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COOPER-WALSH COLLOQUIUM, LEGITIMACY AND ORDER: ANALYZING POLICE-CITIZEN INTERACTIONS IN THE URBAN LANDSCAPE

Community Control over Camera Surveillance: A Response to Bennett Capers's Crime, Surveillance, and Communities

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COMMUNITY CONTROL OVER CAMERA SURVEILLANCE: A RESPONSE TO BENNETT CAPERS'S *CRIME, SURVEILLANCE, AND COMMUNITIES*

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INTRODUCTION

In his provocative article, *Crime, Surveillance and Communities*, Professor I. Bennett Capers argues, contrary to Supreme Court precedent, that camera surveillance of public spaces is a Fourth Amendment search.[1] But he also argues that such surveillance should be permitted even in the absence of probable cause, so long as it is "reasonable."[2] His third contention is that reasonableness analysis in this context ought to take into account not only the extent to which cameras can prevent crime, but also the extent to which the community will benefit from the ability of the cameras to deter police brutality and document evidence of racial profiling and other abuses of discretion.[3] Professor Capers hypothesizes that this ability to monitor the police will enhance government legitimacy and thus cooperation with the police.[4] I have three observations about his article, corresponding to the three main threads of his argument.

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1. I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959 (2013).
2. *Id.* at 975.
3. *Id.* at 978, 986.
4. *Id.* at 978, 987–88.

I. IS CAMERA SURVEILLANCE A SEARCH?

First, Professor Capers argues that people should be able to expect privacy even in public, based on what he calls a "nonconventional reading" of the Fourth Amendment.[5] He points out that many of the Court's cases, from *Katz v. United States*[6] onward, suggest that surreptitious eavesdropping of conversations—even those that occur in public—is a Fourth Amendment search when none of the parties to the conversation consents to the eavesdropping and no one else is in a position to hear it with the naked ear.[7] Based on that case law, he contends, "citizens are not required to assume the risk that they will be monitored by a watching device when no duplicitous eye is actually present."[8]

There are two possible problems with this analysis. First, of course, in most situations involving camera surveillance, members of the public *will* be able to view with the naked eye what the camera sees. Even on streets that tend to be largely abandoned, a few people are usually about, which presumably would mean that human eyes, duplicitous or not, are often present. Furthermore, the Supreme Court has been quite willing to assume that members of the public could have seen what police technology observes even when that conclusion requires a heavy dose of imagination. For instance, in its "flyover" cases, the Court has held that no search occurs even when the police use airplanes and powerful cameras to spy on *curtilage*, much less the public streets, on the theory that any member of the public could have done the same thing.[9] And the Court has been willing to reach this conclusion even when, in fact, members of the general public are not likely to be flying as low as the police did in these cases, not likely to possess magnification devices of the type the police possessed, and not likely to be as interested in the particular property the police targeted.

5. *Id.* at 969.

6. 389 U.S. 347 (1967).

7. *See* Capers, *supra* note 1, at 970–73 (discussing *United States v. White*, 401 U.S. 745 (1971) and *Alderman v. United States*, 394 U.S. 165 (1969)).

8. *Id.* at 974.

9. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 451–52 (1989) (no search when police spy on a backyard from a helicopter hovering 400 yards above ground); Dow Chem. Co. v. United States, 476 U.S. 227, 239, 243 n.4 (1986) (no search occurs when government spies on business curtilage from an airplane in navigable airspace, using a $22,000 mapping camera); California v. Ciraolo, 476 U.S. 207, 209, 215 (1986) (no search when police use a plane to spy on a backyard surrounded by a ten-foot high fence).

Second, even if this initial hurdle to applying the "uninvited ear" cases to camera surveillance can be overcome (perhaps on the ground that no one could possibly have seen whatever the camera captures), the analogy fails because a properly operated camera system would put pedestrians on notice that it is there. Notice is not only a sensible aspect of a surveillance regime designed to deter, but is also constitutionally required under the Supreme Court's cases.[10] If such notice exists, neither surreptitious nor duplicitous 'Peeping Tom-ism' can occur.[11]

If camera surveillance is a search, it is because, as I have previously argued, a right to anonymity in public exists even when the government gives notice of its intent to watch.[12] That right is based on a due process right to locomotion,[13] a First Amendment right to association and expression,[14] and, most importantly, a Fourth Amendment right to feel secure from unjustified government observation of daily activities[15]—the latter an interest that has been rejuvenated by the Supreme Court's recent decision in *United States v. Jones*.[16] Camera surveillance is a form of government stalking that should not take place simply because the government has the resources to engage in it.

II. WHEN SHOULD CAMERA SURVEILLANCE BE AUTHORIZED?

Although we get there by different paths, Professor Capers and I agree that camera surveillance is a search. I also agree with Professor Capers that the Fourth Amendment does not require a warrant or probable cause for such surveillance.[17] Professor Capers is not entirely clear as to why he would relax these traditional protections,

10. *See* CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 126–27 (2007) (citing Supreme Court cases that emphasize how notice helps justify government searches).

11. As I noted in PRIVACY AT RISK, notice does not equate with real consent, but it does alert people to the fact that "they are being watched so that they can act accordingly." *Id.* at 127.

12. *See id.* at 90–92 (describing a right to public anonymity).

13. *See id.* at 101–04.

14. *See id.* at 98–101.

15. *See id.* at 106–08.

16. In *United States v. Jones*, five Justices of the Court indicated that prolonged technological tracking of a car on public thoroughfares should be considered a Fourth Amendment search. *See* 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring); *id.* at 964 (Alito, J. concurring).

17. Capers, *supra* note 1, at 975 (arguing that "[s]everal factors suggest that reasonableness will suffice" in connection with analyzing camera surveillance).

although he seems to fasten on the idea that the Supreme Court's special needs jurisprudence might apply.[18] The problem with that approach is that, to date, the Court claims to resort to special needs analysis only when something other than ordinary criminal law enforcement is involved,[19] which is a difficult argument to make when camera surveillance is involved. The primary goal of camera surveillance, after all, is to deter and detect criminals.

My rationale for relaxing Fourth Amendment strictures on camera surveillance varies, depending on whether the issue is when cameras may be used to target someone or instead when a camera system may be set up in the first instance. On the first issue, my rationale for relaxing Fourth Amendment strictures is based on proportionality reasoning. Although even short-term surveillance can chill locomotion, speech, and association and undermine security, it is not as invasive as many other types of physical or virtual searches.[20] Thus, targeted camera surveillance that is not prolonged should be permitted on less than probable cause. Specifically, I recently proposed that probable cause should be required only if targeted public surveillance lasts longer than two days (in the aggregate), while reasonable suspicion would justify surveillance lasting between 20 minutes and two days, and shorter surveillance would be permitted to achieve any legitimate law enforcement objective.[21]

Of course, targeted surveillance can only take place if a camera system exists, which raises the second issue flagged above—under what circumstances may government establish a camera system? I agree with Professor Capers that the decision to set up such a system must take community views into account.[22] However, relying on political process theory, I have argued that those views need to be

18. *Id.* at 975 ("[S]uch surveillance responds to special needs beyond law enforcement . . . .").

19. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (holding that a roadblock set up to detect narcotics trafficking was aimed at meeting the needs of ordinary law enforcement and thus required individualized suspicion). Although Professor Capers states that cameras are also set up to protect the public and thus can be justified on special needs grounds, that reasoning could have applied just as easily to the roadblock that was found unconstitutional in *Edmond*. *See* Capers, *supra* note 1, at 975.

20. *See* SLOBOGIN, *supra* note 10, at 111–12 (reporting research on lay views about intrusiveness of cameras).

21. Christopher Slobogin, *Making the Most of* United States v. Jones *in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUBLIC POL'Y 24 (2012).

22. Capers, *supra* note 1, at 977 (advocating "listening to communities").

discovered and implemented in a particular way.[23] Specifically, group surveillance systems of the type at issue here must be approved legislatively, by a truly representative body, and must ensure that the surveillance is not targeted at any one person, group, or locale unless the suspicion required for such targeting exists.[24] Under this scheme, if a neighborhood council approves a camera system for that neighborhood after meaningful consultation with the affected populace, a camera system would be permitted. If, in contrast, a city-wide or state legislative body authorizes localized camera systems without the democratic consent of those affected, law enforcement should have to provide data showing that the monitored areas in fact experience high levels of crime.[25]

III. SHOULD TECHNOLOGY'S CAPACITY TO DETER POLICE ABUSE FACTOR INTO REASONABLENESS ANALYSIS?

Professor Capers argues that, in deciding whether surveillance is permissible and for how long, courts and communities should look not only at whether the surveillance might reduce crime but also whether it can enhance the government's legitimacy by monitoring police behavior.[26] I agree that technologically monitoring police behavior is a good idea as a deterrent and as a legitimacy-enhancing device. But I am not sure that we need camera *systems*—that is, cameras on telephone poles and buildings panning city thoroughfares twenty-four hours a day—to do it. If the goal is to make sure that we know what the police are up to, the best technological fix is to equip them with head- or badge-cams, devices already used in some jurisdictions.[27] That maneuver would avoid overbroad surveillance that captures the activities of everyone on the street; instead it would focus on those people that the police single out.

23. Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107, 143 (2010) (summarizing political process theory's application to the Fourth Amendment).

24. *Id.* at 132–36 (providing examples of how political process theory would work); *see also*, Slobogin, supra note 21, at 31–32 (same).

25. Slobogin, *supra* note 23, at 138–41 (providing examples of data-driven group surveillance). *See also* Slobogin, *supra* note 21, at 32 (providing additional examples).

26. Capers, *supra* note 1, at 978 ("Public surveillance can also function to monitor the police, reduce racial profiling, curb police brutality, and ultimately increase perceptions of legitimacy.").

27. *See* David Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by the Police*, 43 TEX. TECH. L. REV. 357, 359–60 (2010) (touting head cams as a method of monitoring police conduct).

The body-camera fix would also avoid forcing a Hobson's choice on the community. A citizenry that is bothered by police misconduct may well agree to undergo surveillance simply to make sure police abuse is deterred. What the community might really want, however, is both less abusive policing *and* less surveillance of its everyday, innocent activities. Body cameras can accommodate both objectives. At the least, a court should not be able to override a community's veto of a camera system on the ground that the system is needed to monitor police conduct.

CONCLUSION

Professor Capers's article helps stimulate thinking about the way in which community views and individual rights interact. In my view, where police propose to conduct surveillance of groups, as occurs with camera surveillance (including the newly developing drone camera systems)[28], the affected group should be heavily involved in the authorization process. If the surveillance is authorized, care must be taken to ensure that all members of the group are equally affected by it unless and until individualized suspicion, proportionate to the intrusion, develops. That formula ensures that the interests of both the collective and the individual are protected.

28. RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R42701, DRONES IN DOMESTIC SURVEILLANCE OPERATIONS: FOURTH AMENDMENT IMPLICATIONS AND LEGISLATIVE RESPONSES 2–3 (2012), *available at* http://www.fas.org/sgp/crs/natsec/R42701.pdf (reporting that the FAA predicts that over 30,000 drones will be flying over domestic airspace within the next twenty years, potentially equipped with "high-powered cameras, thermal imaging devices, license-plate readers, and laser radar (LADAR)").