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SURVEILLANCE AND IDENTITY PERFORMANCE: SOME THOUGHTS INSPIRED BY MARTIN LUTHER KING

FRANK RUDY COOPER*

Early morning, April four
A shot rings out in the Memphis sky
Free at last, they took your life
They could not take your pride[1]

I.
INTRODUCTION: PRIDE AND OUR SURVEILLANCE SUICIDE PACTS

Just before it achieved international superstardom, the band U2 recorded a song called "Pride (In the Name of Love)." It is a tribute to Dr. Martin Luther King, Jr. Its lyrics, such as "they took your life / they could not take your pride,"[2] suggest that King exemplified inner strength in the face of adversity. Let us ask what this song would mean as a theory of self.

In U2's imagination, King had a core self that remained untouched by what happened to his external self. He died, but his pride lived on. This follows the Cartesian notion of the self. Descartes says, "I think, therefore I am."[3] Extrapolating from Descartes, the mind is the core of the self and the body is superfluous.[4] We are essentially the self in our heads rather

* Copyright © 2009 Frank Rudy Cooper. Professor, Suffolk University Law School. Thanks to my excellent research assistant, Paul Lonardo-Roy, excellent research librarian, Diane D'Angelo, and to the staff of the New York University Review of Law & Social Change for editorial excellence. I welcome comments at fcooper@suffolk.edu.

1. U2, *Pride (In the Name of Love), on* THE UNFORGETTABLE FIRE (Island Records 1984).

2. *Id.*

3. *See* RENÉ DESCARTES, DISCOURSE ON THE METHOD AND MEDITATIONS ON FIRST PHILOSOPHY 3 (David Weissman ed., Yale Univ. Press 1996) (1637).

4. *See id.* at 21 ("And then, examining attentively that which I was, I saw that I could conceive that I had no body, and that there was no world nor place where I might be; but yet that I could not for all that conceive that I was not."). In his experiment in the skeptical method, Descartes quickly regains certainty that his thoughts and his mind exist, leading to his first principle, "I think, therefore I am," but works through a series of complex logical maneuvers to return to certainty that his body exists. He persists in concluding that "the nature of intelligence is distinct from that of the body." *Id.* at 23.

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than the self we project to the world. Thus, in U2's depiction, King's essential self was prideful because that was the irreducible characteristic of his mind; pride was his core.

As a test of whether U2's Cartesian vision of King's selfhood has utility, we might consider the case of the Federal Bureau of Investigation's (FBI) surveillance of King. Allegedly because of the connection between Communists and King's black civil rights movement,[5] the FBI conducted extensive surveillance of King. It therefore knew that he was having extramarital affairs.[6] The FBI sent messages to King strongly suggesting that if he did not commit suicide by a certain date, it would publicize his affairs.[7] The threat to embarrass him and endanger his movement weighed heavily upon King.[8] It may be that he considered killing himself.

It seems that King, far from being the steadfast figure depicted by U2, struggled with how to respond to the FBI surveillance. Ultimately, King decided to act as though he either did not know about or did not care about the FBI surveillance.[9] But that was an act. King and his advisors debated about whether to expose the FBI's campaign against him and decided it would ultimately do him more harm than good.[10] Thus, King may or may not have felt as proud as he acted in the face of FBI surveillance. There is, therefore, a tension between thinking of King as having a core self that was prideful and thinking of that prideful self as nothing more than a performance.

In keeping with Judith Butler's theory of performativity, I will suggest that the performance of identity is all that identity consists of.[11] We are no

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5. *But see* DAVID J. GARROW, THE FBI AND MARTIN LUTHER KING, JR. 67 (1981) (describing U.S. Attorney General Robert Kennedy's disappointment with the lack of hard or documentary evidence in an FBI report calling King a Communist).

6. *Id.* at 105–06 (describing inception of surveillance of King's personal conduct).

7. *See* NICK KOTZ, JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING JR., AND THE LAWS THAT CHANGED AMERICA 247 (2005) ("King was convinced that the FBI was trying to drive him to commit suicide.").

8. *See* GARROW, *supra* note 5, at 218 (discussing the increase in the intensity of King's self-criticism caused by his "knowledge that the FBI appeared to be watching his every action").

9. *See* KOTZ, *supra* note 7, at 233 (describing King as "turn[ing] the other cheek").

10. *Id. See also* GARROW, *supra* note 5, at 203 (describing fears of King being besmirched by public discussion of FBI surveillance).

11. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 33 (2d ed. 1999) [hereinafter BUTLER, GENDER TROUBLE] (describing how gender is performatively produced). Butler "draws a distinction between *performance* (which presupposes the existence of a subject) and *performativity* (which does not)." SARA SALIH, JUDITH BUTLER 45 (2002) (explicating Butler's theory of subjectivity). Throughout this article, when I say that someone performs her identity, I do not mean to imply that I agree that there is a Cartesian subject doing the act (nor do I mean to argue fully here that there is no subject whatsoever), but only that a person is performatively constituting herself in a particular way. For further thoughts on the performativity of gender, see, for example, JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993)

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more than what we pretend to be. The external self we project to others is as "real" as the internal self that we feel we are holding back. So we need not resolve the issue of whether King's pride was how he really felt or just an act. If King played a proud individual on television, that was as true a part of his identity as any other. This performative notion of the self has implications for how we think about surveillance; I will start to map out those implications in this essay.

* * * *

A novel way of thinking about the FBI's surveillance of King is that the FBI had a suicide pact with King. The FBI had offered King a one-sided deal: destroy yourself or we will use our surveillance to destroy you. It may be, however, that this suicide pact was not so one-sided. The FBI may have been destroying itself at the same time it tried to destroy King.[12] In the mid-1970s, the Church Committee would reveal the nature of the FBI's 1960s surveillance activities. Revelation of the FBI's surveillance of King was a centerpiece of the Church Committee's criticisms of the FBI.[13] As a result of the Church Committee's report, Congress attempted to seriously curtail the FBI's surveillance powers.[14] The FBI's suicide pact with King wound up being mutual: we will destroy ourselves in an attempt to destroy you.

The dynamics of this suicide pact may well be reproduced in the United States's contemporary surveillance regime. The surveilled are encouraged to destroy themselves in order to avoid surveillance. Meanwhile, the FBI destroys itself, whether it is eventually curtailed or not, in the process of surveying its citizenry. The surveilled are encouraged to destroy themselves in at least two ways. First, surveillance chills.[15] When we believe our expressions or associations might be surveilled, we curtail our activities by a wider berth than is necessary in order to assure we are in compliance with official norms.[16] Second,

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[hereinafter BUTLER, BODIES THAT MATTER] and JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE (1997) [hereinafter BUTLER, EXCITABLE SPEECH].

12. *See generally* KOTZ, *supra* note 7, at 384 (reporting that U.S. Attorney General Clark started to believe that the FBI's campaign against King was harmful to the nation's best interests).

13. *See generally* S. REP. NO. 94-755, bk. III (1976) [hereinafter CHURCH COMMITTEE REPORT] (dedicating a chapter to a case study of FBI surveillance of King).

14. *See* Natsu Taylor Saito, *For "Our" Security: Who is an "American" and What is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. SOC. JUST. 23, 40 (2003) (discussing FBI attempts to revive 1960s-style tactics).

15. *See* CHURCH COMMITTEE REPORT, *supra* note 13, at 184 ("[I]t beggars the imagination not to believe that the [Southern Christian Leadership Conference], Dr. King, and all its leaders were not chilled or inhibited from all kinds of activities, political and even social." (quoting Harry Wachtel)).

16. *See generally* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1426–28 (2000) (arguing that the negative effects of surveillance go beyond chilling to actually change the content of people's characters and their capacity for choice and democracy).

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and more relevant to performativity theory, pervasive surveillance encourages people to perform their identities in certain ways and discourages them from performing their identities in other ways.[17] Surveillance curbs dissenters more than those in the mainstream and thus maintains the status quo.[18] Meanwhile, the government destroys itself by means of its own surveillance. This is so assuming that what makes our form of government special is its commitment to the self-actualization of its citizens.[19]

Self-actualization is the process whereby people create their own identity by means of experimenting with different behaviors. It is possible for people to live in an environment that is more or less alienating to the way in which they perform their identities. Performativity scholars such as Devon Carbado and Mitu Gulati say that people can have an internal sense of self that is distinct from the identity that others attribute to them.[20] Kenji Yoshino emphasizes that individuals may self-actualize but only when they are generally free to perform their external identity in ways that are consistent with their internal senses of self without fear of repercussions.[21] I argue that while the internal sense of self is not more real than the performance of the self, allowing people to make their internal and performed selves consistent will make people feel more self-actualized. Our government is at its best when it maximizes the ability of individuals to self-actualize through identity performance.

Certainly, others have pointed to the self-actualization problem,[22] but I hope to add to the discussion of surveillance an understanding that the identity that is harmed is performatively constituted. In Part II of this essay, I briefly describe the FBI's surveillance of King. In Part III, I identify some aspects of the debate over the Fourth Amendment's application to

17. *See* Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1267–70 (2004) (describing Foucault's analysis of the normalizing effects of the Panopticon).

18. *See, e.g.*, CHURCH COMMITTEE REPORT, *supra* note 13, at 3 ("The unexpressed major premise of the programs was that a law enforcement agency has the duty to do whatever is necessary to combat perceived threats to the existing social and political order.").

19. *See* Solove, *supra* note 17, at 1268 (contrasting the goals of a Big Brother society—"to suppress all individuality, to force everybody to think and act alike"—with the goals of our government—"to be free and democratic").

20. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1261 n.2 (2000) (distinguishing between "sense of self" identity and "attributal" identity, while acknowledging some interplay).

21. *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006). For a compelling extension of Yoshino's work, see generally Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895 (2007) (applying performativity theory to the National Basketball Association's mandatory dress code).

22. *See, e.g.*, Alan F. Blakley, *Privacy: The Delicate Entanglement of Self and Other*, 3 RUTGERS J.L. & PUB. POL'Y 172, 181 (2006) ("The creation of a unique self, or personality, in a removed 'field of operation within which to engage in the conscious construction of self' is necessary." (quoting Julie E. Cohen, *supra* note 16, at 1424)).

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surveillance. In Part IV, I summarize the performativity theory of identity. In Part V, I speculate on how the performativity thesis might change our perspective on the Fourth Amendment's application to surveillance.[23]

II.
OUR PAST: THE FBI'S SURVEILLANCE OF KING

In order to make the case for a performative model of the Fourth Amendment, it is helpful to have a sense of what has gone wrong in the past. A perfect case study for that purpose is the FBI surveillance of King. Although there were no statutory guidelines in place at the time, the FBI's surveillance was clearly inappropriate. This is uncontroversial. Simultaneously, it may have violated the Fourth Amendment.[24] The surveillance seems to have resulted from a combination of factors: FBI Director J. Edgar Hoover's paranoia and racism, President Kennedy's reluctance to pick a fight with Hoover, and President Johnson's voyeurism and fear of the FBI Director.

The FBI began surveilling King in earnest when it learned that he was a friend of Stanley Levison.[25] Levison had been connected with the U.S.

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23. The Fourth Amendment reads as follows:

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

U.S. CONST. amend. IV. Much of my earlier scholarship is about the Fourth Amendment. *See generally* Frank Rudy Cooper, *Cultural Context Matters:* Terry*'s "Seesaw Effect,"* 56 OKLA. L. REV. 833 (2003) (explaining how the *Terry* decision's rearticulation of the Fourth Amendment ignores the risk of a swing between racial profiling and depolicing and demonstrating the existence of that seesaw effect in New York City in the 1990s); Frank Rudy Cooper, *The "Seesaw Effect" from Racial Profiling to Depolicing: Toward a Critical Cultural Theory, in* THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH 139 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006) [hereinafter Cooper, *The "Seesaw Effect"*] (reviewing critical race theory and law and cultural studies scholarship as applied to the *Terry* doctrine's tendency to cause a swing between racial profiling and depolicing); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and* Arvizu, 47 VILL. L. REV. 851 (2002) (arguing law enforcement used the drug war to convince the Supreme Court to accept the biased tactic of racial profiling). For my take on how masculinity impacts police officer behavior, especially during *Terry* stops, see Frank Rudy Cooper, "Who's the Man?": Masculinities and Police Stops (Dec. 28, 2007) (unpublished manuscript, on file with author) (explicating masculinities studies literature, developing a theory of masculine police officer behavior, analyzing how the *Terry* decision reflects assumptions about masculinity, and proposing training programs).

24. *See generally* United States v. United States Dist. Court, 407 U.S. 297 (1972) (discussing constitutionality of warrantless surveillance authorized by the Attorney General).

25. *See* GARROW, *supra* note 5, at 43, 94–95 (explaining the FBI's interest in Levison).

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Communist Party, and Hoover alleged concern that the Communists were instigating the black civil rights movement.[26] The FBI conducted microphone surveillance of Levison's office without obtaining prior approval from any source because no constitutional, statutory, or policy guidelines seemed to apply.[27] Soon thereafter, President Kennedy's Attorney General, Robert Kennedy, approved the wiretap of Levison's phone.[28] Robert Kennedy also approved wiretaps on King's close advisor, Clarence Jones, though not on King himself.[29] The FBI then provided Robert Kennedy with reports alleging that King had communist connections.[30] Robert Kennedy found the reports dubious,[31] but approved limited surveillance of King on a trial basis and asked to be updated on any communist connections.[32]

The FBI was undaunted by its failure to discover the communist connections it sought and instead developed a new interest: King's personal life. When the FBI discovered King's philandering, Hoover encouraged collection of evidence of the affairs, approving an FBI report that claimed, "It is highly important that we do develop further information of this type in order that we may completely discredit King as the leader of the Negro people."[33] This sentiment was echoed in a statement by Bureau Internal Security Supervisor Seymor F. Phillips, who declared in a memo that "[i]t would be most desirable to effect as much technical-type coverage as can be safely done to cover King's activities" so as "to gain further evidence of the activities of this moral degenerate."[34] After the memo had been typed, someone thought to handwrite an insert professing interest in King's philandering "in view of his association with Communists."[35] When President Johnson's Attorney General, Nicholas Katzenbach, ordered the FBI to obtain his permission for microphone surveillance as well as wiretapping, the FBI sent him memos alleging they were seeking to overhear subversive advice being offered by noted leftists Levison, Jones, Harry Wachtel, and Bayard Rustin.[36] According to King scholar David Garrow, however, "[t]hese claims were merely a cover for the Bureau's

26. David Garrow suggests Hoover's fears of communist involvement were honestly held. *See id.* at 95.

27. *Id.* at 46.

28. *Id.*

29. *Id.* at 64–65.

30. *Id.* at 67.

31. *Id.*

32. *Id.* at 72–73.

33. *Id.* at 106 (quoting FBI memo).

34. *Id.* at 117 (quoting Seymor F. Phillips).

35. *Id.* at 117–18.

36. *Id.* at 138.

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continued interest in King's personal life."[37] The FBI even resorted to outright lies to justify its surveillance. For example, Hoover contended Levison had written one of King's speeches criticizing the Vietnam War even though the FBI's own wiretaps revealed that Levison had criticized the speech as intemperate.[38] The surveillance ended not because the FBI satisfied its curiosity about King's personal life but because of imminent Congressional hearings on surveillance by federal agencies. Missouri Senator Edward V. Long's probe caused Hoover to become cautious.[39] The FBI discontinued its surveillance of King from this point through to his assassination.[40]

Still, we might ask why no authority challenged the FBI's longstanding surveillance of a man dedicated to peaceful advocacy for equality. As historian Nick Kotz notes, "[t]hrough the years a succession of presidents had found it easier simply to accept Hoover's defamatory reports than to challenge his power."[41] Why? President Kennedy and Robert Kennedy probably did not have time to see the full scope of the problem and might not have had enough entrenched power to challenge Hoover. President Johnson may have been handcuffed by the benefits he enjoyed as a result of FBI surveillance, both as a voyeur and as someone who made use of the agency's reports against his enemies. Senator Richard Russell noted in his diary that despite Johnson's complaints about the FBI's frequent surveillance reports, in actuality "he love[d] it."[42] Further, Johnson made political use of the FBI reports against his enemies; indeed, "[o]ne slip-up by the FBI agents, and the president might have had his own Watergate . . . ."[43]

Outside the White House, Eugene Patterson, editor of the newspaper the *Atlanta Constitution*, was critical of the FBI's attempt to smear King but did nothing.[44] Editors and reporters apparently prioritized maintaining their FBI sources above challenging Hoover's abuse of power.[45] King himself was powerless to stop the surveillance. He feared a confrontation would provoke Hoover, and President Johnson had previously failed to come to King's defense.[46] King's advisors had also

37. *Id.*

38. KOTZ, *supra* note 7, at 376–77.

39. GARROW, *supra* note 5, at 149–50.

40. *Id.* at 150.

41. KOTZ, *supra* note 7, at 104.

42. *Id.* at 200 (quoting Senator Richard Russell).

43. *See id.* at 216–18 (describing Johnson's use of wiretapping to counter a political challenge by the Mississippi Freedom Democratic Party).

44. *See id.* at 239 (describing Patterson's interaction with the FBI).

45. *See id.* at 249 (criticizing the failure of newspapers to report on the King surveillance).

46. *Id.* at 233.

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warned him that an account of the FBI surveillance would result in the sort of public smearing of King's character that the FBI sought.[47]

Given that the FBI's surveillance of King was so controversial as to eventually result in a congressional investigation, what was its ultimate motivation? For Hoover, a general paranoia, in addition to outright racism, may explain his focus on King.[48] At a lower level, Garrow identifies two sources of FBI domestic intelligence head William Sullivan's interest in King: "a Puritanism on matters of personal conduct and sexual behavior that stemmed from his own rural New England background, and a subconscious racism that was more the paternalistic superiority of a false white liberal than the open hatred of a rabid bigot."[49]

As Jerry Kang and others have noted, subconscious racism explains a great deal of past and present disparate treatment of racial minorities.[50] The idea of moral conservatism also seems to have great explanatory power here. Garrow goes on to connect the FBI surveillance of King to protection of the status quo:

> The Bureau functioned not simply as a weapon of one disturbed man, not as an institution protecting its own organizational interests, but as the representative, and at times rather irrational representative, of American cultural values that found much about King and the sixties' movements to be frightening and repugnant.[51]

So a basic conservatism, in the sense of desiring to preserve the status quo, undergirds the explicit and implicit racism that motivated FBI surveillance of King. This explanation is consistent with legal scholar Natsu Saito's analysis of the FBI's surveillance programs throughout its existence. Her example of the worst of it is COINTELPRO, the 1960s operation that involved the disruption of Leftist and racial minority organizations through tactics ranging from fomenting conflicts within and among groups to outright assassination.[52] Saito links current surveillance to COINTELPRO, arguing that "the state's law enforcement and intelligence powers are being used to protect the status quo—which includes but is not limited to its racial hierarchy—rather than the people as a whole."[53] The FBI's surveillance of King comported with this objective.

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47. GARROW, *supra* note 5, at 203.

48. *Cf.* KENNETH O'REILLY, "RACIAL MATTERS": THE FBI'S SECRET FILE ON BLACK AMERICA, 1960–72, at 355 (1989) (arguing Hoover's surveillance of King and other black leaders stemmed from racism).

49. GARROW, *supra* note 5, at 164.

50. *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1514 (2005) (describing extensive psychological research on implicit prejudice).

51. GARROW, *supra* note 5, at 212–13.

52. *See* Saito, *supra* note 14, at 38–39.

53. *Id.* at 31.

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For our purposes, the past use of surveillance to protect the status quo is significant because it suggests that surveillance encourages particular identity performances and discourages others. Surveilling King discouraged him from having any ties to Communists. The mechanism of this discouragement was the threat to disrupt King's ability to perform the identity of moral leader. Since that identity was crucial to King's liberation strategy, surveillance was an effective means of censoring King's associations.

III.
THE PRESENT OF SURVEILLANCE LAW: THE DEBATE OVER THE FOURTH AMENDMENT

I have claimed that King was censored by the FBI's threat to disrupt his performance of a particular public persona. King was effectively censored even though he won numerous First Amendment cases confirming his speech and associational rights. As the Church Committee reported, quoting Harry Wachtel on FBI surveillance, "it beggars the imagination not to believe that the SCLC [Southern Christian Leadership Council], Dr. King, and all its leaders were not chilled or inhibited from all kinds of activities, political and even social."[54] King thus needed not only freedom of expression but also freedom from surveillance.[55] The Fourth Amendment guarantees such a right. This prompts an inquiry into the current interpretation of the Fourth Amendment, a task complicated by the existence of two distinct principles governing Fourth Amendment application. One principle is that the Fourth Amendment prevents physical intrusions into constitutionally protected areas. The other is that the Fourth Amendment prevents any intrusion into an individual's protected interests. This part of the essay examines those principles and identifies opposing arguments with regard to the proper use of surveillance.

Before discussing the applicability of the Fourth Amendment to surveillance, I will provide a brief primer on the Fourth Amendment. The Fourth Amendment protects the "right of the people to be secure" by providing that there shall be no "unreasonable" search or seizure and that "probable cause" is required to obtain a warrant prior to such an intrusion. A "search" occurs when the government obtains information about a person for which she has a "reasonable expectation

54. CHURCH COMMITTEE REPORT, *supra* note 13, at 184.

55. On the necessity of a synergy between the First and Fourth Amendments, see Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 123 (2007), stating that "uninhibited conversations, association, and exchange of ideas can be stifled by the searching light of government inquest and observation."

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of privacy."[56] Reaching into a suspect's pocket is a paradigmatic search. A "seizure" occurs when the government interferes with one's possessory interest in an object, including one's person.[57] Handcuffing someone in order to arrest her is the paradigmatic seizure. In theory, the validity of an intrusion is always judged by determining its reasonableness, which is accomplished by weighing the government's interests against the individual's interests.[58] However, the Court generally proceeds by category: if it is a certain type of seizure or search, police officers get to do all of the things allowed for that category without further case-by-case analysis.[59] One way to think about this is to say that an intrusion of a particular scope requires a particular level of justification, which I call the "scope continuum approach."[60]

The degree of Fourth Amendment scrutiny applied to a search or seizure depends upon the scope of the intrusion.[61] For instance, the level of the intrusion may be "nothing," as when an officer encounters a civilian on the street and gazes upon her (a potential search lacking a reasonable expectation of privacy) or stops the person to ask ordinary questions about her identity and her business in the area (a potential seizure lacking a reasonable expectation of privacy/possessory interest).[62] If the officer has no Fourth Amendment justification for the intrusion, the person need not answer questions and can go about her business.[63] The level of intrusion

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56. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (establishing expectation of privacy approach). *See also* 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 6.03[C] (4th ed. 2006) (discussing principles behind the Fourth Amendment).

57. *See* Texas v. Brown, 460 U.S. 730, 747–48 (1983) (Stevens, J., concurring) (describing interest harmed by seizure of property as possessory). The interest in not having your person seized seems to arise from the inherent reasonableness of one's expectation of privacy/possessory interest in one's self. This is a slightly different interest than one's interest in the privacy of one's person, which is what the search of a person threatens.

58. *See* Terry v. Ohio, 392 U.S. 1, 22–27 (1968) (balancing the governmental interest in police safety and effectiveness with the individual's privacy right in the stop and frisk context).

59. *See id.* at 20–22 (describing balancing approach); DRESSLER & MICHAELS, *supra* note 56, at § 2.07[A] (describing debate over the contrast between bright-line and case-by-case analysis).

60. *See* Cooper, *The "Seesaw Effect," supra* note 23, at 142–44 (discussing *Terry*'s scope continuum approach).

61. *See id.* at 143.

62. *See* United States v. Drayton, 536 U.S. 194, 200–01 (2002) (noting that a seizure does not occur where a reasonable person would feel free to disregard police requests and continue going about her business) (citing California v. Hodari D., 499 U.S. 621, 628 (1991)).

63. *See Terry*, 392 U.S. at 34 (White, J., concurring) (contending refusal to comply with a *Terry* stop cannot itself furnish the justification for an arrest but may alert the officer to the need for continued observation). *But see generally* Hiibel v. Sixth Judicial Dist.

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might also rise to the level of a "stop" or "frisk." A stop occurs when a reasonable person would not believe she was free to leave, but only for a limited period of time while the officer confirms or dispels suspicion of criminal activity.[64] A frisk occurs when an officer intrudes upon a person or her objects, but only by patting down the outer surface of the person or thing in order to confirm or dispel a suspicion that weapons are present.[65] The level of an intrusion might also rise to the level of an "arrest" or "full blown search." An arrest occurs when an officer's actions would lead a reasonable person to conclude that she was not free to leave and would be under police control for a long period of time.[66] A full-blown search occurs when officers intrude inside objects, such as within a cigarette pack that was in a person's jacket.[67] Finally, the level of the intrusion might be "extraordinary." An extraordinary intrusion occurs when a seizure or search is "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests."[68] Examples are "seizure by means of deadly force," warrantless entry into a home, and physical intrusion into the body.[69]

Originally, the Fourth Amendment applied to surveillance only when the government entered a constitutionally protected area. The Court's 1928 decision in *Olmstead v. United States*[70] allowed the authorities to surveil civilians so long as they did not commit a physical trespass of constitutionally protected space.[71] Following one model, the home (or office) was at the center of Fourth Amendment protection, the curtilage immediately surrounding the home received less protection, and

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Court, 542 U.S. 177 (2004) (providing civilians may be arrested for noncompliance with a state statute requiring identifying oneself to a police officer).

64. *See Terry*, 392 U.S. at 20–22 (defining the test for the validity of a stop).

65. *See id.* at 10, 29–31 (laying out the principles governing a frisk).

66. *See* Ochana v. Flores, 347 F.3d 266, 270 (7th Cir. 2003) (stating that custodial arrest occurs where a reasonable person would view the degree of restraint of freedom of movement as corresponding with that which the law associates with formal arrest).

67. *See generally* United States v. Robinson, 414 U.S. 218 (1973) (upholding search of pockets incident to lawful arrest).

68. Whren v. United States, 517 U.S. 806, 818 (1996).

69. *Id.*

70. 277 U.S. 438 (1928).

71. *Id.* at 464 ("The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."). *See also* On Lee v. United States, 343 U.S. 747, 751–53 (1952) (finding no Fourth Amendment "search and seizure" violation and no trespass because there had been consent to enter); *id.* at 753 (distinguishing cases of problematic seizure because this case rests "in the field of mechanical or electronic devices designed to overhear or intercept conversation . . . where access to the listening post was not obtained by illegal methods"). *See generally* Tracey Maclin, Hoffa v. United States: *Secret Agents in Private Spaces*, *in* CRIMINAL PROCEDURE STORIES 181 (Carol S. Steiker ed., 2006) (critically tracing development of *Olmstead* line of cases).

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unoccupied and undeveloped areas were generally unprotected.[72] This may be referred to as the "protected areas" model of the Fourth Amendment.

The model for the Fourth Amendment's protection of privacy changed in 1967, with *Katz v. United States*.[73] In *Katz*, the Court protected a bookie from having his conversation intercepted even though he could readily be observed placing a phone call from a public phone booth.[74] The Court said,

> [t]he Government stresses the fact that the telephone booth from which the petitioner made his calls was partly constructed of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear.[75]

The *Katz* decision rejected the *Olmstead* approach, holding instead that "the Fourth Amendment protects people, not places."[76] The general test for whether the Fourth Amendment governs a search is to ask whether the individual had a "reasonable expectation of privacy."[77] People are protected when they seek to exclude others from knowing certain information.[78] By contrast, information an individual "knowingly exposes to the public" may be surveilled by the authorities.[79] This is a move from protecting a physical realm of privacy to protecting a symbolic realm of privacy. Thus, it may be referred to as the "protected interests" model of the Fourth Amendment.

Eventually, however, the Court blended the protected areas and protected interests theories of privacy. In *Kyllo v. United States*, it extended protection to a man who might not have had a reasonable expectation of privacy under the *Katz* decision because the authorities detected his marijuana farm by monitoring the level of the heat that escaped from a certain part of his home.[80] He might have lacked a

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72. *See, e.g.*, ROBERT M. BLOOM & MARK S. BRODIN, CRIMINAL PROCEDURE: THE CONSTITUTION AND THE POLICE 24–25 (5th ed. 2006) (depicting concentric circles representing the levels of constitutional protection for each type of area).

73. 389 U.S. 347 (1967).

74. *Id.* at 352–53.

75. *Id.* at 352.

76. *Id.* at 351.

77. *See id.* at 361 (Harlan, J., concurring) (recounting rule emerging from previous cases that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'").

78. *See id.* at 351–52 ("What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

79. *Id.* at 351.

80. Kyllo v. United States, 533 U.S. 27, 29–30 (2001).

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protected interest in privacy on grounds that he "knowingly expose[d]" his heat.[81] Justice Scalia wrote the opinion for a 5-4 majority that defied the Court's usual divisions. He declined to apply the *Katz* test, stating,

> [t]he *Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable. While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes . . . there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*.[82]

With those words, Scalia rejected the *Katz* approach, at least under certain circumstances. The new test, which relies heavily on the old spatial approach to privacy, holds that in certain places, the authorities may not surveil to obtain evidence they could not otherwise have obtained absent a physical intrusion. The *Kyllo* test prohibits "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area.'"[83] Such surveillance "constitutes a search—at least where (as here) the technology in question is not in general public use."[84]

We see the relationship between the *Katz* and *Kyllo* tests in the questions Scalia posed. First, he asked whether police enhanced their senses.[85] By implication, if the government detected the contraband by ordinary senses, the subject does not deserve the protection of a right of privacy. That is effectively the *Katz* protected interests approach. Second, the information must be related to the interior of a home.[86] This effectively mirrors the *Olmstead* protected areas approach. Third, the information must not have been otherwise obtainable without a physical intrusion.[87] Again, then, *Olmstead* appears to be the guide for the rule. Fourth, the technology must not be in general public use.[88] That rule resonates with *Katz*'s requirement that you do not knowingly expose private facts to the public's view.

I argue that the *Kyllo* doctrine is basically *Olmstead*, but with a *Katz* kicker. The *Olmstead* portion of the doctrine is the limitation of the *Kyllo*

81. *See id.* at 41–44 (Stevens, J., dissenting).
82. *Id.* at 34 (citations omitted).
83. *Id.* (citation omitted).
84. *Id.*
85. *Id.* ("obtaining by sense enhancing technology").
86. *Id.* ("any information regarding the interior of the home").
87. *Id.* ("that could not otherwise have been obtained without physical 'intrusion . . . .'").
88. *Id.* ("where (as here) the technology in question is not in general public use").

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protection to particular spaces. The *Katz* portion of the doctrine is the requirement that the technology not be in general public use, making it reasonable to expect privacy. So, the *Kyllo* test only applies when both a certain type of space is surveilled in a way that substitutes for a physical trespass and the expectation of privacy is reasonable.

I am concerned that the *Kyllo* reasoning represents a significant retreat from *Katz*'s protections. Because the surveilled information must be related to the home, *Kyllo* returns to the *Olmstead* notion of constitutionally protected areas. This implies you do not have an expectation of privacy elsewhere. Further, the fact that the information must be unobtainable without a physical intrusion suggests that you do not have an expectation of privacy if the information could have been otherwise discovered. Consequently, the *Kyllo* model of the Fourth Amendment only protects against the equivalent of the police sneaking into your home. Finally, the implication of *Kyllo*'s "not in general public use" requirement is that once a significant portion of the public has a particular technology, you can no longer expect privacy from that device. The Fourth Amendment thus has a waning effect with respect to new technologies; at first it strenuously protects the home, but then its value to individuals decreases.[89]

Even if we found *Kyllo*'s holding to be appropriate, its reasoning raises another crucial question for scholars of surveillance: who should bear the burden when new technologies do not easily fit within the preexisting Fourth Amendment framework? After the PATRIOT Act,[90] which seemed to encourage greater wiretapping of recently developed technologies such as email, policymakers face the dilemma of where to allocate the burden when new technologies are in their nascent state.[91] We could presume the government needs to satisfy the Fourth Amendment when using these technologies or assume they may escape Fourth Amendment scrutiny until new privacy frameworks are developed to address them.

Legal scholar Orin Kerr supports the conservative approach, noting with approval that

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89. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 132 (4th ed. 2004) ("The most telling criticism of the dissenters concerned the majority's 'not in general public use' qualification, which they condemned as 'somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of the intrusive equipment becomes more readily available.'") (quoting *Kyllo*, 533 U.S. at 47 (Stevens, J., dissenting)).

90. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

91. *See generally* Eric Weiner, *The Foreign Service Intelligence Act: A Primer*, NPR.ORG, Oct. 18, 2007, http://www.npr.org/templates/story/story.php?storyid=15419879 (last visited Apr. 3, 2009) (noting the controversy over post-PATRIOT Act interpretations of and revisions of existing surveillance law).

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> [t]he courts have sanctioned a wide range of invasive warrantless surveillance techniques that threaten privacy but not property. So long as the surveillance does not invade the individual's right to exclude others—the very essence of the property right—the surveillance generally does not violate his reasonable expectation of privacy.[92]

Kerr's approach is basically the *Kyllo* approach.[93] That approach has many problems,[94] but I am most concerned that it places the burden of new technology onto private individuals rather than state authorities. In contrast, legal scholar Daniel Solove would place the burden of new technology onto the government out of concern that allowing the authorities to test new technologies in secret would inevitably lead to violations of privacy.[95] The scholarly debate boils down to the question of whether privacy is in little need of protection from new technologies because we have property rights or most endangered precisely when the government has new technologies.

An under-recognized reason to place the burden on the government is that surveillance stifles a person's ability to perform her identity as she sees fit. Just as King was harmed when surveillance caused him to curtail some of his associations, contemporary groups are harmed even when surveillance merely chills the identity performance of their members. To understand the nature of that harm, we need to develop a fuller understanding of how identity is performative. Accordingly, I now turn to an explanation of how people perform their identities.

IV.
THE PRESENT OF IDENTITY: A PRIMER ON PERFORMATIVITY

The problem with surveillance is not just privacy, but performativity. This section summarizes a theory of identity that builds upon one of the most significant developments in the humanities over the last two decades: Judith Butler's theory of gender identity as performative. Three aspects of Butler's argument warrant explication. First, our performances of gender constitute the very things they are thought to express; masculine and

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92. Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 813 (2004) (footnote omitted).

93. Kerr cites *Kyllo* for the proposition that police can invade a homeowner's privacy by peeking in her window from the street. *Id.*

94. For instance, it might make the extent of one's privacy more a function of the extent of one's property than does the *Katz* doctrine.

95. *See* Solove, *supra* note 17, at 1301 ("'National security' has often been abused as a justification not only for surveillance, but also for maintaining the secrecy of government records as well as violating the civil liberties of citizens.").

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feminine actions do not express an internal biological or transcendental essence. Second, gender is performative in that we are not free to enact our identities just as we wish; cultural norms provide a limited set of "scripts" for what will constitute intelligible enactments of masculinity/femininity. Finally, performativity is an interactive process. The acts of others help constitute me as having a certain identity, but my own actions help constitute my own and others' identities. With gender as an example, I now trace those three aspects of identity.[96]

A. Gender as Constituting the Thing It Is Said to Express

Butler's primary argument is that there is nothing more to gender than its performance. There is no such thing as gender if what you mean by that term is that my genetics imply that I should play a certain social role.[97] There is no biological essence that precedes and dictates the deeds we explain based on gender. It is the meaning we choose to make of biological difference that creates our sense of gender. To say that gender is performative, therefore, is to say that our performances of gender constitute the very thing they are said to express.[98]

How can there be no such thing as gender until we perform our identity as though we had a gender? Butler's concept of performative gender is similar to J.L. Austin's concept of the performative utterance,[99] although the former elaborates upon the latter quite significantly. Austin notes that certain words, when spoken under certain conditions, not only signify linguistic meaning but also constitute an action.[100] For instance, to say "I do" under the right circumstances can create a marriage.

Similarly, for Butler it is the performative utterance "It's a boy!" that makes that person a boy.[101] One concrete example of that process is the

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96. For another summary of Butler's theories in relation to race, see Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama's Feminine Side*, 86 DENV. U. L. REV. (2009) (applying critical race theory and masculinities studies to discourse on whether Obama is "our first female President").

97. To address a frequently raised objection to the social construction theory of gender, it may indeed have been that men's tendency toward greater height and upper-body strength made them the more efficient hunters when we were solely hunter-gatherers. But who says we must organize all of the large portion of remaining social relations based on what might have been the best way to hunt large animals? Is not the point of having an opposable thumb that we can choose to organize ourselves differently than a pack of hyenas? Women need not be stuck in the home just because of biological difference; something else about the social construction of relations is at play.

98. BUTLER, GENDER TROUBLE, *supra* note 11, at 33 (arguing that gender is performatively produced).

99. *See generally* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisà eds., 1955) (discussing concept of performative utterance).

100. *See id.* at 6–7.

101. *See* BUTLER, BODIES THAT MATTER, *supra* note 11, at 7–8 (considering interpellative force of a doctor naming a newborn a "he" or a "she").

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story of nineteenth-century French hermaphrodite Herculine Barbin. At birth, doctors evaluated Barbin and, because his "penis" was too small, declared him a girl.[102] After Barbin had a sexual relationship with a woman, her "clitoris" was reevaluated, and she was declared a man.[103] Both of Barbin's genders were real only in the sense that they were declared to be such. But those performative utterances made the gender designations a reality because Barbin was forced to try to conform with the given designation.[104] It was Barbin's attempt to perform his/her identity as female or male that made her/him a boy or girl at a given time. In that sense, gender is nothing more (and nothing less) than the effect of the meanings we attach to bodily configurations and behaviors.

Nevertheless, "identities are created in the very performance of imagined identities."[105] We are what we do. Acting aggressively and explaining it to yourself and others as reflecting your masculinity creates the impression that your masculinity preceded and generated the acts. In fact, our performance of masculinity as though it were reflective of a preceding biological imperative to be aggressive constitutes masculinity as the biological imperative it is said to express. We do not simply perform a preexisting gender identity but bring into being the identity we think of ourselves as merely expressing.

B. Gender Performativity as Constrained by Cultural Norms

We can now turn to the second sense in which gender is performative and ask the following question: if gender comes into being only because of its being performatively constituted, what is the process by which gender maintains its existence? The answer is that we perform our gender by citing to preexisting norms, a process that may also be understood as our performance of "scripts." The beginning of the process of our being gendered, according to Butler, is our being normalized into and made to conform with one of this culture's two fixed categories of gender. That process performatively makes us a boy because henceforth we will be treated as a boy. And it does so by citing to precedent: people with one bodily configuration have traditionally been treated as boys and people with another bodily configuration have traditionally been treated as girls.

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102. HERCULINE BARBIN, HERCULINE BARBIN: BEING THE RECENTLY DISCOVERED MEMOIRS OF A NINETEENTH-CENTURY FRENCH HERMAPHRODITE 124 (Richard McDougall trans., 1980). On the process of determining the sex of people with equivocal genitalia, see Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 HARV. C.R.-C.L. L. REV. 71, 97–104 (2005) (reviewing the practices of and justifications for genital surgeries).

103. BARBIN, *supra* note 102, at 86–89, 124–28.

104. *See* Michel Foucault, *Preface* to BARBIN, *supra* note 102, at xi.

105. BERNARD E. HARCOURT, LANGUAGE OF THE GUN: YOUTH, CRIME, AND PUBLIC POLICY 158 (2006) (describing Butler's performativity theory).

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Further, the original affixing to someone of a particular identity creates its own precedent for following other scripts. The boy's masculinity will be reiterated by dressing him in blue rather than pink, expecting him to be aggressive, and so on. One becomes a boy, and later proves that one is a man, by following the cultural norms prescribed for the behavior of men. For Butler, "[i]f a performative provisionally succeeds . . . then it is . . . because that action echoes prior actions, and *accumulates the force of authority through the repetition or citation of a prior and authoritative set of practices.*"[106]

A consequence of the way in which gender operates through the citation of precedent is that being a certain gender requires following certain preexisting scripts. The forced repetition of preexisting scripts is how those scripts are reproduced as the present rather than merely the past.[107] Hence, gender may be described as "the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being."[108] Despite the implication that we freely choose to adopt certain styles, however,

> Butler is *not* suggesting that the subject is free to choose which gender she or he is going to enact. "The script," if you like, is always already determined within this regulatory frame, and the subject has a limited number of "costumes" from which to make a constrained choice of gender style.[109]

Certain acts would not be intelligible as describing a particular gender because we do not yet have a set of understandings about what they mean.[110] There is a tacit collective agreement to perform gender only in certain ways. The dominant ideologies of gender thus provide a structure within which one acts. The preexisting social structure reproduces itself by inducing the individual to become the type of person that fits within the social structure.[111]

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106. BUTLER, EXCITABLE SPEECH, *supra* note 11, at 226–27.

107. *See, e.g., id.* at 18 ("In Mari Matsuda's formulation, for instance, speech does not merely *reflect* a relation of social domination; speech *enacts* domination, becoming the vehicle through which that social structure is reinstated.").

108. BUTLER, GENDER TROUBLE, *supra* note 11, at 43–44.

109. SALIH, *supra* note 11, at 63.

110. For example, I can choose to act in ways we refer to as "metrosexual" or the "macho" ways we associate with police officers, but I cannot truly recover my "Ashante Warrior" manhood of sixteenth-century Africa or really live as a twenty-third century "omnisexual" in the twenty-first century United States. The term "metrosexual" was coined to describe urban straight men who dress and act in ways associated with gay men. *See* Wikipedia, *Metrosexual*, http://en.wikipedia.org/wiki/Metrosexual (last visited Apr. 3, 2009).

111. *See* BUTLER, EXCITABLE SPEECH, *supra* note 11, at 33 ("The mark interpellation makes is not descriptive, but inaugurative. It seeks to introduce a reality rather than report on an existing one; it accomplishes this introduction through a citation of existing convention.").

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In sum, while we are what we do, we are not free to perform our identity just as we please. Instead, we are born into a preexisting framework of cultural norms that restricts our ability to imagine an outside-the-box identity. That framework also restricts the realm of performances others will understand as intelligible enactments of gender. We perform our identities, but much of the script has already been written.

C. Identities as Intersubjectively Constituted

Having recognized that gender is performative both in the sense of constituting that which it is said to express and in the sense of being largely scripted by cultural norms, we should now consider how performativity operates in interpersonal interactions. Here, I will make an analogy between the performativity of gender and the performativity of race. For example, legal scholar Richard Ford laments that whites sometimes try to give him a "soul handshake" that they would never attempt with fellow whites.[112] Such experiences demonstrate that while we are what we do, we are also what we are treated as. Just as Ford could constitute his own identity by acting in certain ways, the whites who offer Ford a soul handshake have performed his identity. In their gestures of associating Ford with blackness, they have constituted Ford as black. Ford seemingly resists that characterization. His true self, it would seem, is colorblind.[113] His being treated as black, however, makes him black. His acceptance or rejection of the soul handshake will be read as a black man accepting or denying his blackness. Even my critique herein of Ford's complaint locks him into blackness.[114]

But Ford stops short of understanding that the manner of his response gives him some ability to performatively reconstruct both his own blackness and the race of his interlocutor. He could say, "Gee, I always thought of myself as white, but I guess we're both black." Ford would then call the assessment that he is black into question (perhaps he is a dark-skinned Italian), call his interlocutor's asserted whiteness into question (perhaps he knows the handshake because he is only passing as white), and call the very

112. *See* HARCOURT, *supra* note 105, at 158–59 (quoting Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, at 19 (paper delivered to Spring 2002 Faculty Workshop Series at Harvard Law School, May 1)).

113. For a brief critique of colorblindness, see Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 882–85 (2006) (arguing that black men are incentivized to accept corporate colorblind norms).

114. Not being a vulgar social constuctionist, I do not see this as a crime. *See* Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 357, 375 (Kimberlé Williams Crenshaw, Neil Gotanda, Garry Peller & Kendall Thomas eds., 1995) ("To say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world.").

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reality of race into question (perhaps it is a social construction that should be discarded). Ford's use of performativity theory to question race thus says too little. Race, like gender, is interactively performative. The interactive nature of that performativity opens up possibilities for re-performing the exchange.

We can draw insights from analysis of Ford's example that also apply to gender. First, our performance of our gender identity is influenced by how others treat us. As legal scholars Devon Carbado and Mitu Gulati suggest, we have an "attributed identity," which is the identity that others ascribe to us.[115] Any contrary sense we have of ourselves must negotiate with that identity.[116] We are not fully in control of our own identity because we always act against the backdrop of other people's interpretations of our identity. Hence, we "work" our identity by acting in ways that we hope will cause people to perceive us in a particular way.[117] For example, one may turn her office lights on and leave a jacket on her chair before leaving work in order to create the perception that she is working late and is thus a hard-working person.[118]

Second, because our performance of gendered identity constitutes that supposedly precedent identity, when others influence how we *perform* our identity, they influence who we *are*. That influence may be abstract, as when cultural norms constrain what performances we can imagine and what performances others can understand. The influence might also be concrete, as when people impose an attributed identity upon us. For example, because of prevailing cultural stereotypes, a Korean law associate may have the attributed identity of being detail-oriented but lacking leadership skills.[119] That attributed identity will make it less likely that she will be given opportunities to lead and thereby affect her ability to actually attain leadership skills.

Third, though our performative identities are constrained by the actions and beliefs of others, we play a part in the process because our actions influence others' perceptions of us. In Ford's example, he is not fully constrained by others' attributions of identity to him since he can influence both how others see him and how the others are seen. Accordingly, the constitution of identity is an intersubjective process.

D. How Surveillance Alters Identity Performance

The first point regarding performativity and surveillance is that we are what we do.[120] We create our identities by acting in ways that are designed

115. Carbado & Gulati, *supra* note 20, at 1261 n.2 (defining "attributal" identity).
116. *See id.* (contrasting aspects of identity).
117. *See id.* (contrasting aspects of identity).
118. *See id.* at 1260 (using this example).
119. *See id.* at 1268–69 (providing this example).
120. *See* discussion *supra* part IV.A.

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to give others a certain impression of us.[121] Since performance constitutes identity, safeguarding the ability of individuals to perform their identities as they see fit is crucial to the possibility of self-actualization. As the FBI surveillance of King demonstrates, surveillance has the power to prevent people from performing their identities as they would see fit.[122] As I noted in the introduction, when the government destroys self-actualization it commits suicide because it eviscerates that which makes our democracy unique.

It is important to recognize that surveillance does not merely suppress an essential self. If there were an essential self, it might not do harm for surveillance to force someone to hide her true self as long as it did not force her to change this true self. Under the performativity model, however, something crucial is always lost when we are surveilled. Given Austin's notion that speech may amount to action, censorship through surveillance may hinder action.[123] Surveillance stops one from performing one's self and thus from being one's self. Consequently, it does not follow that surveillance is acceptable so long as it merely compels people to hide, but not to change, their selves. Since performing one's self is how one is one's self, to impel a person to hide a version of herself necessarily forces her to change her self.

A second point that emerges from performativity theory is that surveillance changes people by means of pressuring them to adhere to preexisting cultural norms. If identity is performatively constituted, surveillance does not just breach an artificially created realm of privacy, but remolds persons in the image preferred by the status quo. The usual concern with surveillance is that its chilling effect censors and suppresses the speech of its subject.[124] Butler suggests that censorship is instead "a way of *producing* speech, constraining in advance what will and will not become acceptable speech."[125] One who speaks under surveillance does so "only in the context of an already circumscribed field of linguistic possibilities."[126] Surveillance operates performatively because it targets speech against the status quo,[127] impelling one to perform one's identity in

121. *See generally* Carbado & Gulati, *supra* note 20 (discussing the ways in which people engage in identity impression management).

122. *See* discussion *supra* part II.

123. *See generally* AUSTIN, *supra* note 99 (defining and analyzing performative utterances).

124. *See* Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 157 (2008) ("Surveillance bothers Americans, perhaps, because of the chilling effect it has on cherished freedoms, like free speech and freedom of association . . . .").

125. BUTLER, EXCITABLE SPEECH, *supra* note 11, at 128.

126. *Id.* at 129. Butler also says, however, that censorship never fully shuts down speech, in general, or the agency of the speaker, in particular. *See id.* (suggesting that "speech exceeds the censor by which it is constrained").

127. *See supra* text accompanying notes 51–53.

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conformity with the status quo and thereby reproducing the preexisting social structure.[128]

Surveillance does this because identity performance is constrained by cultural norms, which surveillance helps to set. As I noted in Part II, the surveillance of King was ultimately about maintaining a status quo that the FBI believed was threatened by King's civil rights work.[129] Viewed through a performative lens, surveillance is revealed as a way of producing status quo identities and eliminating alternative identities. If one analogizes identity performance to the selection of costumes,[130] surveillance molds our sense of which costumes are acceptable, and thus prevents us from wearing the outfit that might have suited us best. While we do have some say in what identities we try on, we are constrained by what our audience refuses to accept.[131]

Finally, surveillance is a strong form of audience influence on the performance of identities. In the case of surveillance, the audience is the government. If Richard Ford complains that being given a soul handshake locks him into a certain version of blackness, how might he feel if he were surveilled if he acted too black (or too white)?[132] Likely, he, and anyone else, would feel they were required to do more "work" to maintain their identity.[133] For example, after September 11, there may be a higher cost to performing a Muslim identity because that might subject an individual to surveillance.[134] The surveillance itself implies the possibility of punishment, either officially or via the type of harassment King suffered.[135] Some might try to avoid the punishment by covering up their Muslim identity.[136] Since the theory of performativity says that how we act is who we are, being pressured into performing in certain ways remakes us at a fundamental level.

V.
CONCLUSION: TOWARD A PERFORMATIVITY-MAXIMIZING FUTURE

Having mapped out the past of surveillance and its present as a matter of Fourth Amendment law and of identity performativity, I now wish to speculate on what a performativity-maximizing Fourth Amendment might

128. *See* discussion *supra* part IV.B.

129. *See supra* text accompanying notes 51–53.

130. *See* discussion *supra* part IV.B.

131. *See* discussion *supra* part IV.C.

132. *See supra* text accompanying notes 112–14.

133. *See* discussion *supra* part IV.C.

134. *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 104 (2003) (arguing that post-9/11 profiling of Arab and Muslim men shows the endurance of racial essentialism).

135. *See* discussion *supra* part II.

136. *See generally* YOSHINO, *supra* note 21 (describing theory that people cover denigrated identities).

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look like. The future of surveillance law needs to free people to perform their selves in any way they wish. Surveillance, at least when not based on probable cause, is often more problematic than productive because it has the broader effect of preventing people from performing their identities as they see fit, thereby preventing them from becoming the people they can be.

That basic insight about surveillance and identity performance leads to four insights about the Fourth Amendment issues that were the subject of Part III. First, in order to maximize identity performance, the Fourth Amendment must reject the spatial models of privacy suggested by the *Olmstead* and *Kyllo* decisions. Those models fail us because they are based on where you are, not who you are. Consequently, they cannot begin to account for the ways in which surveillance might impel an individual to perform her identity in conformity with the status quo.

Nor is the *Katz* model of privacy sufficient. A second performativity insight is that we need to provide at least some protection for people to express themselves to others. From a performativity perspective, the fundamental problem with *Katz* is its holding that anything one knowingly exposes to public view is unprotected.[137] For example, the "misplaced trust" doctrine makes less sense when one considers identity to be performative. That doctrine says that no reasonable expectation of privacy exists whenever one shares information with another.[138] So Jimmy Hoffa could not claim privacy against an undercover agent's revelation of his criminal plans even though he went to great pains to keep the conversations secret.[139] Hoffa was said to have assumed the risk that his confederate would share his statements with the government.[140] But there is a difference between a friend possibly leaking an imperfect version of your statements and the government's recording the statement verbatim. An analysis informed by performativity theory supports the notion that people need an audience to which they might express themselves to in order to self-actualize. It thus makes sense to require the authorities to have a "reasonable" basis for setting up a false audience.[141] The misplaced trust doctrine assumes that if we really valued what we were saying or doing, we would keep it from everyone else. Such a jurisprudence of

137. *See* Katz v. United States, 389 U.S. 347, 351 (declaring that "knowingly expose[d]" information is unprotected).

138. *See* LAFAVE, ISRAEL & KING, *supra* note 89, at § 3.2 (describing misplaced trust doctrine).

139. *See* Hoffa v. United States, 385 U.S. 293, 302 (1966) (stating that no Fourth Amendment violation existed because Hoffa relied on his misplaced confidence that the individual with whom he spoke would not reveal his wrongdoings).

140. *Id.* at 303.

141. Here I mean "reasonable" in the sense of the Fourth Amendment's broad prohibition of "unreasonable" searches and seizures. In my view, reasonableness requires probable cause on the *Hoffa* facts.

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hermits does not suit a world in which identity is performatively and intersubjectively constituted.

A third performativity insight is that *Katz*'s focus on the reasonableness of an expectation of privacy always limits an individual's freedom to perform her identity to the bounds of status quo acceptability.[142] Just as people are made to conform to cultural norms for gender behavior, they may be so constrained with respect to any type of performance of their identities.[143] The "scripts" for culturally acceptable behavior are always wedded to what has happened up to that point. We thus need to not only reject the *Olmstead* and *Kyllo* approaches, but also imagine beyond the *Katz* decision and develop a performativity-maximizing model of the Fourth Amendment.

Fourth, all of this leads to the insight that the burden of new technologies must be placed on state authorities, not civilians. This is so because of three principles that emerge from Part IV's analysis of the application of performativity theory to surveillance. First, we must protect an individual's ability to perform her identities as she sees fit. Since surveillance dampens identity performance, we ought to craft a presumption against the use of new surveillance technologies. Second, we must avoid promoting status quo identities over alternative identities. Allowing the use of new surveillance technologies would make it more likely we would suffer that harm. Finally, we must be conscious of the fact that an audience's response can stifle a person's belief that she is free to perform her identities as she wishes. Allowing the state to weigh-in in favor of the status quo by means of surveilling dissidents without passing Fourth Amendment muster dampens people's performative freedom.

In this essay, I do not have a goal of turning the four performativity insights discussed above into doctrinal solutions. Instead, I suggest a sort of disposition toward the Fourth Amendment.[144] While it is often argued that we all want the social control that surveillance begets, that argument is largely false. We do not value social control unconditionally, for we want only as much social control as is necessary to control crime. We balance our desire for control of crime with a simultaneous desire to promote

142. Here I mean "reasonable" in the limited sense of an expectation of privacy that society is prepared to accept as reasonable under *Katz* analysis. *See* Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring) (describing the requirement that a subjectively held expectation of privacy also be reasonable).

143. *See supra* text accompanying notes 107–11. For a discussion of how cultural norms of identity influence the application of doctrines, see Cooper, *The Seesaw Effect*, *supra* note 23.

144. One obvious example of a doctrinal move of which I do not approve is the USA PATRIOT Act. That Act heightens the problem of status quo reinforcement by encouraging the development of new surveillance technologies and lowering of the threshold of justification required for searches. Because we value self-actualization, we must reject such moves.

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freedom of thought and action.[145] Reactionaries are fond of saying "freedom ain't free"[146]; we might respond by saying "security is meaningless if it destroys liberty."

As this study of the FBI's surveillance of King demonstrates, state authorities should not be allowed to decide which expressions of identity are reasonable because they are inherently agents of the status quo. Since unfettered surveillance power encourages the government to curtail the freedom to perform one's identities, it amounts to a suicide pact whereby the government destroys itself in the name of self-preservation. We should void that pact by placing the burden of persuasion on the government when it argues new technologies are consistent with the Fourth Amendment.

145. *See* Solove, *Reconstructing Surveillance Law*, *supra* note 17, at 1267–70 (contrasting benefits and harms of surveillance).

146. For a play on the phrase, see Brother Ali, *Freedom Ain't Free*, *available at* http://www.lyricsmania.com/lyrics/brother_ali_lyrics_12206/the_undisputed_truth_lyrics_42256/freedom_aint_free_lyrics_457551.html (last visited Apr. 3, 2009).

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