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Privacy Rights and Public Spaces: CCTV and the Problem of the "Unobservable Observer"

BENJAMIN J. GOOLD

Over the past ten years, closed circuit television (CCTV) cameras have become an increasingly familiar part of the urban landscape in many developed countries.¹ Throughout Europe, despite early concerns about the possible implications for human rights, governments have now begun to regard video surveillance technology as a "magic bullet" in the fight against crime and public disorder. In Britain alone, over one million cameras have been installed in towns and cities across the country, with an estimated 500 being added to this number every week.²

While initially slow to embrace this new technology, in recent years public area CCTV has also begun to become more popular in the United States. Street cameras can now be found in Boston, Los Angeles, and New York, as well as in a growing number of smaller cities and towns.³ In many instances, these cameras have been installed without public consent or even public discussion and are subject to little in the way of either formal or informal legal regulation. Provided they have the support of local government, the police and other law enforcement agencies are free to monitor public spaces such as streets, parks, and open malls with little regard for the concerns of private citizens.

To some extent, this lack of regulation stems from a reluctance on the part of the courts to tackle the question of whether individuals have some legitimate expectation of privacy in public spaces. Despite declaring in *Katz v. United States* that the Fourth Amendment "protects people not places," since the late 1960s the Supreme Court has been highly resistant to the idea that privacy rights can

extend to streets or other public areas.⁴ The Court has also repeatedly refused to consider any suggestion that public area video surveillance should be regarded as a form of police search, a view that has been consistently endorsed by the lower courts.⁵ As a consequence, individuals who believe that they have been the subject of unnecessary and intrusive CCTV surveillance can expect little sympathy from local, state, or federal court judges.⁶

This judicial reluctance is understandable. Privacy rights are notoriously difficult to define, particularly in terms of their operation in public and semi-public spaces.⁷ Yet, while most of us accept that we surrender a certain amount of personal privacy once we leave the confines of our own home, few would concede that we have no expectation of privacy when we stand on the street or walk through a park. The problem lies with identifying the interests that are harmed by the absence of privacy protections in such circumstances. How, for example, is being watched by a CCTV camera different from being watched by a stranger sitting on a park bench or, for that matter, by a police officer standing on a street corner? Why is one somehow more intrusive than the other, and does this tell us anything about the types of interests involved or how best to protect them?

This article examines these questions, and the possibility of developing a coherent framework for thinking about individual privacy rights in public spaces. In particular, it considers whether CCTV surveillance represents a special or unique threat to such rights and how the law should begin to approach the issue of regulation and control. Whether we like it or not, public area surveillance technology is now a fact of life, and there is a pressing need for us to reconsider many of our assumptions—legal and ethical—about the nature and importance of privacy rights.

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Privacy as a Civil Liberty

Although there are many competing conceptions of privacy as a civil liberty, one of the most coherent accounts is that advanced by the legal philosopher David Feldman. According to Feldman, privacy rights are important because they provide individuals with the ability to determine and control the boundaries between different, interlocking social spheres.⁸ For most of us, our daily lives are lived in a number of social contexts, many of which may overlap. At home I am a husband, at work a teacher, and at my local sports club a member of a team. In each case, I assume different responsibilities, respond to different expectations, and maintain different levels of intimacy with those around me. Privacy conventions enable me to exert varying degrees of control over the borders between these different spheres and to limit the extent to which I am subject to the demands of others within them. While I do not abandon my identity as a husband when I leave home every morning, I am not obliged to reveal details about my marriage to my employer, my students, or some stranger I meet on the street. Equally, even in my own home and surrounded by those closest to me, there may be certain thoughts that I choose to keep to myself and certain activities that I prefer to engage in alone. In this regard, privacy is a matter of being able to choose how I respond to the demands and curiosity of those around me and of maintaining some degree of control over how I present myself to the world.

Within this framework, privacy rights deserve protection because they are essential for the maintenance of personal autonomy and because they enable individuals to maintain a range of different and valuable social relationships.⁹ If we are constantly having to respond to the expectations of those around us, our choices are unlikely ever to be free, and we are unlikely to develop a capacity for self-determination or a degree of self-fulfillment. In recognizing that there are different spheres of social life, however, this model of privacy also acknowledges the need to afford different levels of protection to different circles of activity. Although most of us would accept that the home—as one of the most tight-knit and intimate social spheres—should be virtually free from outside scrutiny, few would accept that such protections are either necessary or desirable in the context of the office or the gym. As we move into ever larger social spheres, we in-

creasingly lose control over who else enters that space and the extent to which we are subject to their expectations and curiosity.¹⁰ The question of whether privacy rights extend to public spaces depends, then, on whether we can legitimately claim to exercise any control over who shares such space with us or how they behave in that space. Put simply, does the fact that we appear to have little or no control over the rest of the world in public mean that we surrender any expectation of privacy when we step out onto the street or go for a walk in a park?

On the face of things, the answer to this question appears to be yes. Certainly, Feldman himself admits that at one time he “thought that the fact that one chose to do things in public automatically negated any claim to privacy rights in respect of them.”¹¹ Yet while it is true that we have far less control over who we encounter in public than we do in the home or the workplace, this does not mean that we should be unable to limit the extent to which we feel obliged to respond to their expectations. As Feldman argues, when we speak of public places, we really mean “more public than others,” and while it is easier to justify interfering with the interests of other people in public than in private, it does not follow that all interferences are necessarily acceptable or desirable.¹² Furthermore, as Feldman goes on to observe:

The implication of the model of spheres of privacy . . . is that most spheres involve relationships with other people, and privacy concerns the extent to which we can legitimately claim to control space, action, and information in the context in question. . . . Surveillance, even in public or semi-public spaces, may threaten dignity and autonomy. Privacy claims should therefore still be capable of being asserted, although their degree of publicness will affect their weight.¹³

Although this account of privacy provides a starting point for thinking about the regulation of technologies like CCTV, it leaves a number of crucial questions unanswered. Assuming that privacy rights do exist in the public sphere, what exactly do they look like? Do we need to distinguish between different kinds of interference and scrutiny, and if so on what basis? In order to answer these questions, it is useful to think about how we use public space and what we regard as reasonable intrusions in such circumstances.

Conventions of Anonymity

In attempting to identify what sorts of privacy interests are at stake in public spaces—and what these interests might look like—it is useful to begin by examining some of the informal, everyday conventions that govern social interactions in public. Clearly, when it comes to watching others in public, certain forms of observation are regarded as being inherently more intrusive than others. As von Hirsch has noted, while most people expect to be the subject of “casual and momentary” observation, anything more is likely to be seen as somehow inappropriate and unacceptable.¹⁴ When I walk down the street or through a crowded park, for example, I expect to be noticed by those around me. I do not expect, however, to be stared at intently, followed, or subjected to some other special or prolonged scrutiny, unless I am doing something out of the ordinary or attempting to draw particular attention to myself. Furthermore, being able to see who is watching me is also important. I can only choose how to respond to more than causal or momentary observation if I am aware of being observed.¹⁵

According to von Hirsch, these “conventions of anonymity” exist to ensure that individuals are able to go about in public without being identified or feeling the need to respond to the curiosity and expectations of strangers. In this regard, they provide us with a modicum of personal privacy and help us to maintain a sense of dignity and autonomy as we go about our lives in public. In terms of the general framework outlined by Feldman, it follows then that privacy rights should be extended to public spaces insofar as they serve to protect an individual’s legitimate expectations of anonymity.

Having established a connection between anonymity expectations and privacy interests, von Hirsch goes on to argue that CCTV surveillance violates these identified conventions by exposing individuals to the possibility of prolonged scrutiny from unobservable observers. As he points out, CCTV surveillance necessarily involves camera operators zooming in on and following individuals even if they are not doing anything in particular to draw attention to themselves. Furthermore, regardless of whether CCTV cameras are obvious or covert, it is unlikely that the persons under surveillance are going to be

aware that they are being watched:

Often, the presence of CCTV is unannounced, and the cameras are concealed. But even if the cameras are unconcealed, the fact that they are mechanical, positioned above people’s line of vision, and blend in with other features of the physical environment makes them easily overlooked. A camera is likely to be ignored in a way that a police officer is not.¹⁶

According to von Hirsch, limits need to be placed on the use of CCTV surveillance to ensure that privacy and anonymity is protected in public spaces. Although he readily admits that he can offer no “confident answers” to the question of how best to regulate CCTV, von Hirsch does make two key suggestions. The first, which addresses the problem of prolonged scrutiny, is to restrict access to the video tapes produced by CCTV systems to ensure that they are used only for law enforcement purposes. Reviewing tapes necessarily involves exposing those captured by the cameras to repeated and intense scrutiny and must therefore be justified by reference to some other legitimate competing interest such as the desire to reduce crime. Von Hirsch also argues that there are grounds for restricting monitoring to times and places where suspected criminal activity has been reported and possibly to areas that have been deemed to be “high risk.”¹⁷

His second suggestion—which provides the focus for the rest of this article—is to place a bar on the use of covert CCTV cameras and to require areas under surveillance to have signs indicating that CCTV cameras are in operation.¹⁸ Taking such steps would, von Hirsch argues, help to ensure that people are aware of when they are being watched and in the process go some way towards alleviating the intrusive and “chilling” effects of public area surveillance. Yet is this really even a partial solution to the problem of the “unobservable observer” as identified by von Hirsch? Does knowing that we are being watched, or even being able to see the CCTV cameras themselves, actually satisfy the requirement for observable observation? In the rest of this article, I will argue that ensuring cameras are overt is far from sufficient and that the problem of the “unobservable observer” requires us to think more deeply about the relationship between observation, identity, and motive.

Identity and Motive: The Problem of the "Unobservable Observer"

Although von Hirsch's discussion of the ethics of CCTV goes a long way toward providing us with a framework for the regulation of public area surveillance, it can be argued that he does not go far enough. In part, this is due to the fact that he does not fully engage with the problem of the "unobservable observer," or attempt to explain just what it is about CCTV cameras that makes them seem more intrusive than other forms of public area surveillance. Although he rightly points out that "a camera is likely to be ignored in a way that a police officer present is not," this does not tell us why so many people also find the presence of clearly overt cameras extremely disquieting.

Von Hirsch is right when he suggests that part of the problem lies with the fact we do not know who is operating the camera or what they are looking for. Being able to identify who is watching us is crucial if we are to be able to make decisions about how to adjust our behavior (or not) in the light of such observation. But placing a bar on covert surveillance, as suggested by von Hirsch, provides only a partial solution to the problem (something he himself acknowledges). Knowing that we are being watched by a camera is not the same as knowing the identity of who is watching us. All that we know is that we are being watched, but it is impossible for us to know why or by whom. This is the reason that we draw a distinction between being watched by a visible police officer and a CCTV camera mounted on the side of the building. Seeing, identifying, and attempting to understand the motives of whoever is watching us is an essential precursor to deciding how we feel about being observed and to deciding how to respond to such observation.

Take for example the case of being watched in public by two strangers, one a small girl and the other a man wearing a dark suit and sunglasses. Even if both watch from the same distance and for the same length of time, they are most likely to evoke different responses. In the case of the child, most people would assume that the girl's motive for paying such close attention to them is either benign or unimportant. In the case of the stranger in sunglasses, however, we may be less certain that his reason for watching us is benevolent. Being able to see each of them—the girl and the man in sunglasses—is, however, crucial to the drawing of these conclusions. Once we are able to see and to know something about the

identity of the observer, we are then in a position to draw inferences from their appearance and behavior about their possible motives for watching us. I may, of course, be wrong in my estimations. The small child might be watching with the intention of doing me some harm while the man in sunglasses may simply be especially curious. Given, however, that what matters—at least as far as my immediate privacy interests are concerned—is how being observed makes me feel, in a sense it is not important whether I have come to the right conclusions in either case. What matters is whether being able to draw these inferences has made me more comfortable with the fact of being observed and that conventions of anonymity have been violated.

Even when they are clearly visible and obvious, however, CCTV cameras deny us the possibility of drawing such conclusions. Instead, we are left to wonder exactly who is watching us and for what reason. Although I may suspect that I am being monitored for signs of criminal behavior, because there is no way of knowing who is controlling the camera or watching my image, there is also no way for me to confirm that that my assumption is correct. Perhaps no one is watching, or I am being watched by dozens of people who have no business looking at me at all. Perhaps I am being watched by a highly trained, professional camera operator bound by clear ethical standards or by a voyeuristic pervert and ten of his friends who have just dropped into the control room for an afternoon of entertainment. Unable to see my watchers, I cannot know for certain which is the case and, therefore, how I feel about being watched.

In order to overcome the problem of the "unobservable observer," it is clear that CCTV cameras need to be more than simply visible to the public. Von Hirsch is right when he argues that covert cameras are particularly troublesome and that the public should know when they are being watched by CCTV. Yet making sure that CCTV surveillance is carried out in an overt manner is only a partial solution to the problem. It is also essential to ensure that the public know more about who is watching them and for what purposes. The difficulty, however, lies with deciding how much information the public needs and how best to provide it while also ensuring that CCTV systems are able to operate effectively and securely.

Accepting a Partial Solution: The Need for a "Watchdog"

One obvious solution to the problem of the "unobservable observer" is simply to make the identity of all CCTV camera operators known to the public. Unfortunately, short of attaching two-way television monitors to every CCTV camera, or having operators work in glass booths situated in the middle of the area under surveillance, there is no practical way of providing this information contemporaneously. Another approach might be to make the names of all camera operators a matter of public record so that people concerned about being under surveillance can at least determine who exactly is watching them. Yet even if we know the identity of all of the operators working for a given CCTV scheme, this is unlikely to make us more comfortable given that there is no way of knowing which one of these operators is watching the monitors at any particular moment or whether they are alone in their observation. Furthermore, publicly identifying camera operators may make them more susceptible to undue influence and less likely to target individuals who might harm them or those close to them.

In light of these difficulties, it may be that the best we can hope for is a partial solution to the problem. Although in the ideal case I may want to know exactly who is watching me and why, being able to form some *reliable belief* about who is behind the camera may help to make me feel more comfortable in the presence of CCTV. If, for example, I am confident that the *only* person watching me is a well-trained, professional camera operator bound by a set of clear ethical and legal guidelines, I am then in a position to make assumptions about his or her motives and to decide on how best to respond to the fact of being watched. In this sense, knowing something about the general identity of the camera operators brings me closer to the situation of being watched by a police officer in the street; although I can never know for certain why either is watching me, knowing something about their identity at least allows me to draw inferences about their possible motives and may make the consequent loss of privacy or anonymity resulting from their attentions somehow more acceptable.

Of course, the question then becomes: what sort of information do I need to form this reliable belief? Clearly, signs indicating that CCTV is in operation are not enough, nor are vague assurances from camera operators or scheme managers that my civil liberties are being re-

spected.¹⁹ Instead, I need to know what the camera operators are looking for, that they are behaving professionally, and that I am not being watched by unauthorized persons. In order to ensure that this is the case, it can be argued that there is a need for some independent, publicly accountable agency to supervise the use of CCTV cameras and keep an eye on the behavior of camera operators. Ideally, this agency would be empowered to conduct random inspections of CCTV control rooms and required to publish regular, detailed reports on such things as operator targeting practices and the use of information collected by CCTV. Furthermore, this "watchdog" agency would also be responsible for keeping the public informed about how CCTV surveillance is being conducted, and guaranteeing that individuals are not being subjected to unwarranted or unnecessary surveillance.

Assuming that this agency is doing its job, I should be able to walk down the street safe in the knowledge that while I may not know exactly who is watching me at that particular moment, someone—if not the operators themselves—is protecting my interests and ensuring that my privacy rights are not being infringed any more than is necessary for the purposes of public safety and crime prevention. In this respect, the existence of such an agency might help to bring CCTV closer to the idea of the Panopticon as originally envisaged by Jeremy Bentham. While readers of Foucault and other modern social theorists are likely to be familiar with the disciplinary aspects of the Panopticon, for Bentham one of the great advantages of his model prison was that it would also allow the public to see how prisoners were being treated and make prison guards more accountable. As Janet Semple notes in her classic account of Bentham's thinking:

The final application of the inspection principle was of the whole of the prison by the whole of the outside world. The central tower would enable judges and magistrates to inspect the prison quickly and safely. . . . The design of the building would also enable any member of the public safely to enter the prison and to view every prisoner in it: "I take it for granted, as a matter of course, that . . . the doors of these establishments will be, as, without very special reasons to the contrary, the doors of all public establishments ought to be, thrown wide open to the body of the curious at large—the great *open committee* of the tribunal of the world."²⁰

Ironically, then, whereas the establishment of an independent, supervisory agency may provide only a partial so-

lution to the seemingly intractable problem of the "unobservable observer," it does so by attempting to make existing CCTV systems more, not less, like Bentham's Panopticon. Like Bentham's prison, CCTV control rooms should be open to external scrutiny and subject to regular, independent inspection. As has already been noted, however, there are good reasons for restricting public access to CCTV schemes and establishing some agency to undertake these inspections, if only to protect the safety of operators and to guarantee the security of the system as a whole. How this agency should be organized, managed, and funded are questions for another time and another paper. Crucially though, it must command the respect and confidence of the public and be clearly independent of those responsible for the day-to-day surveillance of public spaces. Unless the agency is independent and trusted, individuals are unlikely to form the kinds of reliable beliefs necessary to allay their fears about being placed under surveillance. Combined with a ban on the use of covert cameras and clear signing of streets, parks, and other areas covered by CCTV—measures strongly

advocated by von Hirsch—the existence of such an agency may go some way to protecting individual privacy interests, if only by fostering public trust and providing citizens with the opportunity to form reliable beliefs about the people behind the cameras.

Finally, it is worth noting that the above discussion raises other, more fundamental questions about the future of public area surveillance, questions that go beyond matters of reform and regulation. If we are forced to accept that we will *never* be able to make CCTV surveillance sufficiently transparent to ensure that the presence of cameras does not in some way contravene conventions of anonymity, the question then arises as to whether we should allow such surveillance at all. Again, this is something that deserves to be considered in another article, but for the time being it is important to recognize that the problem of the "unobservable observer" is an apparently insoluble one and that as a consequence lawmakers and the public need consider how much privacy we are willing to surrender for the sake of crime prevention or public safety.

NOTES

1 Although a great deal has been written about CCTV in recent years, it is surprisingly difficult to find a definition of closed circuit television in the literature of surveillance or crime prevention. For the purposes of this article, CCTV is taken to refer to any system in which a number of video cameras are connected in a closed circuit or loop, with the images produced being sent to a central television monitor or recorder. It is also worth noting that while the term CCTV was originally used to distinguish this type of "private" system from broadcast television—where any correctly tuned receiver can pick up the picture signal sent from the cameras—it has now come to refer to virtually any form of monitoring system that uses video cameras as a means of surveillance.

2 Gadher, *Smile, You're on 300 Candid Cameras*. . . , Sunday Times [London], Feb. 14, 1999. For more recent estimates, see also Appleyard, *Nowhere to Hide*, Sunday Times Mag. [London], Apr. 15, 2001. According to one estimate, some 300,000 security cameras are sold each year in England, the result being a video surveillance industry worth something in the vicinity of £300 million. See Campbell, *Spy Cameras Become Part of the Landscape*, The Guardian [Manchester], Jan. 30, 1995, at 6. See also Narayan, *What's Happening? CCTV Today*, Nov. 1996, at 20; Graham, Brooks, & Heery, *Towns on the Television: Closed Circuit TV in British Towns and Cities* 22(3) LOCAL GOV'T STUD. 3 (1996); and Bannister, Fyfe, & Kearnes, *Closed Circuit Television and the City in SURVEILLANCE, CLOSED CIRCUIT TELEVISION AND SOCIAL CONTROL* 21 (C. Norris, J. Moran, & G. Armstrong, ed. 1998).

3 Burrows, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, 31 VALPARAISO U.L. REV. 1083 (1997).

4 *Id.*; also Gormley, *One Hundred Years of Privacy*, 1992 WISC. L. REV. 1345; McClurg, *Bringing Privacy Law Out of the Closet: A*

Tort Theory of Liability for Intrusions in Public Places, 1995 N.C.L. REV. 1021.

5 Granholm, *Video Surveillance on Public Streets: The Constitutionality of Invisible Citizen Searches*, 64 U. DET. L. REV. 694 (1987); Robb, *Police Use of CCTV Surveillance: Constitutional Implications and Proposed Regulations*, 13 U. MICH. J.L. REF. 582 (1980).

6 At present, this situation is similar to that under the European Convention on Human Rights. Although the Convention recognizes a citizen's right to "respect for his private and family life, his home and his correspondence," based on the decision of the European Court of Human Rights in *Friedl v. Austria*, it is unclear as to whether this right gives rise to any expectation of privacy in public places. See *Friedl v. Austria*, 21 European Human Rights Reports 83 (European Court of Human Rights, Jan. 31, 1995).

7 Feldman, *Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty* 47(2) CURRENT LEGAL PROBLEMS 41 (1994) [hereinafter Feldman, *Secrecy*]; Feldman, *Privacy-Related Rights and Their Social Value in PRIVACY AND LOYALTY* 15 (P. Birks, ed. 1997) [hereinafter Feldman, *Privacy-Related Rights*]. See also arguments by Ronald Dworkin concerning the problems inherent in the relationship between privacy and liberty: R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 266-78 (1977).

8 See Feldman, *Secrecy*, *supra* note 7, at 41; and Feldman, *Privacy-Related Rights*, *supra* note 7, at 15.

9 Feldman, *Secrecy*, *supra* note 7, at 53-59.

10 *Id.* at 51-53.

11 *Id.* at 59.

12 *Id.*

- 13 *Id.*
 14 von Hirsch, *The Ethics of Public Television Surveillance* in *ETHICAL & SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION* 59-76 (A. von Hirsch, D. Garland, & A Wakefield, ed. 2000).
 15 *Id.* at 68-69.
 16 *Id.* at 65.
 17 *Id.* at 66-67.
 18 *Id.* at 68.
 19 For an examination of the operation of CCTV Codes of Practice in Britain, see M. BULOS & C. SARNO, *CODES OF PRACTICE & PUBLIC CLOSED CIRCUIT TELEVISION SYSTEMS* 17 (1996); J. Ansell, *Closed Circuit Television: The Human Element*, unpublished

M.Sc. dissertation, Leicester University (1998). As the civil liberties group Privacy International has observed: "The current legal situation [in Britain] is that visual surveillance largely escapes the cover of law. The Home Office has issued a Code of Conduct, and various authorities have their own codes. These documents in many instances are worthless." See Statement from Privacy International, February 1996, *quoted in* Davies, *CCTV: A New Battleground for Privacy* in Norris *et al.*, ed., *supra* note 2, 243, at 247.

20 J. SEMPLE, *BENTHAM'S PRISON: A STUDY OF THE PANOPTICON PENITENTIARY* 142 (1993). The quotation used by Semple in this passage is taken from J. BENTHAM, 4 *THE WORKS OF JEREMY BENTHAM* 46 (J. Bowring, ed. 1838-43).

BOOK NEWS

DISCRETION, COMMUNITY, AND CORRECTIONAL ETHICS

edited by John Kleinig & Margaret Leland Smith

Some two million Americans are in jail or prison. Except for the occasional exposé, what happens to them is hidden from the rest of us. Is it possible to develop and instill a professional ethic for prison personnel that, in partnership with formal regulatory constraints, will mediate relations among officers, staff, and inmates, or are the failures of imprisonment as an ethically-constrained institution so deeply etched into its structure that no professional ethic is possible?

The contributors to this volume struggle with this central question and its broader and narrower ramifications. Some argue that despite the problems facing the practice of incarceration as punishment, a professional ethic for prison officers and staff can be constructed and implemented. Others, however, despair of imprisonment and even punishment, and reach instead for alternative ways of healing the personal and communal breaches constituted by crime. The result is a provocative contribution to practical and professional ethics.

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