



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



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## 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.

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## 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,

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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 imitating) 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.

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