The Benefits of Surveillance
Eugene Volokh

Automated cameras are the hot new law enforcement tool. Cities use them to catch red light runners and speeders (I was caught by one myself earlier this year). Washington is setting up hundreds of cameras to monitor streets, federal buildings, subway stations, and other locations. Police used cameras with face recognition technology at last year’s Super Bowl to catch known fugitives.

Many of my libertarian friends are outraged by these cameras—creeping Big Brotherism, they say. But the analysis can’t be as simple as “surveillance bad, privacy good”; and at least in some situations, camera systems can promote both security and liberty.

To start, the problem with cameras can’t be privacy. These cameras are in public places, where people’s faces and cars are visible to everyone. They catch only what any passerby, and any police officer who might be present, can lawfully see. For the same reason, cameras don’t involve “unreasonable searches and seizures,” in the words of the Fourth Amendment. The Supreme Court has recognized that observing things in plain public view isn’t a “search” at all, much less an unreasonable one.

In fact, while we should be concerned with protecting our liberty and dignity from intrusive government actions, the red light cameras are actually less intrusive than traditional traffic policing. The law recognizes that even a brief police stop is a “seizure,” a temporary deprivation of liberty. When I was caught on a red light camera, I avoided that.

I avoided coming even briefly within a police officer’s physical power, a power that unfortunately is sometimes abused. I avoided the usual demeaning pressure to be especially submissive to the police officer in the hope that he might let me off the hook. I avoided any possibility of being pulled out and frisked, or of my car being searched. I didn’t have to wonder if I had been stopped because of my sex, race, or age.
And while cameras aren’t perfectly reliable, I suspect that they can be made more reliable than fallibly human officers—so I may even have avoided a higher risk of being wrongly ticketed. (It helps that the photos mailed with the ticket showed me in the driver’s seat, my car’s license plate, and the precise place my car supposedly was when the light turned red.)

The question shouldn’t be “Is the camera perfectly reliable?” but “Which is more reliable—the camera, with no observation by the police and little recollection by the motorist, or the observation and memory of the police officer and the motorist, without the camera?” People are notoriously bad at observing and remembering exactly what happened. Just how fast was I driving? Exactly where was I the moment the light turned red? Few motorists can know this with any accuracy even a minute or two after the fact. Even police officers are probably not very good at observing this. So I think the camera evidence is generally more reliable than the police officer’s and the motorist’s observations—assuming, of course, that the camera is properly calibrated, but it’s easier to verify the camera’s calibration than the police officer’s observational acuity.

Some people object that such automatically gathered evidence violates traditional fair trial guarantees, such as the right to confront witnesses, the freedom from self-incrimination, and the presumption of innocence. These objections are, I think, unsound. The law has long recognized that people’s guilt can be proven using physical evidence, whether it’s fingerprints, DNA, or a traffic photograph. The burden of proof in such cases remains on the government, and the defendant remains free to cross-examine the human witnesses against him and to introduce testimony about the supposed unreliability of the physical evidence against him. True, the physical evidence can be powerful, and, like other powerful evidence, it can put the defendant in a position where he faces conviction unless he comes up with some persuasive explanation for his actions. That, however, simply shows that the government has met its burden of proof, not that the burden has somehow been improperly shifted.

Automated traffic cameras can indeed change traditional legal rules in one important way. A camera can’t always identify the driver, and drivers can exploit this by wearing sunglasses, caps, and
other relatively unobtrusive disguises. The public will be understandably reluctant to let these drivers get off scot-free just because the camera didn’t get a positive identification—and there will therefore be pressure simply to impose liability on the registered owner, regardless of who was driving.

But this is precisely what is done for parking tickets, where law enforcement likewise can’t identify who the driver is. We generally accept this sort of owner liability, partly because the penalty is only money, not jail time, and partly because we recognize that owners can rightly be held responsible for the actions of those to whom they entrust their cars. We might conclude that such owner-liability tickets shouldn’t count towards the loss of a driver’s license, but imposing a fine on the owner shouldn’t be a problem.

**Expanding Government Power**

Cameras are not cause for concern, then, when it comes to individual privacy, fairness, or accuracy; the real issue is government power. Cameras are a tool that can be used for good—to enforce good laws—or for ill: to enforce bad laws, to track the government’s political enemies, to gather ammunition for blackmail, and so on.

In this respect, cameras are like other policing tools, such as the guns that police officers carry, wiretaps, the ability of police departments throughout the nation to share data, and even police forces themselves. Each of these tools can be abused and has been abused. We accept this risk because the tools are valuable, and because we’ve set up control systems that can help diminish the risk.

So we have to consider each camera proposal on its own terms and ask what I call the Five Surveillance Questions:

1. What concrete security benefits will the proposal likely provide?
2. Exactly how might it be abused?
3. Might it decrease the risk of police abuse rather than increase it?
4. What robust control mechanisms can realistically be set up and maintained to help diminish the risk of abuse?
5. And, most difficult, what other surveillance proposals is this proposal likely to lead to?
Answering these questions for traffic cameras suggests that they are a good idea, at least as an experiment. They seem likely to help deter traffic violations. They can’t easily be misused for gathering other sorts of information or for suppressing dissent. They decrease the discretionary and sometimes oppressive power of police over motorists.

There is a danger that local governments, which make money from traffic tickets, will use this cheap law enforcement device primarily to raise revenue without regard to whether it improves safety. Governments could, for instance, be tempted to make yellow lights shorter (perhaps unsafely short) or to set speed limits too low. This sort of moral hazard is always present whenever the government can financially profit from law enforcement.

But the solution to this, I think, is not to reject the useful technology, but to set up administrative control mechanisms to prevent its misuse; and precisely because cameras are evenhanded and catch the rich and powerful alongside everyone else, there are bound to be strong political forces pushing for such control mechanisms. Yes, bureaucrats do like getting the money from the traffic fines, but their bosses like to get reelected. When enforcement is widely spread and not focused on just a few people, the political reaction to any possible abuses is likely to be quite strong.

One friend of mine suggested that traffic tickets are a form of tax and that making the tax easier to collect will mean that this tax rate will effectively become too high. That might initially be true, but which sort of tax is fairer and likelier to be set at the proper level, a tax that is applied indiscriminately to thousands of people, or a tax that is borne by whomever a police officer chooses to pull over?

The one big unknown is the answer to the fifth Surveillance Question. Once the cameras are set up, might the data eventually be used not just to catch red light runners but to photograph and identify all drivers? More about that shortly.

Other types of cameras, such as cameras at stadiums that look for known fugitives, or cameras mounted on government buildings and streetlamps that monitor the surrounding area for crime, are also probably worth experimenting with. They can at least theoretically
help catch some street criminals and deter others (though we should always realize that crime control proposals that sound worthwhile may end up not working in practice). I’m not sure how much the cameras would help fight terrorism, as some people have suggested, but if they just catch street criminals, that’s not chopped liver.

These cameras pose some risk of government abuse, from petty indignities, such as security guards using cameras to ogle women, to more serious misuse, such as officials trying to find possibly embarrassing behavior by their enemies. But they can also reduce the risk of government abuse: the camera that might videotape a mugging can also videotape police stops of citizens, providing evidence of possible police misconduct and maybe even to some extent deterring such misconduct. And videotape evidence can decrease the risk that the wrong person will be arrested.

What about the Slippery Slope?

The modest proposals that we hear today are not, by themselves, particularly troubling. I must acknowledge, though, that they do carry the potential for future danger. Once voters get used to surveillance, they might become more tolerant of the government using the data in ways that do pose more risk of abuse.

Proposals to let the government connect cameras to face recognition software, keep the recordings indefinitely rather than just recycling them after a few days, and merge the data in a centralized database—measures that could indeed be abused by some officials—might become more politically viable once cameras in public places are a part of our daily lives. Slippery slope arguments are often overstated, but in a legal and political system that relies heavily on precedent and analogy, the slippery slope is a real risk. Moreover, once the government invests money in cameras, voters might want to get the most bang for their buck by having the police store, merge, and analyze the gathered data. This slippage isn’t inevitable, but it’s not implausible.

But even if there is slippage, it’s important that the potential for abuse is limited and limitable. The danger isn’t the government
looking into homes, or tapping private telephone conversations. Rather, it’s that cameras in public places will be abused by officials who want to harass or blackmail their political enemies.

There are such rotten apples in government. If you think that there are very many and that law enforcement is fundamentally corrupt, you should oppose any extra tools for the police, because in your perspective the tools would more likely be used for ill than for good, but I don’t take so dim a view. I think that for all its faults, law enforcement is filled mostly with decent people. And more importantly, good law enforcement is vitally necessary to the safety of citizens of all classes and races.

Instead of denying potentially useful tools to the police, we should think about what control mechanisms we can set up to make abuse less likely, and we should recognize that some surveillance tools can themselves decrease the risk of government abuse rather than increase it.