Government Information Quarterly 31 (2014) 421–431

Contents lists available at ScienceDirect

Government Information Quarterly

journal homepage: www.elsevier.com/locate/govinf

Technopolicing, surveillance, and citizen oversight: A neorepublican theory of liberty and information control

Bryce Clayton Newell

The Information School, University of Washington (Seattle), 4311 11th Ave NE, Suite 400, Seattle, WA 98105, USA

ARTICLE INFO

Available online 9 July 2014

Keywords:
Information access
Political theory
Information policy
Information control
Law
Freedom
National security

ABSTRACT

In modern society, we see the struggle to balance the proper functioning of government with the interests and rights of the people to access government information playing out all around us. This paper explores the relationship between liberty and security implicated by government surveillance and citizen-initiated efforts to cast the gaze back at the government (so-called "reciprocal surveillance"). In particular, this paper explores how a neorepublican conception of political liberty, defined as the absence of the possibility of domination, can inform future information policy research in this area. The paper concludes that, to be fully non-dominating, government must respect and provide effective institutional and legal mechanisms for their citizenry to effectuate self-government and command noninterference. Establishing liberal access rights to information about government conduct and mechanisms that ensure that citizens can effectively command noninterference are justified on the grounds that they reduce the possibility of arbitrary, and actual, interference with the right of the people govern themselves.

1. Introduction

Tensions between government power (whether that of executive, legislative, judicial, or administrative bodies) and the rights of citizens to access government information and conduct civilian oversight of their governments have been a longstanding social and political issue. In some ways, access to information has increased dramatically in recent decades; in others, political implementation of information policies has created what Jaeger (2007) calls "information politics," meaning "the manipulation of information access for political gain" (p. 851). However, the reality cuts both ways: governments and citizens both potentially have much greater access to information about the activities of the other than they have in the past—and this information has the potential to produce and influence power on both sides (*see* Forcese & Freeman, 2005, pp. 481–84). Ideally, the nature of representative government would dispel the idea that governments (in all their parts) and citizens stand opposed to each other. Indeed, much government surveillance is ostensibly conducted for the good of the citizenry writ large (to protect against crime and terrorism, among other things), and governments are generally far from monolithic entities with singular purposes standing opposed to public access to information. But the ongoing collection of massive amounts of information by state bodies also serves to reify the coercive power of government (Forcese & Freeman, 2005, pp. 481–84). Without similar expansion in the people's right to access information about government action (a form of "reciprocal surveillance" (Brin, 1998; Haggarty & Ericson, 2006, p. 10)), the people may lose their ability to conduct oversight and ensure government acts in a non-dominating fashion.

We see the struggle to balance the proper functioning of government with the interests and rights of the people to access and document information about government activity playing out all around us in contemporary society (*see* Scherer, 2013). This conflict is characterized by increasing technological prowess on both sides as well as more institutional resort to information seeking, data mining, and monitoring of public (and private) spaces – both offline and on the internet – and by a focus on the security enhancing aspects of contemporary surveillance. The use of surveillance technologies, such as video cameras and electronic data mining systems, might be viewed as only abstractly linked to their stated purposes of crime control, "based on symbols, (that which is hidden must be revealed), theories (surveillance deters) or faith (technology works; it will work here as well)" (Leman-Langlois, 2008, p. 244). These assumptions play on our society's increasing reliance on and trust in technology to mediate power relationships and protect us from actual physical harms. Whether these assumptions are plausible or correct in practice are empirical questions of great practical, legal, and ethical import.

The purpose of this paper is to explore (theoretically and conceptually) the relationship between privacy, liberty, and security implicated by government surveillance and citizen-initiated efforts to cast the gaze back at the government (institutions and agents). Citizen-initiated surveillance activities may include freedom of information requests,

E-mail address: bcnewell@uw.edu.

http://dx.doi.org/10.1016/j.giq.2014.04.001
0740-624X/

filming police officers and other public officials carrying out their duties in public places, and other demands for transparency and citizen access to government information (for example, through the judicial process), and a wide variety of other tactics. In particular, this paper attempts to inform current information policy research by incorporating a growing body of political theory and legal thinking into its analysis. Specifically, the paper explores how a neorepublican conception of liberty, of the type championed by Pettit (1996, 1997, 1999, 2001, 2002, 2003, 2008, 2011, 2012), as the absence of the possibility of domination, can inform the way we think about the proper relationship between these competing values.

By examining these competing forms of surveillance by reference to recent accounts of government-citizen tension in the United States, this paper will emphasize the role that *information* (as object, process, or knowledge) (Buckland, 1991, p. 351; Marchionini, 2008), plays in generating power (and the potential for domination). The recent proliferation of information in society and its attendant questions about information access and control have important ramifications for how we think about political freedom—and how much freedom we ought to let slip away for the sake of security. Importantly, security and freedom are not battling a zero-sum game; security can be protected by the exercise of non-arbitrary power (which, under the neorepublican conception of liberty, is freedom preserving) and the reduction of arbitrary power (domination) clarifies roles and promotes individual and collective political freedom but does not necessarily reduce the ability of the government to protect its people.

In Part II, the author outlines the role of information policy in facilitating or curtailing democratic oversight and participation in politics. In Part III, the paper outlines and some broad questions about balancing privacy, liberty and security in a modern society filled with powerful surveillance technologies. In Part IV, the author outlines the neorepublican argument for freedom as nondomination and contrasts this position against competing republican and liberal theories of freedom, in the context of government secrecy and access to information about government conduct.

Part V provides an overview of some recent real-world examples of government surveillance practices and citizen counter-surveillance efforts, with particular emphasis on the recent United States Supreme Court decision in *Clapper v. Amnesty International.* (2013), efforts of the Seattle Police Department to resist disclosure of dash-camera video footage, and examples of citizen-journalistic video recording of on-duty police officers.

In Part VI, the author analyzes the scenarios from Part V against the neorepublican theory of freedom, and presents the remaining elements of this paper's overall argument that certain limits on citizens' rights to document or access information about government action and decision-making improperly infringe the peoples' liberty. Some possible limitations of the argument are also examined.

Finally, in Part VII, the author offers conclusions and examines possible objections to Pettit's account of freedom from a more liberal tradition, relying on Berlin's conception of negative liberty that focuses on noninterference as the primary component of freedom (Berlin, 1969, p. 118). Ultimately, the concept of freedom as nondomination provides some valuable insights into what freedom might look like in the real-world, and applying it in this context represents an important and novel application of these valuable ideas with the capacity to inform future information policy research. However, despite these positive results, the author concludes that maintaining too narrow a focus on nondomination alone may obscure the continuing importance of restricting actual unjustified interference, and that the differences between the two theories may not be as polarized as some prior work suggests.

2. Information policy and democratic participation

Information policy encompasses a wide terrain, from enabling (or imiting) access to government information, allowing (or prohibiting) governments from accessing information about their citizens (Jaeger, 2007, p. 841) (such as in the Fourth Amendment search and seizure context (*see* Slobogin, 2008)), facilitating First Amendment guarantees of free speech (Balkin, 2013, 2004; Dawes, 2010, p. 377), and defining intellectual property policy (Benkler, 1998; Dawes, 2010, p. 377; *see also* Jaeger, 2007, p.842). All of these instantiations of information policy have significant implications for democracy (Balkin, 2013, pp. 102, 130; Jaeger, 2007, p. 841; Jaeger & Burnett, 2005, p. 466–69). Limiting access to government records not only limits the ability of the public at large to oversee government activity, but it also hinders journalists and the news media, as well as academic researchers and librarians (Jaeger, et al., 2004; Jaeger & Burnett, 2005), from effectively carrying out their broader social functions.

Information policy encompasses a broad array of laws, rules, regulations, and, as made clear by the recent revelations of NSA surveillance practices, internal policies and practices of individual agencies. Jaeger and Burnett (2005) clearly define "information access" as "the presence of a robust system through which information is made available to citizens and others" (p. 465). This definition requires a "socially and politically contextualized" means for public access to government information (Burnett & Jaeger, 2008; Burnett, Jaeger, & Thompson, 2008; Jaeger, 2007; Oltmann, 2013, p. 398).

The world has shifted from a situation, which had existed for most of human existence, where citizens had virtually no power to demand access to government records to a contemporary recognition of access to information as an important human and political right (Blanton, 2011). The public sphere, which combines public access to the flow of information as well as public forums in which citizens may express themselves (Corner, 1995, p. 42; Jaeger, 2007, p. 842), is vitally important to the ability of citizens to critique government action and "its monopoly on interpretation of political and social issues" (Jaeger, 2007, p. 842; *see* Dawes & Helbig, 2010, p. 50) and is essential to protect basic civil liberties (Jaeger, 2007, p. 842; Nerone, 1994, p. 6; Strossen, 2013; *see also* Strossen, 2005, p. 78–79).

In recent years, since the attacks in the United States on 9/11, the executive branch of the United States government has effectively used policy and legal mechanisms to severely limit public access to certain government information (Jaeger, 2007, p. 845; Strossen, 2013). Various national security laws and policies have granted government agencies more power to access the personal information of citizens while cloaking such government conduct in secrecy (Jaeger, 2007, pp. 845–49; Strossen, 2013) and the Obama administration has prosecuted more whistleblowers under the nearly one-hundred-year-old Espionage Act than all prior administrations combined (Strossen, 2013), despite promoting access in other areas (Dawes, 2010, p. 378; Dawes & Helbig, 2010, p.50; Jaeger & Bertot, 2010, pp. 372–73).

It is clear that democracy is predicated on the presumption that the public is sufficiently informed (or has the ability to become informed) and able to intelligently participate in political life, regardless of whether a preferred political theory claims civic virtue is inherently or instrumentally valuable. And, "[w]ithout access to adequate and appropriate information related to governance, such informed participation and deliberation are impossible" (Jaeger, 2007, p. 843). A free press and the diffusion of public libraries and internet access all play roles in supporting positive information policies, just as they are hindered by prohibitive national security laws (such as national security letters with accompanying gag orders or prohibitions on revealing aggregate statistics about such requests) and weakening protections for journalists and confidential sources. Additionally, promoting broad access to government information raises significant concerns about information reliability, comprehensibility, completeness, privacy of data subjects, and a host of other problems (Dawes, 2010, p. 378). Thus, as we seek to balance liberty with security – with public access and government secrecy for certain purposes – we need to critically and thoughtfully evaluate the broader ramifications of our information policies.

3. Balancing liberty and security in a surveillance society

In the aftermath of Edward Snowden's disclosures about U.S. government surveillance programs in June 2013, we have seen a massive amount of media disclosure, public discussion in online fora, public and in-camera congressional hearings, the introduction of secrecy-limiting legislation, lawsuits, and claims by technology companies that they have the right to disclose greater amounts of information about national security requests for user data. This renewed attention threatens to obscure the fact that public interest organizations, technology companies, and others have been attempting to force greater transparency about mass government surveillance for years without much success. It also begs the question about whether the recent revelations are really as new or unique as the immediate public and media outrage might imply.

We have known that governments have been conducting metadata surveillance for years. We have also known that the United States security and intelligence agencies (e.g. the National Security Administration (NSA), Central Intelligence Agency (CIA), and Federal Bureau of Investigation (FBI)) have long been cooperating and sharing intelligence information with allied "Five-Eyes" countries (since at least the Second World War) through the UKUSA intelligence-sharing agreement and a variety of mutual legal assistance treaties. We have had ready access to the text of the Foreign Intelligence Surveillance Act (1978) (hereafter "FISA") and its subsequent revisions and reauthorizations. We just didn't have Snowden's (alleged) smoking gun. Whether the recent revelations will ultimately lead to significant increases in transparency is yet to be seen. Recent decisions by United States' courts indicate change may not come from the judiciary—at least in the United States (*see Clapper v. Amnesty International.*, 2013; *New York Times Co. & v. U.S. Dept. of Justice.*, 2013).

On the other hand, if we shift our attention from surveillance in the cloud to cameras in the streets, recent victories in some federal courts have given citizens reason to believe that their First Amendment right to visually document government conduct has been assured despite outdated or overbroad wiretapping and eavesdropping laws (*Glik v. Cunniffe.*, 2011; *ACLU v. Alvarez*, 2012a, 2012b). However, we continue to see documented occurrences of officers harassing and arresting citizens for filming them in public spaces. Videos recorded on cell phones and uploaded to public repositories on the internet continue to depict officers claiming that filming their conduct in public is illegal and, in some cases, officers continue to seize and confiscate cell phones (see Antony & Thomas, 2010, p. 1281; Associated Press (AP), 2009). From incidents involving Rodney King (Stuart, 2011), Oscar Grant (Antony & Thomas, 2010), and Simon Glik (*Glik v. Cunniffe.*, 2011), we see the potential impact of citizen media on government accountability.

Security, privacy and liberty are all important aspects of a modern liberal society. Security protects us from threats to our very lives – from crime and terrorism – and can provide the opportunities that we need to actually enjoy our privacy and liberty. Privacy allows us to develop personally, nurture relationships, gather information, engage in intellectual pursuits, and maintain dignity. Liberty allows us to be free from unnecessary interference and potential domination by others, including government. If we determine that all three of these values are of significant importance, then we must determine how to properly balance them—both generally and, if appropriate, in particular circumstances that demand certain (temporary) concessions. Whether to make concessions in our privacy and individual liberty for the promise of greater collective security is a choice that citizens often face, especially in times of national crisis, war, and threat from those who would do us harm (*see generally* Moore, 2011; Posner & Vermeule, 2003; Rosenfeld, 2006; Waldron, 2005).

Should security generally trump privacy when technopolicing and mass surveillance appear vital to effective crime control and national security? Would granting citizens' greater rights to cast the surveillance gaze back at the state (for example, through institutions requiring liberal access to information or through citizen-journalistic visual documentation of government practices) adequately protect personal privacy and individual freedom? If so, would forcing this level of transparency come at any risk of diminishing our government's ability to detect, prevent, and investigate crime or terrorism? Some claim that security should always trump privacy and, if access to and use of surveillance data is properly circumscribed, the infringement on individual liberty can be reduced to acceptable levels (Taylor, 2005). Others, also favoring security and unwilling to unduly limit government surveillance, claim allowing citizens equal right to reciprocal surveillance (to watch back) reduces the probability that governments will abuse their powers and allows citizens to exercise their freedom to force government transparency (Brin, 1998; Haggarty & Ericson, 2006, p. 10). Supposedly, this concession will also increase state accountability and provide more justification for the fact that we allow technopolicing to combat technocrime (and other forms of crime, for that matter) (Leman-Langlois, 2008, p. 244).

4. Defining freedom

According to its proponents, neorepublican political theory owes its origins to the experiences of the early Roman republic, and has been influenced and adopted by early figures such as Machiavelli, Jefferson, and Madison, and, more recently, by writers like Quentin Skinner and Philip Pettit (Lovett, 2013, s. 3.1; Skinner, 1984, 1998a, 1998b, 2008; *see also* Fink, 1945; Pocock, 1979; Robbins, 1959; Sellers, 1994), although the precise historiography is still somewhat controversial (Lovett, 2013, s. 1). Lovett and Pettit (2009) argue that neorepublicanism has been adapted from what has been called "classical" republicanism to distinguish it from other, more communitarian, approaches. Lovett (2013, s. 1.2) states that since political liberty ought to be "understood as a sort of structural relationship that exists between persons or groups, rather than as a contingent outcome of that structure," freedom is properly seen "as a sort of structural independence—as the condition of not being subject to the arbitrary power of a master."

In opposition to the modern liberal trend to associate freedom with *actual interference*, Pettit (1996, pp. 576–77; 1997, 2001, 2002, 2003, 2008, 2011, 2012; 1999, p. 165) proposes that we conceptualize freedom as the opposite of "defenseless susceptibility to [arbitrary] interference by another." This proposition is part of a larger neorepublican research agenda based on three primary tenants: individual freedom (conceptualized as freedom as nondomination), limited government power over its citizens based on a mixture of constitutionalism and the rule of law (with an emphasis on the importance of the free state promoting the freedom of its citizens without dominating them), and a vigilant commitment by citizens to preserve the freedom preserving structure and substance of their government through active democratic participation (Lovett & Pettit, 2009).

The more traditional – and so-called "liberal" – conception of freedom has been strongly influenced by Berlin's positive/negative dichotomy (Berlin, 1969; Swift, 2006). Berlin describes two divergent conceptions of liberty that he calls "negative" and "positive" liberties. These conceptions diverge because, on one hand, negative liberty "is simply the area within which a [person] can act unobstructed by others" (Berlin, 1969, p. 169), while positive liberty involves self-mastery, truly autonomous action, and the ability to act on second-order desires (Berlin, 1969, p. 178). To reiterate: the extent to which a person is free, in the negative sense, rests on whether, or how thoroughly, that person is prevented, by another, from doing something the person wishes to do (Berlin, 1969, p. 169).

Other writers have distinguished between various form of positive and negative liberty contained within Berlin's dichotomy, sometimes referred to as "effective freedom" and "formal freedom," as a way to clarify Berlin's distinctions and to make the point that the absence of restraint (defined in terms of *legal* restraints) does not always guarantee the actual ability of and individual to do something he or she is legally entitled to do (for example, a person may not be able to invest in

some activity that would facilitate self-mastery or action in accordance with higher-order desires due to economic hardship or physical disability) (Swift, 2006, p. 55). On one hand, negative freedom is concerned with the absence of state restraint (or interference), while positive freedom may be concerned about equalizing the effective freedoms of everyone is a society (e.g. adequate food and access to transportation might be assured by a state mandating a certain level of basic income).

Despite some claims that Berlin's distinction between positive and negative liberty (sometimes referred to as "freedom from" and freedom to") doesn't hold up (Swift, 2006, pp. 52–54), Berlin does provide a very insightful tracing of the use of positive ideas about liberty that informed the development of various totalitarian regimes in recent history (see Berlin, 1969; Swift, 2006, p. 51). His claim that negative interference is inherently problematic is clearly appealing.

However, in contrast to Berlin's account of negative liberty, Pettit's position removes the requirement of *actual* interference, but still maintains an arguably negative approach by focusing on eliminating the possibility of *arbitrary* interference from others without requiring any action (or self-realization) on the part of an individual to claim freedom (for example, through acting on their second-order desires or achieving self-mastery) (Lovett, 2013, s. 3.2). This claim itself, that neorepublicanism is related to the negative conception of freedom is, of course, not uncontroversial. The neorepublican conception does immunize certain forms of actual interference – non-arbitrary interference, to be precise – from its critique, considering some forms of actual interference entirely unproblematic. Thus it is not *as negative* as Berlin's account would require, and it represents a vast divide from more traditional liberal thinking. However, rather than predicating freedom on ideas of self-mastery, autonomy, or a person's ability to act in accordance with their higher-order desires, one account of positive liberty, neorepublican theory is more concerned with ensuring the ability of the people to self-govern, by reducing domination and arbitrary interference (albeit not *all* interference) (Lovett, 2013). Applied to the government-citizen relationship, if an act or policy arbitrarily dominates the will and autonomy of citizens, thus violating their ability to self-govern (as a collective body of citizens), then these acts or policies and are unjustified.

Importantly, Berlin (1969, p. 177) himself noted that his version of negative liberty was not "logically… connected with democracy or self-government," although he admitted that democratic self-government may better guarantee liberty than other forms of rule. Berlin (1969, p. 177) noted that, "The answer to the question 'Who governs me?' is logically distinct from the question 'How far does the government interfere with me?'" and, admittedly, some forms of positive freedom might also privilege the value of political engagement and self-government (Swift, 2006, p. 64). Self-government, in the context of neorepublican theory, however, is limited to democratic governance within a society and is distinct, in this regard, from theories that encompass the self-government of one's own person, in isolation from society, and that are tied to individual self-mastery and an individual's capacity to act autonomously on second-order desires.

It should also be noted that Pettit's form of republicanism (neorepublicanism) is distinctly not republicanism of the more communitarian or Aristotelian varieties that might be more properly compared to forms of positive liberty. In contrast to communitarian or Aristotelian republicanism, neorepublicanism's definition of liberty does not consider the process of collective will formation or political participation as inherent aspects of political freedom (Lovett & Pettit, 2009, p. 12). Rather, political participation or civic virtue is an *instrumental* means of achieving and maintaining a high level of political freedom (Lovett & Pettit, 2009, p. 23), and should be promoted because of its instrumental utility.

As a consequence of the "emerging orthodoxy" (Pettit, 1996, p. 577), expressed by Mill (2002) as "All restraint, qua restraint, is evil," Pettit is concerned that the noninterference view limits our potential for appropriate emancipation from domination; in effect, the noninterference position allows too many restrictions on individual liberty and may lead to an apathetic defense of some important freedoms. Additionally, the noninterference view problematizes the application of law, as even generally freedom preserving restrictions built into the rule of law constitute interference with absolute liberty (for example, the penalization of premeditated murder). On some accounts, because of its negative focus, neorepublicanism is not necessarily as distinct from liberal commitments as some of its proponents insist. On the other hand, however this argument is spun, the neorepublican continues to recognize the sharp distinction between a slave with a benevolent master and a person not susceptible to the potential domination of a slaveholder (Lovett, 2013, s. 2.1).

Because power and domination – to some degree – are built into the structure of social institutions, improper or inadequate democratic safeguards against abuse could potentially allow institutions to dominate and subjugate the people systemically. Domination, then, could become institutionalized and integrated into our social and political institutions in a way that creates systemic domination, as well as evidenced in the relationships between agents of government and individuals or groups of citizens. In analyzing neorepublican freedom in an applied context, as this article attempts, three primary questions become crucially important. First, what does it mean for one agent to hold power over and subjugate (or dominate) another? Second, what might emancipation from this power appropriately look like? And finally, what does it mean to conceptualize freedom as nothing more than emancipation from such power – what Pettit calls "antipower"?

4.1. Power and domination

Paradigmatically, power and domination are exemplified by slavery. Thus, Pettit argues, "One agent dominates another if and only if he or she has a certain power over the other: in particular the power to interfere in the affairs of the other and to inflict a certain damage" (Pettit, 1996, p. 578, citing Connolly, 1983 and Weber, 1978). Importantly, the dominating agent must have the actual capacity (rather than merely "virtual" or unrealized capacity) to exercise arbitrary power over the dominated person(s), and that power must also be capable of inflicting a certain type of harm. For present purposes, the definition of harm, which can be controversial, encompasses situations where a dominating agent acts with benevolent intent. But what must this exercise of power look like, and what type of harm (or damage) is required?

Pettit (1996) answers these questions by stating that domination requires the capacity to interfere, with impunity and in an arbitrary fashion, with certain choices that the dominated agent otherwise has the capacity to make (here, "certain" means that the scope of the interference need not impinge on *all* of the dominated agent's choices, but may be limited to certain choices of varying centrality or importance). Interference requires "an intentional attempt to worsen an agent's situation of choice" (p. 578). Unintentional or accidental interference is not freely exercised subjugation. However, interference does encompass a wide amount of possible actions, including restraint, obstruction, coercion, punishment (or threat of punishment), and manipulation (which includes, in Pettit's view, "agenda fixing, the deceptive… shaping of people's beliefs or desires, [and] rigging… the consequences of people's actions") (Pettit, 1996, p. 579).

Thus, this sort of interference worsens the dominated agent's position – and causes damage – because it changes the options available to the person or alters the payoffs of the person's choices by allowing the subjugator to manipulate the options and payoffs in play. In this sense, the power-wielding agent has the necessary capacity to interfere. If an agent may act without risk of penalty for interfering, whether from the victim themselves or society at large, then the agent would have "absolutely arbitrary power" (Pettit, 1996, p. 580). The only check on the exercise of such power is in the agent itself—in that agent's free and capricious will. Thus, it follows that a person (X) is dominated by another (Y) when X has no legal recourse to contest actions by Y that

interfere with X's situation of choice. Thus, because widespread state surveillance of the communications of its citizens has the potential to interfere with individual citizens' situations of choice (for example, by chilling free expression), this relationship exhibits domination.

4.2. Antipower and emancipation

Discussing the domination of the powerless may lead us to question what we can or ought to do to diminish or remove the subjugation. Reversing roles would not solve the problem, but would merely relocate it (Pettit, 1996, p. 588). Fairly allocating power to both sides, on the other hand, does not just merely equalize the subjugation; if both sides – say the people and their government – may interfere with the other's affairs, then neither may act with impunity since the other may exact something in return (Pettit, 1996, p. 588). Thus, "neither dominates the other" (Pettit, 1996, p. 588). This is an exemplification of antipower. According to Pettit (1996), "Antipower is what comes into being as the power of some over others – the power of some over others in the sense associated with domination – is actively reduced and eliminated" (p. 588). Antipower, then, subjugates power and, as a form of power itself, allows persons to control the nature of their own destiny (Pettit, 1996, p. 589). In this sense, the "person enjoys the noninterference resiliently" because they are not dependent on the arbitrary use of power, precisely because they have the power to "command noninterference" (Pettit, 1996, p. 589).

To promote antipower, and reduce domination, we can protect the powerless against the powerful by regulating the use of the powerful agent's resources or by granting the powerless new resources. This could involve creating or empowering protective institutions and the "nonvoluntaristic" rule of law (characterized by constitutional governance and associated protections for minorities). The rule of law itself could be used as a form of power, and thus provide legal incentives to avoid interfering with the lives of others (for example, through an effective criminal justice system) and "generality, transparency, nonretroactivity, and coherence," based on constitutional guarantees can help limit this possibility (Pettit, 1996, p. 590). Regulating the resources of the powerful might also include checks on and separations of power, regular representative elections, democratic participation, limited tenure of government officials, access to independent courts or other bodies with powers to review government action, and open access to information (Pettit, 1996, p. 591).

Of course, fully eliminating domination may not be always be easy, or even completely possible, and antipower may exist in varying degrees, based on how much power a person (or group of people) can effectively wield to command noninterference or limit domination. Commanding noninterference may require collective action, and this theory admittedly relies on the presence of institutions as means to administer government and facilitate the peoples' claims. This does not mean, however, that we ought to be complacent, or even limit our concern to reducing actual interference. On the contrary, if an act or policy of an institution or agent of government arbitrarily dominates the will and autonomy of citizens, thus violating their ability to self-govern, then these acts or policies and are unjustified.

As stated above, governments must allow their citizens enough access to information necessary for individual self-government. To be fully non-arbitrary and non-dominating, government must also respect and provide effective institutional and legal mechanisms for their citizenry to effectuate self-government and command noninterference. Establishing liberal access rights to information about government conduct and mechanisms that ensure that citizens can effectively command noninterference are justified on the grounds that they reduce the possibility of arbitrary, and actual, interference with the right of the people govern themselves. Such measures would also limit the institutionalization of systemic domination within political and social institutions.

5. Public surveillance and freedom

In modern society, governments are conducting enormous amounts of surveillance – both online and offline – and are amassing huge databases of information about citizens within the scope of their searches. The enormity, and attendant reality, of this information gathering has been recently granted greater visibility as a consequence of The Guardian's recent publication of a classified court order granting the U.S. government on-going, daily, access to information about all calls (whether domestic or international) made over Verizon's systems, and top secret documents indicating that the U.S. government has had a high level of access to user data held by a number of large U.S.-based internet companies, including Google, Apple, and Facebook (the so-called "PRISM" program) (Greenwald, 2013; Greenwald & MacAskill, 2013; Roberts & Ackerman, 2013).

Police departments and other government agencies are installing and utilizing video surveillance cameras in urban and commercial areas (or are accessing video footage filmed by privately-owned cameras); utilizing automated license plate recognition systems to track and locate vehicles; data-mining information available online (including information from online social networks and personal data aggregation enterprises); employing facial recognition systems to identify individuals; and using unmanned aerial vehicles (otherwise known as "drones") equipped with cameras, weapons, communications receivers and cellphone tower imitators.

The following sections examine these questions by applying a neorepublican lens to certain recent developments in an attempt to define a theory of information policy grounded in the neorepublican conception of liberty as non-domination.

5.1. Surveillance and the war against terror: Clapper v. Amnesty International

On February 26, 2013, the United States Supreme Court rejected a challenge (*Clapper v. Amnesty International.*, 2013) to the constitutionality of FISA (1978). FISA (1978) allows the government to intercept communications between U.S. citizens and foreign powers (or agents of foreign powers, including U.S. citizens suspected of working as agents of foreign powers), and to maintain secrecy about whose correspondence the government has intercepted. FISA (1978) was enacted after the Supreme Court's 1972 decision in *United States v. United States Dist. Court for Eastern Dist. of Mich* (1972), in which the Court suggested that the Constitutional framework applicable to national security cases might be different than in cases dealing with the "surveillance of 'ordinary crime'" (*Clapper v. Amnesty International.*, 2013, p. 1143, quoting Keith, 1972, p. 322–23).

When adopting FISA (1978), Congress also established two courts to review applications for foreign intelligence surveillance activities, the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (which reviews denials by FISC) (*Clapper v. Amnesty International.*, 2013, p. 1143). FISC is authorized to approve electronic surveillance "if there is probable cause to believe that 'the target of the electronic surveillance is a foreign power or an agent of a foreign power, ' and that each of the specific 'facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power'" (*Clapper v. Amnesty International.*, 2013, p. 1143, quoting FISA, 50 U.S.C. 1804(a)(3)(a)–(b); see also Kris & Wilson, 2007, pp. 194–95, 528–29).

In the case at hand, *Clapper v. Amnesty International.* (2013), Amnesty International USA and a variety of other human rights, legal, media, and labor organizations sued the United States government, claiming that surveillance authorized under Section 1881a (enacted in 2008 by the Foreign Intelligence Surveillance Act of 1978 Amendments Act (2008)) violated their Constitutional rights. The organizations claimed that, because of their regular communications with overseas persons, there was an "objectively reasonable likelihood that their communications

will be acquired under section 1881a at some point in the future," and that the threat of this acquisition had caused them to take costly preventative measures aimed at preserving the confidentiality of their communications (*Clapper v. Amnesty International.*, 2013, p. 1143). Despite the fact that, due to the law's secrecy requirements, the government was the only entity that knew which communications had been intercepted, the Court held that third-parties like Amnesty International did not have standing to challenge the Act because they could not show that they had been harmed (*Clapper v. Amnesty International.*, 2013, p. 1155) (precisely because they didn't have access to information about the government's surveillance activities). In effect, the decision legitimizes the idea that the people ought to "just trust the government," closes opportunities for democratic participation and judicial review of government surveillance conducted under FISA (1978), and leaves the protection of citizen privacy solely in the hands of the executive branch of the federal government.

A few months later, in a secret FISC order[1] leaked by Snowden to The Guardian journalist Glenn Greenwald and published on June 5, 2013, the FISC ordered Verizon, one of the largest telecommunications providers in the United States, to turn over phone call metadata on millions of Americans to the NSA on an on-going and daily basis (Greenwald, 2013). Following the Guardian's publication of the order, the American Civil Liberties Union (ACLU) and New York Civil Liberties Union (NYCLU) filed the first lawsuit against the NSA to come after Snowden's leaks (Nakashima & Wilson, 2013). Both the ACLU and NYCLU claimed standing in their complaint because they were actually Verizon customers during the dates covered by the FISC order (American Civil Liberties Union v. Clapper, 2013). This time around, the Supreme Court may have to finally address the Constitutionality of section 1881a powers, instead of sidestepping the issue on a technicality.

These cases are far from the only challenges mounted by civil liberties organizations against government programs that mandated high levels of information secrecy. In just one additional example, a Federal District Court judge held, in January 2013, that the United States government could keep information about its "targeted killing program" a secret (*New York Times Co. & v. U.S. Dept. of Justice.*, 2013). In that case, *New York Times Co., v. U.S. Dept. of Justice*, the ACLU and New York Times had filed Freedom of Information Act lawsuits against the Department of Justice seeking information about the contested killing program. In her decision, Judge MacMahon stated that:

> The FOIA requests here in issue implicate serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men…. More fulsome disclosure of the legal reasoning on which the Administration relies to justify the targeted killing of individuals, including United States citizens, far from any recognizable "hot" field of battle, would allow for intelligent discussion and assessment of a tactic that (like torture before it) remains hotly debated….
>
> However, this Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice–in–Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret.
>
> [*New York Times Co. & v. U.S. Dept. of Justice.*, 2013, p. *1]

These recent judicial holdings demonstrate that U.S. courts are exercising restraint when faced with challenges to the federal government's claims of national security, potentially at the direct cost to the civil and Constitutional liberties of the people. In the very moments when these courts have been perfectly positioned to reduce government domination and protect the peoples' antipower, they have chosen to turn a blind eye or have a least been unwilling to robustly defend the Constitutional rights of American citizens. The cases that follow are not so obviously problematic, but they are presented to show that each of these scenarios also pose a distinct threat to individual liberty and antipower.

5.2. Police dash-camera surveillance and restricting public access to records

In Seattle, Washington, the Seattle Police Department (SPD) has been embroiled in controversy. In December 2011, the U.S. Department of Justice (DOJ) handed down a stinging review of the SPD's overuse of unnecessary and unlawful force (U.S. Department of Justice, 2011, Dec. 16; U.S. Department of Justice Civil Division & United States Attorney's Office of the Western District of Washington, 2011, Dec. 16), resulting in a comprehensive cooperative agreement between DOJ and SPD to "implement sustainable reforms" (U.S. Department of Justice, 2012, July 27). Additionally, the SPD and City of Seattle have been involved in a number of lawsuits with private individuals and local news agencies about SPD refusals to release video footage recorded by police department surveillance cameras installed in police vehicles under state freedom of information laws (Newell, 2012a).

In one case, a local attorney filed a public records request for dash-camera footage allegedly showing SPD officers using unnecessary force against some of his former clients. The City of Seattle denied his request and filed a lawsuit against the attorney for declaratory judgment (Newell, 2012a; Vedder, 2012a, 2012b). In the case, SPD asked the court to uphold their denial of the request for the videos based on a provision in state privacy law (Holmes, 2012; Newell, 2012a). In another case, a Washington State court found the SPD liable to a local man for originally denying the existence of dash-camera footage of the man's arrest, despite the fact that footage actually existed (Carter, 2011). Further analysis of the dash-camera footage logs may suggest that the initial denial was part of SPD's common practice (Carter, 2011).

In a third case, a local news agency sued the SPD for refusing to release logs of dash-camera footage, ultimately resulting in a state court fining the SPD for refusing to comply with the public records request, but not requiring the release of surveillance footage (Carter, 2012). In that case, the judge found that the legislative mandate required some delay in releasing surveillance footage under the Public Records Act, and that, even though "Investigations of our private and public institutions by journalists are vital to our public life, and the issues raised by some in-car videos are currently important and prominent in our City," the court could not second guess the legislature (*Fisher Broadcasting (KOMO 4) v. Seattle, 2012*). This case is particularly interesting because the City's video-retention policy required the videos to be kept secret until they were destroyed at the end of a three-year statute of limitations on potential claims, effectively keeping many recordings secret without any opportunity for review by the public (Carter, 2012).

In these cases, access to the courts has provided some measure of effective oversight through democratic participation in the judicial process – some amount of antipower has been granted to citizens (or their representatives) – but the limited scope of the judgments suggests that power has not been balanced equally.

[1] A copy of the order is available on the Guardian's website at http://www.guardian.co.uk/world/interactive/2013/jun/06/verizon-telephone-data-court-order.

5.3. Citizen journalism: recording police in public spaces

The advent of commercially available low-cost video recording devices, and indeed their proliferation in recent years as embedded elements within most of the cellphones and smartphones carried around by large numbers of people in contemporary society, has marked a significant increase in police visibility (Goldsmith, 2010). Combine the current ubiquity of portable, handheld, video cameras with increased ease of access to online video sharing websites like Youtube.com, and the massive number of publicly accessible videos of police (mis)conduct on the internet is not that surprising. Indeed, police have historically been one of the most visible appendages of government, and these recent developments have only heightened the public pressure under which police officers and departments work (Goldsmith, 2010, pp. 914–15).

As an early example, the video of Los Angeles Police Department officers beating Rodney King filmed by George Holliday covertly from his nearby apartment, provides a good starting point for putting this sort of new police visibility in perspective. In fact, after Holliday sent the recording to a local television station, which aired and distributed the recording widely, it became a media sensation. The visibility created by the existence and distribution of the footage contributed to riots in Los Angeles, and elsewhere, after the eventual acquittal of the police officers involved in the beating.

Of course, since 1991, the availability of low-cost handheld video cameras has skyrocketed, as have the number of citizen-produced recordings of alleged police brutality. In many cases, these videos quickly find their way onto prime-time television as well as video-sharing websites like YouTube, and are discussed in a wide variety of traditional and emerging media, from print and online newspapers to blogs, Twitter feeds, and Facebook pages. In one fairly recent case, a number of Bay Area Rapid Transit passengers recorded Officer Johannes Mehserle shooting and killing Oscar Grant in the back while Grant was lying on a subway platform, supposedly resisting restraint (*see* Antony & Thomas, 2010). Multiple recordings of the killing were uploaded to YouTube, despite officer attempts to confiscate cameras in the vicinity, and the reaction to the videos and news reports fueled both peaceful and violent protests in the days following the incident.

Alongside these developments in the use of video cameras to document police conduct lies a parallel reality that, at least in some of these cases, makes recordings of police officers in public spaces illegal under state law (*see* Newell, 2012b). Thus, citizens press record at their own peril. In twelve U.S. states, wiretapping (or eavesdropping) statues prohibit citizens from making audio or audio-visual recordings of conversations without getting consent from all parties to the recorded conversations. These state laws vary in their scope and application, but have been used frequently in recent years to arrest, detain, and harass photographers, including citizens and members of the credentialed press, who have been filming public police activity. These laws would have made recordings like those described above illegal (at least as far as conversations or speech were part of the recordings). In the United Kingdom, an anti-terrorism law similarly used by police officers to detain and question photographers has recently been held to be in violation of the European Convention for Human Rights and Fundamental Freedoms (*Case of Gillan & Quinton v. the United Kingdom, 2010*).

In a landmark case in 2011, the United States First Circuit Federal Court of Appeals held, in *Glik v. Cunniffe.* (2011), that the First Amendment clearly gives citizens the right to record police officers and other public officials while they are performing their official duties in public spaces, despite contrary provisions of Massachusetts state law, as long as the citizens do not interfere with the police officer's legitimate work and make the recordings overtly (not secretly) (*Glik v. Cunniffe.*, 2011). One year after *Glik*, the Seventh Circuit enjoined the Illinois state attorney from using the Illinois wiretapping law to arrest members of the American Civil Liberties Union (ACLU) who were planning to record police officers as part of an ACLU police accountability program (Newell, 2012b).

The Illinois statute (Illinois Criminal Code of, 2012) prohibits audio recordings even where officers do not maintain any expectation of privacy in their conversations, and carries steep criminal penalties as a class 1 felony—equivalent to sexual offenses such as rape. Some earlier decisions in other parts of the country also protect the public's right to record officers in public to varying degrees (*Fordyce v. City of Seattle*, 1995, p. 438; *Smith v. City of Cumming*, 2000, p. 1333; *State v. Flora.*, 1992), but reports of officers arresting photographers on eavesdropping charges continue to proliferate around the country—in some cases, even in jurisdictions where police department guidelines expressly state that officers should not arrest citizens for recording. In one extreme case, a citizen who recorded a conversation with an official while making a public records request was later arrested for violating the eavesdropping law for making the recording (Kohn, 2010).

6. Antipower in context

As an initial matter, we must determine whether (and how) each of these scenarios limiting public access to government surveillance information implicates subjugation and domination. In the first two cases presented above, the government (or government agents) clearly have the actual capacity (rather than merely "virtual" or unrealized capacity) to exercise arbitrary power over the dominated person(s) because of their control of collected information (and of the modalities in which such information was obtained), whether by coercion, arrest (or threat of arrest or punishment), or limiting or refusing to release information. It is also clear that restricting (chilling) a person's free expression, their first amendment right to gather information (implicated by all three scenarios), or their right to acquire information about government activity, causes harm and affects a person's choices.

This is especially apparent when, under Pettit's account of freedom, a subjugating interference with a person's choices may be limited to certain choices of varying centrality or importance, and need not totally remove all choices available to that person. Such interference by police officers or law enforcement (and the policy- or law-making processes behind the enforcement) also clearly equates to "an intentional attempt to worsen an agent's situation of choice" (Pettit, 1996, p. 578) because it represents an intentional act that eliminates certain information that might be relevant to that decision-making process of that agent in that situation.

The threat of punishment, whether the risk of arrest for communicating across international borders or the likelihood of being forced to incur legal costs to defend a legitimate public records request or an arrest stemming from protected free speech activities, surely has the coercive capacity to limit the choices open to the dominated agent and to chill the exercise of expression. But are these exercises of power arbitrary and enacted with impunity? Does the subjugator in any of these scenarios act without risk of penalty for interfering? In the case of the SPD, we can see the power of the police has been curtailed—at least in part. Courts have found the SPD's practices of denying that video footage exists and refusing to release information have violated the law, but the courts have still allowed the police to refuse to release actual footage and to delay in other cases. Even if the citizens maintain some amount of antipower in this scenario (through an opportunity to bring suit in courts of law), such power is not fully realized. The *Clapper v. Amnesty International (2013)* case demonstrates that not all arbitrary state surveillance power is subject to review by (or even the knowledge of) the citizenry or the Article III courts.

In the third example, courts have begun to recognize a constitutional right to film officials in public spaces (under certain conditions), but state laws and current police practices apparently continue to limit the reasonable choices of citizens on the ground. Thus, democratic participation through petition to the judicial system is an open avenue. Citizens have some ability to challenge government action, but generally only have standing after their Constitutional rights have been (allegedly) infringed (due to systemic and institutionalized power

inequities). Therefore, the balance of power is not completely equal, and antipower has not been fully realized in these cases. And, importantly, whenever antipower has been limited (for example when some avenue to obtain legal recourse has been effectively closed to citizens), such interference is problematic unless properly justified.

Additionally, since the Fourth Amendment generally does not protect against the government's collection of information and mass surveillance in public spaces, many forms of surveillance (e.g. use of drones, cameras, license plate readers, and mining personal information on the internet) may not be subject to any real scrutiny through democratic processes or legal proceedings in courts of law. The legal and practical restrictions on citizens wanting to document or access information about government conduct, combined with the power of government to watch its citizens, represents an imbalanced situation where citizens lack the antipower they might otherwise command. As a result, we should question whether this is a situation in which,

> The powerless are not going to be able to look the powerful in the eye, conscious as each will be – and conscious as each will be of the other's consciousness – of this asymmetry. Both will share an awareness that the powerless can do nothing except by the leave of the powerful: that the powerless are at the mercy of the powerful and not on equal terms. The master–slave scenario will materialize, and the asymmetry between the two sides will be a communicative as well as an objective reality.
>
> [Pettit, 1996, p. 584]

Of course, one answer in response to this position is that the democratic process, and the potential for participatory democratic governance, has not been curtailed. The people have not been denied access to their representatives or to the courts (although some remedies have been clearly denied). In fact, in order for the government to use surveillance data gathered through FISA sanctioned surveillance, they would still have to prove compliance with the Fourth Amendment. And, although not many foreign defendants could likely make a claim that the Fourth Amendment applied in their case, the government's disclosure "would provide grounds for a claim of standing on the part of the [defendant's] attorney" (*Clapper v. Amnesty International.*, 2013, p. 1154). However, the people do not have access to all of the information that supposedly supports the government's need to conduct various types of electronic surveillance and they do not have full access to information about what the government has done with the powers it has been given. This is inherently problematic, especially under the neorepublican position that governments should protect their peoples' freedoms and ensure that the state does not come to dominate its people in any arbitrary fashion. Without some form of effective democratic check in place – some way for the public to make informed, deliberative choices based on real information – abuse (and domination) is always a real possibility.

Perhaps it is best – even essential – that citizens grant their governments some power to restrict public access to information for national security (though this seems less vital for crime control at the local state or municipal level), but this does not mean that citizens should not have the right to insist on safeguards, and the right to ensure the government complies with constitutional requirements in the exercise of its power. If that were so, the exercise of power would cease to be arbitrary, and the action would not be subjugating. The people would retain antipower.

Because the people are sovereign and should retain antipower *vis-à-vis* their government, there should be a presumption that the people retain the right to access government information and to document information about how the government discharges its duties. However, a presumption, by definition, may be overcome in appropriate circumstances, and a more robust description and explication of the appropriate threshold is in order. In some instances, it might be appropriate for a state to withhold information from its people (potentially an act of domination if the people have not granted such power), acting unilaterally or on its own, for the protection of the people and national security, as long as certain safeguards are put in place to properly respect the sovereignty of the people. Thus, building on this argument, we can see that the state, absent powers granted by its citizens, may not generally withhold information about its activities from its people or deny them the right to access information about government activity, because such actions are acts of domination. However, as stated above, this theory does have room to entertain the idea that certain state interests, such as national security, may sometimes justify the state in withholding information from its citizens, despite the possibility that such withholding may infringe the people's antipower, thus overcoming the initial presumption.

Importantly, there appears to be a significant difference (in terms of the threat to antipower) between government decisions re secrecy (and the related risks to national security) of 1) the *substantive information* collected by the government (i.e. the actual information or metadata collected), and 2) the *procedural information* about how the government conducts its activities (surveillance activities or otherwise) or the *legal processes* that authorize such conduct. This division rests on the idea that the Constitution protects the people from certain inappropriate actions of government (e.g. the Fourth Amendment prohibition on unreasonable and unjustified searches or seizures).

Domination is also more clearly implicated in terms of government conduct (or the potentiality of arbitrary conduct) that interferes with a person's situation of choice than it is with the nature of the underlying information. (Although this can also be constitutionally significant, for example, in the distinction between content and non-content information about a citizen's communications under the Fourth Amendment, but this distinction is often secondary to the procedural question about whether the information was *obtained lawfully* in the first place). Thus, the following distinctions need to be made: First, there is a greater abrogation of the peoples' antipower when the state withholds information about the *methods and procedures* used by the state to collect the information and to approve information gathering activities of the state than when the state withholds *substantive information* collected by the state about its citizens or other targets.

Second, if the state collects information about its citizens, but denies its citizens the right to know what information has been collected about them, the state has acted in a dominating manner unless the people themselves have authorized the government to withhold such information and sufficient constitutional safeguards are put in place to ensure civil liberties are not violated. In no case, however, shall the people relinquish their right to sovereignty by allowing the government to act without censure in ways that may violate the Constitution (for example, by relinquishing their right and ability to access information about the methods and procedures used by government to carry out and justify its surveillance activities). Thus, if the state exercises its surveillance powers, but denies its citizens the right to know or document how this information was collected, and what procedural requirements were met to authorize such information gathering, then the state has acted in a dominating way by eliminating the citizens' antipower, and has come to impermissibly dominate its citizens because it has eliminated the sovereign right of its people to ensure that their government protects their freedom and Constitutional rights.

The preceding argument leads to the conclusion that, because the people are sovereign, they should presumptively retain the right to access and document information about how their government conducts the activities and duties entrusted to it by the people. This presumptive right of access encompasses information about how government agents conduct surveillance and what information is gathered through such surveillance activities, subject only to determinations by the people themselves that certain information be kept secret (for example, for national security purposes). In any case, however, the state may not withhold information about the methods and procedures used to gather the information or the procedural requirements used to authorize such information gathering.

However, at least one additional problem needs to be addressed at this point. The allowance just made for government secrecy must be tempered. If it is not, the peoples' antipower has been severely limited and the state retains much of the power the argument presented in this paper has sought to limit. The allowance was predicated on the assumption that sometimes certain information ought to be secret to protect the peoples' interests in security and protection by the state from outside evils. But such secrecy does not necessarily need to persist for lengthy periods of time, and certainly not in perpetuity. Sunlight provisions, or enforceable and mandatory declassification provisions, would provide a balance between national security interests (when those interests are present and legitimate) and the peoples' right to sovereignty and liberty by providing a form of retroactive accountability. This idea, despite its simplicity, is an incredibly important core issue, and is vital to a proper balancing of the security and liberty interests at stake.

Thus, we may concede that substantive information collected by governments about its citizens or other targets may sometimes be withheld from the people, because release would compromise legitimate national security interests, without eliminating the usefulness or force of our neorepublican conception of freedom. But, as just stated, withholding this information in perpetuity always impermissibly infringes the people's antipower, unless the people effectively retain the right to override the State's ability to classify the information in perpetuity. Thus, when government surveillance information is withheld from the people for national security purposes, it should only be temporarily withheld, mandatory sunlight provisions should be specified clearly in the law, and the people should retain the power to ensure information is released consistent with the relevant sunlight provision(s). Importantly, such provisions might also contain clauses that allow the people to hold state actors accountable for violations of their rights after the information is lawfully declassified, should violations of constitutional or legal rights be identified.

Indeed, Jaeger's (2007) concept of "information politics," meaning "the manipulation of information access for political gain" (p. 851) suggests that much of the problems attendant to information access are related to personal information privacy. Governments and citizens both potentially have much greater access to information about the activities of the other than they have in the past—and this information has the potential to produce and influence power on both sides (*see* Forcese & Freeman, 2005, pp. 481–84). Information can equal power, and if rights to personal privacy are not respected by the state, the imbalance indicates a potential for subjugation.

7. Conclusion

In conclusion, it is important to note the potential objection of the dominant liberal view that freedom (of the negative kind) is really noninterference. The attraction of this view is clear. Can we really say that a person is less free when no one ever *actually* interferes with their speech or ability to access information (despite the possibility, however vague and unlikely) than when no one *can* interfere? This view makes great intuitive sense, but it also creates some potential problems. For example, it problematizes forms of non-arbitrary, democratically decided, and appealable acts of interference, such as the application of law itself. On this view, any application of law is an abrogation of freedom, regardless of whether the enforcer acted on clear constitutional grounds and without impunity. The noninterference view of freedom was embraced by some, like Hobbes, Paley, and Bentham, to argue that that all law and every form of government restricted liberty, whether enacted by democratic authority or despotic rulers, American revolutionaries or the British parliament (Lovett & Pettit, 2009, pp. 13–15; Pettit, 1996, pp. 598–600). Clearly, noninterference is an aspect of freedom, but why should all interference negate freedom *per se*?

Viewing freedom as antipower – as the absence of domination by another – allows us to respect the importance of noninterference, but also to recognize that some forms of interference (those that are not arbitrary or without recourse) do not necessarily restrict our freedoms, but may only condition it (Pettit, 1997, pp. 26, 56, 76, 83, 94, 104; Pettit, 2002, p. 342). On this view, we can see that proper application of the nonvoluntaristic rule of law (with opportunities for effective appeal and democratic participation) actually protects and preserves our freedoms, rather than restricting them as a means to some other end. A person living under a friendly despot is not in the same position – in terms of freedom – as the person living in a properly constituted constitutional democracy with limits on domination. Fully realizing a situation of more equalized reciprocal surveillance and rights to access information about government activities (with temporary exceptions as may be needed to protect national security, as described above) would give citizens greater ability to ensure their government was not overreaching and abusing its authority, to hold the state and state actors accountable for rights violations, and to maintain government as an entity that protects it citizens' freedoms without coming to subjugate them to arbitrary exercises of power.

Consequently, the version of neorepublican theory developed in this paper and applied to information policy, with its core concept of freedom as nondomination, provides valuable insights into how one-sided surveillance powers and control of information vested in states can limit individual freedom. Applying neorepublican political theory in this context represents an important and novel application of these valuable ideas with the capacity to inform future information policy research and the development of better laws and policies related to surveillance, secrecy, and access to information. However, maintaining too narrow a focus on nondomination alone may obscure the continuing importance of restricting actual unjustified interference. Actual interference is, importantly, a more serious problem for freedom than is the mere possibility that such interference could take place in the future. As a consequence, we might be suspect of republican or liberal approaches that prioritize positive freedoms at the expense of limiting our focus on the importance of limiting actual interference, especially when such interference is – or might be – arbitrarily exercised by one agent over another. Ultimately, however, the differences between the version of neorepublicanism espoused here and more traditional liberal theories of negative freedom may not be as incommensurate as some prior work suggests.

At the end of the day, the primary point of this argument is not that we eliminate or unduly restrict to ability of government and law enforcement to conduct surveillance (or to restrict access to certain information in some cases), but rather that we recognize the bargain we have struck, in our representative democratic society, that the government assume some surveillance powers – and thus encroach on our individual *negative* freedoms to some degree – because they have the ability (and the responsibility) to use these powers for the public good; namely, public safety and national security. Our contract, and our consent, does not negate the possibility of domination or the relevance of freedom (Pettit, 1996, p. 585). The neorepublican concept of non-domination allows us to address, understand, and accept this reality. However, this power cannot be granted without strings attached.

Acknowledgments

The author wishes to especially thank Stephen Gardiner (University of Washington, Philosophy Department), Adam D. Moore (University of Washington, Information School and Philosophy Department), Alan Rubel (University of Wisconsin, Madison, School of Library and Information Studies and Legal Studies), Laura Lenhart (University of Arizona, School of Information Resources and Library Science), Chris Heaney (University of Washington, Information School), and the three anonymous reviewers for Government Information Quarterly, for their very helpful critiques, suggestions, and overall encouragement. Their suggestions have dramatically affected and improved this work. Any faults are those of the author alone.

References

Books and periodicals

Antony, M. G., & Thomas, R. J. (2010). 'This is citizen journalism at its finest': YouTube and the public sphere in the Oscar Grant shooting incident. *New Media & Society*, *12*(8), 1280–1296.

Associated Press (AP) (2009, Jan. 6). *Man's Fatal Shooting by San Francisco Subway Police Prompts Probe, Plans for $25M Lawsuit*. Fox News (Retrieved from http://www.foxnews.com/story/0,2933,476644,00.html.).

Balkin, J. M. (2004). Digital speech and democratic culture: A theory of freedom of expression for the information society. *New York University Law Review*, *79*, 1–58.

Balkin, J. M. (2013). The first amendment is an information policy. *Hofstra Law Review*, *41*, 101–130.

Benkler, Y. (1998). The commons as a neglected factor of information policy. *Paper presented at the 26th Annual Telecommunications Research Conference, Arlington, VA*.

Berlin, I. (1969). Two concepts of liberty. *Four essays on liberty*. Oxford, England: Oxford University Press.

Blanton, T. (2011). A humble forward. *The art of access: Strategies for acquiring public records*. Washington DC: CQ Press.

Brin, D. (1998). *The transparent society: Will technology force us to choose between privacy and freedom?* Reading, MA: Perseus Books.

Buckland, M. (1991). Information as thing. *Journal of the American Society of Information Science*, *42*(5), 351–360.

Burnett, G., & Jaeger, P. T. (2008). Small worlds, lifeworlds, and information: The ramifications of the information behavior of social groups in public policy and the public sphere. *Information Research*, *13*(2).

Burnett, G., Jaeger, P. T., & Thompson, K. M. (2008). Normative behavior and information: The social aspects of information access. *Library and Information Science Research*, *30*(1), 56–66.

Carter, M. (2011, Oct. 5). *Man sues, says SPD conceals dash-cam videos*. The Seattle Times (Retrieved from http://seattletimes.com/html/localnews/2016416424_dashcam06m.html.).

Carter, M. (2012, Apr. 11). *Judge upholds SPD dash-cam policy but still levies fine*. The Seattle Times (Retrieved from http://seattletimes.com/html/localnews/2017960641_dashcam12m.html.).

Connolly, W. (1983). *The terms of political discourse* (2nd ed.). Princeton, N.J.: Princeton University Press.

Corner, J. (1995). *Television form and public address*. London: Edward Arnold.

Dawes, S. S. (2010). Stewardship and usefulness: Policy principles for information-based transparency. *Government Information Quarterly*, *27*, 377–383.

Dawes, S. S., & Helbig, N. (2010). Information strategies for open government: Challenges and prospects for deriving public value from government transparency. In M.A. Wimmer (Eds.), *Electronic government 2010: Lecture notes in computer science*, *6228*. (pp. 50–60).

Fink, Z. S. (1945). *The classical republicans: an essay in the recovery of a pattern of thought in seventeenth century England*. Evanston, IL: Northwestern University Press.

Forcese, C., & Freeman, A. (2005). *The laws of government: The legal foundations of Canadian democracy*. Toronto, Canada: Irwin Law.

Goldsmith, A. J. (2010). Policing's new visibility. *British Journal of Criminology*, *50*(5), 914–934.

Greenwald, G. (2013, June 6). *NSA collecting phone records of millions of Verizon customers daily. The Guardian* (originally published on June 5, 2013) (Retrieved from http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order/.).

Greenwald, G., & MacAskill, E. (2013, June 6). *NSA Prism Program Taps into User Data of Apple, Google and Others*. The Guardian (Retrieved from http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data/.).

Haggarty, K. D., & Ericson, R. V. (2006). The new politics of surveillance and visibility. In K. D. Haggarty, & R. V. Ericson (Eds.), *The new politics of surveillance and visibility* (pp. 3–25). Toronto, Canada: University of Toronto Press.

Holmes, P. (2012, Feb. 22). *Why I'm suing attorney James Egan*. SLOG (The Stranger) (Retrieved from http://slog.thestranger.com/slog/archives/2012/02/22/why-im-suing-attorney-james-egan.).

Jaeger, P. T. (2007). Information policy, information access, and democratic participation: The national and international implications of the Bush administration's information policies. *Government Information Quarterly*, *24*, 840–859.

Jaeger, P. T., & Bertot, J. C. (2010). Transparency and technological change: Ensuring equal and sustained public access to government information. *Government Information Quarterly*, *27*, 371–376.

Jaeger, P. T., & Burnett, G. (2005). Information access and exchange among small worlds in a democratic society: The role of policy in redefining information behavior in the post-9/11 United States. *The Library Quarterly*, *75*(4), 464–495.

Jaeger, P. T., McClure, C. R., Bertot, J. C., & Snead, J. T. (2004). The USA PATRIOT Act, the Foreign Intelligence Surveillance Act, and information policy research in libraries: Issues, impacts, and questions for library researchers. *Library Quarterly*, *74*(2), 99–121.

Kohn, M. (2010). Unblinking: Citizens and subjects in the age of video surveillance. *Constellations*, *17*(4), 572–588.

Kris, D., & Wilson, J. (2007). *National security investigations & prosecutions*, *Vol. 1*, Eagan, MN: Thomson/West.

Leman-Langlois, S. (2008). Afterword. In S. Leman-Langlois (Ed.), *Technocrime: Technology, crime and social control* (pp. 243–246). Portland, OR: Willan.

Lovett, F. (2013). at s. 3.2. In Edward N. Zalta (Ed.), *Frank Lovett, Republicanism, The Stanford Encyclopedia of Philosophy* (Spring 2013 ed.) http://plato.stanford.edu/archives/spr2013/entries/republicanism/.

Lovett, F., & Pettit, P. (2009). Neorepublicanism: A normative and institutional research program. *Annual Review of Political Science*, *12*, 11–29.

Marchionini, G. (2008). Human–information interaction research and development. *Library and Information Science Research*, *30*(3), 165–174.

Mill, J. S. (2002). *On liberty*. Mineola, NY: Dover.

Moore, A.D. (2011). Privacy, security, and government surveillance: WikiLeaks and the new accountability. *Public Affairs Quarterly*, *25*(2), 141–157.

Nakashima, E., & Wilson, S. (2013, June 11). *ACLU sues over NSA surveillance program*. The Washington Post (Retrieved from http://articles.washingtonpost.com/2013-06-11/politics/39893547_1_surveillance-program-clapper-jr-aclu/.).

Nerone, J. (1994). *Violence against the press: Policing the public sphere in U.S. history*. New York: Oxford University Press.

Newell, B. C. (2012, Apr. 16a). *Privacy v. Public Access in the Emerald City*. Digital Media Law Project (DMLP) blog (Retrieved from http://www.dmlp.org/blog/2012/privacy-v-public-access-emerald-city/.).

Newell, B. (2012, May 17b). *Citizen counter-surveillance of the police?* There's an App For That. *Digital Media Law Project (DMLP) blog* (Retrieved from http://www.dmlp.org/blog/2012/citizen-counter-surveillance-police-theres-app/.).

Oltmann, S. M. (2013). 'The public is part of the audience': Information access for citizens, democratic accountability, and climate change science. *proceedings of the 2013 iConference* (pp. 398–408).

Pettit, P. (1996). Freedom as antipower. *Ethics*, *106*(3), 576–605.

Pettit, P. (1997). *Republicanism: A theory of freedom and government*. Oxford, UK: Clarendon Press.

Pettit, P. (1999). Republican freedom and contestatory democratization. In I. Shapiro, & C. Hacker-Cordon (Eds.), *Democracy's value*. Cambridge, UK: Cambridge University Press.

Pettit, P. (2001). *A theory of freedom: From the psychology to the politics of agency*. Oxford, UK: Oxford University Press.

Pettit, P. (2002). Keeping republican freedom simple: On a difference with quentin skinner. *Political Theory*, *30*(3), 339–356.

Pettit, P. (2003). Agency-freedom and option-freedom. *Journal of Theoretical Politics*, *15*(4), 387–403.

Pettit, P. (2008). Freedom and probability: A comment on Goodin and Jackson. *Philosophy and Public Affairs*, *36*(2), 206–220.

Pettit, P. (2011). The instability of freedom as noninterference: The case of Isaiah Berlin. *Ethics*, *121*(4), 693–716.

Pettit, P. (2012). *On the people's terms: A republican theory and model of democracy*. New York, NY: Cambridge University Press.

Pocock, J. G. A. (1979). *The Machiavellian moment: Florentine political thought and the Atlantic republican tradition*. Princeton, NJ: Princeton University Press.

Posner, E. A., & Vermeule, A. (2006). *Terror in the balance: Security, liberty, and the courts*. New York, NY: Oxford University Press.

Robbins, C. (1959). *The eighteenth-century commonwealthman*. Cambridge, MA: Harvard University Press.

Roberts, D., & Ackerman, S. (2013, June 6). *Anger swells after NSA phone records court order revelations*. The Guardian (Retrieved from http://www.guardian.co.uk/world/2013/jun/06/obama-administration-nsa-verizon-records/.).

Rosenfeld, M. (2006). Judicial balancing in times of stress: Comparing the American, British, and Israeli approaches to the war on terror. *Cardozo Law Review*, *27*(5), 2079–2150.

Scherer, M. (2013, June 14). The Geeks who leak. *Time*, *181*(24), 22–29.

Sellers, M. N. S. (1994). *American republicanism: Roman ideology in the United States Constitution*. New York, NY: New York University Press.

Skinner, Q. (1984). *The paradoxes of political liberty: The Tanner lecture on human values*. Delivered at Harvard University, October 24 and 25, 1984.

Skinner, Q. (1998a). *Liberty before liberalism*. New York, NY: Cambridge University Press.

Skinner, Q. (1998b). The republican ideal of political liberty. In G. Bock, Q. Skinner, & M. Viroli (Eds.), *Machiavelli and republicanism* (pp. 239–309). Cambridge, UK: Cambridge University Press.

Skinner, Q. (2008). *Hobbes and republican liberty*. New York, NY: Cambridge University Press.

Slobogin, C. (2008). Government data mining and the fourth amendment. *Chicago Law Review*, *75*, 317–341.

Strossen, N. (2005). Safety and freedom: Common concerns for conservatives, libertarians, and civil libertarians. *Harvard Journal of Law & Public Policy*, *29*, 73–83.

Strossen, N. (2013). Government secrecy and surveillance: We the people know too little about our government while it knows too much about us. Paper presented at the 2013 Information Ethics Roundtable, Seattle, WA (April 26, 2013). at. http://infoethics.ischool.uw.edu/?attachment_id=346

Stuart, F. (2011). Constructing police abuse after Rodney King: How Skid Row residents and the Los Angeles Police Department contest video evidence. *Law & Social Inquiry*, *36*(2), 327–353.

Swift, A. (2006). *Political philosophy: A beginner's guide for students and politicians*. Cambridge, UK: Polity.

Taylor, J. S. (2005). In praise of big brother: Why we should learn to stop worrying and love government surveillance. *Public Affairs Quarterly*, *19*(3), 227–246.

U.S. Department of Justice (2011, Dec. 16). Press Release, *Justice Department Releases Investigative Findings on the Seattle Police Department*. Retrieved from. http://www.justice.gov/opa/pr/2011/December/11-crt-1660.html

U.S. Department of Justice (2012, July 27). Press Release, *Implement Reforms of Seattle Police Department*. Retrieved from. http://www.justice.gov/opa/pr/2012/July/12-crt-940.html

U.S. Department of Justice Civil Division, & United States Attorney's Office of the Western District of Washington (2011, Dec. 16). Investigation of the Seattle Police

Department. Retrieved from. http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf
Vedder, T. (2012, Jan. 10a). *Attorney sued by Seattle files new request for SPD dash cam video.* KOMO News (Retrieved from http://www.komonews.com/news/local/Attorney-James-Egan-sued-by-Seattle-files-new-public-records-request–137061103.html.).
Vedder, T. (2012, Jan. 4b). *Seattle sues attorney over public records request.* KOMO News (Retrieved from http://www.komonews.com/news/problemsolvers/136704018.html.).
Waldron, J. (2003). Security and liberty: The image of balance. *Journal of Political Philosophy, 11*(2), 191–210.
Weber, M. (1978). In G. Roth, & C. Wittich (Eds.), *Economy and society: An outline of interpretative sociology, vol. 1*, Berkeley, CA: University of California Press.

Cases and court documents

American Civil Liberties Union v. Clapper (2013). *Case no. 13 Civ. 3994. ACLU Complaint, filed June 11, 2013.* U.S. District Court for the Southern District of New York (Retrieved from https://www.aclu.org/files/assets/nsa_phone_spying_complaint.pdf).
Case of Gillan, & Quinton v. the United Kingdom (2010). *Application no. 4158 (European Court of Human Rights).*
Clapper v. Amnesty International. (2013). 133 S.Ct. 1138 (USSC).
Fisher Broadcasting (KOMO 4) v. Seattle (2012). Case no. 11-2-31920-2 SEA, Apr. 6, 2012, *Order on Cross-Motions for Summary Judgment.* Retrieved from. https://ziffblog.files.wordpress.com/2012/04/dash-cam-ruling.pdf
Fordyce v. City of Seattle. (1995). 55 F.3d 436 (9th Cir.).
Glik v. Cunniffe. (2011). 655 F.3d 78 (1st Cir.).
New York Times Co., v. U.S. Dept. of Justice. (2013). 2013 WL 50209 (S.D.N.Y.).
State v. Flora. (1992). 845 P.2d 1355 (Wash. Ct. App.).
Smith v. City of Cumming. (2000). 212 F.3d 1332 (11th Cir.).
United States v. United States Dist. Court for Eastern Dist. of Mich. (1972). 407 U.S. 297 (USSC).

Statutes

Foreign Intelligence and Surveillance Act of 1978, 50 U.S.C. § 1801, *et seq*.
Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, H.R. 6304.
Illinois Criminal Code of 2012, Article 14, Eavesdropping, 720 Ill. Comp. Stat. 5/14, *et seq*.

Bryce Clayton Newell, J.D., is a doctoral candidate in Information Science at the University of Washington (Seattle) Information School. He is also a grad fellow of the Comparative Law and Society Studies (CLASS) Center at UW, a recipient of the graduate certificate in Values in Society offered by the UW Philosophy Department's Program on Values in Society and, in 2013, was a Google Policy Fellow hosted by the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), housed in the Centre for Law, Technology and Society at the University of Ottawa Faculty of Law in Ottawa, Ontario, Canada. He received his J.D. from the University of California, Davis School of Law, and is licensed to practice law as an attorney in California (currently inactive). Bryce has published (or is in the process of publishing) academic research on privacy, surveillance, and intellectual property in I/S: A Journal of Law and Policy for the Information Society, University of Illinois Journal of Law Technology and Policy, Maine Law Review, Creighton Law Review, BYU International Law and Management Review, Richmond Journal of Law and Technology, USF Intellectual Property Law Bulletin, and in the proceedings of the 2013 46th Hawaii International Conference on System Sciences (HICSS) and the 2014 iConference. A forthcoming book chapter on privacy (co-authored) is also under contract as part of an anthology with Cambridge University Press, with an anticipated publication date in 2015. Bryce has also presented research at a number of academic conferences, including the Law and Society Association, Association for Education in Journalism and Mass Communication, Information Ethics Roundtable, iConference, Hawaii International Conference on System Sciences, and the 2014 Maine Law Review Symposium.