

Crime, Surveillance, and Communities

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Crime, Surveillance and Communities, 40 *Fordham URB. L.J.* 959 (2013).



Camille Nelson

Timing is everything. I started reading *Crime, Surveillance and Communities* in the midst of the unrest in Ferguson, Missouri. The community north of St. Louis was the site of civil unrest in the wake of the shooting of Michael Brown, an unarmed black teenager. I could say that Prof. Capers' article, which explores the use of technological surveillance as a mechanism to police the police, is prescient. However, given the number of such shootings, especially those that have risen to national attention, I would instead describe the article as a thoughtful effort to assess how technology might be used to assist and address interactions between police and community members, especially interracial interactions. Let me explain.

Capers argues that because the Fourth Amendment does protect some actions in public from technological surveillance, reasonable privacy intrusions must be balanced with the public good. Thus, technological surveillance in public is legitimate only so long as the surveillance is reasonable. Capers begins by introducing the many ways in which surveillance technology is already being used to watch our public movement and activities, be it through video cameras, biometric technology, zoom and movement capabilities, license plate readers, car trackers, CCTV, facial recognition technology, or apps. All of these, he says, combine to amount to "warrantless mass surveillance."¹ Thus, the Big Brother possibility, and the Foucauldian panopticon, are already a part of our lives. (P. 964.)

Capers then reviews the conventional reading of the Fourth Amendment's protection against technological surveillance. This jurisprudence centers around the question of what are reasonable expectations of privacy in the public sphere, and is largely driven by the notion that knowing exposure to the public gaze defeats the argument that monitoring conducted through surveillance technologies is a "search". After reviewing the seminal cases, notably *United States v. Knott*,² Capers concludes that, "...the general notion [is] that what one exposes in public is not protected by the Fourth Amendment...the use of surveillance cameras to monitor activity that occurs in public is reasonable and therefore does not violate the Fourth Amendment." (P. 961.)

As a counter-consideration to the logic of “it’s not a Fourth Amendment violation if ‘...a passerby would easily have been able to observe,’” (P. 969.) Capers then offers an unconventional reading of the Fourth Amendment. Despite the fact that conventional Fourth Amendment jurisprudence is predicated on movement in public being unprotected, Capers re-reads the line of cases from *Katz*,³ to *Alderman* to *White* and reaches the conclusion that, “the use of surveillance cameras in public does implicate reasonable expectations of privacy, and thus is subject to Fourth Amendment protection, thereby requiring reasonableness.” (P. 970.) Drawing on a distinction between an invited ear, “for which citizens assume some risk,” (P.972) and an uninvited ear,⁴ “for which they do not,” (P.972) and extrapolating the latter to encompass the uninvited eye, Capers teases out a distinction in the Fourth Amendment jurisprudence between nonconsensual and consensual monitoring. He states:

It is precisely this interstitial space that provides a foundation for subjecting covert public surveillance to Fourth Amendment protections. Even though the Court has made clear that a person must assume the risk that an ear is duplicitous, the Court has also drawn a line. The crucial factor in determining whether eavesdropping is a Fourth Amendment search is not only whether the ear was invited or not. It is also important to inquire whether the ear is actually, physically, or corporeally present. (P. 973).

In reaching the conclusion that reasonableness will suffice in such Fourth Amendment regulation, Capers undertakes a balancing assessment. He argues that “...mass surveillance neither restricts the movement of individuals nor interferes with any tangible property rights.”... further, while “overt surveillance [] may chill movement...that intrusion is *de minimis*, and with respect to covert surveillance, “the intrusion is non-existent.” (P. 975) Capers then juxtaposes the “substantial public interest” served by overt surveillance, such as deterrence of crime, assistance in crime-solving, public safety (especially post 9/11), and the potential for non-discriminatory applications, to assert that, “cities and towns would have some flexibility in using cameras as tools of crime control and public safety.” (P. 975-76.) Before reaching the most timely assertion, however, Capers states, that there is, “a strong argument [that] can be made that camera surveillance in public is in fact subject to Fourth Amendment regulation. In addition, a balancing of the intrusion to the individual, and the needs of the public, suggest that such surveillance will comply with the Fourth Amendment so long as such surveillance is reasonable.” (P. 977).

In the penultimate section, Capers notes the binary opinions in legal scholarship addressing the implications of the fourth amendment to mass surveillance, including the significant criticism of “mass surveillance as ‘an insidious assault on our freedom’ that threatens our ability to “express what we believe, to do what we want to do, to be the type of person we really are,”⁵ and the counter position that “mass surveillance is a necessary tool in deterring crime and apprehending criminals.” (P. 978.) Instead of picking a side or attempting to weigh into this debate, Capers sets out an additional consideration – he suggests that in addition to the deterrence and crime solving potential of mass surveillance, it “can also function to monitor the police, reduce racial profiling, curb police brutality, and ultimately increase perceptions of legitimacy.” (P. 978.)

I found the arguments relating to the utility of mass surveillance in racialized community policing interactions particularly compelling. Capers articulates a position that is important, especially as the nation again struggles with the killing of an unarmed black teenager, Michael Brown, in Ferguson, Missouri. I cannot help but think, would mass surveillance have been of assistance in assessing the competing narratives of what happened on August 9, 2014 as stories become concretized, and as more information, including the autopsy results are revealed. Capers’s article would suggest that mass surveillance would indeed be helpful at a time like this.

Capers explains how technological surveillance can assist with combatting racial profiling, which he underscores as “citizenship diminishing,”⁶ and also police the use of excessive force, which many in minority

communities view as endemic. If these realities are addressed through mass surveillance, it would decrease the “...perception that officers themselves operate in a zone of underenforcement,” (P. 984) free police to do the real police work, while “ha[ving] the advantage of being racially neutral ...[as it] treats all offenders alike and therefore [is] citizenship-enhancing.” (P. 984-85) Thus,

...just as cameras deter criminal and other inappropriate behavior, cameras likely will deter police from engaging in stops and frisks that cannot be justified by reasonable suspicion that cannot be well-articulated. In short, it may deter them from engaging in inefficient, racialized policing, and induce them to engage in more efficient policing. (P. 986).

The enhancements that could flow from “monitory democracy”⁷ include efficient internalized regulations, scrutiny of state actors, and contemporaneous visual documentation of the use of force which, “can be another tool in leveling the playing field.” (P. 986-87.) The sum total of these benefits leads to enhanced legitimacy, and “individuals are more likely to voluntarily comply with the law when they perceive the law to be legitimate and applied in a non-discriminatory fashion.” (P. 987). Capers suggests that camera surveillance can also be helpful in addressing the binary complaints from members of minority communities about over and under-policing. Specifically, if surveillance becomes witness to excessive policing and brutality, as well as playing a role in crime solving and identification of suspects, Capers opines that “... the possibility that Big Brother will watch us does not have to be frightening.” (P. 989.)

I like this article because it seeks to carve a path for community interactions with police that could be perceived as untainted by societal biases, prejudices, and “isms.” If, as Capers posits, camera surveillance can assist policing by being “more egalitarian and race-neutral,” we should seriously consider his suggestions. Indeed, in the context of the controversy around the shooting of Michael Brown, I learned of a related initiative in Rialto, Texas, where police began to use wearable cameras.⁸ According to one report, this town with a population of approximately 100,000 and a police force of 115 saw “a plunge in incidents involving use of force, from 60 in 2011 to 25 the following year. Complaints from citizens dropped from 28 to three, with just four in the past twelve months.”⁹ No doubt unresolved civil liberties issues remain. In the wake of yet another killing of an unarmed black man, amidst contested narratives, I think we need to weigh the potential benefits of camera surveillance in this context, and in others.

For these reasons, and more, I like Crime, Surveillance, and Communities a lot.

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1. Laura Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 **Minn. L. Rev.** 407, 409, cited in *Crime, Surveillance and Communities*, *supra* note 1 at 963. [?]
 2. 460 U.S. 276, 281-82 (1983) (holding that because visual surveillance from public places was voluntarily conveyed to anyone who wanted to look, there could be no reasonable expectation of privacy). [?]
 3. *State v. Katz*, 389 U.S. 347 (1967); *Alderman v. United States*, 394 U.S. 165 (1969); *United States v. White*, 401 U.S. 745 (1971). [?]
 4. *Supra* note 1 at 970 citing *United States v. White*, 401 U.S. 745 (1971) and *United States v. Katz*, 389 U.S. 347 (1967). [?]
 5. *Supra* note 1, at 977, citing Chris Slobogin, *Privacy at Risk: The New Government Surveillance and the Fourth Amendment*. [?]
 6. *Supra* note 1 at 981, referring to his earlier work, I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 **Harv. C.R.-C.L. L Rev.** 1, 14 (2011). [?]
 7. *Supra*, note 1 at 986, citing Richard V. Ericson, *Patrolling the Facts: Secrecy and Publicity in Police Work*

, 40 **Brit. J. Soc.** 205 (1989). [?]

8. James O'Toole, *Cameras on cops: Coming to a town near you*, CNN (March 14, 2014), <http://money.cnn.com/2014/03/14/technology/security/cameras-on-cops/>. [?]
9. James O'Toole, *Cameras on cops: Coming to a town near you*, CNN (March 14, 2014), <http://money.cnn.com/2014/03/14/technology/security/cameras-on-cops/>. [?]

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