

# Setting the Watch

Privacy and the Ethics of CCTV Surveillance

Beatrice von Silva-Tarouca Larsen

STUDIES IN PENAL THEORY AND PENAL ETHICS

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# Preface

The lyrics of pop songs often reflect the Zeitgeist and current preoccupations.

Some years ago, 'Hard-Fi', hailed as the 'next major British band', released the album *Stars of CCTV*. Its eponymous title song had this somewhat frantic refrain:

Every move that I make  
gets recorded to tape  
so somebody up there  
can keep me safe.  
I'm going out tonight  
I'll get my hair just right  
I'm always looking good  
for my spot light. . . .  
a winning smile up to the gallery,  
gonna get my face on the six o'clock news.\*

Closed circuit television (CCTV) surveillance has found its way into British consciousness after all, in spite of the apparent indifference citizens display in the face of the CCTV phenomenon. While not directly an ethical discourse, the song has a message: the words not only capture today's obsession with getting noticed and famous, and how unquestioningly we have bought into the promise of security; they are also telling us that we should not be fooled—being watched by millions of cameras as we go about in public does something to us and it makes us change how we behave. In spite (or because) of its upbeat mood, the song is cunningly subversive. We want to challenge the naive and gullible simpleton with the winning smile. Is it not rather grating to think that every move gets recorded on tape? I may not always want the spotlight when I go out. And anyway, who is that somebody up in the gallery, and can he really keep me safe? How is it that my face could end up on the six o'clock news? If I have not got my hair just right, that could be rather embarrassing.

In my discussion of the ethics of public CCTV surveillance, or open-street CCTV as it is often called, I shall pursue this theme and try to unpick the questions the song raises in the minds of those who listen. My focus

\* Stars of CCTV

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will be on the moral reasons why we should be entitled to object to being watched by CCTV cameras and the people behind them, and how to resolve the tension between this entitlement and our interest in being kept safe from crime. This requires four layers of analysis that will be spread over four chapters. In chapter one, I shall explain why a claim to an exclusive private sphere can also be upheld in a public space. Chapter two will show how CCTV surveillance interferes with this claim to a private sphere in public. In chapter three, I shall examine the purported counter-vailing justification of this interference by crime prevention objectives. Based on the foregoing analysis, chapter four will set out policy principles for the regulation of public CCTV, with regard both to its implementation and execution, and provide an overview and critique of the existing regulatory framework in the UK.

*Beatrice von Silva-Tarouca Larsen*  
*May 2010*

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## Privacy Interests in Public Space

CLOSED CIRCUIT TELEVISION (CCTV) involves observing people as they go about in public spaces that are open and accessible to everyone. This situation is different from the scenario one usually associates with a claim to privacy, lacking two important features: seclusion and intimacy. The person who is abroad in the streets does not set himself apart from the public domain and is in no position to exercise control over who is to be admitted to that space. As a rule, such a person would be in pursuit of mundane business, not engaged in activities of an intimate nature.

This has not prevented those who are critical of the unrestrained proliferation of CCTV from claiming that CCTV surveillance in public amounts to a violation of privacy interests. Even the most fervent advocates of CCTV do not deny that this is conceivable, and few take the position that privacy interests simply do not exist in a public space. However, not many attempts have been made to provide an analysis of why a person should have a right not to be watched when he has willingly subjected himself to being observed by a random audience, and why he should have an interest in privacy if he is engaged only in innocuous activities.

A theoretical framework has been put forward by Andrew von Hirsch in his article 'The Ethics of Public Television Surveillance'.<sup>1</sup> In section I. below, I shall summarise von Hirsch's ideas, comment on them and use them as a basis for developing my own conception of privacy in public space.

<sup>1</sup> A von Hirsch, 'The Ethics of Public Television Surveillance' in A von Hirsch, D Garland and A Wakefield (eds), *Ethical and Social Perspectives on Situational Crime Prevention* (Oxford, Hart Publishing, 2000) 57.

## 2 *Privacy Interests in Public Space*

### I. THE CONCEPT OF PRIVACY

#### A. von Hirsch's 'three circle' theory and the right to anonymity

Andrew von Hirsch argues that whereas a person who visits open, publicly accessible spaces cannot object to others seeing him and taking perfunctory notice of him, he may nevertheless claim to go about without being identified and subjected to intense and prolonged scrutiny. Unless the person provokes special attention by the way he comports himself, he has reasonable expectations to be left alone and to remain anonymous. Prevalent norms of behaviour—'anonymity conventions' to use von Hirsch's term—limit the degree of mutual observation in public to momentary and casual appraisal. Closer approaches, such as eavesdropping on other people's conversations or trying to join in, or audio/video-taping them, would be considered inappropriate.<sup>2</sup>

For von Hirsch, the expectation of anonymity in public spaces belongs to the realm of privacy interests. These he defines as an entitlement to non-disclosure and protection from scrutiny by unchosen others, giving a person control over whose expectations he needs to satisfy. In von Hirsch's conception, there are three circles of activity where privacy has a role to play, with a differing kind of protection afforded to each circle. The narrowest circle concerns an individual's most personal feelings, expressions and relationships, and the intimate aspects of his body.<sup>3</sup> von Hirsch calls for the strongest protection against involuntary disclosure for matters belonging in this circle. A person should be able to keep his intimate life to himself or reveal it only to chosen others. For von Hirsch, intimacy interests are not restricted to the home; they can also extend to the public domain—to the extent that there occurs intrusive scrutiny of others' intimate business.

von Hirsch's second circle relates to the social and working sphere. Privacy in this context gives a person a right to withhold information about his life outside his professional functions, because he should not be answerable (eg to his employer) for choices and actions that lie outside those functions. Disclosure may reasonably be demanded as far as it is germane to specific aspects of the business at hand. Thus an employer would be entitled to know when his employee wishes to take his holidays, and for how long, but not what activities he plans to undertake while away from work. von Hirsch acknowledges that the dividing line between legitimate requests for information and what should be protected against

<sup>2</sup> *Ibid* at 64.

<sup>3</sup> *Ibid* at 63ff.

disclosure may be difficult to draw, as this second circle concerns relationships with chosen associates who by the nature of the association have a legitimate interest in having some idea of the kind of person with whom they are dealing. He does not elaborate on this subject, however, as it is of no particular importance in the context of public CCTV.

The first and the second circle have in common that the information to be withheld is of a certain personal quality and meaning, which is the usual domain of privacy interests.

It is with the third circle that von Hirsch moves beyond the traditional scope of privacy, by acknowledging an entitlement to freedom from scrutiny, irrespective of the type of activity a person is pursuing. He draws this broader notion of privacy from the conception of privacy as 'control over presentation of self', which, referring to Ervin Goffman's analysis of 'The Presentation of Self in Everyday Life',<sup>4</sup> is concerned with protecting a person's ability to affect how he presents himself to the world. This conception of privacy was developed by Thomas Nagel, Alan Ryan, David Feldman and Ferdinand Schoeman. In this view, the existing conventions of discretion are an important way of keeping under a modicum of control to whose expectations a person needs to respond, and whose curiosity he has to satisfy. 'Anonymity conventions', which govern our behaviour in public, dictate, von Hirsch explains, that a person going about in generally accessible places may be subjected to casual scrutiny, but should otherwise be left to pursue his business. People might find his behaviour silly or irritating, but anonymity conventions demand that they leave him in peace. This, von Hirsch argues, is particularly important in public, as it is there that a person has the least control over whom he will encounter, and he should not be or feel called upon to respond to the expectations of such unchosen others, who may have different and possibly uncongenial values and attitudes. Because they are strangers, with whom the person has not undertaken any dealings of any kind, they have no entitlement to disclosure, making the assertion of access control more straightforward than in a case of activities falling within the second circle, according to von Hirsch. Only if someone draws attention to himself by manifestly aberrant behaviour may closer scrutiny occur: 'Others need not have to pretend disinterest, when the behaviour strongly would impinge on an ordinary person's attention.'<sup>5</sup>

The anonymity conventions of public space, von Hirsch points out, have nothing to do with the intimate or otherwise sensitive character of the activities involved. One 'should leave free from intensive scrutiny even the

<sup>4</sup> E Goffman, *The Presentation of Self in Everyday Life* (London, The Penguin Press, 1990).

<sup>5</sup> von Hirsch, above n 1, at 64.

#### 4 *Privacy Interests in Public Space*

most innocuous forms of activity'.<sup>6</sup> A person should be able to go about in public without having to be concerned about the preferences of the other people he encounters, and he should be so entitled even if he is pursuing only mundane business. The latter fact could, however, have an influence on the degree of priority to be given to anonymity interests, von Hirsch concedes, suggesting (but without developing the argument) that concerns about intimacy might be given a somewhat higher priority.<sup>7</sup>

By focusing the notion of privacy upon the interest in going about one's business without being scrutinised, judged or held accountable, von Hirsch's theory overcomes the problems of those privacy theorists who isolate particular activities or states deserving protection. They tend to place too much emphasis on intimacy and emotional intensity, which can restrict privacy protection to a narrow range of subject matters, or else require far-fetched arguments to bring less charged situations under its auspices.<sup>8</sup>

von Hirsch's approach is to demystify privacy, and his sober appraisal of the interests at stake cuts through the copious literature and the sometimes fuzzy prose used for the discussion of privacy issues. It has enabled him to expand the conception of privacy beyond the traditional realms of home and intimacy, and to bring an important part of people's lives—their comings and goings in general public space—within its scope.

This would also be useful when applying the theory to the particular issues raised by CCTV, and would help with the evaluation of which underlying notions of privacy are involved and what degree of priority ought to be given to the specific privacy interests at stake.

Privacy, according to von Hirsch, is the entitlement to non-disclosure, the protection from scrutiny by unchosen others and the control over whose expectations one has to satisfy.<sup>9</sup> This, however, describes only the claim, not the rationale for protection. Why should others not be able to scrutinise me at will, and why should they not confront me with their expectations? What are the common ethical principles that link anonymity with the right to privacy? Existing anonymity conventions support and shape the claim, but they do not provide the rationale for it. While I agree with von Hirsch's analysis in principle, his discussion of the concept of

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.* at 67.

<sup>8</sup> See Innes's discussion 'Intimacy: The Core of Privacy' in J Innes, *Privacy, Intimacy and Isolation* (Oxford, Oxford University Press, 1992) 74ff. Innes defines privacy as an agent's control over intimate matters, but her conception of intimate matters as 'any act, actions, or activities drawing their meaning from the agent's loving, caring, or liking', implies that any act, action or activity can potentially be intimate. Showing that certain acts are imbued with the agent's loving, caring or liking requires her at times to resort to convoluted reasoning.

<sup>9</sup> von Hirsch, above n 1, at 63.



anonymity is too briefly stated and would benefit from a more fully-developed treatment. To answer the questions raised by public CCTV, I believe it is necessary to go back to the ethical principles underlying privacy, and to establish the connection between those and a claim for anonymity in public.

## B. The ethical principles underlying privacy

The concept of privacy is based on the idea that an individual should be entitled to claim sovereignty over himself. Privacy as a form of 'self ownership' gives a person a say over matters that are more closely connected with him than with any other person, and are therefore first and foremost his own concern. The rationale for this allocation is the acknowledgement of the inherent value of the individual and therefore his claim to be respected. As Feinberg puts it, 'to respect a person or to think of him as possessed of human dignity simply is to recognize his capacity to assert claims'.<sup>10</sup> An elementary claim of an individual is that he is his 'own' person, that his well-being, feelings and choices count, and that he should be entitled to fashion a life that is worth living from his own perspective.<sup>11</sup> To quote Rousseau, a person needs to be on good terms with his self, for it is 'the only man one can never be separated from'.<sup>12</sup>

To be one's own person implies that one is in charge of matters that are closely bound up with one's identity and one's body. It also means that a person is not treated like an object by others, to examine and meddle with as they see fit. Privacy is concerned with the degree to which we can control access to ourselves, exclude others from participating in our lives and refuse to accept their attention. A person must have a say over how closely he wants to get involved with other individuals and how much of himself he wants to disclose, for making distinctions in the way we engage with others is of fundamental significance in human relations. We practise it almost from the day we are born, and it plays an important part in defining ourselves in the social environment in which we live. It is a way of

<sup>10</sup> J Feinberg, 'The Nature and Value of Rights' in J Feinberg, *Rights, justice and the bounds of liberty* (Princeton, NJ, Princeton University Press, 1980) 145.

<sup>11</sup> Closed institutions often deliberately deny the inmates privacy as a part of a 'degradation and mortification ritual': E Goffman, *Asylums* (Harmondsworth, Penguin Books, 1961) 24. Apart from censure for the actions people have committed, the implicit message is also that the moral authority of people who have given reason to be detained is not trustworthy, and therefore they should not have space 'to be themselves'. They must submit to supervision, to prevent them from creating further harm, and to re-education, to have their ways changed.

<sup>12</sup> L Damrosch, *Jean-Jacques Rousseau: Restless Genius* (Boston, Mass, Houghton Mifflin, 2006) 412.