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Abstract

In recent years body-worn cameras have been championed by community groups, scholars, and the courts as a potential check on police misconduct. Such has been the enthusiasm for body-worn cameras that, in a relatively short time, they have been rolled out to police departments across the country. Perhaps because of the optimism surrounding these devices there has been little consideration of the Fourth Amendment issues they pose, especially when they are coupled with facial recognition technology (FRT). There is one particular context in which police use of FRT equipped body-worn cameras is especially concerning: public protests. This Comment constitutes the first scholarly treatment of this issue. Far from a purely academic exercise, the police use of FRT equipped body-worn cameras at public protests is sure to confront the courts soon. Many police departments have, or will soon have, body-worn cameras equipped with real time FRT and a number of police departments do not prohibit their members from recording public protests. Although primarily descriptive—exploring the state of current Fourth Amendment doctrine by predicting its application to a hypothetical scenario—this Comment has a normative subtext; namely, suggesting that First Amendment values can strengthen the Fourth Amendment's protections against the tide of technologically enhanced mass surveillance.

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I. Introduction

August 12 has passed, and with it the first anniversary of the events of Charlottesville, Virginia, which saw the death of Heather Heyer and the emboldening of white supremacists across the nation. Despite fears of a repeat, the streets of Charlottesville were largely peaceful on August 12 this year. But things could have gone differently.

Imagine that Jason Kessler and hundreds of his white supremacist acolytes have gathered in Emancipation Park (formerly Lee Park) to "celebrate" the events of one year earlier. A large group of counter-protestors have assembled some distance away to mark the anniversary of Heyer's death and to decry the continued mainstreaming of white supremacy. Both groups are assembling consistently with the terms of permits they obtained ahead of time from the local authorities. Unlike 2017, the local police department is determined to maintain control of the

proceedings and has established a cordon of police officers separating the two groups. The police are dressed for the occasion in full riot gear, including helmets, shields and canisters of tear gas. In the hope of deterring potential troublemakers, the police department heavily advertised its presence in advance and notified the public that police officers would be recording the entire day on body-worn cameras fitted with real time facial recognition technology. The way such technology operates is that whenever an individual exposes their face to the camera that individual is instantly compared to a databank of images, identified and then electronically tagged throughout the remainder of the footage, even when their back is subsequently turned to the camera. Knowing this, many protestors arrive at Emancipation Park wearing paraphernalia, such as bandanas, intended to confound the facial recognition technology.

Notwithstanding the police efforts, a violent altercation breaks out between the opposing groups. Police ultimately regain control of the situation and order everyone to disperse. As people are leaving the park, police review their body-worn camera footage. On the footage, one woman with a Black Lives Matter bandana half covering her face can be seen punching Kessler. Although the woman's back was turned to the cameras for the duration of the melee, she has been tagged by the facial recognition technology as a result of having faced the cameras a few minutes earlier in the footage. (The facial recognition technology was able to produce a match despite half of the woman's face being concealed by the bandana.) The electronic tag includes not just a name but also a residential address, which happens to be on a nearby street in Charlottesville. Police central command dispatches a unit to stake out the residence and, within an hour, the woman is arrested on the pavement outside her front gate. The woman agrees that her name is the same as that tagged by the technology but refuses to answer further questions. Police are unable to obtain any corroborating evidence so they decline to bring charges. (Kessler, on the advice of his lawyers, refuses to cooperate with police.) The woman subsequently brings a civil suit against the City of Charlottesville, seeking damages for the violation of her constitutional rights under the Fourth Amendment.[1]

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1. There are admittedly a number of loose ends to this hypothetical. Is facial

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The body-worn camera "revolution,"[2] as some scholars have called it, grew out of events like the death of Michael Brown in Ferguson and attendant public demands for increased police transparency and accountability.[3] Yet in the "moral panic"[4] to equip officers across the country with these devices, there has been insufficient attention paid to the Fourth Amendment implications of body-worn cameras, especially those fitted with facial recognition technology (FRT). A number of scholars have separately considered Fourth Amendment concerns relating to

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recognition technology already so advanced that it can produce matches using only a portion of a person's face? How did police *lawfully* obtain the databank image of the plaintiff against which to compare the body-worn camera footage? These are interesting questions but not the focus of this Comment. Don't fight the hypothetical.

2. Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C.D. L. REV. 897, 901 (2017).

3. *See* Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 407–09 (2016) (describing the "police-worn body camera revolution" in the wake of the events in Ferguson in 2014); Karson Kampfe, Note, *Police-Worn Body Cameras: Balancing Privacy and Accountability Through State and Police Department Action*, 76 OHIO ST. L.J. 1153, 1154–55 (2015) (discussing the rapid uptick of body-worn cameras as a response to Michael Brown's death and other similar tragedies); Howard M. Wasserman, *Moral Panic and Body Cameras*, 92 WASH. U. L. REV. 831, 832 (2015) (stating that "one significant policy suggestion has emerged from the [Ferguson] controversy: equipping police officers with body cameras"); *cf.* Iesha S. Nunes, Note, *"Hands up, Don't Shoot": Police Misconduct and the Need for Body Cameras*, 67 FLA. L. REV. 1811, 1815–21 (2015) (describing pre-Ferguson incidents of police uses of force against black civilians that arguably also contributed to the groundswell of support for body-worn cameras).

4. Wasserman, *supra* note 3, at 832.

body-worn cameras[5] and FRT,[6] but few have the examined the unique constitutional considerations arising when these two technologies are combined.[7] Furthermore, no scholar has yet asked the especially vexing questions presented by police use of FRT equipped body-worn cameras at public protests. This is not a purely academic exercise. Many police departments have, or will soon have, body-worn cameras equipped with real time FRT,[8] and,

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5. *See, e.g.*, Zachary R. Blaes, Note, *Cop-arrazi: Why Body Cameras Are Incompatible with the Fourth Amendment*, 50 NEW ENG. L. REV. 15, 33 (2015) (concluding that police body-worn cameras should be held to violate the Fourth Amendment); Kelly Freund, Note, *When Cameras Are Rolling: Privacy Implications of Body-Mounted Cameras on Police*, 49 COLUM. J.L. & SOC. PROBS. 91, 121 (2015) (arguing that "it is unlikely that the courts will find the use of body-mounted cameras to record individuals in public to be unconstitutional"); Erik Nielsen, Comment, *Fourth Amendment Implications of Police-Worn Body Cameras*, 48 ST. MARY'S L.J. 115, 141 (2016) (concluding that, under current doctrine, there is no Fourth Amendment violation any time a body-worn camera recording is made in a public place); Richard Shiller, *Shooting in High Definition: How Having Tough Policies in Place Makes the Use of Body Cameras in Law Enforcement Comport with the Fourth Amendment*, 51 NEW ENG. L. REV. 187, 195 (2016) (arguing that, with the right police department policies in place, police use of body-worn cameras would not violate the Fourth Amendment).

6. *See, e.g.*, Roberto Iraola, *Lights, Camera, Action!—Surveillance Cameras, Facial Recognition Systems and the Constitution*, 49 LOY. L. REV. 773, 785–98 (2003) (concluding that "it is difficult to argue that the use of surveillance cameras, even in conjunction with facial recognition systems, constitutes a search when those cameras are directed at public places."); Christopher S. Milligan, *Facial Recognition Technology, Video Surveillance, and Privacy*, 9 S. CAL. INTERDISC. L. J. 295, 318–20 (1999) (enumerating factors that courts would likely take into account in assessing whether police may use FRT consistently with the Fourth Amendment).

7. For authors who have adverted to this issue but not considered it in any depth *see* Freund, *supra* note 5, at 104, 123 (concluding that there "are few constitutional limits on the use of photographic database and FRT to scan faces in public in real-time."); CLARE GARVIE, ALVARO BEDOYA & JONATHAN FRANKLE, THE PERPETUAL LINE-UP: UNREGULATED POLICE FACE RECOGNITION IN AMERICA 4 (2016) ("If deployed pervasively on surveillance video or police-worn body cameras, real-time face recognition will redefine the nature of public spaces."); Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 EMORY L.J. 527, 614 (2017) ("[A] body camera with biometric recognition capabilities is a significant technological enhancement . . . and could be far more susceptible to abuse").

8. *See* VIVIAN HUNG, STEVEN BABIN & JACQUELINE COBERLY, A MARKET SURVEY ON BODY WORN CAMERA TECHNOLOGIES 410 (2016) (conducting market survey of 38 body-worn camera manufacturers and concluding that at least nine had FRT capabilities or were designed to be FRT capable in the future).

in Virginia, few police departments prohibit their members from recording public protests.[9] This Comment aims to draw attention to this urgent issue. Although primarily descriptive—exploring the state of current Fourth Amendment doctrine by predicting its application to the hypothetical fact pattern set out above—this Comment has a normative subtext; namely, suggesting that First Amendment values can revivify a strong version of the Fourth Amendment that might then be transposed to situations with less obvious political dimensions. In this respect, this Comment contributes to the recent project of scholars like Thomas Crocker and Jed Rubenfeld who seek to emphasize the *political* character of the Fourth Amendment.[10]

The Comment will proceed in three parts. Part II asks the question – as Fourth Amendment doctrine currently stands, would police use of FRT equipped body-worn cameras at public protests be characterized as a search? Part III proceeds to consider possible exceptions to the warrant requirement. Part IV asks whether, if an exception to the warrant requirement applied, the search would be reasonable in light of all the circumstances. Throughout the discussion, the Comment highlights the points at which First Amendment concerns are likely to exert pressure on the Fourth Amendment analysis. The ultimate aim of this Comment is to show how, when we sharpen our Fourth Amendment analysis on the edge of the First Amendment, we can envisage the Fourth Amendment as a robust check on the tide of technologically enhanced mass surveillance.

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9. *See* FRANK KNAACK, GETTING TO WIN-WIN: THE USE OF BODY-WORN CAMERAS IN VIRGINIA POLICING 3 (2015) (estimating that only 3% of Virginia police departments prohibit their officers from recording public protests); *see also* Brennan Centre for Justice, *Police Body Camera Policies: Privacy and First Amendment Protections*, BRENNAN CENTRE FOR JUSTICE (Aug. 3, 2016), https://www.brennancenter.org/analysis/police-body-camera-policies-privacy-and-first-amendment-protections (last visited Aug. 10, 2018) (identifying a number of police department across the country that require their officers to record public protests) (on file with the Washington and Lee Law Review).

10. Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303 (2010); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008).

II. A Search or Not a Search?

The Fourth Amendment relevantly protects "the right of the people to be secure in their persons . . . against unreasonable search and seizures."[11] The "threshold question"[12] in a case like the present is whether the government has conducted a "search." Under current doctrine, a government action will be a search under the Fourth Amendment if it satisfies either of two conditions: a "reasonable expectation of privacy" inquiry;[13] or a "common-law trespassory test."[14] The Supreme Court has made clear that the former test is appropriate in situations like ours that involve "merely the transmission of electronic signals without trespass."[15] There are two limbs to this test: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[16] The actual expectation limb has been exposed to

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11. U.S. CONST. amend. IV. The full text of the Fourth Amendment reads:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the space to be searched, and the persons or things to be seized.

12. Soldal v. Cook County, 506 U.S. 56, 59 (1992).

13. The "reasonable expectation of privacy" test originated in Justice Harlan's concurrence in Katz v. United States, 389 U.S. 347, 360–61 (1967). It subsequently became the orthodox approach. *See, e.g.*, Smith v. Maryland, 442 U.S. 735 (1979); California v. Ciraolo, 476 U.S. 207 (1986); Bond v. United States, 529 U.S. 334 (2000).

14. *See, e.g.*, United States v. Jones, 565 U.S. 400, 404–13 (2012) (articulating and applying the "common-law trespassory test" to find that the government action in issue was a search for Fourth Amendment purposes). For criticism of the supposed historical foundations of the trespassory test *see* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 68 (2012) (stating that "no trespass test was used in the pre-*Katz* era. Neither the original understanding nor Supreme Court doctrine equated searches with trespass. *Jones* purports to revive a test that did not actually exist.").

15. *Jones*, 565 U.S. at 411. *See also* Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018) (applying the reasonable expectation of privacy test to a case involving the police collection of cell site location information).

16. *Katz*, 389 U.S. at 361; *cf.* Matthew Tokson, *Knowledge and Fourth Amendment Privacy*, 111 NW. U. L. REV. 139, 148 (2016) (reframing the *Katz* analysis: "in practice, the Katz test seems to ask the following: (1) Has the person in question waived her privacy in her information by knowingly exposing it to the

withering scholarly critique[17] and is routinely ignored by the courts.[18] Accordingly, the remainder of Part II is dedicated to discussing factors[19] relevant to the other limb.

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public? and (2) If not, then could the person have had an objectively reasonable expectation of privacy in the information?").

17. *See, e.g.*, James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 MISS. L.J. 317, 344–45 (2002)

> There is no good theoretical or practical reason for retaining the actual expectation prerequisite. That inquiry has never been determinative in a Supreme Court decision. That may be because any factor that leads to the conclusion that an individual has not manifested a subjective privacy expectation also supports the conclusion that society is unprepared to deem an expectation reasonable. The inquiry is superfluous or duplicative, at best. At worst, it has the potential to mislead lower courts into denying legitimate Fourth Amendment claims. Fourth Amendment threshold doctrine could only be improved by elimination of the "actual (subjective) expectation of privacy" demand.

18. *See* Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 117–18 (2015) (examining cases from 2012 applying the *Katz* test and concluding that only 12% considered the subjective limb).

19. For other authors' lists of factors relevant to the "search" inquiry *see* Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing through Kyllo's Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393, 1406 (2001) [hereinafter Slobogin, *Peeping Techno-Toms*]

> (1) the nature of the place to be observed; (2) the steps taken to enhance privacy; (3) the degree to which the surveillance requires a physical intrusion onto private property; (4) the nature of the object or activity observed; (5) the extent to which the technology enhances the natural senses; and (6) the extent to which the surveillance is unnecessarily pervasive, invasive, or disruptive.

Slobogin also identifies a seventh factor, "the availability of the technology to the general public": *see also* Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J. L. & TECH. 383, 389–98 (1996) (describing the seven factors in more depth); Levinson-Waldman, *supra* note 7, at 530

> (1) the duration of the surveillance; (2) the lowering of structural barriers to pervasive surveillance, reflected in the greatly reduced cost of tracking; (3) the recording of an individual's or group's movements; (4) the elicitation of information from within a protected space such as a home; and, as appropriate, (5) whether the technology undermines

A. The Type of Activity Engaged In

In Fourth Amendment jurisprudence, it has been written that "certain areas deserve the most scrupulous protection from government invasion."[20] The paradigm example is the special Fourth Amendment sanctity afforded to the home,[21] because it "provide[s] the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."[22] However, remembering that "the Fourth Amendment protects people, not places,"[23] it is clear that the areas deserving scrupulous Fourth Amendment protection are not solely to be conceived of in physical terms; they can also include categories of activity or conduct.

Crocker has made a convincing case for the Fourth Amendment to be read in a manner that is at least partially activity-orientated rather than purely location-focused.[24] More specifically, Crocker relies on the First Amendment's guarantee of a "right of the people" to frame the provision as an essentially *political* right that coheres with the First Amendment's protections.[25] Rubenfeld too emphasizes the words "the people" in the Fourth Amendment in contrast to the other individual-focused

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core constitutional rights and (6) whether surveillance technologies are piggy-backed on each other.

20. Oliver v. United States, 466 U.S. 170, 178 (1984).

21. *See, e.g.*, Silverman v. United States, 365 U.S. 505, 511 (1961) ("At [the Fourth Amendment's] very core stands the right of a man to retreat to his home and there be free from unreasonable government intrusion.").

22. *Oliver*, 466 U.S. at 179.

23. Katz v. United States, 389 U.S. 347, 351 (1967).

24. *See generally* Crocker, *supra* note 10; *see also* Rubenfeld, *supra* note 10 (arguing, to similar effect, for a conception of the Fourth Amendment that is orientated to "security" rather than "privacy"); *cf.* Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979 (2011) (adopting an originalist analysis focused on the Fourth Amendment's place in criminal procedure rather than its political valence).

25. Crocker, *supra* note 10, at 311 ("Fourth Amendment liberty protects public associations [and] private life . . . [and] allows us to see how rights against search and seizure coordinate with rights to speak and assemble." *Id.* at 312 "[T]extual placement of protecting 'a right of the people' indicates a political purpose better suited to protecting liberty than privacy alone.").

criminal procedure guarantees in the Fifth and Sixth Amendments.[26]

Crocker and Rubenfeld's structural and textual arguments are supported by an understanding of the Fourth Amendment's origins in seditious libel cases. As is now widely accepted, the Fourth Amendment grew out of Founding-era admiration for a number of British cases—those of John Entick[27] and John Wilkes[28] being the most renowned—limiting the power of the State to seize the papers and effects of political opponents. The Supreme Court has acknowledged the essentially *public* and *political* concerns motivating the Fourth Amendment, observing: "It is true that the struggle from which the Fourth Amendment emerged 'is largely a history of conflict between the Crown and the press.'"[29] What flows from this historically grounded understanding of the Fourth Amendment's political dimension? In an analogous context, the Supreme Court has said: "history indispensably teaches" that certain Fourth Amendment requirements must be applied with "scrupulous exactitude" when First Amendment freedoms are implicated.[30] The same ought to be true in the present instance. In order to fully effectuate the Fourth Amendment's political protections, a court confronted with our hypothetical fact pattern ought to scrupulously apply the Fourth Amendment's search criteria to the impugned government action.

B. Duration of Surveillance

The duration of government surveillance is well recognized to be relevant in determining whether the government has infringed

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26. Rubenfeld, *supra* note 10, at 120.

27. Entick v. Carrington, (1765) 19 Howell's State Trials 1029 (C.P.) 1031.

28. Wilkes v. Wood, (1763) 19 Howell's State Trials 1153 (C.P.) 1167.

29. Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978) (quoting Stanford v. Texas, 379 U.S. 476, 482 (1965)); *see also* United States v. Edwards, 498 F.2d 496, 498 (2d Cir. 1974) (recognizing the "historical background of the [Fourth] Amendment, with its stress on the seizure of books and papers on political affairs").

30. Stanford v. Texas, 379 U.S. 476, 485 (1965) (describing heightened warrant particularity requirements relating to searches and seizures of a citizen's political books).

a reasonable expectation of privacy.[31] In our present factual scenario the surveillance would have lasted no more than a few hours. While some authors have suggested that this may exceed the constitutional limit,[32] it is likely that duration would be a factor weighing against categorization of the police conduct as a "search."

C. Technological Enhancement

Where state surveillance entails the use of technology, the courts will consider the degree to which the technology enhances human information gathering capabilities.[33] Alternately put, the courts will ask: "does the technology allow law enforcement to achieve an objective that would normally be circumscribed by the Fourth Amendment?"[34] This concern is typically discussed in the context of cameras capable of zoom or magnification,[35] but

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31. *See, e.g.*, United States v. Houston, 965 F. Supp. 2d 855, 873 (E.D. Tenn. 2013) (holding that ten-week surveillance of a defendant's private residence transgresses a reasonable expectation of privacy: "ten weeks crosses into the unreasonable, provoking an 'immediate negative visceral reaction' suggestive of the Orwellian state").

32. *See, e.g.*, CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 128 (2007) (suggesting that, for suspicionless individualized surveillance, the constitutional limit might be "a minute or so").

33. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 629–62 (5th ed. 2012) (identifying that a primary consideration in the "search" stage of the court's inquiry is "the level of sophistication of the equipment utilized by the police").

34. John J. Brogan, *Facing the Music: The Dubious Constitutionality of Facial Recognition Technology*, 25 HASTINGS COMM. & ENT. L.J. 65, 84 (2002).

35. *See, e.g.*, Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 31 (2013) ("Police can use telescopes or extremely powerful zoom lenses to scrutinize details on a person's clothing, or on items or documents removed from a wallet or briefcase, that would be invisible to bystanders just a few yards away"); Freund, *supra* note 5, at 120 (suggesting that "magnification" capabilities are relevant to the "search" inquiry); *cf.* Christopher Slobogin, *Community Control over Camera Surveillance: A Response to Bennett Capers's Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 993, 994 (2013) (arguing that the Supreme Court has regularly concluded that camera surveillance does not constitute a search "even when, in fact, members of the general public are . . . not likely to possess magnification devices of the type the police possessed"). For an example of a case in which technological magnification did not result in the attachment of the "search" label *see* Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986) (holding that aerial surveillance using a specialized mapping

assumed special importance in the Supreme Court's consideration of a more novel technology—thermal imaging—in *Kyllo v. United States*.[36] In that case, police used a thermal imaging camera to detect heat emanating from inside a suspect's house. Finding that such action constituted a search, the Court remarked: "obtaining by sense-enhancing technology any information . . . that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search."[37] In *Kyllo* it was clear that, using only their natural senses, the police would have had to enter the house to obtain the same information they were able to obtain from outside with the benefit of thermal imaging technology.

As applied to our imagined lawsuit, this factor suggests that the Charlottesville police's actions ought to be described as a "search". Given that the plaintiff was wearing a bandana concealing half of her face, it would not have been possible for police to identify her with the naked eye. The only way police could conceivably have identified the plaintiff without the aid of technology would have been to physically remove her bandana, which of course they could not do without "physical intrusion into a constitutionally protected area." This consideration thus falls on the plaintiff's side of the ledger, although one scholar has suggested that this factor is rarely determinative.[38]

D. General Public Use

Where a government action makes use of sense-enhancing technology, the extent to which that technology is in general public use will be a relevant factor in considering the reasonableness of a civilian's expectation of privacy. For example, in *Kyllo*, the Court remarked on the fact that "the [thermal imaging] technology in

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camera was not a search for the purposes of the Fourth Amendment).

36. 533 U.S. 27 (2001).

37. *Id.* at 34–35 (internal quotation marks and citation omitted).

38. Thomas K. Clancy, *What Is a "Search" within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 23 (2006) ("[T]he use of devices by law enforcement to enhance sight . . . [has] rarely changed the Court's conclusion that no search occurred.").

question is not in general public use."[39] Many commentators worry that the "general public use" consideration creates a one-way ratchet reducing constitutional protections as technology inevitably advances in capability, affordability and availability.[40] For the moment, however, this factor remains one that courts take into account.

As applied to our hypothetical lawsuit, the City could quite reasonably claim that—given the widespread public use of camera phones at protests, including Charlottesville 2017—people attending such events can no longer claim a reasonable expectation that they will not be filmed. The police use of FRT, however, complicates things. It is true that rudimentary forms of FRT have been available to the public for over a decade,[41] and that quite advanced forms of FRT may soon be available on smart phones.[42] Importantly, however, public users of FRT do not have access to the government's expansive databanks of comparison images.[43] (Such databanks are now reported to contain images of approximately half of the nation's adult population.[44]) Without a meaningfully large databank there is little utility to FRT.[45]

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39. *Kyllo*, 533 U.S. at 34–35 (internal quotation marks and citation omitted).

40. *See, e.g.*, Slobogin, *Peeping Techno-Toms*, *supra* note 19, at 1437; Quin M. Sorenson, *Losing a Plain View of Katz: The Loss of a Reasonable Expectation of Privacy under the Readily Available Standard Comment*, 107 DICK. L. REV. 179, 195 (2002).

41. Iraola, *supra* note 6, at 796 n.115 (describing FRT available to the general public in the early 2000s).

42. Jake Laperruque, *Apple's FaceID Could Be a Powerful Tool for Mass Spying*, WIRED, (Sept. 14, 2017 11:00 AM), https://www.wired.com/story/apples-faceid-could-be-a-powerful-tool-for-mass-spying/ (last visited Aug. 10, 2018) (stating that Apple's FaceID tool will use FRT to identify individuals and unlock their phones) (on file with the Washington and Lee Law Review).

43. This may soon change, *see* Jay Stanley, *A Looming Implication of Face Recognition: Private Photo Blacklists*, AM. CIV. LIBERTIES UNION: FREE FUTURE (Apr. 16, 2018, 2:30 PM), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/looming-implication-face-recognition-private-photo (last visited Aug. 10, 2018) (detailing the rise of "private photo blacklists") (on file with the Washington and Lee Law Review).

44. GARVIE, BEDOYA & FRANKLE, *supra* note 7 ("One in two American adults is in a law enforcement face recognition network.").

45. Brogan, *supra* note 35, at 84

> Although the individual elements of facial scanning technology are widely available: cameras, recognition software, and databases, the power of a scanning system is its breadth: the dizzying quantity of

Accordingly, a proper understanding of the City's use of FRT reveals that such capabilities are not in use by the general public. This consideration should thus support a finding that a Fourth Amendment "search" has occurred.

E. Efforts to Shield Information from Public View

In assessing whether to endorse as reasonable a particular expectation of privacy the courts generally take the view that a person's actions in public do not attract a reasonable expectation of privacy. (This is not to be confused with the "plain view" exception to the warrant requirement.[46]) The rationale is that a person cannot expect privacy in information that they have voluntarily conveyed to anyone who would care to look.[47] There are, however, limits to this rationale, especially when a person has made efforts to shield their information from public view. Thus in *Katz v. United States*—a case where the FBI bugged a public phone box—it was significant that Mr. Katz had closed the phone box door, in what was understood to be an effort to shield his conversation from other members of the public. Justice Harlan explained: "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection. But what he seeks

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interlinked cameras and baseline databases. To that extent, facial scanning systems are in no more common use by the general public than was the thermal sensing technology used in *Kyllo*. (citation omitted).

46. *See* LAFAVE, *supra* note 33, at 599

> [T]he concern here is with plain view in quite a different sense, namely, as descriptive of a situation in which there has been no Fourth Amendment search at all. This situation, which perhaps is deserving of a different label so as to avoid confusion . . . encompasses those circumstances in which an observation is made by a police officer without a prior physical intrusion into a constitutionally protected area.

47. *See, e.g.*, United States v. Knotts, 460 U.S. 276, 281 (1983) (explaining that a person driving on public roads can have no reasonable expectation in the privacy of their movements).

to preserve as private, even in an area accessible to the public, may be constitutionally protected."[48]

This principle coheres with the "container doctrine", which recognizes a reasonable privacy interest in the contents of a sealed container, even where that container is in a public place. Under this doctrine, "a traveller who carries a toothbrush and a few articles of clothing in a . . . knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case."[49] As analogized to the present hypothetical, one might think of the plaintiff's bandana as equivalent to the closed phone box door or the knotted scarf.[50] The plaintiff's efforts to shield her identifying information—namely, her face—from public view should distinguish her case from earlier biometric data cases in which the courts refused to recognize a Fourth Amendment search.[51] Accordingly, this factor supports the plaintiff's claim of a reasonable expectation that her identity would remain private at the Charlottesville protest.

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48. Katz v. United States, 389 U.S. 347, 351 (1967); *cf.* United States v. Wymer, 40 F. Supp. 3d 933, 938–39 (N.D. Ohio 2014) (the fact that no efforts had been made to "shield the property from public view" counted against the reasonableness of any expectation of privacy). *See also* Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) ("A person does not surrender all Fourth Amendment protection by venturing into the public sphere.").

49. United States v. Ross, 456 U.S. 798, 822 (1982).

50. On the dangers of analogical reasoning in Fourth Amendment cases involving new technologies *see* Marc McAllister, *The Fourth Amendment and New Technologies: The Misapplication of Analogical Reasoning*, 36 S. ILL. U. L.J. 475, 477 (2011) ("In rejecting Fourth Amendment claims involving warrantless use of sophisticated technologies, courts often rely upon analogies to prior 'search' cases, but these supposed analogies are so far removed from the new forms of surveillance that analogies to them only confuse, rather than clarify, the actual analysis required by *Katz*.").

51. *See, e.g.*, United States v. Dionisio, 410 U.S. 1, 14 (1972)

> The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.

F. Conclusion to Part II

In concluding our discussion of the indicia of a search under the Fourth Amendment it is worth adverting to some broader, overarching policy considerations likely to play out in any court's analysis of the "search" issue. Any determination of whether or not a practice is a search is, after all, "a value judgment."[52] Some judges would likely look to find that no search occurred in this case, because such a finding would avoid involving the courts in the inevitably messy task of adjudging the "reasonable" use of rapidly developing technology.[53] Conversely, other judges might worry about concluding that no search has taken place because to do so would effectively immunize this powerful new technology from any judicial oversight.[54] This anxiety would be compounded by worries that the technology might "chill" First Amendment expression and association (this will be discussed in Part IV.B.). It is unlikely that any "chill" could be addressed by way of a direct First Amendment challenge,[55] because of the unhelpful standing jurisprudence that

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52. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974) (describing the "search" question as a "value judgment" as to "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society").

53. This cautious, non-interventionist approach is also recommended by some scholars. *See, e.g.*, Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805 (2003)

> [C]ourts should place a thumb on the scale in favor of judicial caution when technology is in flux, and should consider allowing legislatures to provide the primary rules governing law enforcement investigations involving new technologies. . . . When technology is in flux, Fourth Amendment protections should remain relatively modest until the technology stabilizes.

54. Tomkovicz, *supra* note 17, at 325 ("The significance of the threshold issue is hard to understate. If the employment of a new investigatory tool is not a search at all, it is outside the sphere of Fourth Amendment regulation, and government authorities are at liberty to use it whenever they wish, without need for prior justification.").

55. *Cf.* Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 151 (2007) (advocating for First Amendment remedies against government information gathering: "[T]he First Amendment should serve as an independent source of procedure to protect expressive and associational activity

governs claims of "chilled" speech.[56] Accordingly, it may be that First Amendment concerns guide the court to a Fourth Amendment result, namely a finding that the conduct is a "search" and thus susceptible to judicial oversight.[57]

III. An Exception to the Warrant Requirement?

"To say that the Fourth Amendment applies here is the beginning point, not the end of the analysis."[58] Assuming, for argument's sake, that the City's use of FRT equipped body-worn cameras is found to be a search for Fourth Amendment purposes, what then? Given that no warrant was obtained, the search would be considered "*per se* unreasonable"[59] unless it could be brought within an exception[60] to the warrant requirement.[61] Many of the

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from government information gathering.").

56. *See* Laird v. Tatum, 408 U.S. 1, 13–14 (1972) (considering government practice of monitoring the political activities of anti-war activists, the Court held that the "subjective chill" on the protestors' First Amendment rights did not satisfy standing requirements of objective harm or threat of specific future harm); Stauber v. City of New York, No. 03 Civ. 9162 (RWS), 2004 WL 1593870, at *19 (S.D.N.Y. Jul. 16, 2004) (finding Fourth Amendment, but not First Amendment, standing of individual plaintiff to challenge bag searches at public protests); *cf.* Bourgeois v. Peters, 387 F.3d 1303, 1316–25 (11th Cir. 2004) (finding that the local authority's proposal to subject political demonstrators to a metal detector search violated the First Amendment).

57. *See* LAFAVE, *supra* note 33, at 651

> To say that a particular type of police practice is not a search is to conclude, in effect, that such activities [are outside of the court's regulation] . . . thus the push must be in the direction of applying the "search" appellation to those varieties of police conduct we are not prepared to leave totally uncontrolled.

58. Maryland v. King, 569 U.S. 435, 1969 (2013).

59. Katz v. United States, 389 U.S. 347, 357 (1967).

60. Half a century ago it was said that exceptions to the warrant requirement are "jealously and carefully drawn." Jones v. United States, 357 U.S. 493, 499 (1958). It is now closer to the truth that the warrant requirement is "so riddled with exceptions that it [is] basically unrecognizable." California v. Acevedo, 500 U.S. 565, 582 (1991). *See also* Riley v. California, 134 S. Ct. 2473, 2482 (2014) (stating that "the label 'exception' is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant.").

61. *Riley*, 134 S. Ct. at 2482 ("In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant

recognized exceptions—such as consent[62] and "plain view"[63]—are inapplicable to the present facts, but there are at least two exceptions that might arguably be engaged.

A. Exigent Circumstances

The Court has recognized that, in certain circumstances, "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment."[64] There are a number of common fact patterns under this doctrine, including: pursuit of a fleeing suspect,[65] prevention of imminent evidence destruction,[66] and searches of premises where the occupant is seriously injured or

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requirement.").

62. One could imagine the City arguing that the plaintiff consented to being filmed with FRT equipped body-worn cameras by attending the protest. This would be a difficult argument for the City to maintain absent proof that the plaintiff had actually been aware of the advance police notifications regarding the use of FRT at the protest. Even if the City could establish knowledge on the part of the plaintiff this should not necessarily be equated with consent, especially given her attempts to conceal her face with a bandana. As a general rule, consent is an inapposite warrant exception to apply to mass surveillance techniques. *See* SLOBOGIN, *supra* note 32, at 127 ("[T]he notion that people consent to public surveillance simply because they proceed with their business after having been notified that cameras are present is disingenuous at best. Consent implies that realistic alternatives exist."); *see also* Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 846, 905–06 (2010) (arguing that "implied consent" in this context should be deemed an "unconstitutional constraint"); Bourgeois v. Peters, 387 F.3d 1303, 1324 (11th Cir. 2004) (describing the requirement to submit to a search in order to engage in First Amendment expression as "an especially malignant unconstitutional condition"); *cf.* Johnston v. Tampa Sports Authority, 530 F.3d 1320, 1326 (11th Cir. 2008) (finding that a visitor to a sports stadium impliedly consented to a pat-down search that was conducted on all patrons).

63. Properly understood, the "plain view" exception to the warrant requirement applies in circumstances where police incidentally observe or seize evidence in the course of an otherwise lawful search or seizure. The plain view exception to the warrant requirement has no application in circumstances such as the present where the initial search or seizure is what is subject to constitutional challenge. LAFAVE, *supra* note 33, at 599.

64. Mincey v. Arizona, 437 U.S. 385, 394 (1978).

65. Warden v. Hayden, 387 U.S. 294, 298–99 (1967).

66. Kentucky v. King, 563 U.S. 452, 460 (2011).

threatened with such injury.[67] Importantly, the exigent circumstances exception to the warrant requirement is only properly engaged when there is a specific threat (often amounting to probable cause[68]) that would make obtaining a warrant impractical.[69]

At first blush this exception might look attractive to the City. The argument would be that, as the violence at Emancipation Park subsided, police reviewed the body-worn camera footage out of fear of further violence. Alternately, the City might try to analogize the present facts to a "hot pursuit" situation. A close reading of our plaintiff's case reveals that these arguments are foreclosed by the chronology of events. The search at issue here began at the moment that the police body-worn camera recorded the plaintiff's face and matched that face to an identity (the search did not begin only when police look at the body-worn camera footage). This was before any risk of violence and certainly before any attempted police pursuit. The exigent circumstances exception to the warrant requirement does not apply to the sort of precautionary or prophylactic search at issue here.

B. Special Needs

Arguably more appropriate would be the "special needs" exception—an outgrowth of the "administrative search" exception[70]—so often invoked by police to justify terrorism related dragnet searches.[71] Developed in the face of a perceived uptick in domestic terrorism in the late 1960s,[72] the special needs exception

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67. Brigham City v. Stuart, 547 U.S. 398, 400 (2006).

68. *See* LAFAVE, *supra* note 33, at 308 (asserting that a warrantless search of personal effects requires probable cause).

69. *King*, 563 U.S. at 473 (Ginsburg, J., concurring) ("Circumstances qualify as 'exigent' when there is an imminent risk of death or serious injury, or danger that evidence will immediately be destroyed, or that a suspect will escape.").

70. *See* United States v. Kincade, 379 F.3d 813, 822–23 (9th Cir. 2004) (describing "special needs" searches and "administrative" searches as distinct exceptions to the warrant requirement but noting that they are "not necessarily mutually exclusive").

71. *See* Simmons, *supra* note 62, at 850–86 (reviewing case law and tracing the origins and development of the special needs doctrine through a slew of terrorism cases).

72. *See id.* at 850–59 (describing how the "administrative search" doctrine

to the warrant requirement was designed to apply to "those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[73] The central requirement of the special needs doctrine is that the government's "direct", "primary" or "immediate" purpose[74] must be something other than a "general interest in crime control,"[75] "the normal need for law enforcement"[76] or "crime detection."[77] The distinction between a special need and a general interest in crime control has, at times, proved elusive.[78]

Outside of the anti-terrorism context, the Supreme Court has relied on the special needs doctrine to uphold suspicionless sobriety checkpoints to protect the public from the dangers of drunk driving.[79] Yet, a decade later, the Court refused to endorse suspicionless vehicle checkpoints for drug searches, explaining that the checkpoints were designed to "detect evidence of ordinary criminal wrongdoing"[80] and this went no further than a "general interest in crime control."[81] While the special needs cases have been described to be in "a state of disarray,"[82] the Court appears to have drawn a distinction between prophylactic *protection* against crime and after-the-fact *detection* of crime; only the former will be capable of amounting to a special need.

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was developed in response to more aggressive government surveillance practices after domestic terrorism incidents in the late 1960s and early 1970s).

73. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting Justice Blackmun's concurrence in the aforementioned case).

74. Ferguson v. Charleston, 532 U.S. 67, 83–84 (2001).

75. Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979).

76. *T.L.O.*, 469 U.S. at 351.

77. Chandler v. Miller, 520 U.S. 305, 314 (1997).

78. *See, e.g.*, Bourgeois v. Peters, 387 F.3d 1303, 1312–13 (11th Cir. 2004) (suggesting that protecting the public and enforcing the law are "inextricably intertwined").

79. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990).

80. Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000); *see also* Chandler v. Miller, 520 U.S. 305, 314 (1997) (explaining that "crime detection" alone cannot constitute a special need).

81. *Edmond*, 531 U.S. at 41.

82. Simmons, *supra* note 62, at 887.

A number of lower courts have convincingly articulated the dangers of carving out a special needs warrant exception for anti-terrorist policing,[83] however just such an exception appears to have emerged. In *MacWade v. Kelly*,[84] the Second Circuit upheld the practice of random searches in the New York City subway system to meet the special need of "preventing a terrorist attack."[85] That same year a differently constituted Second Circuit wrote: "It is clear to the Court that the prevention of terrorist attacks on large vessels engaged in mass transportation . . . constitutes a 'special need.'"[86] In the air travel context, the special need of protecting against terrorist attacks has been widely accepted for decades.[87]

In our case, the City would likely argue that they were acting in furtherance of a special need to protect against domestic terrorism of the sort that occurred in Charlottesville in 2017. Attorney General Jeff Sessions and some national security scholars appear to agree that the events of Charlottesville 2017 may properly be labelled "domestic terrorism."[88] Given the burden

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83. *See Bourgeois*, 387 F.3d at 1311

> While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment's protections in any large gathering of people. In the absence of some reason to believe that international terrorists would target or infiltrate this protest, there is no basis for using September 11 as an excuse for searching protestors.

see also Hassan v. City of New York, 804 F.3d 277, 306–07 (3d Cir. 2015) (cautioning that courts remain "vigilant in protecting constitutional rights" even when faced with claimed threats of terrorism); United States v. U.S. Dist. Court of the E.D. of Mich., 407 U.S. 297, 320 (1972) (prohibiting the federal government from warrantless surveillance of people who were alleged to be domestic terrorists).

84 460 F.3d 260, 263 (2d Cir. 2006).

85. Id. at 263.

86. Cassidy v. Chertoff, 471 F.3d 67, 82 (2d Cir. 2006).

87. *See* LAFAVE, *supra* note 33, at 326–57 (reviewing airport search case law from the late 1960s until today).

88. *See* Charlie Savage & Rebecca R. Ruiz, *Sessions Emerges as Forceful Figure in Condemning Charlottesville Violence*, N.Y. TIMES (Aug. 14, 2017), https://www.nytimes.com/2017/08/14/us/politics/domestic-terrorism-sessions.html (last visited Aug. 10, 2018) (reporting on Session's description of Charlottesville 2017 as "domestic terrorism") (on file with the Wasington and Lee

of the case law, the need to protect against a repeat of such events would probably satisfy the description of a "special need".

C. Conclusion to Part III

If, as I have predicted, the City's actions in Charlottesville fall within the "special needs" exception to the warrant requirement that would not end the inquiry. The description of a particular factual situation as an "exception" is somewhat deceptive because the "ultimate touchstone"[89] of the Fourth Amendment is "reasonableness." Finding an "exception" applicable is best understood to return the court to an open textured "reasonableness" inquiry.[90] As was explained in an early special needs case, "the legality of a [special needs] search . . . should depend simply on the reasonableness, under all the circumstances, of the search."[91]

IV. Reasonableness

The Supreme Court has said that "where a Fourth Amendment intrusion serves special governmental needs . . . it is necessary to balance the individual's privacy expectations against the Government's interests."[92] In what follows, I identify a number

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Law Review); Mary B. McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism*, LAWFARE (Aug. 21, 2017, 1:59 PM), https://lawfareblog.com/criminal-law-should-treat-domestic-terrorism-moral-equivalent-international-terrorism (last visited Aug. 10, 2018) (characterizing the events of Charlottesville 2017 as domestic terrorism) (on file with theWashington and Lee Law Review).

89. Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

90. *See* Simmons, *supra* note 62, at 895 ("all of the current suspicionless antiterrorism cases—after applying the special needs test to bypass the general requirement of a warrant and probable cause—essentially apply a reasonableness analysis."); *see, e.g.*, Florida v. Jimeno, 500 U.S. 248, 250 (1991) (explaining that a search falling within an exception to the warrant requirement must still satisfy a reasonableness inquiry: "the touchstone of the Fourth Amendment is reasonableness").

91. New Jersey v. T.L.O., 469 U.S. 325, 340–41 (1985).

92. Von Raab v. United States, 489 U.S. 656, 665–66 (1989).

of factors[93] that would feature in the "balancing analysis"[94] in our plaintiff's case.

A. The Specificity of the Threat

When the government interest is identified as "deterring highly hazardous conduct" like terrorism, the courts will generally give great weight to that interest in the "reasonableness" inquiry.[95] The greater the danger posed to public safety, the more likely a court is to find the search reasonable.[96] It remains unclear, however, what degree of specificity of threat is required to reasonably justify suspicionless searches. At one end of the continuum, it is relatively settled that a search of political protestors will not be found to be reasonable purely on the basis of an "omnipresent" threat of terrorist attacks at large public gatherings.[97] Similarly, courts will be reluctant to uphold searches

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93. For other taxonomies of relevant factors *see* Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1120–25 (1998) (discussing factors relevant to determining whether a search is reasonable, including: the intrusiveness of the search; the importance of the governmental interest; and the identity of the person being searched); Cassidy v. Chertoff, 471 F.3d 67, 75 (2d Cir. 2006) (listing the balancing factors as "(1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs."); MacWade v. Kelly, 460 F.3d 260, 268–69 (2d Cir. 2006)

> [T]he court determines whether the search is reasonable by balancing several competing considerations. These balancing factors include (1) the weight and immediacy of the government interest; (2) "the nature of the privacy interest allegedly compromised by" the search; (3) "the character of the intrusion imposed by" the search; and (4) the efficacy of the search in advancing the government interest. (citations omitted).

94. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990).

95. *Von Raab*, 489 U.S. at 675 n.3 (discussing suspicionless searches conducted at airports).

96. *See, e.g.*, *Sitz*, 496 U.S. at 449–52 (upholding the constitutionality of suspicionless sobriety tests of drivers and noting the grave danger posed by drunk drivers to public safety).

97. *See* Bourgeois v. Peters, 387 F.3d 1303, 1311–12 (11th Cir. 2004) (finding that a proposal to subject all protestors to a metal detector search was unreasonable).

of political protestors based on "overly vague" evidence or a "general invocation of terrorism threats."[98] Instead, what these more demanding cases require is a "fixed and distinct" threat, rather than one that is "indefinite or generalized."[99] Relevant to a court's inquiry will be whether there is a "history of injury or violence" in relation to the specific event or events like it.[100]

As against these cases there is dicta from the Supreme Court to the effect that "where the risk to public safety is *substantial and real*, blanket suspicionless searches calibrated to the risk may rank as 'reasonable.'"[101] Lower courts have noted that suspicionless searches at airports occur absent any evidence of specific threat and, accordingly, have upheld suspicionless searches on public transportation.[102] In so doing, one court explained that a search will be held to be reasonable where there is a generalized but "high risk" of terrorism associated with the particular services or activity targeted—in that case, "mass transportation".[103] The Second Circuit has further explained, quoting from the Supreme Court: "All that is required is that the 'risk to public safety [be] substantial and real' instead of merely 'symbolic.'"[104] In the present case, the 2017 acts of violence at Charlottesville would likely provide sufficiently specific evidence of a threat of repeated domestic terrorist activity. The court would

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98. Stauber v. City of New York, No. 03 Civ. 9162 (RWS), 2004 WL 1593870, at *84–85 (S.D.N.Y. Jul. 16, 2004).

99. Stauber v. City of New York, No. 03 Civ. 9162 (RWS), 2004 WL 1663600, at *1 (S.D.N.Y. Jul. 27, 2004).

100. State v. Seglen, 700 N.W.2d 702, 708 (N.D. 2005) (finding that a program of searching all attendees to a sports stadium violated the Fourth Amendment).

101. Chandler v. Miller, 520 U.S. 305, 323 (1997) (emphasis added), quoted in MacWade v. Kelly, 460 F.3d 260, 272 (2d Cir. 2006).

102 *See, e.g.*, American-Arab Anti-Discrimination Comm. v. Massachusetts Bay Transp. Auth., No. 04-11652-GAO, 2004 WL 1682859 (D Mass. July 28, 2004) (upholding suspicionless searches of bus and train passengers around the 2004 Democratic National Convention); Cassidy v. Chertoff, 471 F.3d 67 (2d Cir. 2006) (upholding suspicionless searches of passengers on a ferry).

103 *Cassidy*, 471 F.3d at 82, 83–84 (observing "the government has a 'special need' to prevent [terrorist attacks] from developing, and courts have readily acknowledged the special government need in protecting citizens in the mass transportation context" and explaining, further, that "the airline cases make it clear that the government, in its attempt to counteract the threat of terrorism, need not show that every ferry terminal is threatened by terrorism").

104 *MacWade*, 460 F.3d at 272 (quoting *Chandler*, 520 U.S. at 322-23).

then need to balance this threat against countervailing considerations in the reasonableness calculus.

B. The Nature of the Privacy Intrusion (Enter the First Amendment)

As against the government interest in protecting against terrorist attacks the court would have to weigh the plaintiff's privacy interest.[105] It is at this point that First Amendment values would likely enter the analysis.[106] The Supreme Court has instructed: "in . . . determining the reasonableness of a search, state and federal magistrates should be aware that 'unrestricted power of search and seizure could also be used as an instrument for stifling liberty of expression.'"[107] In this spirit, the plaintiff would likely argue that the potential "chill" to First Amendment expressive activities and associations should count against a finding that the police conduct was reasonable.[108] The concern here

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105 Indianapolis v. Edmond, 531 U.S. 32, 42–43 (2000)

> [T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. Rather . . . in determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue.

Riley v. California, 134 S. Ct. 2473, 2484 (2014) ("[W]e generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy.'" (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

106 *See* Wilkinson v. Forst, 832 F.2d 1330, 1339 (2d Cir. 1987) (examining the Fourth Amendment constitutionality of weapons searches at Ku Klux Klan rallies and accepting that First Amendment jurisprudence was relevant to the analysis); Stauber v. City of New York, No. 03 Civ. 9162 (RWS), 2004 WL 1593870, at *31 (S.D.N.Y. Jul. 16, 2004) (analyzing the reasonableness of bag searches at a public protest and taking into account the "danger of discouraging constitutionally protected expression" and the danger of attaching "stigma" to the persons searched); Stauber v. City of New York, No. 03 Civ. 9162 (RWS), 2004 WL 1663600, at *1 (S.D.N.Y. July 27, 2004) ("A . . . search in the context of the exercise of constitutionally protected speech calls for a different analysis.").

107 Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978) (quoting Marcus v. Search Warrant, 367 U.S. 717, 727 (1961)).

108 *See* Freund, *supra* note 5, at 106 (articulating concern that "body-mounted cameras would chill political and other types of speech.");

is not with body-worn camera surveillance per se, which would likely only have a minor "chilling" effect,[109] but with the use of FRT in combination with body-worn cameras.

This argument proceeds from an understanding that certain people only engage in expressive action or association, especially unpopular action or association,[110] when they believe that they can remain anonymous in doing so.[111] To strip such people of their anonymity, the argument goes, would have the effect of discouraging the sort of speech and association at the heart of the First Amendment.[112] Paradoxically, the fact that the City gave advance notice of the proposed use of FRT—a factor which usually minimizes privacy intrusion[113]—could have heightened the chilling effect as it may have deterred people from attending the protest at all. Effects aside, any evidence of *intent* on the part of

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SLOBOGIN, *supra* note 32, at 99 ("[I]f public conduct is expressive—for instance, a speech at a park rally—and public associations are speech related—such as joining the rally—then the First Amendment should be implicated by camera surveillance. That is because . . . such surveillance can chill conduct.").

109 *See* Levinson-Waldman, *supra* note 7, at 612 (noting that, "ironically", the chilling effect of body-worn cameras may "be mitigated in some degree by the fact that the presence of police officers always imposes some chilling effect; the addition of a body camera adds to that chill, but perhaps not as much as long-term surveillance").

110 *See* Talley v. California, 362 U.S. 60, 64 (1960) (striking down a prohibition on anonymous handbills, the Court noted: "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.").

111 *See, e.g.*, Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 197–98 (1999) (referring to evidence presented to the District Court establishing that compelling petition circulators to wear name badges inhibited participation, especially relating to "volatile" political issues).

112 *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (striking down, as violating the First Amendment, an Ohio Code provision that prohibited the distribution of anonymous campaign literature); NAACP v. Alabama, 357 U.S. 449 (1958) (finding that the state of Alabama could not, consistently with the First Amendment, compel the NAACP to disclose its membership lists); *see also* SLOBOGIN, *supra* note 32, at 101 ("People who engage in expressive conduct in public know they will be observed. But they may choose . . . not to reveal their identity, for all sorts of reasons. Camera surveillance virtually nullifies that effort.").

113 *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 463 (1990) (Stevens, J., dissenting, joined by Brennan, J., and Marshall, J.) ("There is a critical difference between a seizure that is preceded by fair notice and one that is effected by surprise.").

the City to discourage the protest entirely would almost certainly be fatal to a "reasonableness" finding.[114]

One final, but important, consideration is that the FRT used here operated in real time, not retrospectively. The Supreme Court's decision in *Buckley v. American Constitutional Law Foundation, Inc.* suggests that after-the-fact government identification of political actors is not as grave a concern as identification of actors in the "precise moment" of the First Amendment event.[115] On this reasoning, a police department might be permitted to record protestors and to subject that footage to FRT *after* the protest ended, but would not be permitted to film protestors using *real time* FRT. Accordingly, this factor tends against a reasonableness finding in our hypothetical.

C. The Degree to Which the Search Advances the Government Interest

Where a warrant exception applies and the court reverts to a generalized reasonableness analysis, it will interrogate the degree to which the search advances the government interest.[116] In our case, two considerations present as relevant: first, the extent to which body-worn cameras served to protect against the identified

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114 *See* Indianapolis v. Edmond, 531 U.S. 32, 47 (2000) (explaining that, contrary to most other areas of Fourth Amendment jurisprudence, the government's subjective purpose is a relevant factor when considering the reasonableness of special needs or administrative searches).

115 *See Buckley*, 525 U.S. at 199–200 (holding that compelling a petition circulator to wear a name badge while petitioning infringed First Amendment rights, but requiring that same petitioner to disclose their name in an affidavit afterwards did not). The Court reasoned: "The injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest. . . . In contrast, the affidavit requirement [is permissible]." *Id.*

116 Riley v. California, 134 S. Ct. 2473, 2484 (2014) ("[W]e generally determine whether to exempt a given type of search from the warrant requirement 'by assessing . . . the degree to which it is needed for the promotion of legitimate government interests.'" (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)); *see also* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (taking into account, as one factor in the balancing analysis, "the extent to which this [search] can reasonably be said to advance that [government] interest").

threat; and, secondly, the extent to which the police use of body-worn cameras was limited to achieve its purpose.[117]

On the first of these issues, the case law requires that the government search be a "*sufficiently productive* mechanism to justify the intrusion upon Fourth Amendment interests."[118] This does not require the government to show that the search is the *most productive* means of achieving its interest,[119] however the government's case will be assisted by at least some empirical data[120] showing "how the searches will reduce the threat."[121] In our case, as in the challenge to passenger searches on the New York City subway, the City would likely argue that the search would deter terrorist activity.[122] More specifically, the City would argue that the advertised[123] presence of FRT equipped cameras would cause any rational person to think twice before engaging in violence. This reliance on what some have called the "civilizing effect"[124] of body-worn cameras is not entirely supported by the empirical data. A recent study of body-worn cameras in Washington, D.C. showed that civilians interacting with police officers wearing body-worn cameras were *more likely* to assault the officers than civilians who were interacting with camera-free

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117 New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (explaining that an administrative or special needs search must be "reasonably related in scope to the circumstances which justified the interference in the first place" (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

118 Delaware v. Prouse, 440 U.S. 648, 659 (1979) (emphasis added).

119 *Sitz*, 496 U.S. at 453–54 ("[F]or purposes of Fourth Amendment analysis, the choice among reasonable alternatives remains with the governmental officials who have a unique understanding of, and responsibility for, limited public resources, including a finite number of police officers.").

120 *See id.* at 454 (suggesting that the absence of empirical data was fatal to the Fourth Amendment reasonableness of the police conduct in Delaware v. Prouse, 440 U.S. 648 (1979)).

121 Stauber v. City of New York, No. 03 Civ. 9162 (RWS), 2004 WL 1593870, at *31 (S.D.N.Y. Jul. 16, 2004).

122 MacWade v. Kelly, 460 F.3d 260, 274 (2d Cir. 2006) (describing the City's "deterrent effect" argument and the expert evidence led in support of it).

123 *See* Commonwealth v. Carkhuff, 804 N.E.2d 317, 322–23 (Mass. 2004) (noting that the suspicionless search at issue in that case was not preceded by advance public notice, and that this was a fact counting against the State).

124 Justin T. Ready & Jacob T. N. Young, *The Impact of On-Officer Video Cameras on Police–Citizen Contacts: Findings from a Controlled Experiment in Mesa, AZ*, 11 J. EXP. SOC. PSYCHOL. 445, 446 (2015).

officers.[125] Nevertheless, courts deciding these questions have exhibited reluctance to "peruse, parse, or extrapolate" empirical data, and instead tend to defer to government experts and elected officials.[126] Accordingly, considered "at the level of design,"[127] a court is likely to accept the plausibility of the City's argument that FRT cameras would deter potential violence at the Charlottesville 2018 protests.

On the second question—relating to the extent to which the search was limited to achieving its purpose—the government need not show that the search was "the least restrictive means" of achieving its objective,[128] but there must be a "close fit" between the scope of the search and the objective.[129] In order to answer this question in the context of our hypothetical, a court would need to look into the City's body-worn camera policies relating to activation, data retention, storage and publication. It is likely that any court would be reluctant to give Fourth Amendment imprimatur to a body-worn camera policy that appears overexpansive and without sufficient safeguards relating to individualized data.[130] Slobogin has argued, in the context of

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125 DAVID YOKUM, ANITA RAVISHANKAR & ALEXANDER COPPOCK, EVALUATING THE EFFECTS OF POLICE BODY-WORN CAMERAS: A RANDOMIZED CONTROLLED TRIAL (2017).

126 *See MacWade*, 460 F.3d at 274

> We will not peruse, parse, or extrapolate four months' worth of data in an attempt to divine how many checkpoints the City ought to deploy in the exercise of its day-to-day police power. Counter-terrorism experts and politically accountable officials have undertaken the delicate and esoteric task of deciding how best to marshal their available resources in light of the conditions prevailing on any given day. We will not—and may not—second-guess the minutiae of their considered decisions.

127 *Id.* at 274.

128 Bd. of Educ. v. Earls, 536 U.S. 822, 837 (2002), quoted in *MacWade*, 460 F.3d at 273.

129 Ruskai v. Pistole, 775 F.3d 61, 69 (1st Cir. 2014) ("While we will not require the government to adopt the least intrusive practicable alternative, there must be a fairly close fit between the weight of the government's interest in searching and the intrusiveness of the search.").

130 Consider Justice Ginsburg's concerns about the integrity of information on police databases. Herring v. United States, 555 U.S. 135, 155 (2009) (Ginsburg, J., dissenting) ("Electronic databases form the nervous system of contemporary criminal justice operations. In recent years, their breadth and influence have dramatically expanded. . . . The risk of error stemming from these databases is

CCTV, that strict policies regulating storage and publication of body-worn camera footage would help bring a particular recording within the range permitted by the Fourth Amendment.[131] In fact, Slobogin has conducted empirical research that suggests that people consider camera surveillance significantly less intrusive when footage is destroyed after a short period of time rather than permanently retained.[132] Another proposal that might ensure a meaningful connection between the special need and the search itself is if there were a policy in place prohibiting review of the footage except where an incident of domestic terrorism in fact eventuated.[133] Absent detailed evidence of the City's body-worn camera policy, however, it is difficult to predict how a court would decide this particular question.

D. Conclusion to Part IV

In concluding our "reasonableness" discussion, and remembering that this question will always entail value-based judgments,[134] it is worth highlighting the two competing policy interests likely to dominate the court's analysis. On the one hand,

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not slim. . . . Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty.").

131 SLOBOGIN, *supra* note 32, at 129.

132 *Id.* at 111. (reporting on survey of 190 respondents asked to rate the intrusiveness of various examples of camera surveillance).

133 *See* MARC JONATHAN BLITZ, POLICE BODY-WORN CAMERAS: EVIDENTIARY BENEFITS AND PRIVACY THREATS 16 (2015)

> Police may adopt a policy that their body-worn cameras *will* routinely record their surroundings as they search, but that *no one* will preserve or view this video footage unless a violent encounter or other basis for a complaint has arisen shortly after the search. It is true that video footage may capture images of items police do not have a right to search, or allow for the possibility of a detailed analysis of items they have a right to view during the search but not to seize. However this may not raise Fourth Amendment problems if there are strict protocols in place that prevent any government officials from ever viewing such a video, except where an emergency has arisen, requiring this evidence. (emphasis in original)

134 *See, e.g.*, Clancy, *supra* note 38, at 52 (arguing that the Fourth Amendment inquiry "must always be a value-based judgment").

courts have traditionally been reluctant to curtail law enforcement efforts that are both non-discriminatory and effective at protecting the public.[135] On the other hand, the judiciary has recently been a zealous protector of First Amendment interests.[136] Absent the First Amendment issues, it is likely that most courts would prioritize public safety in the balancing exercise. This has been a common criticism of the balancing test in anti-terrorism contexts: that the risk of catastrophic consequences inevitably pushes the courts towards limiting Fourth Amendment protections.[137] Here, however, it might be hoped that the potential First Amendment "chill" would persuade the court to find a Fourth Amendment violation.

V. Conclusion

The above analysis has been primarily descriptive, rather than normative, in the hope of revealing just how far the Fourth Amendment has been eroded by technological advancements and the normalization of mass surveillance.[138] The courts are not

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135 *See* Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5, 38 (2002) (describing the Court's "barely constrained enthusiasm for the emergence of new technologies and their inevitable use by law enforcers").

136 *See* Tabatha Abu El-Haj, "*Live Free or Die"—Liberty and the First Amendment*, 78 OHIO ST. L.J. 917, 917 (2017) (reviewing Roberts Court case law and asserting: "Recent years have witnessed an extraordinary expansion of the First Amendment."); Peter M. Shane, "*The Expanding First Amendment" in an Age of Free Speech Paradox*, 78 OHIO ST. L.J. 773, 773 (2017) ("[T]he Supreme Court in recent years has broadened the domain of communicative activity covered by the First Amendment's 'speech' protection and has limited in other ways the capacity of government to regulate communication based on content.").

137 *See* Simmons, *supra* note 62, at 897 ("[A]ntiterrorist searches are particularly ill suited to a generalized balancing test . . . for the simple reason that the gravity of the potential harm is so great that it overpowers any other variable that could be placed into the balancing equation."); Anthony C. Coveny, *When the Immovable Object Meets the Unstoppable Force: Search and Seizure in the Age of Terrorism*, 31 AM. J. TRIAL ADVOC. 329, 384 (2007) ("[W]henever a bright line rule is replaced by a balancing test, civil liberties are likely to lose."); *see, e.g.*, United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) ("When the risk is the jeopardy to hundreds of human lives and millions of dollars of property . . . the danger alone meets the test of reasonableness, so long as the search is conducted in good faith . . . and with reasonable scope [and with advance notice].").

138 *See, e.g.*, Travis S. Triano, Note, *Who Watches the Watchmen? Big Brother's Use of Wiretap Statutes to Place Civilians in Timeout*, 34 CARDOZO L.

unaware of this danger.[139] This Comment has suggested that the one hope for a check on this trend might be in contexts where Fourth Amendment rights are coupled with First Amendment interests. It is in these instances that the courts might be willing to revivify the robust political protections that the Fourth Amendment was intended to enforce.

REV. 389, 409 (2012) (stating that "being subject to a video recording is an accepted fact of modern society").

139 Kyllo v. United States, 533 U.S. 27, 34 (2001) (remarking on the "power of technology to shrink the realm of guaranteed privacy").