surveillance that already exists in many small communities. It also benefited from provocative questions and/or thoughts regarding privacy and video (or other forms of) surveillance from David Medine, Becky Burr, Will DeVries, Joseph Onek, Sharon Bradford Franklin, Deirdre Mulligan, David Yang, Tara Wheatland, Jeffrey Rosen, John Shore, Christopher Slobogin, and John Eden. I also owe many thanks to Michael Dallal, Marni Brot, Amy Lambert, Jessica Berenbroick and the other editors of the Fordham Urban Law Journal who organized this Symposium and provided substantial assistance with this article.

1. Georg Simmel, *Group Expansion and the Development of Individuality*, in *ON INDIVIDUALITY AND SOCIAL FORMS* 251, 255 (Donald Levine ed., 1971).

2. See ALAIN CARRAZE & HELENE OSWALD, *THE PRISONER* 35 (1990) (providing a

stark change in his external environment is a sharp decrease in his freedom. Whereas his life in London was his own, he discovers upon venturing out into the village³ that his decisions and actions are now community property. He is watched everywhere he goes both by neighbors and hidden cameras.⁴ He is expected to be an enthusiastic participant in all communal events, and is ostracized as “unmutual” when he instead seeks out privacy and seclusion.⁵ The town’s authorities are intent on ensuring that residents cannot opt out of village life: quaint taxis transport people within the village, but never outside of it; phone service is strictly local; maps at the village store show nothing beyond the community’s boundaries.⁶ Each showing of independence or defiance by the protagonist brings strong pressure from the authorities to fully account for (and recant) his actions.⁷ In short, his familiar urban life is replaced with a communitarian dystopia, hostile to privacy and deeply suspicious of every act of individuality.⁸

The story of environmental shock depicted in this television series has also made an appearance in sociological observation. Decades ago, one of the founders of sociology, Georg Simmel, imagined what it would be like for an inhabitant of a modern metropolis to be suddenly lifted out of his urban existence and dropped into the smaller and more confining world of an ancient or medieval village. The modern city dweller, said Simmel, “could not even breathe under such conditions.”⁹ He could not tolerate the “limits upon [his] movements” or the restrictions on “his relationships with the outside world.”¹⁰ Nor could he suffer the loss of the “inner independence and differentiation” that would accompany such a shift from the city to a close knit, loyalty-demanding community.¹¹ While such an environment may have seemed tolerable to individuals born and bred within its confines, it would be insufferable, said Simmel, to anyone who long enjoyed the individual freedom made possible by the anonymity and

summary and episode guide to the television series).

3. The community is called only “the Village” by its inhabitants and rulers.

4. CARRAZE & OSWALD, *supra* note 2 at 38, 153-57.

5. *Id.* at 153-57.

6. *Id.* at 35-36.

7. *See, e.g., id.* at 46-47, 153-57.

8. Somewhat ironically, the main character does succeed in *completely* retaining anonymity with respect to at least one outside party: television viewers never learn his real name, as he is referred to in the Village only as “Number 6.” *See generally* CARRAZE & OSWALD, *supra* note 2.

9. Georg Simmel, *The Metropolis and Mental Life*, in ON INDIVIDUALITY AND SOCIAL FORMS 324, 333 (Donald Levine ed., 1971) [hereinafter Simmel, *The Metropolis and Mental Life*].

10. *Id.*

11. *Id.*

incomparable diversity of modern city life. This modern urban environment, he stressed, provides individuals with a “type and degree of personal freedom to which there is no analogy in other circumstances.”¹² In the limited space of a small village, one can express individuality only when acting as a leader, as the “number one” figure “in the village,” or when “exist[ing] in it only externally [as an outcast].”¹³ By contrast, in city life, the multitude of options and the indifference of neighbors provide people with plenty of room to follow their own unique paths while still being part and parcel of the larger urban community. As E.B. White has written in his celebration of New York, city life can thus blend “the gift of privacy with the excitement of participation.”¹⁴

But if the unparalleled individual freedom one gains in urban anonymity is deeply valued, is it also constitutionally protected? If municipal or state governments decide, for example, that the extensive freedom and anonymity provided by modern city life not only provides valuable room for individuality, but also worrisome hiding space for terrorists or criminals, can they take measures to “roll back” some of this unmonitored space? Can they make it more difficult for individuals to escape government monitoring or avoid identification in public places? Or would such a transformation cross important First Amendment or other constitutional boundary lines?

These questions are important ones as cities, police departments, and other government actors struggle with the difficult challenges associated with protecting urban areas against terrorism in the wake of the September 11 attacks and those in Madrid and London. The dangers of terrorism predictably cause such actors (and the citizens they represent) to take more interest in others’ (possibly dangerous) actions. New chemical and biological weapons allow hateful individuals and small organizations to

12. *Id.* at 332.

13. Georg Simmel, *Group Expansion and the Development of Individuality*, *supra* note 1, at 261 (Donald Levine ed., 1971).

14. See E.B. WHITE, *HERE IS NEW YORK* 22 (Little Bookroom 1999) (1949), available at <http://mbhs.bergtraum.k12.ny.us/cybereng/shorts/white.html> (last visited September 5, 2005). I am indebted to Kenneth Jackson for informing me, and other audience members, of this E.B. White quote in his introductory remarks at the Symposium which gave rise to this article. See also IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 237-38 (1990) (defining “city life” as “the being together of strangers” and emphasizing that while city dwellers are “bound together” they can follow diverse ends, rather committing themselves to “shared final ends”); Jerry Frug, *The Geography of Community*, 48 *STAN. L. REV.* 1047, 1049 (1996) (claiming that city life establishes common bonds between residents not by “cultivating a feeling of oneness,” but rather by “fostering a recognition that one has to share one’s life with strangers, with strangeness, with the inassimilable, even the intolerable”).

cause fatalities and economic destruction of a magnitude that could previously have been inflicted only by a large and highly visible army. Not surprisingly, law enforcement and other officials have taken a keen interest in powerful surveillance and identification technologies that might allow them to more effectively locate and thwart these very dangerous and difficult to detect threats. Not surprisingly, while such technologies may well undermine the freedoms we are used to finding in cities, many officials and citizens alike now wonder whether this is a sacrifice worth making—and whether the unparalleled anonymity and freedom that we are now accustomed to in cities is a luxury that we can no longer afford in the current security context. As Simmel himself recognized when describing the individual freedom one finds in the metropolis, such freedom is unlikely to flourish in a society that feels itself under “an incessant threat against its existence by enemies near and far.”¹⁵

As a result, the nature of city life appears to be changing. On the streets of London, which “The Prisoner” presented over three decades ago as a striking contrast to the claustrophobic and camera-monitored confines of the main character’s new and involuntarily-imposed community, individuals are now watched constantly by cameras as they walk from block to block or drive down the road. As Jeffrey Rosen observed, there are 4.2 million cameras in Britain, many in London proper, including “speed cameras and red-light cameras, cameras in lobbies and elevators, in hotels and restaurants, in nursery schools and high schools.”¹⁶ In part, these cameras are intended to protect citizens against terrorism: they were used to gather invaluable data about the July 2005 terrorist strikes against the London public transport system.¹⁷ But they have also been used to gather significant information from street life and shopping malls that is unrelated to terror attacks or serious crimes.¹⁸ Far from worrying that such routine monitoring of citizens will undercut individualism, the British government has taken the stance that citizens should have no anxieties about submitting themselves to external observation since, in the words of a pro-camera campaign slogan, “[i]f you’ve got nothing to hide, you’ve got

15. Simmel, *The Metropolis and Mental Life*, *supra* note 9, at 333.

16. JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 36-37 (2004).

17. See Will Knight, *CCTV Footage Shows London Suicide Bombers*, NEW SCIENTIST.COM (July 13, 2005), at <http://www.newscientist.com/article.ns?id=dn7669> (last visited July 16, 2005) (reporting that “[s]urveillance cameras provided a vital breakthrough in the hunt responsible for the four bomb blasts that killed at least 52 people in London, UK on 7 July”).

18. See ROSEN, *supra* note 16, at 48-54 (describing use of video surveillance cameras for banning certain individuals from malls and observation of non-criminal activity).

nothing to fear.”¹⁹

Just as significant as the spread of cameras is the fast embrace of new technologies that can instantaneously identify strangers as they walk through public spaces. Americans today have some experience with these technologies; they realize that they leave a trail of information about their whereabouts and activities whenever they use credit cards, make calls on cell phones, or drive their cars through electronic tollway systems. The future also promises to bring newer, more powerful identification technologies which are even more difficult to escape. The last decade, for example, witnessed tremendous growth in the use of “biometric” technologies which identify people by their distinctive physiological features. Citizens might be identified with iris or retinal scanners, or with devices that allow entry into parks or plazas only in return for an identifiable hand scan or fingerprint. Cameras might also be equipped with “face recognition software” that matches a person walking on a street to a “face print” in a database.²⁰

Such technologies are already in use, on an experimental basis, in airports and at sporting events. The war on terrorism has bolstered interest in their use. The Defense Department, for example, conducted a “Human Identification at a Distance program” to “develop automated biometric identification technologies to detect, recognize and identify humans at great distances” providing “critical early warning support for force protection and homeland defense against terrorist, criminal, and other human-based threats.”²¹ The Defense Department has also encouraged development of so-called “3-D Combat Zone” technology that will not only be able to identify “vehicles by size, color, shape, and license tag” but also identify the faces of drivers and passengers.²²

While many observers have expressed deep concern about this transformation of urban space, others have argued that, implemented correctly, such a technological transformation might make city life more communitarian, that is, city life would be more like a small town where

19. *Id.* at 36.

20. See generally SAMIR NANAVATI ET AL., *BIOMETRICS: IDENTITY VERIFICATION IN A NETWORKED WORLD* (2002); JOHN D. WOODWARD, JR. ET AL., *BIOMETRICS: IDENTITY ASSURANCE IN THE INFORMATION AGE* (2003).

21. See David Goldberg, *Human ID at a Distance*, 21C MAGAZINE, at http://www.21cmagazine.com/issue2/iao_remix/humanid.html (last visited May 15, 2005).

22. See Michael J. Sniffen, *Pentagon Wants City-Wide Vision*, AKRON BEACON J., July 2, 2003, at A6. Although the technology is primarily for combat, the technology itself could conceivably be employed to monitor potential threats within America’s borders. See Cynthia L. Webb, *Newsbytes News Network, Government IT Review*, TECHNEWS.COM, July 2, 2003, available at <http://www.washingtonpost.com>.

everyone knows each other and knows a lot about what they do. This, they stress, need not be such a terrifying prospect. David Brin, for example, argues that tremendous good can result when emerging surveillance technologies transform each “metropolis” into “an easily spanned village.” After such a transformation, he explains, citizens might well feel safer in public walking under the protective gaze of powerful cameras while simultaneously “us[ing] the godlike power [that comes with these cameras] to zoom at will from vantage point to vantage point.”²³ Knowing that their “[h]omes are sacrosanct,” and that the sacrifice of public anonymity is the price they must pay to exploit the wonders of new crime-fighting tools, citizens will be able to bear—and benefit from—a world of ubiquitous cameras and microphones.²⁴

Others echo Brin’s optimism about the rapid spread of cameras, and many have become more receptive to it as Americans’ fear of terrorism has grown. Adam L. Penenberg, for example, writes that “[e]ven as we trade privacy for security and convenience, we’re hardly headed toward totalitarianism.”²⁵ Citizens, he writes, “have already learned to use surveillance tools to keep government accountable” and “transparency . . . is almost always a good thing.”²⁶ While privacy in the home remains important, “[i]n public institutions and on city streets, the more transparency the better.”²⁷ Amitai Etzioni likewise proposes that, in determining how to balance the value of privacy with that of the common good, Americans often give short shrift to the latter.²⁸ One measure he considers to “correct the imbalance” is to employ the use of biometric identifiers.²⁹ Indeed, he says, “[t]he minimal opposition to cameras installed in many public places suggests that citizens may be less opposed to some kinds of biometric ID technologies than to ID cards.”³⁰

Still, such accounts of how cities might become more like small towns do not answer the question of whether cities’ current movements in this direction raise any constitutional problems. Are cities free to reconceive themselves in this way? Are they unhindered by First Amendment anonymity protections or other constitutional civil liberties when they

23. DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* 9 (1998).

24. *Id.*

25. Adam L. Penenberg, *The Surveillance Society*, WIREd, Dec. 2001, available at <http://www.wired.com/wired/archive/9.12/surveillance.html>.

26. *Id.*

27. *Id.*

28. AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 9-10 (1999).

29. *Id.* at 10, 115-16.

30. *Id.* at 117.

install face recognition, iris scanners, or other identification technologies in plazas, streets, or train stations? To ask the same question in a slightly different way, is American constitutionalism neutral between the vision of urban life presented by Simmel and that offered more recently by Brin?³¹ Does the Constitution in any sense favor urban landscapes that allow for greater freedom and individuality? Or do defenders of such individualism simply have to make peace with the notion that the openness and anonymity of twentieth-century cities was just a historical phase rather than a constitutional right, and that American Constitutionalism places no constraints on cities that prevent them from evolving into closely-monitored spaces very different from what they once were?

I already addressed such questions from one angle in a previous article, where I argued that public video surveillance systems should be found in some circumstances to be in violation of the Fourth Amendment's protection against unreasonable searches.³² I argued that the Fourth Amendment, although currently defined as protecting "reasonable expectations of privacy," should instead be understood to protect certain features of environments, both private and public, that provide Americans with a certain minimal level of insulation against excessive government monitoring.³³ That article, however, dealt only in passing with the question raised above; namely, what grounds exist for viewing the anonymity and freedom that one finds in modern urban life as fundamental features of the constitutional landscape? Why not allow such anonymity and freedom to fade as cities evolve in a direction incompatible with them—or be traded away for other benefits if elected city, state, or federal representatives decide, under voters' watch, that security concerns demand a new balance between privacy, liberty, and other interests?

This article suggests that there is already a powerful answer to this question implicit in modern First Amendment jurisprudence. Unlike modern Fourth Amendment case law, which gives short shrift to the importance of insulating public space from government control and design,³⁴ modern First Amendment law places meaningful limits on the control that governmental authorities may exercise over streets, parks, and other public spaces central to urban life. It also stringently protects the anonymity that individuals may retain in such public spaces—for example,

31. *See supra* notes 9-15, 23-24 and accompanying text.

32. Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1480-81 (2004).

33. *See id.* at 1434-49.

34. *See id.* at 1357-59, 1366-74.

when they distribute unsigned leaflets or present controversial views to strangers on a public street. These limits suggest there are constitutional boundaries on the extent to which governments may transform urban spaces (and other public spaces) in which their citizens live. While cities have significant freedom to redesign themselves, they may *not* trade away those elements of the urban environment that have evolved into crucial supports for freedom of expression and intellectual exploration. In this sense, the liberty-enabling features of streets, parks, and plazas are akin to historic buildings that have become central to a city or a neighborhood's identity. They have become an integral and defining part of Americans' constitutional life and, as such, have earned a claim to preservation that distinguishes them from other features of the urban landscape.³⁵

Part I of this article examines how some commentators can plausibly argue that constitutional liberty and privacy protections do *not* protect the individual liberty and privacy that modern individuals have come to expect in many public spaces, particularly in urban environments.³⁶ Why is it not clear that identification technologies that might chill speech run afoul of speech protections? Constitutional liberalism, this section points out, makes this question a difficult one, because it is marked by scrupulous neutrality towards different visions of "the good life." In other words, the constitutional order does not condemn those who choose a communitarian way of life and favor those who prefer individualism. Rather, it tolerates both of these (and other) preferences about one's social and cultural environment, and leaves citizens free to opt for the life of their choice. Given this neutrality, one might argue, it would be wrong to interpret the United States Constitution as somehow forcing individualism on cities and their inhabitants if a majority of them may be willing to forsake it in return for greater security or other benefits. Arguments based on constitutional interpretation present additional reasons to let city governments (or inhabitants) abandon long-standing freedoms which are characteristic of urban life. For example, proponents of the view that constitutional interpretation must remain deeply anchored in the "original understanding" of the Constitution's text might argue that this understanding could not have included protection of modern urban freedoms. Making this argument quite plausible is the fact that the liberties that late-nineteenth and early

35. This is not to say that existing First Amendment jurisprudence prevents cities from closing any given park, street or plaza. Rather, it assures that when governments do provide citizens such features of cities – as they can hardly avoid doing – they provide them under rules and conditions that respect the basic First Amendment requirements applicable to these public spaces.

36. *See infra* notes 39-71 and accompanying text.

twentieth century observers (such as Simmel) celebrated in urban environments did not exist when the Constitution was drafted a century earlier. At that time, many of the great American metropolises were less distinctly urban and more akin to small towns.

If, by contrast, one believes that constitutional interpretation should change as society changes, then why not let conceptions of First Amendment and other constitutional rights change with developments in citizens' conceptions of liberty, privacy, and security, and the proper relationship between them? To the extent that city life is marked by continual transformation of cities' physical structure and social fabric, perhaps the proper forum for individualists and communitarians to spar over the direction of such transformation is not in constitutional law at all, but in the vigorous policy debates that play a vital role in democratic governance. The future of urban existence may very well be shaped by debates over architecture, park design, and zoning laws rather than debates over the meaning of the First Amendment.

Part II sketches an answer to these challenges and suggests a reason for courts and others to find that freedom-enabling institutions that did not exist earlier in American history, and might cease to exist in the future, deserve certain constitutional protection while they are here.³⁷ This part addresses these challenges by explaining that however counterintuitive this claim may seem, it receives a strong and implicit endorsement in the way that scholars and courts analyze the First Amendment, the Internet, and the intersection between them. In short, I suggest that it is difficult to make sense of our modern jurisprudence of First Amendment rights, especially as they relate to anonymous communication and association on the Internet and elsewhere, unless one allows room in our constitutional law for a jurisprudence that "captures" and preserves social incarnations of liberty and privacy that were not yet in existence when the Constitution was drafted. Courts defenses of Internet anonymity provide one example of such a liberty-preserving doctrine.

In Part III, I explain why defending the urban freedom identified by Georg Simmel deserves a place in constitutional jurisprudence for largely the same reason. Like the virtual liberation offered by the Internet, city life offered and continues to offer an invaluable refuge for substantial expressive activity and intellectual exploration that would be far more elusive without this type of urban existence.³⁸ It provides individuals with an incredibly rich bazaar of ideas, and allows them to browse among these

37. See *infra* notes 72-119 and accompanying text.

38. See *infra* notes 120-163 and accompanying text.

ideas, substantially free from outside monitoring or control. While First Amendment law does not *single out* urban environments for protection, it protects such environments indirectly by preserving certain opportunities that are characteristic of modern urban life: opportunities for giving speeches to large crowds, for confronting strangers with ideas they may find unfamiliar or provocative, or for speaking or gathering information in the anonymity of the crowd. A person may sometimes find such opportunities in small towns as well as cities. But it is in urban environments where one finds the most numerous and frequent opportunities both for broadcasting one's views and for hiding them. And I suggest here that defending this feature of urban settings does not undercut our constitutional regime's tolerance of, and neutrality toward, different visions of the good, so long as we are assured that the freedom-enhancing environment of the city can continue to exist *alongside of*, and not in place of, alternative forms of collective life.

PART I: URBAN SPACES, SURVEILLANCE, AND THE COLLECTIVE RIGHT TO REDESIGN ONE'S COMMUNITY

Urban environments have long been a refuge for those seeking the freedom that comes with privacy and anonymity. As Jane Jacobs notes, “[p]rivacy is precious in cities” and far more attainable there than in most places: “In small settlements everyone knows your affairs. In the city everyone does not—only those you choose to tell will know much about you.”³⁹ That may well be changing. Indeed, some cities may soon be among the places where it is hardest to escape public identification and monitoring. Thanks to London's embrace of ubiquitous cameras, the average Londoner is now captured on video hundreds of times each day.⁴⁰

Many officials and municipal governments in America are exploring ways to ensure that such images capture not only faces, but also names. New York City, for example, has reportedly explored mounting a hundred cameras equipped with face recognition technology over Times Square.⁴¹ Proposals for requiring information-loaded ID cards have become more

39. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 58 (3d. ed. 1961).

40. See Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 *MISS. L.J.* 213, 214 (2002).

41. See *Morning Edition: Profile: Use of Surveillance Cameras in New York City and Other Places Around the World* (NPR radio broadcast, Feb. 25, 2002, 10:00 a.m.) (discussing talks about installing “a hundred cameras with face recognition software in Times Square”), transcript available at LEXIS News Library.

common since 2001. And where such emerging technology does not work, law enforcement might take advantage of a host of other recent developments—including electronic tollways and ubiquitous cell phone and credit card usage—to track people and retrace their activities on a particular day.

Does this transformation of anonymous spaces into constantly-monitored zones raise constitutional difficulties? One might think the answer is clear. The Constitution protects anonymous speech and association.⁴² It also shields individuals from attempts to “contract the spectrum of available knowledge.”⁴³ It provides people with privacy protection, which they take with them as they “step from their homes onto the public sidewalks.”⁴⁴ As Christopher Slobogin has demonstrated, pervasive public video surveillance has dire consequences for the “anonymity in public [that] promotes freedom of action and an open society.”⁴⁵ How then could one deny that the Constitution stands as a barrier against new surveillance measures in cities that reduce anonymity, “chill” information-gathering, and monitor people on streets and sidewalks?

While I will ultimately argue that the Constitution provides precisely such protection, this argument is not as straightforward as it has seemed to some privacy advocates. On the contrary, anyone who wishes to invoke constitutional anonymity protections to limit use of face recognition and other identification technologies must carefully address a number of significant objections.

A. Constitutional Neutrality, Meaning, and Change: Skepticism About a Constitutionally-Preferred Vision of Urban Life

One of the defining features of constitutional liberalism is its neutrality between different visions of the good life, including those that place more

42. See *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Stratton*, 536 U.S. 150, 166–69 (2002) (declaring unconstitutional a town law requiring those who wish to canvass door-to-door to first identify themselves in a permit application filed with the mayor’s office and made available for public inspection); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342–43, 356 (1995) (striking down an Ohio law prohibiting the distribution of anonymous campaign literature and taking note of “a respected tradition of anonymity in the advocacy of political causes”) (citing *Talley v. California*, 362 U.S. 60, 64–65 (1960)); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (forbidding the state of Alabama from compelling the NAACP to disclose its membership lists).

43. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

44. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

45. Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, *supra* note 40, at 240–251.

emphasis on community and accountability than on individualism and anonymity. As philosopher Charles Larmore notes, “the distinctive liberal notion is the neutrality of the state.”⁴⁶ To maintain this neutrality, a liberal regime cannot promote partisan claims about what “freedom must include,” such as calls for enhanced “self-realization,” or greater availability of “meaningful choices.”⁴⁷ If it did so, a modern state may find itself forcing such specific conceptions of freedom on citizens who deeply disagree with and resent being subject to them. In the absence of liberal neutrality, for example, religious and cultural groups organized around tradition might be required to adhere to individualistic practices at odds with their traditional values. To avoid subjecting groups to values deeply at odds with their own, liberal states thus defend conceptions of constitutional liberties that are neutral between specific visions of the good.

Such neutrality, of course, would seem absurd if it were understood to permit the rise of an Orwellian state regime in which officials use spy cameras to keep watch over citizens and ensure their unquestioning loyalty by crushing all signs of dissent. Certainly, this is the image many writers invoke to argue against the unrestricted use of face recognition and other new surveillance technologies. Indeed, the telestory of “The Prisoner,” described at the beginning of this essay, portrays a community with such coercive features.⁴⁸ In “The Prisoner,” village authorities may not only punish dissenters with ostracism and social disdain often characteristic of tight-knit communities, but also with techniques of confinement, physical harm, or corrective medical procedures characteristic of totalitarian states.⁴⁹ Clearly, “neutrality” toward such institutionalized intolerance or physical coercion would hardly be consistent with the fundamental principles of constitutional liberalism. Advocates of liberal neutrality, such as Larmore, recognize that liberalism strongly supports the basic freedom entailed in “the right of the person not to face unjustifiable interference by the state.”⁵⁰ At a minimum, liberal principles of neutrality require that the government tolerate those who disagree with its policies, and refrain from silencing or harming them.

Totalitarianism, however, is not the only form of collective life that can be fitted to a landscape covered with face recognition and other identification devices. One might see such a landscape not as a ready-made ground for totalitarianism, but as a technologically-updated version of

46. CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 42, 47 (1987).

47. *Id.* (internal quotes in original)

48. See CARAZZE & OSWALD, *supra* note 2.

49. See, e.g., *id.* at 152-61, 182-89.

50. LARMORE, *supra* note 46, at 47.

small town life. As I noted above, David Brin shows that a camera-covered city need not be a dark and authoritarian one.⁵¹ Instead of paving the way for an omnipotent government, with godlike power over its subjects, cameras and identification technologies might be used to empower citizens, and to enlarge their power to keep track of both their fellow citizens and elected officials.⁵² Instead of bringing a nightmarish and alien future, video surveillance and instant identification might thus revive a more comfortable and familiar past where people know, and know about, their neighbors and others in their communities.⁵³

Portrayed in these communitarian terms, a closely-surveilled city has a very different status in a liberal constitutional order than it does if it is seen as a manifestation of totalitarianism. Whereas totalitarianism is entirely incompatible with fundamental principles of constitutional liberalism, this is not true of the preference for an intimate and close-knit community, in which accountability may trump individuality. On the contrary, such communities are entitled to the same tolerance in a liberal order as any other type of community. After all, a tolerant state does not demand that small, tightly-knit communities transform themselves into larger, more anonymous and impersonal environments. It does not hold such a community in violation of First Amendment freedoms simply because individuals may feel less comfortable speaking their minds there than if they lived in a more urban setting, where views might be more diverse or where their dissent would be less noticeable. If a small town is free to remain a small town, why aren't those who oversee a city just as free to make it *more like* a small town? In short, while some members of a liberal society may treasure the urban anonymity and freedom that Georg Simmel said could not be found outside the modern metropolis, many city dwellers (particularly in an era of deep anxiety about security) may want their environment to be *less* individualistic and *more* like those one finds in smaller communities. One might argue that in a tolerant liberal constitutional order, this choice should be just as permissible as a more individualistic one.

This vision of constitutional liberalism has found expression in many recent debates about how liberal societies should react to "illiberal" religious or cultural communities in their midst. William Galston, for example, notes that the liberty of a pluralistic society must "protect the ability of individuals and groups to live in ways that others would regard as

51. BRIN, *supra* note 23, at 9-10.

52. *Id.*

53. *Id.*

unfree.”⁵⁴ And Chandran Kukathas argues that if modern communities are to be tolerant communities, they must tolerate highly traditional and anti-individualistic communities that, instead of welcoming dissent, choose to “ostracize the individual who refuses to conform to [their] norms.”⁵⁵ If liberal constitutional orders must make room in their midst for traditional communities that adopt illiberal practices, perhaps there is an equally strong case to be made that they should make room for cities which, while perhaps very individualistic in certain respects and more tolerant of unconventionality and idiosyncrasy than many traditional cultural groups, choose to keep closer watch over their citizens in order to deter, or respond to, crime and terrorism.

Such an argument also finds support in the fact that while the First Amendment bars state censorship, it cannot and does not eliminate the social pressures that often make dissent or unconventional speech uncomfortable. Thus, it would seem that to the extent a technological framework simply exposes us and our activities to criticism and possible ridicule from those in our community, it does not, for this reason, amount to constitutionally-forbidden censorship. As Lee Bollinger notes, there is a stark difference under our constitutional regime and culture between “the use of legal penalties against speech activities” and the “employment of nonlegal forms of coercion.”⁵⁶ While legal penalties on speech are severely restricted by the Constitution, non-legal penalties are not only permitted, but often encouraged. People may and do respond to offensive speech with the “myriad of coercive responses typically at [their] disposal,” including “ridicule or humiliation” and “any number of forms of social shunning.” Further, people can “withhold various practical benefits, like employment opportunities.”⁵⁷ Such penalties, as Kukathas notes, are available to the cultural and religious communities within a liberal society, and may be utilized to enforce adherence to their norms.⁵⁸ To the extent that the presence of public cameras and biometric identification devices simply makes us more accountable to the community for our behavior—and to the state for criminal acts—why, one might ask, should a liberal constitutional society make this option unavailable to elected representatives and citizens? Far from ruling out this option, the liberal

54. William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism*, 40 WM. & MARY L. REV. 869, 877 (1999).

55. Chandran Kukathas, *Are There Any Cultural Rights?*, in THE RIGHTS OF MINORITY CULTURES 248 (Will Kymlicka ed., 1995).

56. LEE C. BOLLINGER, THE TOLERANT SOCIETY 13 (1986).

57. *Id.*

58. Kukathas, *supra* note 55, at 248.

constitutional commitment to individual freedom would seem to demand that people be left free to choose it. Individual freedom, in other words, demands that city dwellers be free to forsake the individualism frequently associated with cities and transform their environment into one where accountability is more inescapable (and threats to public safety are more detectable).

Such an argument based upon political theory might be bolstered by two very different arguments about constitutional interpretation. On the one hand, one might draw on “originalist” interpretation to underscore that judges should hesitate before reading the First Amendment as protecting individual freedoms of a sort that did not exist when the First Amendment was drafted. At the end of the eighteenth century, after all, one could not find the same degree of anonymity and variety that Simmel observed in the early twentieth century. For example, “unlike later and larger Philadelphias, the eighteenth century town was a community.” Its population numbered 23,700 on the eve of the revolution and its “narrow compass” ensured that citizens of different groups lived “jumbled together” and interacted frequently.⁵⁹ It thus seems odd to think that the First Amendment was designed to defend an environmental background for free expression and thought that did not exist at the time. On the other hand, one can espouse the notion of a living constitution, whose protections change with changing conceptions of liberty, but this arguably leaves cities with as much freedom to adopt new expansive surveillance systems. Under this “evolving constitution” approach, First Amendment protection might evolve to make room for citizens’ changing preferences about how cities should behave (as reflected in their decisions or those of legislators and administrators charged with honoring such preferences). Jane Jacobs, after all, referred to rebuilding a city in the right way as a “wonderful challenge,” providing each citizen with the “chance to reshape the city and to make it the kind of city that he likes, and that others will too.”⁶⁰ While Jacobs, like Simmel, recognized that such a city life may require leaving room for “the incongruous, the vulgar, or the strange,” she sought to preserve room for these elements of city life by inviting city dwellers to exercise control over their environment, not by recruiting courts to constitutionally insulate it from such control.

59. See Sam Bass Warner, *Philadelphia: The Private City*, in *AMERICAN URBAN HISTORY: AN INTERPRETIVE READER WITH COMMENTARIES* 54, 55 (Alexander B. Callow, Jr. ed., 3d ed. 1982).

60. Jane Jacobs, *Downtown is for People*, in *THE EXPLODING METROPOLIS* 157, 184 (William H. Whyte, Jr. ed., 1958).

B. Argument from Judicial Competence

There is another complementary argument that constitutional protections should not be the safeguards of urban freedom. The argument is that courts are, by their nature, woefully ill-equipped to assess and make binding decisions on the social and physical conditions that make such freedom possible. This is because such conditions are as likely to be features of a city's physical architecture as they are of its legal regime. Thus, most of the contemporary writers who inherited Simmel's admiration for urban individualism aimed their impassioned defense of it not at courts deciding constitutional questions, but rather at city-dwellers thinking about how they want their environment to be designed. William H. Whyte, for example, celebrated the city's "variety and concentration, its tension, its hustle and bustle," and harshly condemned any attempt at transformation into something more calm and rural.⁶¹ Many city planners, he complained, aimed to "banish the most wonderful [of] city features—the street" and replace its vigorous heterogeneity with "anti-cities . . . sealed off from surrounding neighborhoods as if they were set in cornfields miles away."⁶² Jane Jacobs likewise had harsh criticism for "the city destroying ideas" of those who wished to replace the heterogeneity and privacy of cities with the togetherness and homogeneity of small towns.⁶³ These writers celebrate the opportunities for individuality and heterogeneity that Simmel identified as the hallmark of urban culture. Decades before the spread of cameras on public streets and parks, they worried that other attempts to redesign the structure of cities would undercut these distinctive and invaluable features of urban life. Thus, they called on city planners to reject popular conceptions inherited from the "Garden City" movement and the "Decentrists," designed to make city life more like that in rural settings.⁶⁴ For similar reasons, they called on them to recognize as wrongheaded and harmful the "Radiant City" design proposed by Le Corbusier with the underground streets and high-rises intended to unclutter streets and park areas of pedestrians and obstacles.⁶⁵ But it would have seemed bizarre to take these complaints to a courtroom; rather, their

61. William H. Whyte, Jr., *Introduction*, THE EXPLODING METROPOLIS 7 (William H. Whyte, Jr. ed., 1958).

62. *Id.* at 10.

63. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES, *supra* note 39, at 20, 62-63 (condemning the movement by "Decentrists" of the 1920s to "thin [cities] out, and disperse their enterprises and populations into smaller, separated cities or, better yet, towns" and city areas designed to promote "togetherness," such that instead of casual and limited contact on sidewalks, one shares significant amounts of one's life with neighbors).

64. *See id.* at 16-21.

65. *See id.* at 21-24.

assumption was that the freedom and diversity-enhancing character of cities could only be saved if citizens could be persuaded it was worth saving (and made to see what was needed to save it).⁶⁶ This assumption appears to have held sway as newer defenders of urban individualism and diversity revise Jacobs' and Whyte's criticisms of attempts to model cities on country towns to critique "technocommunitarian" reconceptions of urban space.⁶⁷ Responding to claims that cyberspace and other new technological innovations can superimpose the togetherness and transparency of community over the "difference and disorder" of modern urban life, Kevin Robins argues that such a remaking of cities would do substantial harm.⁶⁸ However, he does not present this danger as harm to the constitutional order, but rather to the fabric of city life.

In short, the working assumption of such defenders of urban individualism appears to be that it must be defended in a democratic give-and-take, and not by making their vision of city life constitutionally required. Even writers such as Jerry Frug, who argue that the defense of urban diversity and individuality requires a certain legal structure, and not just a certain physical architecture,⁶⁹ generally see the defense of this legal structure as a task for citizens and legislators, not as a task for courts giving force to First Amendment freedoms.⁷⁰ This is due in part to the fact that the individualism and anonymity of city life is not an unmixed blessing. Instead, it comes with less social support than one finds in more traditional settings and makes possible crime, and fear of crime, not present in such settings.⁷¹ A jurisprudence of rights may be ill-suited for reconciling the different values at stake, and helping city dwellers decide which values they prefer in the event they cannot have everything they want. Perhaps constitutional freedoms are affected by developments in city design and architecture, but this does not mean that courts have anything to say or do about them.

66. See Jacobs, *Downtown is for People*, *supra* note 60, at 183-84.

67. See Kevin Robins, *Foreclosing on the City? The Bad Idea of Virtual Urbanism*, in *TECHNOCITIES: THE CULTURE AND POLITICAL ECONOMY OF THE DIGITAL REVOLUTION* 34-59 (John Downey & Jim McGuigan eds., 1999). Robins uses the term "technocommunitarian" primarily to describe (and critique) the notion that one can restore a lost sense of community through new means of networked communication. I use it here to refer more broadly to any argument that favors reviving the characteristics of a small community by technologically transforming the urban environment.

68. *Id.* at 45, 47.

69. See Jerry Frug, *The Geography of Community*, 48 *STAN. L. REV.* 1047, 1104-08 (1996).

70. See, e.g., *id.* at 1104-05, 1107-08 (proposing redesign of "local government law" regarding land use regulations).

71. See *id.*

**PART II: THE FIRST AMENDMENT AND THE IMPERATIVE OF
PRESERVING SPACES FOR UNMONITORED EXPLORATION AND
EXPRESSION**

What then could be wrong with modern cities deciding to become high-tech, “easily-spanned village[s]?” Why can’t they decide for themselves if this is a model of collective life they find attractive, and make that decision free of judicially-imposed constraints? I argue in this Part that a closer examination of First Amendment law, and particularly First Amendment law on anonymity on the Internet and elsewhere, shows that there are potential problems with both halves of “technocommunitarianism.”

**A. The Electronic Village I: First Amendment Problems with the
Technological Perfection of Monitoring in Urban Spaces**

First, there is a potential problem with the “high tech” part of this transformation—not because use of modern law enforcement technology is unwise or unacceptable, but because of how a futuristic version of “village life” might feel when it is recreated with automated biometric eyes instead of curious neighbors. In short, a certain amount of individual freedom might be lost in the translation of informal monitoring by neighbors into constant and pervasive electronic watching. One concern lies in the difference between the respective consequences of human and electronic monitoring. Video and audio tapes record one’s private life in greater and more vivid detail than does human memory. As Justice Harlan noted in his famous dissent in a Fourth Amendment search and seizure case, in a world where “recording . . . insures full and accurate disclosure of all that is said, free of the possibility of error and oversight that inheres in human reporting . . . [w]ords would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed.”⁷² Such recording, worried Harlan, might well “smother that spontaneity . . . that liberates daily life.”⁷³ Officials, of course, could surveil a citizen even without video cameras, but his public privacy would still be protected by “the likelihood that the listener will either overlook or forget what is said, as well as the listener’s inability to reformulate a conversation.”⁷⁴ Whereas memories tend to fade, and the feelings associated with an event often become less powerful, hearing or watching a tape of private actions tends to revive memories of, and reactions to, a person’s behavior. Such tapes also provide an objective

72. *United States v. White*, 401 U.S. 745, 787-88 (Harlan, J., dissenting).

73. *Id.*

74. *Id.* at 788.

reference point that makes it harder for a person to explain and retell an action she took by placing it in a broader context; for example, by describing it in light of motives, concerns, or other background facts that are not as vivid and uncontested as the images captured in video. In other words, it deprives the person of an element of freedom and autonomy that is likely to be present even in communities where everyday life is subject to close and frequent observation.

Another concern lies in the extent to which biometrically-equipped cameras might eliminate even the seclusion and insulation from observation that is available to people in places where everyone knows everyone else. Even in a small town individuals can find places in public to privately read a book or a letter, or have a private conversation, by finding a physically remote area or checking to ensure that no one is near. By contrast, in a world where cameras or microphones strewn throughout public spaces can “zoom in” on individuals unaware of their presence, a person may find it difficult or impossible to travel far enough away from such electronic eyes and ears to escape their range.⁷⁵ Whereas other people might find it hard to identify them from a distance, a biometrically equipped camera could magnify a person’s image and match it against a database.⁷⁶

In addition, the decision of cities to transform themselves into electronically-watched villages might be problematic for another related reason. Not only might the electronic watching be more intense than the observation to which people are subject in small towns and villages, it may also be used in more worrisome ways. More specifically, there is a significant difference between observations by one’s neighbors and observations systematically collected by the state. Admittedly, people may often be more comfortable being observed by (or observable to) police than by curious neighbors. This is because police looking at video footage or individuals picked out by face recognition scanners are more likely to be looking only for evidence of criminal activity than are curious onlookers, who may instead attend to and gossip about irrelevant idiosyncrasies.⁷⁷ To the extent the state strays from a focus on law enforcement, however, the potential harm it does can be much greater given its monopoly on legalized force. State officials and police are also more likely to notice and be offended by political dissent of the sort that courts have often identified as a core (if not *the* core) of First Amendment protections: citizens may be

75. See ROSEN, *supra* note 16, at 36-37.

76. *Id.* at 51.

77. And the state is also likely to be subject to greater scrutiny and accountability than are private individuals. See BRIN, *supra* note 23, at 9.

less likely to criticize the government if they know that the government itself is watching. Such a problem will not necessarily be cured by Brin's recommendation that citizens be allowed as much access to cameras and identification technologies as police and other officials;⁷⁸ while citizens can theoretically use such access to detect and punish abusive action by government authorities, in practice government opponents might be more likely to hold their tongues than to openly challenge the government in court or elsewhere. Moreover, such a chilling effect on opposition speech may happen without any visible sign of abuse, making it difficult for citizens to rally opposition to it.

This, then, is one way in which electronic surveillance and identification technologies may run afoul of the First Amendment and other constitutional provisions where garden-variety social pressure does not. Government-operated electronic monitoring networks might be more inescapable than community observation ever could be, and differs importantly from such informal viewing and reporting in the fact that it is government-operated. Both of these factors have constitutional significance.

First, while the presence of curious neighbors does not mandate that a person disclose his identity, the presence of pervasive biometric devices effectively does – at least when these devices do what they are meant to do and effectively “unmask” anonymous individuals. This fact weakens the basis for one argument against placing any constitutional limits on face recognition or other biometric identification. One might argue that what First Amendment anonymity cases have celebrated and defended is not the anonymity of the crowd or street corner, but the anonymity of speech or associational support. Such anonymity, the argument goes, is found not in city squares or any other distinctly urban settings, but in anonymous authorship and behind-the-scenes organizational activity. Thus, while James Madison, Alexander Hamilton, and John Jay could publish their Federal Papers under a pseudonym (“Publius”),⁷⁹ this did not mean that they could prevent neighbors from recognizing them as they walked down the street. Similarly, NAACP members could support that organization without the State of Alabama learning their names, but this did not mean that they could participate in a televised march or demonstration and keep their participation a secret. While the Supreme Court prohibited compelled disclosure of membership lists to the government, it did not prohibit police

78. See BRIN, *supra* note 23, at 4, 9.

79. See Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, in CATO SUPREME COURT REVIEW 2001-2002 57 (James L. Swanson ed., 2002).

observation of public activities by the group or its members.⁸⁰ Fourth Amendment case law similarly protects “reasonable expectations of privacy,” but does not change the fact that “[n]o person can have a reasonable expectation that . . . his face will be a mystery to the world.”⁸¹ In short, this logic leads to the conclusion that what is constitutionally impermissible is not identification by neighbors, acquaintances, or even nearby police officers; rather, it is government-compelled *disclosure* of one’s identity in connection with speech or association.

But a pervasive and inescapable network of identification devices blurs this distinction between coincidental recognition and compelled disclosure.⁸² While face recognition (or other biometric identification) has sometimes been portrayed as a high-tech equivalent of happenstance identification by a nearby acquaintance, it can in fact operate in a way that is practically much more like the disclosure requirements. The very act of walking on a city street in such a world, for instance, makes it impossible not to identify oneself to town officials. A door-to-door solicitor may not have to go through the burden of informing a town of her identity, by filling out a form or signing a piece of campaign literature. Yet she does have to identify herself as a condition of performing such activity, simply because the activity cannot be carried out without revealing her identity. Thus, the pervasiveness of high-tech camera networks may well run afoul of the First Amendment anonymity protections enunciated by the Supreme Court in the 2002 case of *Watchtower Bible & Tract Society of New York, Inc. v. Stratton*.⁸³ In that case, the Court held that door-to-door solicitors had a right to maintain their anonymity as they engaged in protected First Amendment activity.⁸⁴

Second, the fact that government officials operate or have regular access to cameras and face recognition scanners has constitutional significance, even if they are not the only ones with such access. This is because while the First Amendment does not protect us (at least not directly) from informal community pressures towards conformity, it *does* protect us from any such pressure when it comes from the government.⁸⁵ Indeed, government disclosure requirements are constitutionally problematic even

80. See *NAACP v. Alabama*, 357 U.S. 449, 466 (1958).

81. *United States v. Dionisio*, 410 U.S. 1, 14 (1973).

82. Even recognition that is planned—for example, when a private eye follows a person—is not as inescapable as compelled disclosure, or as surveillance in a world of pervasive and effective face-recognition cameras.

83. 536 U.S. 150, 169 (2002).

84. *Id.*

85. See *Denver Area Educ. Telecomm. Consortium, Inc. v. Federal Communications Comm.*, 518 U.S. 727, 754 (1996).

if the government itself refrains from imposing any punishment on speech or association: Even if it merely *facilitates* community pressure or private retaliation against a dissenter—for example, by forcing that dissenter to reveal his connection to unpopular views or unorthodox ideas—it will likely run afoul of First Amendment protections. Thus, the village of Stratton was barred in *Watchtower Bible* from collecting identifying information on solicitors on behalf of (and for examination by) its residents.⁸⁶ And Congress was similarly barred from requiring individuals interested in receiving sexually-explicit cable channels from identifying themselves and their interests to cable carriers. In that case, the Court noted that the requirement would “restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the ‘patently offensive’ channel.”⁸⁷ The fact that punishment of such interests would likely come from community members and not from government itself could not make such a self-identification requirement permissible.

Even if the government does not directly silence protected speech, it causes First Amendment harm when it aids silencing by pointing such speech out to wielders of private power who will likely find it objectionable. In such circumstances, the government’s role is not unlike that of a military unit that sends up flares or shines a spotlight so that a separate attacking force can identify its target. In so doing, that unit clearly participates in, and aids, such an attack (made problematic when the object of the attack is constitutionally-protected speech or association).

Of course, this analogy is much weaker if the government’s role in undercutting anonymity is not to target any particular viewpoint or topic (for example, the sexually-explicit programming targeted in *Denver Area Educational Television Consortium*⁸⁸) but rather to alter the environment in such a way that *everyone* can see what anyone else says or does. In such a circumstance, the government does not so much highlight anything with a focused spotlight as it shines “light” *everywhere* so that everyone can benefit from the increased safety and certainty that comes with having a clear view of the surrounding environment (as well as the potential support of others who can better see threats to the community). Still, such viewpoint and content neutrality will not necessarily save a government disclosure requirement, or a functionally similar measure that wrests anonymity from speakers or information-seekers who desire it. The

86. *Watchtower Bible*, 536 U.S. at 150, 155 n.2, 169.

87. *Denver Area Educ. Telecomm. Consortium* at 754.

88. *Id.* at 732.

Supreme Court made this clear in *Buckley v. Valeo*.⁸⁹ It concluded in that case that there is an inherent First Amendment against the forced disclosure of a speaker's identity; any government measures that threaten this right must be subjected to "exacting scrutiny," which is necessary "because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights."⁹⁰ In *McIntyre v. Ohio Election Commission*,⁹¹ the Court made it even clearer that its protection for anonymity goes beyond protecting unpopular views. An anonymous speaker has a First Amendment right to maintain that anonymity, it said, not only when "economic or official retaliation" lurks just around the corner, but also when a person simply has "a desire to preserve as much of one's privacy as possible."⁹² Even when the motivation is not fear of harassment or harm, "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."⁹³ Thus, the Court in *McIntyre* found that the restrictions on anonymous campaign pamphlets in that case could pass constitutional muster only under the strictest form of review (i.e., "strict scrutiny"): they had to be "narrowly tailored to serve a an overriding state interest."⁹⁴ The Court was able to base its holding in part on the fact that the statute it was striking down was directed only at certain speech *contents*, namely speech designed to influence an election.⁹⁵ However, even when the Court confronted a *content-neutral* restriction on in the 2002 *Watchtower Bible* case, it made clear that it would also treat such restrictions with significant skepticism. Although not expressly applying strict scrutiny, it stated that even content-neutral disclosure requirements for door-to-door solicitors were a "dramatic departure from our national heritage and constitutional tradition" and noted that it is not carefully tailored to the ends it is purported to serve.⁹⁶

To some extent, perhaps, this is because even disclosure measures that are neutral on paper, and neutral in design, may predictably harm minority points of view much more than majority viewpoints. As David Ogden and Joel Nichols point out, "by their inherent nature bans on anonymity do not impose burdens equally on all expression."⁹⁷ It is rather "the most

89. 424 U.S. 1 (1976).

90. *Id.* at 64.

91. 514 U.S. 334 (1995).

92. *Id.* at 341-42.

93. *Id.* at 342.

⁹⁴ *Id.* at 347

⁹⁵ *Id.* at, 345-46.

⁹⁶ *Watchtower Bible*, 536 U.S. at 165-66.

97. David W. Ogden & Joel A. Nichols, *The Right to Anonymity Under the First*

controversial views, the fringe political parties and candidates, the unorthodox ideas, and the least popular advocacy groups or religious sects that will principally be deterred by bans on anonymous speech.”⁹⁸ But *McIntyre*’s extensive anonymity protection is justified not only as a shield against the majority punishment of minority viewpoints, but also as a shield that protects numerous kinds of speech or information-seeking that might suffer or wither away in the harsh light of publicity. This shield can afford protection for speech or intellectual exploration that might line up with majority views, but offend particular members of a speaker’s family or circle of associations; tentative views that individuals might be hesitant to offer as a firm statement of their own beliefs (or a statement that could be mistakenly viewed as such); and speech that gains some of its strength (or even content) from the fact of the author’s anonymity. Such First Amendment activity can of course be threatened or “chilled” by social pressure or by fear of private penalties even when the government does not take any action to disable it—and indeed, even when the government affirmatively protects it. These penalties do not mean, however, that the government can add its own damage on top of that caused by society. On the contrary, the conclusion of *McIntyre* appears to be that the First Amendment bars such damage. Thus, to the extent that government-installed cameras and identification measures give government actors a role in undermining anonymity that they do not play in the informal monitoring of small towns and villages, they may well raise distinct First Amendment problems.

Accordingly, a problem arises when city governments seek to convert cities into closely-monitored, “easily-spanned villages.” The conversion may result not simply in an insular, tight-knit community with little privacy and anonymity, but in an extreme, technologically-distorted version of such a community where the harm to privacy and autonomy is more extensive, and comes in large part from a source—namely, the state—that is not constitutionally permitted to inflict it (at least in the absence of a compelling state interest).

B. The Electronic Village II: First Amendment Problems with Reviving Traditional Monitoring in Urban Spaces

The video cameras and face recognition scanners emerging in cities, moreover, are problematic not only to the extent that their intrusiveness

Amendment, 49 A.P.R. FED. LAW. 44, 47 (2002).

98. *Id.*

goes *beyond* that of a community lacking in privacy but also to the extent that they *succeed* in recreating such an environment. In other words, “technocommunitarianism” is problematic not solely because of the technological intrusion it makes possible, but because of its communitarianism. This is a controversial claim. To the extent a panoptic city-wide surveillance can be portrayed as a Frankenstein monster, alien to anything American society has seen or tolerated in the past, it is relatively easy to defend the claim that such a freakish and non-traditional environment is at odds with traditional liberties. But such an accusation is far more difficult to defend when a city’s defensive monitoring of its inhabitants takes away no more privacy or anonymity than Americans would lose by moving from a city to a smaller, more intimate community. Nor is it wholly justified: Cities have changed significantly over the course of the nineteenth and twentieth centuries. They will likely continue to change over the course of the twenty-first century. Furthermore, they may, in certain respects, become more like smaller communities which, far from being at odds with freedom or individualism, are often freely chosen by individuals who prefer such environments to life in large cities. This does not mean, however, that the Constitution places *no barriers at all* in the face of government measures that would transform urban life into an environment considerably less private and considerably less free than it is now. As Iris Marion Young points out, city life provides valuable support for individual freedom not just for city dwellers, but for other citizens of modern societies. Such freedom is a “material given” not only for urbanites, but for all “those who live in advanced industrial societies”; it “define[s] the lives not only of those who live in huge metropolises, but also of those who live in suburbs and large towns.”⁹⁹ Through the medium of art, film, and other cultural resources, even those far outside of a city’s boundaries can partake in its “energy, cultural diversity, technological complexity, and [] multiplicity of . . . activities.”¹⁰⁰ Individuals may thus benefit from urban freedom not only by living immersed in urban culture, but by borrowing from it. Understood in this way, urban individualism may deserve constitutional protection not because it is *superior* to the more intimate life of a small town, but because modern freedoms can exist only where the opportunities found in modern cities exist *alongside of*, and *supplement*, such a life. Urban individualism might receive constitutional protection, in other words, not because it is preferable to small town life, but because it serves a crucial role in a larger system of free expression that embraces modern citizens living both inside and outside of urban settings.

99. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 237 (1990).

100. *Id.*

In this sense, the urban environment may be akin to another type of environment that has been more widely-recognized by scholars as deserving a special place in First Amendment jurisprudence: the Internet. Scholars have implored courts and citizens to recognize that the Internet empowers speakers and readers alike in unprecedented ways—and laws should enhance, or at least avoid reversing such empowerment. Thus, Ann Branscomb writes that the Internet “promises to become one of the most powerful democratic tools ever devised.”¹⁰¹ When dealing with such an environment, she says, “an environment unlike any heretofore made available . . . [i]t would be tragic . . . [t]o saddle such a promise with an overload of baggage from a bygone era.”¹⁰² Lee Tien similarly argues that First Amendment law must register the Internet’s impressive “shift in the architecture of everyday communication.”¹⁰³ And Yochai Benkler likewise touts the vast increase in “the range and diversity of information” that “individuals can access” online, and the ability this networked communication gives them to build “an autonomously conceived and lived life.”¹⁰⁴

Such claims about the unprecedented possibilities of the Internet have been echoed in recent First Amendment decisions, and most notably in the Supreme Court’s first major statement on Internet speech in *Reno v. American Civil Liberties Union*.¹⁰⁵ Striking down Congress’s restrictions on indecent Web material in that case, the Court remarked that, in the age of the Internet and the World Wide Web, “[a]ny person or organization with a computer [and Internet connection has a] vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.”¹⁰⁶

This vision of the Internet as an area where speech protection has extraordinary force has found expression not only in decisions about online censorship, but also in cases about online anonymity. A series of cases have placed high hurdles in the way of plaintiff corporations trying to discover the identity of anonymous Internet users who allegedly defamed them, violated their trademark, or caused them some other alleged harm online. While not leaving these plaintiffs entirely helpless, for example,

101. Ann Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1640 (1995).

102. *Id.* at 1678.

103. Lee Tien, *Who’s Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 137 (1996).

104. Yochai Benkler, *Freedom in the Commons: Toward a Political Economy of Information*, 52 DUKE L.J. 1245, 1267-69 (2003).

105. 521 U.S. 844 (1997).

106. *Id.* at 853.

one court stressed that the need for any such discovery must “be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously.”¹⁰⁷ A New Jersey court similarly refused to let a plaintiff corporation gain easy access to its alleged defamers’ identity, emphasizing “the unique circumstances created by the advent of the Internet” and role of such circumstances in deciding cases where the anonymity of Internet users is at stake.¹⁰⁸ It also demanded that plaintiffs meet a high threshold before they could undercut the anonymity of their online critics, and found that plaintiffs did not meet it.¹⁰⁹ In short, such online “Jane and John Doe” cases have “generally awarded anonymous speech a high level of First Amendment protection,” with most of them “quash[ing] subpoenas or motions seeking the identities of defendants.”¹¹⁰ These cases honor many scholars’ calls to carefully guard the freedom-enhancing character of the Internet, and are consistent with Lee Tien’s observation that “lack of identity information” (and the anonymity resulting from it) is an important part of this freedom.¹¹¹

But, if the Internet constitutes an unusual First Amendment environment, where certain distinctive freedom-enhancing characteristics must be protected, it is not the *only* such environment. Almost a century before scholars celebrated the remarkable opportunities that the Internet offers for enhancing individual autonomy, Georg Simmel wrote of the similarly unprecedented increase in individual autonomy made possible by the rise of modern cities.¹¹² In the same way that later writers marveled at the diversity of Web-based information sources from which individuals could build distinctive lives, appropriate to idiosyncratic interests, Simmel

107. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999). Thus, where traditional discovery rules might have allowed an angry plaintiff to run roughshod over this “legitimate and valuable right,” the Court formulated a higher discovery threshold for cases involving anonymous Web users. *Id.* Plaintiffs had to (1) “identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court;” (2) “identify all previous steps taken to locate the elusive defendant;” (3) “establish to the Court’s satisfaction that plaintiff’s suit against defendant could withstand a motion to dismiss;” and (4) “file a request for discovery with the Court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom the discovery process might be served and for which there is reasonable likelihood that the discovery process will lead to identifying information that would make service of process possible.” *Id.* at 578-80.

108. *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 767 (2001).

109. *Id.*

110. Victoria Smith Elkstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL’Y 405, 418 (2003).

111. Tien, *supra* note 103, at 163-64.

112. Simmel, *The Metropolis and Mental Life*, *supra* note 9, at 337-39.

remarked on how the diversity made possible by urban settings nourishes “individual independence and the elaboration of personal peculiarities.”¹¹³ And just as later writers would emphasize the unparalleled anonymity that the Internet makes possible, Simmel identified as one crucial element of urban freedom the fact that “we do not know by sight neighbors of years standing.”¹¹⁴

The parallel between the freedoms of the Web and the freedom of modern cities raises the question of whether the First Amendment—and other core constitutional principles—really demands neutrality between different forms of urban community. Legal scholars writing about the Web have not demanded such neutrality with respect to cyberspace. In other words, not all possible Internet architectures are equal in light of our constitutional values. Thus, Lawrence Lessig warns that changes in the “code” that underlies the architecture of the Internet constitute a “new threat to liberty.”¹¹⁵ With changes in such code, government could take a medium that gives individuals an unprecedented degree of liberation, and convert it into something marked by the constraints (and controllability) of ordinary space.

For example, government might undermine the anonymity in Web life that frees people from many aspects of their identities in the physical world (or offer incentives for private companies to do so).¹¹⁶ As Tien notes, by removing visual cues, cyberspace “permits [individuals] to have selves unencumbered by appearance or gender.”¹¹⁷ Lessig likewise notes, “the architecture of the original [unregulated] cyberspace” gives to those disabled by blindness, deafness, or perceived unattractiveness, a significant freedom from these conditions. The Internet gives them “something they did not have in real space,” namely, the ability to communicate easily without anybody knowing certain aspects of their lives.¹¹⁸ If Web sites adopt and use “identification technologies” that make it a simple matter for the government learn who has viewed a particular site or posted a particular message, such measures will sharply curtail the expressive freedom the Internet now provides. Furthermore, as Lessig notes, Internet anonymity will be on extremely precarious ground when such “identification technologies” incorporate “biometric keys”—requiring a person to access a Web site with his thumb, retina, or “whatever body part turns out to be

113. *Id.* at 338.

114. *Id.* at 331.

115. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 86 (1999).

116. *Id.* at 50.

117. Tien, *supra* note 103, at 166-67.

118. LESSIG, *supra* note 115, at 50.

cheapest to certify.”¹¹⁹

If there is reason to be disturbed about trading our newfound electronic freedoms for the familiar chains of “real space,” why isn’t there similar reason for concern when cities sacrifice the freedoms of real space for the more closely-monitored communal arrangements of an earlier age? Why isn’t a biometrics-driven elimination of anonymity just as worrisome in urban space as it is in cyberspace? And why should the neutrality of constitutional liberalism demand that courts and others stand back and let the future happen with respect to government-imposed changes in one of these environments, but not in the other?

PART III: PUBLIC FORA AND ANONYMOUS SPACE

I suggest in this article that constitutional liberalism makes no such demand. On the contrary, just as courts generally appear to recognize and respect the significance of the Internet as the foundation for much of our existing marketplace of ideas, so courts have recognized in the past that features of urban life and other physical settings deserve a similar kind of respect and protection. Indeed, our existing First Amendment jurisprudence already protects certain features of urban space. Far from being entirely neutral, courts have long held fast to the notion that governments who manage public parks are compelled by the First Amendment to recognize and respect the fact that these spaces have “immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹²⁰ For this reason, content-based regulations in such settings are subject to strict scrutiny, and even content-neutral regulations must be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”¹²¹

As is true for the electronic space of the Internet, there is nothing inevitable about the vision of parks as a sanctuary for speech and debate. Indeed, the Supreme Court’s statement in *Hague* that such parks have constituted a refuge for speech, “from time out of mind,” is inaccurate. In the late nineteenth and early twentieth century, before the Supreme Court classified parks as “quintessential public fora” where the First Amendment interests are entitled to special weight, park authorities often promulgated strict rules about what kind of speech and assembly was permissible within

119. *Id.* at 57-58.

120. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

121. *Perry Education Assn’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 (1983).

park boundaries. In England, for example, “[r]eligious and political meetings were a part of urban life, but as parks were seen as peaceful places, such potentially divisive activities were generally prohibited.”¹²² Similarly, American parks of the nineteenth century made sure to keep “discussions of politics and religion out of park programming.”¹²³

In the late nineteenth century, Oliver Wendell Holmes—then Chief Justice of the Massachusetts Supreme Court—found that there was nothing impermissible about such speech restrictions. “For the legislature absolutely or conditionally to forbid public speaking in a highway or public park,” he wrote, “is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”¹²⁴ This opinion was upheld by the United States Supreme Court.¹²⁵ The shift that has since occurred in the Court’s First Amendment jurisprudence indicates that, in contrast to Holmes’ late nineteenth-century opinion, the current-day Court believes that freedom of expression cannot flourish unless citizens have environments of a kind that can support it. The Internet represents one such environment. Municipal parks, public streets and plazas, and other common meeting grounds in “real space” provide others.

This equation between expressive freedom on the Internet and in parks may seem odd. The Internet is not a quintessential public forum. A public forum, such as a street or park, is a type of government-owned property. While it may be provided by the government or with government funds, the “virtual space” that exists on the Web is not *government-owned* space, but rather space that, for the most part, is owned and managed by private parties. Focusing only on the government ownership of public fora, however, obscures the fundamental respect in which they are similar to virtual spaces. The importance of both of these spaces is the “environmental support” they provide for speakers and information-seekers that might otherwise have difficulty finding a reliable and affordable space for First Amendment activity. The Internet, as scholars and courts alike have emphasized, provides an unparalleled opportunity for expression and information-seeking even to those who can afford little more than a computer and Internet connection. In this sense, as writers such as Lee Tien have pointed out, Internet speech is “cheap speech,” reminiscent of

122. HAZEL CONWAY, *PEOPLE’S PARKS: THE DESIGN AND DEVELOPMENT OF VICTORIAN PARKS IN BRITAIN* 190 (1991).

123. GALEN CRANZ, *THE POLITICS OF PARK DESIGN: A HISTORY OF URBAN PARKS IN AMERICA* 23, 77 (1982).

124. *Commonwealth v. Davis*, 162 Mass. 510, 511 (1895).

125. *Davis v. Massachusetts*, 167 U.S. 43, 44 (1897).

the writings of “lonely pamphleteers.”¹²⁶ Public spaces such as streets and parks are similar in that they provide another key First Amendment resource for those who might otherwise be unable to marshal resources to find an audience for their views or compatriots for group expression. As the Supreme Court emphasized in *Hague*, much like open markets where buyers and sellers know to look for each other, public parks and streets provide natural gathering points where speakers can go to find a potential audience for their ideas, and information-seekers can go to select from a thriving marketplace of ideas.¹²⁷ In the absence of such protected meeting grounds, “buyers” and “sellers” in the marketplace of ideas would have to expend far more resources (perhaps including resources they do not have) to find each other, or congregate (or demonstrate) with like-minded individuals.

Because such environments provide a key support for First Amendment communications, the basic architecture of these spaces cannot be as “value neutral,” or as vulnerable to hasty redesign, as are other realms within a liberal democracy. In this sense they are unlike other organizational forms in a liberal democracy that can shift, in chameleon-like fashion, to fit the values of whatever group inhabits them. The rules of a church or a private school or university, for example, can be bent or revised in large part to fit the mission and world view of whatever group runs it. Many employers and residential areas can likewise accommodate themselves to specific value systems. They can adopt traditional group ideals at odds with individualism. Thus, many of the great thinkers of the liberal tradition have recognized that within a liberal order, one may find markedly illiberal groups.¹²⁸ But in order for First Amendment expression to remain a real and ever-present opportunity in the midst of such social malleability, there are spaces within a liberal constitutional order that are set aside, and *remain* set aside, for untrammelled First Amendment debate and exploration. Seen in this light, the distinctive freedoms that Georg Simmel attributed to urban spaces are not temporary benefits that can simply be traded away for other benefits, or transformed to fit very different values; rather, the openness one currently finds in the streets and parks of these spaces is a key, non-negotiable element that cannot be sacrificed without undermining existing First Amendment jurisprudence. To make such a sacrifice would not only

126. Tien, *supra* note 103, at 121.

127. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939).

128. *See, e.g.*, JOHN RAWLS, *POLITICAL LIBERALISM* 261 (1993) (noting that whereas the “basic structure” of a society must be governed by liberal principles of justice, “for churches and universities different principles are plainly more suitable”—more specifically, those principles that arise from the “shared aims and purposes” of the organization).

hurt those city dwellers who live near parks. It would also undercut the First Amendment interests of speakers (or listeners) from smaller communities who come to spread a message (or receive one), and the readers in all types of communities who will ultimately review and partake in the debates generated in such public spaces.

It is still conceivable, perhaps, that courts would nonetheless find that cameras and effective face-recognition devices meet the legal threshold normally demanded of content-neutral measures in streets and parks: Courts might conclude that *carte blanche* use of such powerful surveillance devices is “narrowly tailored to serve a significant government interest,” namely its interest in battling crime and terrorism, and that it “leave[s] open ample alternative channels of communication,” because – in watching citizens – the cameras do not silence them.¹²⁹ But such a conclusion would be a questionable one. At a minimum, the “narrow tailoring” requirement appears to require some showing that the design and institutional operation of the cameras will effectively limit them to the significant interests that justify their presence. Additionally, it would be rash to conclude that a dragnet surveillance system leaves open “alternative channels” of communication simply because citizens may still hold private conversations under the close watch of the state. Where anonymity is an important condition for protected speech, then an alternative channel is only viable alternative where it offers the anonymity that the cameras threaten to eliminate.

There is also another more important reason that unrestrained video surveillance causes unacceptable damage to a public forum – even if watching citizens’ expressive activity does *not* technically count as regulating it under the First Amendment. “Quintessential” public fora, such as streets and parks, are classified as such because there is something about their character that makes them natural places for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Even if the government’s surveillance measures do not technically run afoul of the court’s tests for content-based and content-neutral speech regulations in public fora, the government could easily undercut a key and long-standing element of First Amendment jurisprudence if were allowed to transform traditional preserves of free and vigorous discussion into zones subject to constant and unrestrained official monitoring.

Indeed, it is not simply the concrete features of public spaces, such as

¹²⁹ Perry Education Assn’n v. Perry Local Educator’s Ass’n, 460 U.S. 37, 45 (1983).

streets and parks, which have a special status under the Constitution. Intangible environmental characteristics, such as possibilities for anonymity in public space and elsewhere, receive protection as well. It is difficult to make sense of the Court's current jurisprudence of anonymous speech unless one understands it as intended not only to protect against an author's unwilling disclosure of identity, but also to protect the possibility of anonymous speech and information-seeking more generally. In other words, like the electronic and physical sanctuaries that liberal societies have set aside to support robust debate and exchange of ideas, the opportunity for anonymity represents a kind of environmental condition—one which is a *precondition* for significant First Amendment activities. Just as the “vast platform” provided by the Web and the natural assembly point presented by streets and parks dramatically lower the costs of effective free expression for ordinary citizens, the opportunity for anonymity also reduces the cost of such speech by placing it within the reach of many who would not otherwise risk the opprobrium and social penalty they might face if they challenged, or rethought, conventional views in public. As Judith Shklar has written, the liberty to speak out and dissent against the powers that be, both political and social, must be available not only to “saints” and “heroes” but also to ordinary citizens, with ordinary amounts of courage.¹³⁰ Anonymity helps put dissent and free expression within their reach.

At first glance, this argument may seem to restate First Amendment jurisprudence on anonymity somewhat awkwardly and inaccurately. It does not, for example, distinguish between compelled disclosure, which is the key target of *McIntyre* and other anonymous speech cases, and other government measures that make recognition of a person more likely. Indeed, one might claim that the argument presented here runs directly counter to another recent case; namely, the Second Circuit's 2004 decision that the First Amendment does not rule out “anti-mask” laws. In *Church of American Knights of the Ku Klux Klan v. Kerik*, the Second Circuit upheld New York's anti-mask law and rejected the Ku Klux Klan's claim that the right of anonymous speech protected in *McIntyre* allowed Klan members to hold a public demonstration while wearing masks.¹³¹ *McIntyre*, said the Court, was about compelled disclosure.¹³² “The Supreme Court,” it stressed, “has never held that freedom of association or the right to engage in anonymous speech entails a right to conceal one's appearance in a public

130. JUDITH SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 6 (1986).

131. See 356 F.3d 197, 211 (2d Cir. 2004).

132. *Id.* at 208-09.

demonstration.”¹³³ The Court then considered, and swiftly rejected, the view that the chilling effect of such an anti-mask law raised First Amendment problems. The First Amendment “does not guarantee ideal conditions for [expressing viewpoints], since the individual’s right to speech must always be balanced against the state’s interest in safety.”¹³⁴

This holding, one might argue, undercuts the claim that the First Amendment broadly protects the possibility of anonymity. Rather than promote an “ideal environment” in which dissenters or protesters could feel comfortable, the Court’s anonymity cases serve the more limited goal of protecting against one particular type of damage to anonymity: namely, compelled disclosure by an individual writer of his identity or by a group of its membership. Thus, the argument goes, the anti-disclosure case law cannot be invoked against technologies like face recognition, that “unmask” people from a far, rather than forcing them to reveal themselves through compelled speech.. Admittedly, there are a number of reasons that the First Amendment would conceivably restrict compelled disclosure, but provide no protection against other measures that undermine anonymity. One possibility is that the harm that such anonymous speech cases guard against is only harm that results from *unwanted publicity*. That kind of harm, after all, can result from *either* compelled disclosure (that was barred in *McIntyre*) or the compelled revelation of one’s face to on-lookers (that was allowed in *Kerik*). Rather, cases such as *McIntyre* might be understood as guarding against another harm as well; namely, the violation of autonomy that arises when someone is forced to voice or write words at odds with her wishes. This, says Lee Tien, is what happens when an anonymous author is forced to state his name.¹³⁵ In such a circumstance, his right “not to speak” is violated in a way that it is not violated when a speaker is simply made easier to identify instantaneously—for example, by forbidding the wearing of masks or by lining city streets with face recognition-equipped cameras.

But this view of the Court’s anonymous speech jurisprudence depends heavily on *McIntyre*’s claim that anonymity is necessarily a part of a work’s content, and that by removing this anonymity and forcing the author to replace it with a name, one is forcibly changing the content of his speech, and thereby putting words in his mouth. This claim, however, is an odd one. In some circumstances, anonymous authorship *does* seem to be a part and parcel of the work’s message. In some works of art, for example, an artist intentionally leaves a certain amount of mystery about his identity

133. *Id.* at 209.

134. *Id.*

135. *See* Tien, *supra* note 103, at 133.

because of what such mystery adds to the content of the work. In some cases, he uses a pseudonym chosen to illuminate the content of the work. In other cases, however, one's name is no more integral a part of the work itself than a fax cover sheet is a part of the message it carries.

Even in such circumstances, the absence or presence of a particular name can affect how the accompanying speech is perceived. But in this respect, anonymity is no different from many aspects of a work that are normally considered part of its manner of presentation and not its content. For example, the loud volume of a speech or the kind of paper a book is printed on may well be chosen by an author or distributor in order to effect how the content is perceived. As Lee Bollinger points out, so-called "manner" regulations are difficult to distinguish from "content" regulations as they may well "impinge on more than the circumstances under which the speech activity can occur."¹³⁶ More problematic for the view that anonymity is content is that almost any "circumstances under which the speech activity [occurs]" can conceivably be said to be a part of its content.¹³⁷ A speaker may well claim, for example, that his political speech has a different meaning in front of the White House than it does on a random street corner.

There is, moreover, another more serious problem for the claim that anonymity protection should focus only on the harms of compelled disclosure: such protections could rather easily be circumvented by having *someone else* do the disclosing, thus obviating the need to force this information from an unwilling speaker. Consider, for example, the circumstances in *Watchtower Bible v. Stratton*.¹³⁸ The Village of Stratton's ordinance demanded that individuals fill out a form identifying themselves.¹³⁹ But the police could also have had them appear for a photo, which might then have been matched against a driver's license database. Their only obligation would then be to appear and stand still for the cameras, not to say or write anything. Face recognition, of course, could make the same process much simpler and even less cumbersome for the solicitors in that case. They would not even need to appear before town authorities. All they would need to do would be to walk down the street while automatic devices do the disclosing, perhaps without the speaker even noticing. This would solve the compelled disclosure problem. But it *wouldn't* solve the anonymous speech problem that caused the Court to strike down the Ohio law in *Stratton*, which was not about forced speech,

136. BOLLINGER, *supra* note 56, at 202-03.

137. *Id.*

138. 536 U.S. 150 (2002).

139. *Id.*

but about unwanted identification in circumstances where solicitors might want to, and are normally able to remain anonymous.

Likewise, it is not compelled disclosure that is the central harm in the anonymous association cases. In cases such as *NAACP v. Alabama*,¹⁴⁰ or *Bates v. Little Rock*,¹⁴¹ the Court's concern was not that a group's leadership was forced to engage in an involuntary speech act, but rather that the members of the group might be subject to harm as a consequence of losing their anonymity. The compelled disclosure forbidden in these decisions could be avoided by enabling the state to spy on certain groups and record the names of their members. For example, a state-operated surveillance camera might zoom in on and capture images of a membership list in the event that a group leaves it open to public observation. Or perhaps biometric cameras could identify and create records of who attended the group's meetings. Again, while avoiding compelled disclosure, such state actions would squarely conflict with the purpose of the associational anonymity decisions—to assure that associational activity could remain shielded from retaliation by those opposed to it.

How then might one make sense of the *Kerik* decision against the Court's anonymous speech jurisprudence, and what implication does this decision have for the development of powerful identification technologies intended for installment in city streets? The best account of *Kerik* is that, while the First Amendment does give people a right to remain unidentified in many circumstances, it does not give them a right to become *unidentifiable and untraceable*.¹⁴²

This distinction between anonymity and untraceability parallels the distinction that exists in the wiretapping context between the right to avoid being wire-tapped (without probable cause) and the right to make one's telephone facilities "wire-tap proof." While the former right against wire tapping is now an established part of Fourth Amendment jurisprudence as well as statutory law, the latter right has no such constitutional status and has been clearly repudiated by Congress in the Communications Assistance for Law Enforcement Act of 1994 (CALEA), which requires telephone service providers to make electronic surveillance possible over their facilities so that such facilities cannot be used by criminals or terrorists to

140. 357 U.S. 449, 466 (1958).

141. 361 U.S. 516, 523-24 (1960).

142. For illuminating and more detailed discussions of the contrast between "traceable" and "untraceable" anonymity (especially as that distinction applies to the law of cyberspace) see generally A. Michael Froomkin, *Anonymity and Its Enemies*, 1995 J. ONLINE L, art. 4 (1995) and David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. CHI. LEGAL F. 139 (1996).

escape monitoring by law enforcement.¹⁴³

The reliance on a distinction between anonymity and untraceability is not without problems. As I have argued elsewhere,¹⁴⁴ even where a government entity or private actor simply increases its *capacity* to monitor individuals' privacy—for example, by installing, but not activating bugging devices or secret cameras—it can cause many of the harms that actual monitoring causes even if the observer does not engage in any spying. A person's concern that he has become much more *vulnerable* to monitoring can be just as constraining as actually being monitored; if he is unsure whether the video camera is operating or not, he may have to assume that anything he does may be captured on tape. Indeed, even if he remains unaware that the installation of a camera or bug has compromised his privacy, this compromise still does harm by breaching a barrier that protects individuals from monitoring at the whim of the state. Thus, one court squarely rejected a defendant's argument, in a privacy tort case, that he never intruded upon the plaintiff couple's privacy because there was no showing that he actually used the listening and recording device he had installed in their bedroom.¹⁴⁵ One might similarly question the Supreme Court's assumption—in *United States v. Karo*¹⁴⁶—that no Fourth Amendment violation could have occurred where an installed beeper has not yet been activated.¹⁴⁷ And one might likewise question the suggestion I made above, that laws which require people to remain *identifiable* do not necessarily cause the same harm as laws that require them to identify themselves.

This analysis has implications for how one thinks about the use of biometric technology: laws which require everyone to enter face prints, fingerprints, or DNA samples for future identification are not necessarily saved from Fourth Amendment challenge by the fact that police have not yet used biometric technologies to specifically identify them. Unlike a law that simply requires that masks be removed, such a biometric data collection scheme would make it potentially simple for authorities to breach anonymity with little effort, and make individuals far less secure in the belief that what they do anonymously today will not be linked to them tomorrow. On the other hand, one can envision face recognition

143. Pub. L. No. 103-414, 108 Stat. 4279.

144. Blitz, *supra* note 32, at 1447-48.

145. See *Hamberger v. Eastman*, 206 A.2d 239, 242 (N.H. 1965) (finding that publicity with respect to private matters is an injury to personality “[w]hether [it is] actual or potential”).

146. *468 U.S. 705 (1984)*.

147. *Id.* at 706.

technologies—supplemented with scrambling devices—which allow police to collect basic information about what people are doing without immediately learning of their identities. Then, if police have a need to “unscramble” and identify someone in a section of footage, technology might allow them to do so (subject to a showing of necessity), thus making individuals traceable although not immediately identifiable by law enforcement. Researchers trying to reconcile privacy and face recognition have begun developing precisely this kind of technology.¹⁴⁸ Of course, there are still difficult questions one would have to address about whether making people’s identities traceable in this way leaves their anonymity too vulnerable. This is not an easy question, and would probably require developing some “bright line” tests that do not correspond perfectly with every case-specific intuition. In any event, such an approach would, at the very least, identify two poles that are unacceptable given First Amendment and security interests; namely, instantaneous biometric identification, on the one hand, and complete untraceability on the other.

This rethinking of *Kerik’s* anti-mask decision, and its relationship to the Supreme Court’s anonymous speech thus aids us in understanding why municipal governments may not have carte blanche, under the First Amendment, to line streets with face recognition devices. More significantly, the above discussion of First Amendment law and free speech on the Web provides one powerful answer, suggested by First Amendment precedent, to the question with which this article began; namely, does the Constitution in any sense favor urban landscapes that allow for greater freedom and individuality, or do defenders of such individuals simply have to make their peace with the notion that the openness and anonymity of twentieth-century cities was just a historical phase rather than a constitutional right? The first part of the answer is that the openness and anonymity of twentieth-century cities is *both* a historical phase and a constitutional right. It is a historical development, but one that the Court now recognizes as supporting First Amendment freedoms (just as it recognizes the Web as playing a similar role). Such a claim may appear to be at odds both with those approaches to constitutional interpretation that rely on original (pre-twentieth century) understandings of constitutional liberties, as well as those that provide courts with freedom to adopt new conceptions of such liberties, narrower than those of an earlier, less security-conscious age. But as Randy Barnett points out, “with any theory of textual interpretation, not just originalism, there is a need to establish the appropriate degree of abstraction or generality which properly attaches to

148. See Blitz, *supra* note 32, at 1475-76 & n. 559.

particular provisions.”¹⁴⁹ The original meaning of particular language, such as “freedom of speech,” may be “underdeterminate,” leaving room for “constitutional construction within the bounds established by original meaning,”¹⁵⁰ and perhaps for manifestations of expressive liberty that eighteenth-century citizens could not have anticipated. Moreover, even if one places “bounds” on constitutional interpretation from some source *other than* original meaning—for example, from subsequent constitutional transformations outside of the formal amendment process¹⁵¹—such bounds could prevent electoral or legislative majorities from sharply curtailing the openness and anonymity modern Americans can find in public fora (at least in the absence of additional “higher lawmaking”). Thus, my argument here is not for or against any particular approach to constitutional interpretation, but rather for the notion that if key, long-established features of our First Amendment jurisprudence are to be preserved, any such interpretation must leave some room for the incomparable freedom that Simmel found in the modern metropolis.

The above discussion of First Amendment law also suggests an answer to the question of how we can reconcile liberal neutrality with a constitutional approach that gives preference to a specific (e.g., urban) ideal of the good life. The Constitution *does* in some sense favor urban landscapes that allow for greater freedom and individuality, but this is not because our constitutional regime *prefers* such environments over others, but because it demands a larger social environment that at least includes such environments as important (and widely-accessible) components. Such a limit on municipal redesign follows from courts’ demands that key public spaces in urban life,¹⁵² including streets, parks, and plazas, retain a character that favors robust debate and individual expression—and from their demand that the anonymity one finds among strangers continues to be available to speakers and listeners alike.

149. Randy E. Barnett, An Originalism for Non-Originalists, 45 *LOY. L. REV.* 611, 644 (1999). See also LAURENCE H. TRIBE AND MICHAEL C. DORF, *ON READING THE CONSTITUTION* 73-80 (1991) (arguing that those charged with applying constitutional rights must confront the question of “what level of generality to use” in interpreting those rights).

150. *Id.* at 645.

151. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE I: FOUNDATIONS* 41-44, 50-57, 266-94 (1991) (arguing that Americans can act, and have acted, as a constitution-making majority outside of the formal amendment process).

152. This First Amendment protection in streets, parks, and other traditional public forums also applies *outside* of cities, in small, less anonymous communities. But although it is meant for all environments – and not just cities – public forum doctrine necessarily safeguards the *greater* sense of freedom from monitoring and constraint one often finds in an urban public spaces. See *supra*, at 110.

Of course, in some respects the suitability of streets and parks for these purposes is a question of architectural design and planning rather than of First Amendment law. Thus, some of the harshest criticism that Jane Jacobs directs at modern city planning accuses it of deadening public fora such as sidewalks and parks.¹⁵³ Sidewalks, for example, become inappropriate for vibrant and heterogeneous city life when one “cleanses” them of stores and other appropriate sites for people to engage in casual conversation. Where sidewalk life is marked by trees, flowers, and attractive paving, but lacks places for casual contact, social gatherings are forced from public sites, like stores, into private places, like individuals’ houses, and thus into a setting where contact and conversation is less temporary and less consistent with privacy.¹⁵⁴ In such circumstances, a “suburbanlike sharing of private lives grow[s]” in place of “city sidewalk life.”¹⁵⁵ But while such planning questions implicate zoning law, they do not make sidewalk design a matter of First Amendment law.

Similarly, Jacobs draws on issues of park placement and design, and not public forum law, when she argues that modern city planners often design parks that will predictably become blighted and frightening places for many citizens to explore or congregate.¹⁵⁶ The solution is not to enlist courts and constitutional provisions to force cities into designing parks correctly, but rather to drive home the point that parks must be placed near natural “focal points” for city dwellers, near places where “life swirls—where there is work, cultural, residential and commercial activity,” and not places where people have little reason to be or visit in their everyday lives.¹⁵⁷

One might well describe the installation of cameras and biometric identification devices in similar terms: while such changes have significant implications for urban anonymity, one might argue that they are design changes rather than censorship laws. And if they deaden life in streets, parks, and other plazas, writers in the mold of Jane Jacobs and William H. Whyte can tell citizens (and legislators) why this is the case instead of looking for courts to provide a solution. But I believe this analogy stems from a misconception. In the first place, the city planning choices that Jacobs and White scorn are not *intended* to deaden public space and silence its inhabitants. The sterility of public life that follows such design is in

153. See generally JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES, *supra* note 39.

154. *Id.* at 63.

155. *Id.*

156. *Id.* at 97.

157. *Id.* at 101.

many cases an unintended consequence. By contrast, emerging surveillance systems *are* often intended to roll back some of the openness and anonymity that make freedom from government control possible in public spaces (and unfortunately help shield criminals as well as others from ongoing state monitoring). Moreover, a design change is not *only* a design change if it is clearly the functional equivalent of a law that wrests away citizens' anonymity. The latter is a more profound threat to citizens' use of public space, especially since it tends to arise not from discrete design choices in certain parks or neighborhoods that might be counterbalanced with better decisions elsewhere, but rather from a comprehensive municipal policy to intensify the surveillance of a city's public spaces. Consider, for example, the video surveillance system now being planned for Chicago. This policy does not involve case-by-case addition of cameras to a particular park or street corner, but rather placement of numerous cameras throughout public space that will "make [Chicago residents] some of the most closely observed in the world."¹⁵⁸ And this public video surveillance measure will be supplemented with a "Homeland Security" fiber optic grid that is "1,000 miles long with cameras and biochemical sensors to watch for signs of terrorism, crime and traffic tie-ups."¹⁵⁹ One would misunderstand the proposed Chicago surveillance system by describing it merely as an inept design of public urban space. It is a well thought-out plan to closely monitor space that has traditionally served as a key preserve of First Amendment activity.

This does not mean that courts should invoke First Amendment anonymity protections to order removal of all such surveillance systems. On the contrary, as I have argued in the Fourth Amendment context, such technological advances in surveillance can offer great benefits to city-dwellers and others who feel in need of greater protection against terrorism and other violent crime. They may even play an admirable role (albeit a partial one) in remedying some of the blight and fear that, as Jacobs laments, has driven vibrant pedestrian life away from sidewalks and neighborhood parks, particularly in poorer areas. Indeed, Jacobs herself notes that one of the keys to keeping sidewalks safe, and thus attractive for pedestrians, is to assure that "public street spaces have eyes on them as continuously as possible."¹⁶⁰ Jacobs was talking about the natural

158. Steven Kinzer, *Chicago Moving to "Smart" Surveillance Cameras*, N.Y. TIMES, Sept. 21, 2004, at A18.

159. Hal Dardick, *City to Keep Eyes Peeled Big Time*, CHICAGO TRIBUNE, Feb. 11, 2005, at C1.

160. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES, *supra* note 39, at 38. See also David J. Barron and Gerald E. Frug, *After 9/11: Cities*, 34 URB. LAW. 583, 592 (2002) (drawing on Jacobs' observation to challenge the assumption that cities are more vulnerable

surveillance that comes with having numerous other pedestrians in the area, but public cameras and biometric identification devices can provide more continuous watch, better ability to identify and apprehend criminals, and more immediate contact with police officials who might intervene in criminal activity before harm is done (indeed, many cameras feed directly into police monitoring stations). The supplementation of natural with artificial surveillance, however, should not come at the expense of the other crucial benefits provided by the life of sidewalks and parks. In the first place, such surveillance must not be designed in such a way that deprives people of the privacy they generally find so crucial in city life. The presence of other pedestrians does not do this: for the reasons Jacobs explains, even sharing the sidewalk with dense crowds of people does not entail sharing all of your life. On the contrary, while such temporary contact is enriching and enjoyable, and helps everyone on sidewalks feel more secure that they will have nearby support in times of danger, it does not give people a large window into one another's lives. If the new and powerful forms of artificial surveillance destroy such public privacy, and drive neighbors and acquaintances toward the more complete revelation that is characteristic of smaller, more closely monitored communities, then they will alter the character of public urban spaces.

The solution, as I have argued in the Fourth Amendment context, is not to bar local governments from making use of cameras and identification technologies, but rather to ensure that they are designed to coexist with, rather than displace, the anonymity and freedom that has long been an invaluable feature of such spaces. To this end, courts, legislators, and others charged with upholding constitutional values can require that public cameras, wherever possible, include design features or operate under institutional rules that limit damage to individuals' anonymity as far as possible.¹⁶¹ They might insist, for example, on technologies that "scramble" faces in video images, unmasking them only when necessary for a criminal or terrorism investigation, or for other tasks crucial for protecting public safety.¹⁶² They might also insist that even scrambled video recordings can only be watched by those law enforcement officials with a need to see them. Far from paving the way for everyone to monitor everyone else, then, such technologies might transform criminal and terrorist investigations without displacing the freedom from monitoring made possible by modern urban environments.

It is still likely that changes in city life will one day force city-dwellers

to terrorism and other violent crime than are communities with lower population density).

161. Blitz, *supra* note 32, at 1456-1478.

162. *Id.*

to experience something akin to the environmental shock experienced by the “The Prisoner” when he opened his apartment window to find an unfamiliar world outside.¹⁶³ It is likely, for example, that the streets, parks, and buildings of the future will look strikingly different than they do today. But that does not mean that the constitutional values of that world should be as unfamiliar to modern-day writers as its physical appearance. For the reasons I have described in this article, even if parks, streets, and other spaces in the urban environment come to have a very different feel and appearance, existing principles of First Amendment jurisprudence require that they continue to serve their long-standing function of providing individuals with spaces that are well-suited to host a free and unconstrained marketplace of ideas.

163. *See supra* notes 2-8 and accompanying text.