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# A republican and collective approach to the privacy and surveillance issues of bodycams: a commentary

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## INTRODUCTION

As evidenced from the preceding chapters, bodyworn cameras (bodycams for short) are quickly becoming ubiquitous in public spaces around the world. Whether worn by officers of the law or personnel of a local car parking authority, they present a unique form of surveillance which challenges privacy in public. Governments and other organizations are adopting laws, internal rules, and operational guidelines in a scramble to catch up with the rapid spread of the technology. This fragmented approach to policymaking has so far not provided a panacea to the surrounding privacy issues.

In this contribution, we will apply the relatively underexplored theoretical angle of republican political theory and its focus on non-domination to this problem. We would like to put forward that taking a republican approach to the value of privacy might be a first step towards addressing some of the concerns raised by the chapters. We focus on two aspects of republican theory: the arbitrariness of interferences, and the closely related notion of freedom as non-domination rather than non-interference. The potential usefulness of the concept of collective privacy in this regard will also be discussed. First, however, we will summarize the preceding chapters which inform this analysis.

## RECAPITULATION

The chapters deal with the privacy and surveillance issues of bodycams in diverging ways. Whereas Benjamin J. Goold's contribution is a theoretical reflection on the nature of public space, the other two chapters approach the subject more empirically. Mary D. Fan collected and indexed an impressive amount of laws and regulations in the United States of America. Finally, Charles Leleux and C. William R. Webster interviewed staff at four Scottish organizations

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where bodycam are operated in order to better understand how the technology is being used on the ground.

*Benjamin J. Goold – Not just about privacy: Police Body-worn Cameras and the Costs of Public Area Surveillance*

In his chapter, Benjamin J. Goold makes a twofold argument. First, he focuses on how the costs of bodycams are usually assessed. He warns that by constantly underlining the harms to individual privacy, we risk ignoring how this technology influences our understandings about who and what public spaces are for. Second, he argues that the police's willingness to adopt bodycams must be seen as more than a simple acceptance of the need to be more accountable. Rather, it represents an attempt to regain control over how narratives are being formed.

With regards to his first argument, Goold draws a line directly from the introduction of CCTV in public spaces to bodycams. He argues that the gradual introduction of CCTV has led to an acceptance amongst the general public that public areas are under constant camera surveillance. This has slowly "ratcheted down" privacy expectations, and cleared the way for the introduction of the police bodycam. This process normalizes the idea that public spaces are state spaces. Thereby, we risk losing the important functions public spaces play in open, democratic societies. Goold emphasizes the importance of public spaces as spaces that belong to citizens and are relatively free from state control. He signals that there are limits to what states can record, and the function of public spaces in the forming of political narratives. Focusing on only the individual privacy harms of bodycams ignores these societal costs.

Goold's second argument relates to the motivations of police forces for introducing bodycams. They are quick to adopt the language of civil liberties organizations and frame them as tools for accountability and transparency. In this manner, the police contributes to framing the harms and benefits of bodycams as personal rather than societal. However, bodycam footage is at least equally useful to counter videos shot by citizens and the interpretations that go with them. Here, it is important to consider that there is nothing inherently objective about any visual recording, let alone one made, possibly edited, and released by a law enforcement agency. Rather, they represent an attempt to foreground a narrative that suits a powerful institution.

*Mary D. Fan – Privacy, Public Disclosure and Police-Worn Body Camera Footage*

In her contribution, Mary D. Fan focuses on the laws regulating the disclosure of bodycam footage in the United States of America (USA). As many states have strong freedom of information laws to facilitate governmental transparency, highly sensitive footage may be disclosed against the will of the persons captured. Fan reflects on the balancing acts undertaken in this regard.

Some states, such as North and South Carolina, have opted to exempt bodycam footage from their freedom of information requests in general. Others, such as Louisiana, Texas, Illinois and Oregon, use a "no, unless" model. In these states, recordings are only disclosed in specific circumstances such as a complaint or a firearms discharge. Other states follow a "yes, unless" model, in which disclosure is the default, but this can be limited if the recording has been made,

for instance, in a private residence. This model is followed in e.g. North Dakota, Connecticut, Minnesota and Georgia.

Fan heavily criticizes the laws limiting the freedom of information as undercutting the key reasons behind public support for bodycams: regulation by transparency, rebuilding public trust in the police, and ensuring accountability. She proposes that disclosure should be the default, but only after comprehensive redaction has taken place. Given the large (labor) costs involved, she urges legislators and law enforcement authorities adopt policies that would foster technological innovation in this regard.

Finally, Fan looks at camera turn-off and turn-on regulations, many of which are adopted by law enforcement agencies. Here, she explicitly calls for police officers to actively ask victims and witnesses whether recording should be discontinued during the taking of statements in order to protect potentially vulnerable groups.

*Charles Leleux and C. William R. Webster – The Rise of Body-Worn Video Cameras: A New Surveillance Revolution*

Charles Leleux and C. William R. Webster present in their chapter the results of a unique piece of empirical research on bodycams. In 2015 and 2016, they visited and interviewed stakeholders at four public service providers where bodycams had recently been introduced in Scotland: Police Scotland, a local authority car parking unit, train services provider ScotRail, and a local authority warden service. This yields various significant insights into the practices and attitudes of both the staff responsible for their introduction as well as the personnel who need to work with the devices on a daily basis. Most of these sites were still trialing the technology, but had extended rollouts planned.

In general, the attitude of the service providers towards bodycams is very positive. They protect employees against assault, provide evidence of incidents (including with regards to the behavior of staff), and reduce the amount of time spent on complaints. The key downside mentioned was privacy, although not of the citizens being filmed. Rather, personnel often felt management was watching them and this led to some initial mistrust amongst the frontline workers. All of the service providers had set up guidelines on the use of the bodycams, although they only covered operational issues and diverged widely between the four organizations studied. Leleux and Webster conclude by noting the parallels to the introduction of CCTV in the 1990's: the limited public discourse on bodycams and the lack of standardized governance might mean they will creep into public spaces in much the same way mounted security cameras did: slowly but surely.

### REPUBLICAN FREEDOM AND BODYCAMS

These three chapters indicate that the diffuse introduction of bodycams calls for regulation, but that those efforts so far have not been sufficient. Goold argues that as the state emboldens its claim on public spaces, we should not limit the debate to a privacy narrative. Such a narrative

prioritizes individual rights, but in doing so overshadows a collective interest in vibrant public spaces. In this section we introduce an approach to privacy based on republican political theory as a possible way to reconcile these different aspects. Attention will also be paid to Alessandro Mantellero's notion of collective privacy, which helps in thinking through these problems and possible solutions.

### *Arbitrary interferences*

Republican political theory holds that individuals need to enjoy freedom as non-domination to be able to strive towards self-determined ends. Domination in this context denotes any situation in which Alice can arbitrarily interfere with Bob's choices on (how to achieve) these ends. This does not mean that Alice may never interfere with Bob's life, as Alice's interferences are only considered arbitrary if Bob has no control over them. Suppose, for instance, that Bob and Alice are spouses and that Alice wishes to set an early alarm. If Bob and Alice, after a deliberative process, conclude that this is necessary for Alice to catch her train and that Bob is willing to sacrifice some sleep, the interference will not be arbitrary and Bob is not being dominated by Alice (Roberts 2015).

Bodycams can arbitrarily interfere with the privacy of Bob, or any other citizen when a wearer of such a device decides to turn the camera on. Although in most states in the US there are some situations that should always or never be filmed, Mary D. Fan makes clear that police officers in most departments still enjoy a wide margin of discretion in this regard. In the Netherlands and Belgium, officers even have complete freedom to turn on or off a bodycam (Houwing and Ritsema van Eck, forthcoming). The interference with the private life of Bob happens at the will of others, over which he has no control.

The application of this aspect of republican political theory to the deployment of bodycams thus focuses our attention on the importance of a deliberative democratic process to establish rules on the usage of this new technology. After all, if there are established rules on which Bob could have had some influence, the interference would no longer be arbitrary. The examples which Leleux and Webster give are not encouraging in this regard. They show how the implementation of bodycams deliver a classic example of surveillance creep: once introduced solely for use by the police, they are increasingly and slowly creeping into other areas of public space governance. As a result of this scattered process, there is very little room for input on the guidelines being set up. They are being developed on the fly, with each organization internally drafting its own set of operational rules. The similarity with Fan's discussion of departmental police policies on the use of bodycams is striking: they are quickly drafted by police officials, and only afterwards can democratic control be exerted through city or municipal councils. The call by Leleux and Webster for more standardization gains extra strength in this regard.

The various US laws on the disclosure of bodycam footage discussed by Fan are also interesting here. From a republican view any attempt at democratic governance of the use of new technologies should of course be welcomed; it gives citizens the chance to participate in

rulemaking, and thus lessens any potential domination. Arbitrary disclosure of footage is thus prevented and, as Fan argues, this might in turn help to curb other arbitrary interferences by law enforcement agencies. However, as these laws focus on freedom of information aspects, they skip over an important step in the introduction of bodycams: the decision whether or not bodycams should be used at all. In order to better understand this step, we turn to another aspect of republican theory: non-domination.

### *Non-domination*

The republican notion of freedom as non-domination — rather than the liberal understanding of freedom as non-interference — holds special appeal for understanding the value of privacy. Non-domination covers situations in which Bob suffers a loss of privacy but an interference hasn't taken place, or in which Bob isn't even aware of any loss of privacy. If Alice for instance reads Bob's diary, she can potentially use the information therein to influence Bob's choices. However, as long as Alice refrains from using the information, freedom as non-interference can not account for why this limits Bob's freedom. Scaled up, this argument also accounts for why covert mass surveillance such as that carried out by the NSA is problematic whether or not all the information hoovered up is actually used (See further Roberts 2015, in general Pettit 1999, and Cohen 2013 for privacy aspects).

This argument holds great appeal for public spaces, and partially explains the unease around bodycams that many feel. In public, a police officer may appear at any moment as part of his/her general surveillance task. If the officer in question also wears a bodycam, any encounter can be filmed, be it a friendly chat or a rowdy altercation — with the stress being on *can* be filmed. Whether this happens, is at the discretion of the police officer, or at best, the policies s/he is bound to follow. Fan points out that if there are such departmental policies, they offer wildly divergent guidelines on when cameras should be turned on and off. Furthermore, few of the policies she analyzed had any provisions protecting victims and witnesses. In addition to these law enforcement statutes on the use of bodycams, the organizations described by Leleux and Webster also have their own operational guidelines.

The result is a plethora of rules and regulations. This makes it nigh impossible for citizens to know if they are being recorded. Take the situation in Scotland as analyzed by Leleux and Webster: When a police officer is recording, s/he should always clearly communicate this to the persons being filmed. Although the employees of ScotRail have no such obligation, their bodycams do need to be switched on before recording takes place, so an alert citizen might still be aware of being on camera. A person who concludes that they would usually receive an active cue when being recorded might be surprised to learn that the Local Authority Car Parking Unit studied by Leleux and Webster has its bodycams switched on continuously. In other words: in the current situation, with so many organizations implementing bodycams, knowing if any specific bodycam is turned on is practically unattainable. Following republican political theory,

this is an unacceptable state of affairs: Bob, even if he is aware of the presence of the bodycam, still has no idea if information about him is being gathered.

Fan's discussion of public disclosure laws, as pointed out above, provides examples of democratic deliberations on bodycams. Although this diminishes arbitrary interferences, in the context of non-domination we would like to draw the attention to two problems. First of all, these laws again frame the issue as a quest for balance between an individual interest in privacy and a collective interest in police accountability and transparency. Debating the merits of a possible disclosure presupposes that a recording has already been made, and police officers have worn a bodycam. However, at that point domination has already increased. By focusing on disclosure, we are not having a debate on the general merits and dangers of (bodycams as a kind of) public space surveillance.

Secondly, do we believe that public spaces belong to the state, or should we resist attempts to claim it by technological means? Goold emphasizes the importance of public space as a place outside of the limits of state control, where not everything can or should be recorded for surveillance purposes. In this manner, political narratives can be freely developed by citizens making use of their democratic rights and who are contributing to a free and democratic society. Alessandro Mantelero introduces a concept of collective privacy that could protect just this:

"[...] collective privacy protects non-aggregative collective interests (Newman 2004), which are not the mere sum of many individual interests. To clarify this assumption it is necessary to briefly point out that interests may be shared by an entire group without conflicts between the views of its members (aggregative interests) or with conflicts between the opinions of its members (non-aggregative interests). If the group is characterized by non-aggregative interests, the collective nature of the interest is represented by the fundamental values of a given society (e.g. environmental protection)"

(Mantelero 2017, 147).

Our ability to actively engage in the free development of new political narratives in public space could be seen as such a non-aggregative collective interest protected by the collective privacy concept of Mantelero.

## CONCLUSION

In this contribution we have presented an overview of the chapters that together form the section on privacy and surveillance issues of bodycams. On the basis of these chapters, we developed a way to move the debate on privacy in public spaces and bodycams forward. We introduced republican political theory as a frame to think through these concerns. Neither of the two core preconditions for freedom that this theory contains — no arbitrary interferences and non-domination — are currently being met. Finally, we made a link to the work of Mantelero

on collective interests and collective privacy. His work ties in to the concerns raised by Goold and underscored by the empirical findings of Fan and Leleux and Webster.

*A way forward*

How do we move on with the problems raised in this and the preceding chapters? Mantelero makes an interesting suggestion in terms of protecting collective interests in public space by looking at two other sectors in which rights have collective dimensions: labor law and consumer protection. In these fields, threats to collective interests are answered by collective representation through an independent entity. As Mantelero writes:

"These contexts are all characterized by situations of power imbalance, which affect an individual (employee, consumer, and citizen), due to disproportionate imbalance of strength between the parties (employer vs. employee, big corporation vs. consumers and citizens). Furthermore, in many cases the conflicting interests are referring to contexts where the use of IT technologies makes it more difficult to be aware of their potential negative implications"

(Mantelero 2017, 149).

The same characteristics are present when it comes to the use of technological means in surveillance in the state–citizen relationship. Could collective representation also help to protect collective interests against bodycam surveillance? Do we, as users of public spaces in democratic societies, need a union?

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