

State surveillance of protest and the rights to privacy and freedom of assembly: a comparison of judicial and protester perspectives

Valerie Aston [1]

Cite as Aston, V., "State surveillance of protest and the rights to privacy and freedom of assembly: a comparison of judicial and protester perspectives", in European Journal of Law and Technology, Vol 8, No 1, 2017.

ABSTRACT

This paper considers the approach taken by the UK courts to the use of visible, overt police surveillance tactics in the context of political assemblies. Contrasting judicial attitudes to the direct experiences of protesters themselves, the paper argues that the narrow approach taken by the courts to questions of privacy, based on informational autonomy and the 'reasonable expectation of privacy' test, has led to the insufficient recognition of the psychological, social and political harms arising from intensive surveillance operations. The paper argues for a broader view of privacy, or in the alternative, a more robust application of the right to freedom of assembly, to protect protest mobilisations and assemblies from disruptive and intrusive aspects of overt state surveillance.

Keywords: Surveillance; overt photography; data-gathering; policing; privacy; intrusion; autonomy; freedom of assembly

INTRODUCTION

This paper considers the approach taken by the UK courts to the use of visible, overt police surveillance tactics in the context of political assemblies. Judicial considerations in relation to the overt surveillance of protest have largely been centred on the application of privacy rights. The courts have emphasised the public nature of protests, and the extent to which their activity is observable (and intended to be observable) by the general public. As a result, the courts have reasoned, protesters have 'no reasonable expectation of privacy' in relation to being seen, or photographed, by others: they must expect to be watched and photographed by police officers in the same way that they are watched and photographed by supporters, journalists or passers-by. The mere 'snapping of the shutter' therefore breaches no rights, even if the camera is wielded by police officers. The courts have found an interference with privacy rights only where information has been both collected *and retained* on police information systems. Further, the courts have, on the cases so far brought in front of them, been dismissive of the applicability of the right to freedom of assembly to issues of visible police surveillance. Neither the collection nor the retention of data relating to political protesters has been held to be an interference with rights to freedom of assembly.

The approach taken by the courts contrasts markedly with protesters' perspectives. This paper draws on empirical data taken from interviews with thirty-five people who have direct experience of being the subject of overt police surveillance at political meetings, demonstrations, rallies and other forms of protest (all names of interviewees have been changed). The data suggests police surveillance was perceived as being i) physically and psychologically intrusive, ii) restricting social and political interaction and iii) reducing autonomy. It was also reported to be disruptive of collective political freedoms by reducing internal and external perceptions of legitimacy and safety, creating divisions and deterring participation. Being subject to police surveillance was perceived as being different to simply being watched or observed by other potential audiences. Interview data points to four key distinctions: i) surveillance could be prolonged and sustained, taking place over a period of time or across significant distance; ii) it could be targeted at individuals in a way that removed their sense of public anonymity; iii) it could be carried out in proximity, invading perceptions of personal space; iv) conspicuous attention from uniformed police officers could reduce external perceptions of protest legitimacy in a way that observation from others would not.

This paper suggests that the courts have taken a singularly narrow and non-experiential approach to privacy, which conceptualises privacy as individualised and (in general) lost or not maintainable in public. Aspects of privacy relating to individual and collective autonomy have not been sufficiently recognised, nor has the personal and political harm from surveillance been adequately acknowledged. Further, there has been very little if any attempt by the court to conceive of surveillance as implicating mobilisation and organisational elements of the right to assembly peacefully under Article 11 of the ECHR.

There are thus three parts to this paper. Firstly, I present an analysis of 'public privacy' as it applies to public assemblies. This will include a recognition of the role played by privacy in enabling social and political interactions, and will draw on the work of Kirsty Hughes and other privacy theorists to examine the extent to which the privacy barriers and social norms necessary for the maintenance of privacy in the public realm may be dismantled by state actions. The second section will look at the damage that surveillance may inflict on the building blocks of protest mobilisations, drawing on social movement literature as well as the experiences of protesters themselves. In the third part, I will consider the extent to which the

courts have recognised, or failed to recognise, the potential harm to protest and protesters from visible police surveillance. I argue that the distinction between mere observation and visible police surveillance relates to psychological intrusion and decisional autonomy, and is not restricted to matters of informational autonomy (i.e. whether or not data is retained). Further, I suggest that in not articulating this distinction, the courts have missed an opportunity to provide a much needed framework for restricting police discretion in the operation of visible surveillance, and have failed to provide adequate protection to privacy rights or the right to freedom of assembly.

PRIVACY AND PUBLIC PROTEST

There are two common arguments against the applicability of privacy rights in relation to police surveillance of assemblies. Firstly, protest is considered to be an inherently public activity, which can be freely observed by others. Protest activity therefore, is not something that is considered to be *private*. Secondly, that even if it is accepted that privacy has a role in public activities, visible, overt police surveillance is no more destructive of privacy than any other form of public observation. Seeing as public activities are unavoidably open to public view, any such right to privacy would be unacceptably broad and without utility. In this section, I aim to address both arguments. I suggest that far from being irrelevant to assemblies, privacy is integral to protest mobilisations and important for protesters in three key ways: i) it facilitates the social interactions on which protest mobilisations depend; ii) it enables us to separate our professional, social and family and political lives, thus enabling us to pursue contentious activities without fear of unwelcome consequences in other life spheres; and iii) it enables us to develop, hold and discuss contentious or unpopular views free from ridicule or disapproval of others. Further, I argue that privacy is not necessarily lost by being merely observed by others, but that the ability of policing bodies to breach social norms may result in significant loss of privacy and autonomy.

Fundamental to this argument is a conception of privacy that recognises its importance in facilitating and enabling all forms of human relations. Fried (1968) established that it was an essential element of our ability to build friendship and trust, by allowing us space for interactions without the intrusion of others. 'Privacy is not merely a good technique for furthering these fundamental relationships;' he stated, 'rather without privacy they are simply inconceivable'. Building on this work, Rachels (1975) argued that this feature of privacy was not confined to intimate relations, but was a vital component to all forms of social relationships. Our ability to determine when, how and with whom we share aspects of ourselves is what enables us, said Rachels, 'to create and maintain different sorts of social relationships with different people... privacy is necessary if we are to maintain the variety of social relationships with other people that we want to have'

The potential impacts of the loss of privacy on the ability to form and maintain social relationships in the context of political assembly were supported by interview data. A number of respondents reported that surveillance made it more difficult to form or build relationships, or connect socially to those around them, either because others were wary of attracting police attention, or because protesters were nervous of causing police attention to shift onto others. Evan's experience of surveillance, for example, took place in the context of an anti-war demonstration;

'It made me feel very isolated from a demonstration, often these were very large demonstrations, thousands of people, where it's not as if I was doing anything to draw attention to myself, but they'd recognise me, they'd then bring over a police

photographer who would take a large number of photographs of me at a short distance...it definitely had that effect on other people...I bumped into a friend's ex, who was on that demonstration, and we were just idly chatting, I hadn't seen her for a few years. She witnessed that happen and didn't really want to associate with me after that. She was scared she'd be targeted in a similar manner or worse. I mean, she said that.' - Evan

Ellen was an organiser of protests and campaigns against war and against the arms trade. She reported being reluctant to approach other people at demonstrations because of concern that they may themselves become subject to police attention as a result.

'When we ran trainings one of the things we used to say to people was that if you see us on a protest you're welcome to say hello, it's not that we are ignoring you, but if you come and say hello to us, the police will take an interest in you because you have come to say hello, and you've talked us, and to be aware of that. I felt like I had a responsibility to warn other people that that was the consequence of associating with us on a protest.' - Ellen

The second feature of public privacy relates to our ability to separate different features of our lives. Things that we are happy to share about ourselves in one context, we may be less happy sharing in another. Feldman (2002; 1997) suggests that a fundamental role of privacy is in enabling the construction of separate social spheres, 'overlapping fields in which people can claim to be private in relation to varying other classes of other people', allowing us to 'control access' to social groupings, maintaining security and enabling co-operative and collective activities to take place without external disruption. Nissenbaum (2010) argues that the sharing of information across separate spheres in ways that are not considered 'relevant, appropriate or proper' violates the norms of contextual integrity and inevitably results in a loss of privacy.

The fear that information may be transferred as a result of surveillance activities is itself restrictive of autonomy, whether or not information is retained or disseminated in any particular case. People may be fearful, for example, that their political views or activities may be viewed with suspicion by employers or prospective employers, and therefore concerned about the potential impact of state surveillance activities. There is here significant overlap between interference in privacy rights and those relating to the restriction of assembly, of which more is said in the second half of this paper. Jenny spoke of the particular difficulties faced by refugees and migrant workers wishing to participate in campaigning activities.

'No-one really being sure, is there a link between [police surveillance] and the Home Office for example? And I had that conversation loads of times with myself and with other activists. And with people, on the one hand you really want to encourage people, you know, its fine, it's not going to come back on you. But...you wouldn't put it past them. I don't know, are they really linking that stuff up, is that what their intention is? I don't know, so you can't really, um, you can't reassure someone it isn't going to have an impact... and people are uh-uh, I can't get involved in campaigns' - Jenny

The third function of public privacy is in providing a shield from the inhibiting effects of social norms. It thus creates a space for the development of unpopular, controversial or dissident ideas. It frees us from censure and ridicule (Gavison, R 1980) and what Nissenbaum (2010) has called 'the stultifying spectrum of approbation (or disapprobation)'. Privacy, it is suggested, may not only inhibit the generation of ideas, it may inhibit the development of

creative or innovative forms of protest. In situations where privacy is lost through surveillance activities, the fear that behaviour may contravene social or legal norms may restrict participation, even if that participation is lawful or within the margin of tolerance of state authorities. Brenden, for example, described plans for an anti-capitalist protest in the West End of London which involved playing a game of football on the street with giant inflatable balls. He felt that the surveillance he was subject to was an indication that there would be no tolerance of any transgressive behaviour on his part.

"You'd end up policing yourself, you see what I mean? That's when... they did the football match - it meant you couldn't get involved as much as you want, because you know if you've got seven cops with you and three have got cameras, you are policing yourself, you know, because they are waiting for you to step out of line." - Brenden

The data supports the claim that privacy is important to key aspects of individual autonomy, even in the context of public activity. It relates to: the ability to form social bonds and relationships with others; the ability to live differentiated lives; and the freedom from social censure. A loss of privacy may have significant repercussions for both individual well-being and autonomy.

It is therefore far less incongruous than case-law would maintain to conceive of protests on public streets as raising privacy concerns. The difficulty from a rights perspective, however, is how to contain the breadth of any right to privacy. While Gavison (1980) has suggested that being perceived by others necessarily involves some degree of privacy loss, it is clearly too broad a basis for any legal *right* to privacy (Hunt C, 2011). As has frequently been argued, all of us when we go out in public must expect to be seen and observed by others, either directly or through the medium of technology. As is discussed in more detail further on in this paper, within judicial discourse the application of privacy rights in public places has been limited to circumstances involved in the retention of data. The mere observation of protesters (or anyone else) by visible police surveillance methods is considered to be outside the scope of a legal right to privacy.

It is suggested here, however, that certain features of visible police surveillance distinguish it from mere observation of the type that we all experience in public. The particular attributes of police forces - resources, capabilities and coercive powers - enable them to behave, in the process of surveillance, in ways that other observers would and could not. Making use of a concept developed by Kirsty Hughes (2012), I suggest that police surveillance intrudes upon privacy by virtue of their particular abilities to overcome the privacy barriers that in normal circumstances, protect our privacy while we are in public places.

Kirsty Hughes suggests that we rely upon on privacy barriers to facilitate social interaction by preserving the public space we need for states of privacy to be realised. An invasion of privacy thus takes place 'when those barriers are breached and the intruder obtains access to the privacy-seeker'. As well as physical barriers, Hughes suggests that we construct barriers which are behavioural and normative. Behavioural barriers refer to those things that we do to resist access - we may walk away, for example, to stop someone staring at, or looking at us. Normative rules restrain others from actions which result in unwanted access; we rely on others, for example, not to stare. In order to illustrate these, Hughes provides the example of the use by X of a public toilet.

'He uses the cubicle walls and door as a physical barrier, his behaviour in choosing to use a public toilet rather than the street indicates (amongst other things) that he desires privacy - this creates a behavioural barrier, and X relies upon a social norm that Y will not look over the toilet cubicle door whilst X is using the toilet, or that Y will not have set-up a secret video camera in the cubicle. An invasion of privacy takes place when Y does not respect these barriers'

Other theorists have drawn attention to the role of social norms in regulating privacy in public places. Anthony Giddens (1991), for example, notes that the 'variety of encounters that make up day to day life in the anonymous settings of modern social activity are sustained in the first instance by what Goffman (1963) has called 'civil inattention'. This inattention, he suggests, 'is not indifference. Rather it is a carefully monitored demonstration of what might be called polite estrangement'. In her critique of public privacy, Larsen (2011) identifies a number of social rules;

'One does not show more than a passing neutral interest in one's fellow passers-by. Other rules follow from that: One does not participate in or seek to listen to other people's conversations, nor ask personal questions and try and become familiar with them. One looks at another fleetingly and (circumstances permitting) from a reasonable distance. This way people get only a superficial impression of one another, and are not made to give away more than they display voluntarily; no-one can claim to arrive at an informed opinion about the other person...[a]nother rule is that members of the crowd are to be treated as part of the crowd. Picking out an individual and making him the target of special attention would be rude and inappropriate. A person who goes out in public must put up with being seen, but he can reasonably expect to be left to his own devices and not be singled out or made the subject of comment.'

Interview data suggests that police surveillance repeatedly and pervasively broke down physical and behavioural barriers, and intruded upon social norms. The removal of physical barriers (clothes, bags, containers, etc.) requires the use of statutory powers (such as stop and search). Such constraints do not apply to privacy intrusions that occur through the removal of behavioural barriers and the disregarding of social norms. While these may be perceived to be less harmful than physical intrusions, interview data suggests that they are nonetheless capable of creating significant emotional and psychological distress.

Although the detention and search of a person is regulated by statute, there remains significant police discretion in relation to the element of surveillance. Interview data suggests that protesters believed that police exploited statutory powers for surveillance objectives unrelated to the stated purposes of the search. Craig, for example, was stopped at an anti-arms trade demonstration under provisions of the Terrorism Act 2000 which were in place at the time (although subsequently repealed after successful challenge at the ECtHR in the case of *Gillan* [2]). Craig's complaint was not merely that he had been stopped and searched (he thought, unreasonably), but that his lawful detention enabled surveillance teams to see beneath the physical barrier of the clothes he was wearing.

'I had to take my top off...they marked every tattoo I had and everything I was wearing was finely detailed. And there were about five people this happened to. And they logged every little detail of what we were wearing and markings...I think they took photographs of us from a distance, but they took notes of every little detail.' - Craig

Similarly, Bob, an environmental activist, described being stopped and searched under powers to search for weapons. Although no prohibited articles were found, the police went to some significant effort to obtain and record identification data.

'They looked through my wallet and told me at the time they were looking for razor blades, and I didn't give them any information, but they wrote down on the description area of the stop and search form the name that was on my bank card. I think the next day when I was moving through a line they did something similar, only this time they got me to read out the name on the bank card, to prove it was my bank card and I hadn't stolen it from anyone. Since then I've heard about this tactic used many times, but at the time it was quite new to me. And it seemed very sneaky and not particularly nice.' - Bob

Behavioural barriers were breached when surveillance was sufficiently pervasive, or mobile, as to prevent subjects from removing themselves from view. For Lexy, for example, it was the scale and extensiveness of the surveillance of an anti-fracking demonstration that she raised objections to;

'We came up the road and there were bikes with cameras, and more vans on the other side. As soon as you came in there was no way that you could not have been filmed. There were cameras everywhere. So they had, the ones on bikes had cameras on their chest there, there were cameras in the van, there were cops holding cameras. I couldn't get over it, the level of surveillance was huge. I've seen more cops on demos, but I've never seen so many surveillance cameras before. And that's what freaked me out was the amount they were filming. And this is a family friendly day, there were kids there... it takes a strong mind not to get really angry or really upset.' - Lexy

Some interviewees recounted that they had been subject to a police surveillance tactic described as *accompaniment* (HMIC, 2009), which involves keeping an individual under direct physical surveillance for a period - sometimes an extended period - of time. Both Esther and Craig were unable to remove themselves from surveillance even after leaving the site of the protest, with clear implications for personal autonomy and the development of social relationships.

'It was that period when police were following me, personally, around on demonstrations. I would end up on my own being followed by police, because I wouldn't want people to be with me. I remember once I got followed on the tube all the way to Tooting from central London. I was on my own. Because people also don't want to be around you. Also it was the end [of the demonstration]. What was I supposed to do?' - Esther

'You have one or two uniformed police following you, wherever you go, whatever you do, so you can't do anything out of their sight, which is, quite obviously, stops you doing what you want to do, even if you weren't doing anything illegal, even if you were going back to your girlfriend's mum's house. You wouldn't want to do that would you? If you've got two coppers in tow? I remember being followed on the tube, they got on the tube with me, and I told them, look I'm going to my girlfriend's parents' house and I'm not going to do that if you are still following me, and they did radio in and eventually leave me alone after around an hour or so.' - Jack

Social norms were also breached when police officers 'picked people out' of crowds. As Larsen (2011) has observed, the preservation of anonymity is an essential feature of our public personas: it is, she has said, 'the unidentified and impersonal existence we mostly lead when we are in public [which] is a condition of modern life'. The fact that we are in a public place (or engaging in a public activity) does not equate to being identified. A large proportion of the interview sample stated that not only had they been 'picked out' and identified by police officers, this had been done in a highly visible, conspicuous way, which one interview described as 'aggressively saying hello'.

'When I first lived in London...it was quite easy to attend a fair number of demonstrations and other political events these police would be at. So they very quickly wanted to know who I was. And I'm not sure how they first learned by name, but once they learned it they used it all the time...not just approaching me and asking things, but shouting from vans, the other side of crowds, pointing me out in a way that made it clear that the aim was to make me know I was being watched.' - Jeremy

'[I] was on a march and an officer came up to me and started talking to me using my name. And I had no idea who they were. But they had a camera and they were filming me and they were talking to me and using my name. And I thought, well hang on a sec, who on earth are you? I was amongst thousands of people, so they clearly came up to me. They didn't really have much to say, they just wanted to make sure I knew they knew who I was. Purely intimidation.' - Rob

Emotional distress is a known 'harm' that can result from a loss of privacy (Solove 2008). Interview respondents talked variously of feeling irritated, angry, upset, annoyed, intimidated or harassed. Some respondents, particularly where surveillance was prolonged and targeted, reported significant psychological harm:

'They understood incredibly well how that psychologically fucks you up. Someone did. What they knew, was that having them follow you back to your house, standing outside the pub for three hours, for no reason at all, eventually adds up...I was followed every day for four days, and I wasn't one of the key people...it creates an atmosphere where you are always talking about them - I wonder if the [police intelligence-gathering team] are going to be there, who will be following who. It takes over your life. By the third day of the [protest] I was dreaming about cops all night. Nothing mad or crazy, but cops would feature because you would be seeing them all day.' - John

The argument that visible police surveillance in public at marches and demos and during other forms of action raises no privacy concerns since it is indistinguishable from "harmless" momentary observation, to which we are all assumed to submit, does not stack up. While the harms suffered by protesters from such surveillance may be different in nature to the privacy harms suffered by covert or hidden surveillance, or by the retention or dissemination of information, they are not necessarily more trivial or less significant. The dismantling of behavioural privacy barriers by police surveillance, and/or the disregarding of social norms, therefore has the potential to result in an intrusion into psychological integrity, as well as limiting personal autonomy.

The harm done by visible police surveillance of protest is, however, not confined only to individual privacy. In the next section, I argue that such surveillance may also result in

disruption to collective actions of protest and dissent, such that there is an interference in the right to freedom of assembly.

SURVEILLANCE AND FREEDOM OF ASSEMBLY

There is a close relationship between individual autonomy and freedom of assembly. As we have seen, intrusions into privacy may restrict the perceived choices available to individuals, potentially reducing or deterring their engagement in political assemblies. While there has been recognition of the 'chilling effect' of surveillance on protest activities, the UK courts have, to date, declined to substantially explore the issue within the framework of the right to freedom of assembly.

Surveillance does not, of course, prohibit involvement in assemblies, and it is often argued that those with sufficient commitment or belief in their cause would not be deterred by it. This may be true; but participation in protest activities should surely be open to those who are merely curious or concerned, not restricted to those with strong beliefs and confirmed commitments. Further, as a range of social movement literature has made clear, participation in protest is determined only in part by the issue at hand: other factors, such as the legitimacy or reliability of the actors concerned, and the perceived likelihood of being able to achieve change, are also influential.

In this section I address the extent to which surveillance is capable of undermining the process of protest mobilisation. I suggest that the impact of surveillance is more complex and cumulative than is often recognised, and that it has a decisive impact on the capacity and capability of protest groups to achieve successful mobilisations. Once again drawing on empirical data, as well as social movement studies literature, I argue that surveillance undermines some of the key building blocks of successful mobilisations: i) the perceived legitimacy of protest groups; ii) the mobilisation potential of protest groups; and iii) their access to resources.

Legitimacy is important for all forms of protest organisation. Those wishing to establish a campaign, or further the cause of a social movement, need to be able to attract support from their target audiences. Literature on social movements suggests that, for a successful mobilisation, it is not sufficient for the issue at hand to be perceived as important; the proposals for the actions to be taken must be viewed as acceptable by those who are likely to support it, and the relevant actors, including organisers and allies must be perceived to be reliable (Gerhards and Rucht, 1992). A protest mobilisation must therefore be *framed* in a way that optimises support and participation.

'Framing' is the process by which social movements develop ideas, values and plans for action, based on a common understanding of the problems at hand, and the ways that these should be addressed or challenged. It has been described as being concerned with the ways in which social movements develop 'a shared interpretation of who should act, why and how' (van Stekelenburg and Klandermans, 2013). The potential to generate support is determined, in part, on the ability of groups and networks to define positive 'frames' relating to the legitimacy of their concepts, structures and proposals (Snow D, 1986). If a campaign or mobilisation is seen as lacking legitimacy, this is likely to have a negative effect on its ability to attract support and to form productive networks, interactions and alliances (Passy F, 2003).

The impact of surveillance on social movements in the United States was the subject of an extensive study by Amory Starr et al. (2008). The study found that surveillance undermined

the framing process by attaching labels of criminality or extremisms, which was likely to reduce perceptions of legitimacy. As a result, movements were less likely to be taken seriously, and were often drawn into expending increased time and resources in attempts to 're-frame themselves' in a more positive light. They summed up the impact as follows:

'They were subject to surveillance implying criminality when they were not involved with anything illegal. Weekly meetings were criminalized, watched, patrolled. This gives the message to groups and activists that "not only are we watching you, but everything you're doing is wrong.

...Surveillance sullies the reputation of organizations-this is the public relations function of criminalization. Without any prosecution having occurred, potential participants, donors, and supporters perceive an organization as criminal. Social justice groups that are part of religious congregations found that their reputation for surveillance damaged their relation with their communities...'

Interview data suggested that surveillance had a similar impact on the legitimacy and positive framing. Interview respondents reported that in their experience, surveillance had the following effects: it made those already involved way of continuing because of real or perceived harms and rendered newcomers less likely to become fully involved (see Magnus and Ricky below); it was divisive in creating a fissure or fracture between those prepared to sustain surveillance that those who were not, and rendered external support and alliances less likely (as reported below by Esther and Jenny). Magnus described the surveillance that accompanied the organisation process for environmental protest;

'[There were] monthly meetings...in a different city every month to organise. Which was usually around 50 people turned up. For the first two years every monthly meeting had cameras outside, video cameras, videoing every single person that turned up... [t]o my mind, that's there to intimidate people. That's saying, if you even want to talk to these people about what they are doing, you're on file. We have four officers taking this down, that's how seriously we are taking this. It's amazing that it takes four police officers to operate a camera, but. You know, that doesn't come cheap. This is on a Saturday and a Sunday, and they are outside the building all the time.' - Magnus

This testimony from Ricky, also involved in the organisation of environmental protest, also suggests that surveillance altered the perceived legitimacy of the group amongst its potential supporters and undermined positive framing.

'At each of our gatherings, there would be uniformed police officers with big cameras stationed outside the door, taking absolutely everyone's picture as they came in. It was impossible to avoid them...So every new person who came had their photo taken coming to the meeting...People started doubting whether or not they should be there. It became noticeable quieter, so people I had chatted to before who had seemed quite confident and really excited and enthused about getting involved in the movement would come to a meeting and they'd suddenly shrink, and be less confident and they would not participate and often they didn't come back.' - Ricky

The delegitimising impact of surveillance was evident in interview data. Jenny, for example, was involved in campaigns related to migration rights. She suggested that surveillance not only altered the relationship between protest participants and the external social sphere, but

that it also had a destabilising impact on internal dynamics as targets of surveillance were treated with increased suspicion.

'It wasn't a demo against any particular target, it was people marching and saying look, we're here and we're dignified and we're human, and we've got a right to be there, that was the aim of it. But the fact that the cops were there, with their big cameras, it felt like It sort of changed it...it felt like it totally drew attention, just their presence changed the dynamic, and probably put a lot of people off from wanting to participate but also created that edge, that feeling of edginess, which was interesting because it wouldn't have been there otherwise...I suppose what I'm saying is I think sometimes their presence, which is supposedly to monitor and prevent, to prevent things happening, is quite divisive and creates this kind of 'that's the militant people over there, with the cameras', and other people are drawn away from that, because why would you want to be [associated], it's interesting the effect it can have on a broader group.' - Jenny

Esther had similar experiences in her campaign work relating to precarity and inequality. She suggested that surveillance portrayed engagement with political activity as an inherently risky activity.

'It would act as a deterrent to people who had historic trauma with the police, communities of colour, if you have a meeting and people show up and there's loads of cops outside, you might not go into that meeting, you don't want to have hassle. If it means police attention and surveillance, what sort of message does that send out? If you feel like you wouldn't be treated fairly anyway, by a judicial process or by the police, you are not going to put yourself at more risk.' - Esther

The deterrence of potential support may have a cumulative impact if it occurs during the mobilisation phase of protest. As protest mobilisations tend to have limited access to financial resources, the capacity of the group depends on their ability to harness resources offered by supporters and participants. This is known as social capital, defined by Lin (1999) as 'resources embedded in a social structure which are accessed and/or mobilized in purposive actions'. It is concerned with the structural capacity of the group or movement to reach out to potential allies and supporters, and with the development of co-operative structures that enable the business of mobilisation building to take place. Mobilisations, particularly those of significant size, do not materialise from nowhere: they are the result of an often lengthy series of meetings, gatherings, discussions, outreach activities, fundraisers, etc., all of which must be planned, organised and resourced. Access to social capital is thus a key ingredient for successful protest mobilisations.

If participation is reduced by surveillance activities, so too is social capital, as the pool of available resources will shrink. Interview data suggests also that surveillance may also deter individuals from adopting an organisational role: taking on the facilitative or logistic aspects of protest planning may make individuals more prominent, and thus more likely to receive police attention. Rebecca, an organiser of anti-war and anti-arms trade protests, believed that she was frequently subject to police surveillance as an attendee at planning meetings and that as a result of being seen at meetings, she was subsequently targeted for increased surveillance at protests themselves.

'They are following you because you are organising... there are people [who had done direct action] in the past, and maybe they would think they might do something like that again.

But I've never done anything like that. So they wouldn't have anything to go on, why would I do that and not the next person? But they have seen me going into organising meetings.' - Rebecca

The implied criminalisation inherent in visible surveillance may also make access to physical resources more difficult. Interviewees reported that, in some cases, access to venues for meetings and fundraising events were impeded if venue operators or other venue users became concerned at being associated with criminality.

'They'd stand outside and take photos of everyone, whether or not they were coming to our meeting, so if we were sharing a building there might be a women's group upstairs, and us downstairs, but *everyone* who was coming in would get their photo taken. People gave us grief for bringing this down on them. And we were sorry that us being there meant they were being photographed too. But it was the police that were choosing to indiscriminately and openly surveille other people. But we got criticism and it damaged relationships with the venues. If they were getting complaints sometimes it was hard to persuade them to let us come back again.' - Ricky

Unlike other police measures that seek to prevent disorder, surveillance does not act as a bar to protest mobilisations taking place - it does not act as a ban, or as restrictive conditions on protest might act. While people were conspicuously subject to surveillance, there were no legal sanctions for participation in meetings or attendance at demonstrations. This does not mean, however, that surveillance does not disrupt or inhibit political assemblies. As we have seen, surveillance is capable of having a negative impact on the perceived legitimacy of protest groups, their ability to attract support and participation, and their access to resources, both human and physical. The cumulative impact of overt surveillance activities suggests that it presents, as Starr has suggested 'an alarming threat to mobilizations (constitutionally protected assemblies) and social movement organizations (protected associations)' (Starr et al., 2008). Recognising the disruptive capacity of such police surveillance in public to "chill" the organisational aspect of the right to peaceful assembly, guaranteed under Article 11 of the ECHR, is however strikingly absent in the case law. It is to that, in this final section, that we now turn.

THE APPROACH TO SURVEILLANCE TAKEN BY THE UK COURTS

Surveillance, it has been argued, is capable of having a destructive impact on both the privacy rights of protesters, and the extent to which protest may be mobilised at all. In this concluding section, we examine the approach the UK courts have taken to safeguarding the right to privacy and the right to freedom of assembly, and suggest that the courts have taken an unnecessarily narrow approach to both. Privacy has been interpreted restrictively with an emphasis on the 'reasonable expectation of privacy' test which inevitably leads to an inadequate recognition of privacy in public places. The fact that we are will be observed by others when we go out in public has been accepted as a reasoned basis for the non-applicability of privacy rights to visible surveillance activities, and there has been little or no recognition of the distinctive nature of police practices in their form and effect on individual autonomy and integrity. Privacy has instead, been confined to circumstances in which data is retained, disseminated or published. The courts have also rejected the opportunity to apply, as an alternative to privacy, the framework of assembly rights. Instead, they have adopted a

narrow view of Article 11 rights as being essentially concerned with time, place and manner restrictions, and not with the broader disruptive impacts of surveillance activities.

As has been frequently acknowledged, there is no common law right of privacy that predates the implementation of the Human Rights Act 1998; instead, emerging privacy doctrine has been constructed from the action for breach of confidence viewed in the context of the application of Article 8 of the Convention (Phillipson, 2003). As a result, cases relating to privacy have been predominantly concerned with the identification of the types or classes of information in relation to which disclosure or publication may be restricted. Privacy rights have therefore been concerned with information in relation to which there is a 'reasonable expectation of privacy [3]' on the basis that information is sensitive or 'obviously private' [4] or that it is considered to form part of the intimate or familial private sphere [5]. The courts have consistently concluded that there is no reasonable expectation of privacy, in relation to merely being observed or photographed by others.

A separate strand of privacy law has developed in relation to the retention of information. The ECtHR has variously found that Article 8 rights are applicable where information has been obtained and retained in a permanent or systematic manner [6], even if such information is taken from the public domain [7]. As a result the UK courts have acknowledged the privacy impact of long-term retention; the longer that records are retained, they reason, the greater the threat to privacy from the potential for data disclosure. Lord Hope stated in *R(L)* that, 'the systematic storing of this information in central records means that it is available for disclosure...long after the event when everyone other than the person concerned is likely to have forgotten about it. As it recedes into the past, it becomes a part of the person's private life which must be respected. [8]'

Neither concept of privacy, however, provides a great deal of scope for the recognition of broader concepts relating to physical and psychological intrusion or the protection of social or political interaction. In the case of *Wood* [9], the Court of Appeal was presented with an opportunity to expand judicial conceptions of privacy to incorporate such concerns - an opportunity that it largely failed to grasp. Andrew Wood was a campaigner working full-time for the Campaign Against the Arms Trade (CAAT), who attended in the course of his employment, an AGM of Reed Elsevier plc, a company concerned in the organisation of trade fairs for various industries, including the arms industry. During the AGM two activists (but not Mr Woods) carried out an act of protest which consisted of chanting slogans, and they were ejected. After the meeting, however, Mr Wood was subjected to what he perceived was intense and intrusive surveillance.

Mr Wood claimed that the police took repeated photographs of him from close quarters, coming within two metres of him and his companion, who was also photographed. He was stopped by police who questioned him and requested his name and address, and he was then followed by a number of uniformed officers as he walked to the tube station. On arrival at the station, the officers attempted (unsuccessfully) to gain the assistance of station staff to obtain Mr Wood's name from his travelcard, although they later obtained his details from the records of the meeting he had attended. In a statement to the court Mr Wood recounted that he had found the incident extremely upsetting; that he had 'felt shaken and frightened as a result [10]', and that his experience was likely to inhibit his willingness to exercise his Article 10 and 11 rights in future [11]. Mr Wood's experiences clearly mirror those of other campaigners and protesters: numerous interviewees, including Esther and Craig, described being followed by police officers, sometimes for long periods, in comparable circumstances; others, such as Evan, that they had been subject to repeated close-up photography; others still,

Jeremy for example, had found that the police had also obtained their personal details. Many described varying degrees of emotional and psychological distress (see, for example, John's account); and that surveillance inhibited social and political interaction and participation (Ellen and Jenny's testimony).

The court in *Wood* went some way towards differentiating state surveillance activities from mere public observation. Laws LJ, giving lead judgment on the issue of the applicability of Article 8 rights (although he was in the minority on the question of proportionality), commented that '[t]he Metropolitan Police, visibly and with no obvious cause, chose to take and keep photographs of an individual going about his lawful business in the streets of London. This action is a good deal more than the snapping of the shutter. The police are a State authority.' [12]. Lord Collins, further, expressed that he was 'struck by the chilling effect on the exercise of lawful rights such a deployment would have' [13] and questioned the reasonableness of a police operation that had involved police officers following and obtaining the identity of Mr Wood when the police had no reason to believe he had been involved in any activity.

Such recognition did not, however, enable the court to disentangle itself from the constraints of the 'reasonable expectation of privacy' test. Laws LJ rejected arguments that the way in which the surveillance was carried out could itself breach privacy rights: the intrusive nature of the surveillance was instead considered only in relation to proportionality. Instead, he concluded that the distinctive power of the state became relevant only in relation to the retention and subsequent use of data. Being observed or photographed by others, he stated, could breach no privacy rights regardless of who was doing it; article 8 rights became applicable only where this was being done with the purpose of *retaining* information for future police use.

'Accordingly I conclude that the bare act of taking the pictures, by whoever done, is not of itself capable of engaging art 8(1) unless there are aggravating circumstances. I have already referred (para 34) to the case where the subject of the photographer's attention is harassed and hounded, and perhaps assaulted. As I have said that is plainly not this case. And as for this particular case, I have already rejected (again para 34) the suggestion that the fact that more than one picture was taken, or that the police followed the Appellant down Duke St, could give rise to a *prima facie* violation of the Article...The real issue is whether the taking of the pictures, along with their actual and/or apprehended use, might amount to a violation.' [14]

The court also rejected the use of the right to freedom of assembly as an alternative approach to examining the impact of surveillance. Despite Mr Wood's claim that the surveillance had an inhibiting impact on his assembly rights, Laws LJ simply remarked that it was 'fanciful to suppose that in the events which happened there was any interference with the Appellant's rights under art 10 and 11' as Mr Wood 'was not purporting to exercise either such right on the occasion in question' [15]. He did not expand on his reasoning, but he appears to take a narrow view of protest as *event* rather than a broader view of protest as *process*. The fact that Andrew Wood himself perceived the surveillance to have an inhibiting impact on his *future* campaigning activities did not appear to have been considered relevant.

The case of *Wood*, therefore, hints at the possibilities for a less impoverished conceptualisation of privacy, one that would accord far better with the everyday experiences of those subjected to police surveillance but ultimately falls a long way short. Although in the case of *Wood* the court ultimately found that there had been an interference with Mr Wood's article 8 rights, the ruling did not challenge the notion that public privacy was confined to circumstances in which

there was retention of data. Nor did the court give any serious consideration to the use of Article 11 as an alternative framework within which to examine the impact of surveillance on fundamental rights.

The next opportunity for a measure of redress presented itself to the Supreme Court. The decision, from the perspective of this paper, was once again found wanting. The case of Catt concerned a veteran campaigner of good character who had been identified, photographed and monitored through visible, overt police surveillance operations at a large number of protests stretching across several years. Not only was Mr Catt's presence at demonstrations noted, his associations and activities were recorded in some detail, some of which were described in the Guardian newspaper:

'John Catt sat on a folding chair by the southernmost gate of EDO MBM and appeared to be sketching,' states one of several logs. "He was using his drawing pad to sketch a picture of the protest and police presence," said another from 10 March 2006. A separate report, about his sketch of a Guantánamo Bay detainee, noted: "John Catt was very quiet and was holding a board with orange people on it. "' [16]

The veteran campaigner (who was in his seventies when he brought the claim) was often driven to protests and accompanied by his daughter, and as a result she too became a target of surveillance. Her car was at one point allocated a 'marker' which resulted in it being tracked through the national Automatic Number Plate Recognition (ANPR) system, and stopped and searched as a result [17]. The surveillance of Mr Catt and his daughter was such that it generated over 60 intelligence records.

When the case came before the Supreme Court, it was accepted once again that privacy rights were applicable only on the narrow question of whether data was retained. It was noted that the surveillance was of public activities in public places, circumstances in which a person has no 'reasonable expectation of privacy' in relation to being observed and photographed. As a result, any interference as there had been with Article 8 rights was considered only 'minor' in nature. Lord Sumption concluded,

'The starting point is the nature and extent of the invasion of privacy involved in the retention of information of this kind. I am conscious that the Strasbourg court has in the past taken exception to the characterisation of interferences by English courts with private life as being minor...but the word seems to me to be appropriate to describe what happened in this case. The information stored is personal information because it relates to individuals, but it is in no sense intimate or sensitive information like, for example, DNA material or fingerprints. It is information about the overt activities in public places of individuals whose main object in attending the events in question was to draw public attention to their support for a causethe primary facts recorded are and always have been in the public domain. No intrusive procedures have been used to discover and record them, another marked contrast with DNA material. The material records what was observed by uniformed police officers in public places.' [18]

There was no detailed consideration of the extent to which the surveillance he was subject to was intrusive or disruptive of Mr Catt's autonomy or his social or political interaction; instead the court suggested that, in taking part in public protest activity, individuals must 'expect' not only to be seen and photographed by others, but to be the subject of police surveillance activities. The application of Article 11 rights was dismissed with equal brevity to that seen in

Wood; Lord Sumption was content merely to note that the surveillance was for policing purposes and 'not used for political purposes or for any kind of victimisation of dissidents. [19] Once again, therefore, an opportunity to appropriately develop the rights framework was missed.

IN CONCLUSION

In this paper, I have attempted to demonstrate that in adopting a narrow interpretation of privacy and assembly rights, the courts have failed to establish an adequate level of protection for protesters and more generally for protest, against state interference. The capacity of the state to obtain and process information is, I would acknowledge, an important privacy concern; however, the collection and retention of information by the state are not the only available means to differentiate harmful surveillance activities from less harmful public observation. As has been illustrated by the testimonies of protesters that have been included in this paper, the type of surveillance they experienced differed markedly from mere observation in that it involved identification, targeting and being picked out from the crowd; it involved pervasive, prolonged monitoring, from which it was difficult or impossible to escape; and it involved physical and psychological intrusion into personal space.

It is surely open to the courts to adopt a more expansive approach to privacy rights. As Nicole Moreham (2008) has helpfully documented, the ECtHR has variously held that the right to private life is 'a broad term not susceptible to exhaustive definition' [20]; that it extends to a 'zone of interaction of a person with others, even in a public context [21]' and that it includes the 'right to establish and develop relationships with other human beings and the outside world [22]'. It has also held that privacy encompasses 'the physical and psychological integrity of a person' [23], aspects of an individual's physical and social identity [24]' and the 'right to identity and personal development' [25].

Alternatively, the courts could give new consideration of the applicability of the right to freedom of assembly. The lack of deliberation of Article 11 rights contained within the judgments in both Wood and Catt is perhaps surprising given that the ECtHR has frequently reiterated the obligation on states to 'safeguard the right to assemble peacefully [and to] refrain from applying unreasonable indirect restrictions upon that right' [26]; and to 'secure the effective enjoyment of these rights' [27]. Further, it is clear that such obligations arise in relation to a variety of forms of assembly, including indoor private meetings as well as outdoor rallies and demonstrations. [28] For either framework to function adequately, however, it is necessary for the courts to take the opportunities that are presented to it, to develop a conception of the right to privacy and freedom of assembly that is appropriate and sufficient for the task at hand.

REFERENCES

- Feldman D (1997) *Privacy-related Rights: Their Social Value* in Birks, P (ed) *Privacy and Loyalty* (Oxford, Clarendon Press)
- Feldman D (2002) *Civil Liberties and Human Rights in England and Wales* (Oxford, OUP) 2nd Edition
- Fried C (1968) 'Privacy', *Yale Law Journal* 475
- Gavison R (1980) 'Privacy and the Limits of Law', *Yale Law Journal*, 421
- Gerhards J and Rucht D (1992) 'Mesomobilization: Organizing and Framing in Two Protest Campaigns in West Germany', *American Journal of Sociology* 555
- Giddens A (1991) *The Consequences of Modernity*, (Stanford, Stanford University Press)
- Goffman E (1963) *Behaviour in Public Places* (New York, Free Press)
- HMIC (2009) *Adapting to Protest - Nurturing the British Model of Policing*
- Hughes K (2012) 'A Behavioural Understanding of Privacy' *Modern Law Review* 806
- Hunt C (2011) 'Conceptualizing Privacy and Elucidating its Importance: Foundation Considerations for the Development of Canada's Fledgling Privacy Tort', *Queens Law Journal* 167
- Larsen B (2011) *Setting the Watch: Privacy and Ethics of CCTV Surveillance* (Oxford, Hart)
- Moreham N (2008) 'The Right to Respect for Private Life in the European Convention on Human Rights: a re-examination' *European Human Rights Law Review*
- Nan Lin (1999), 'Building a network theory of social capital' *Connections* 28
- Nissenbaum H (2010) *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford, Stanford University Press)
- Passy F (2003) 'Social networks matter. But how?' in Diani M, McAdam D (eds) *Social movements and Networks: Relational Approaches to Collective Action* (Oxford, Oxford University Press)
- Phillipson G (2003) 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' *Modern Law Review* 726
- Rachels J (1975) 'Why Privacy is Important', *Philosophy and Public Affairs* 323
- Snow D et al (1986) 'Frame Alignment Processes, Micromobilization and Movement Participation', *American Sociological Review* 464
- Solove D (2008) *Understanding Privacy* (Cambridge, Harvard University Press)

Starr A et al (2008) 'The impacts of state surveillance on political assembly and association: a socio-legal analysis' *Qualitative Sociology* 251

van Stekelenburg J and Klandermans B (2013) 'The social psychology of protest' *Current Sociology* 886

[1] Val Aston is a PhD Candidate at the University of East Anglia.

[2] *Gillan v United Kingdom* (Application no. 4158/05 judgment of 12 Jan 2010)

[3] *Campbell v MGM Ltd* [2004] UKHL 22, 21 per Lord Nicholls of Birkenhead

[4] *Campbell v MGM Ltd* [2004] UKHL 22

[5] *Murray v Express Newspapers PLC and another* [2008] EWCA Civ 446

[6] See for example, *S and Marper v UK* (2009) 48 EHRR 50

[7] *PG and JH v UK* (2008) 46 EHRR 51

[8] *R (on the application of L) v Comr of Police of the Metropolis* [2009] UKSC 3, 27

[9] *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414,

[10] *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [2]

[11] *Wood v Commissioner of Police of the Metropolis* [2008] EWHC 1105 (Admin) [78] per McCoombe J

[12] *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [45]

[13] *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [92]

[14] *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [36-38]

[15] *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [61]

[16] Paul Lewis and Rob Evans 'Peace campaigner, 85, classified by police as 'domestic extremist' *The Guardian* 25 June 2010

<https://www.theguardian.com/uk/2010/jun/25/peace-campaigner-classified-domestic-extremist>

[17] Paul Lewis and Rob Evans 'Activists repeatedly stopped and searched as police officers 'mark' cars' *The Guardian* 25 October 2009

<https://www.theguardian.com/uk/2009/oct/25/surveillance-police-number-plate-recognition>

- [18] [Catt v Commissioner of Police for the Metropolis](#) [2015] UKSC 9 [26]
- [19] [C Catt v Commissioner of Police for the Metropolis](#) [2015] UKSC 9 [27]
- [20] [Niemietz v Germany](#) (1992) 16 EHRR 97 at [29]
- [21] [Von Hannover v Germany](#) (2005) 40 EHRR 1 at [50]
- [22] [Amann v Switzerland](#) (2000) 30 EHRR 843, 843 at [65]
- [23] [Pretty v United Kingdom](#) (2000) 35 E.H.R.R 1 at [61]
- [24] [Van Kück v Germany](#) (2003) 37 EHRR 51 at [69]
- [25] [Bensaid v United Kingdom](#) (2001) 33 EHRR 10 at [47]
- [26] [Oya Ataman v. Turkey](#) (no. 74552/01 judgment of 5 December 2006) at [36]
- [27] [Djavit An v. Turkey](#) (Application no. 20652/92, judgment of 20 February 2003) at [57] and [Plattform "Ärzte für das Leben"](#) (Application no. 10126/82, judgment of 21 June 1988)
- [28] [Barankevich v Russia](#) (Application no. 10519/03, judgment of 26 July 2007)