

Rethinking Pre-Crime Surveillance versus Privacy in an Increasingly Insecure World: Imperative Expediency

Olubukola Olugasa

Department of Private & Commercial Law, Babcock University School of Law & Security Studies, Iperu-Remo Campus, Ogun State, Nigeria; formerly a Visiting Scholar, Center for Law, Technology and Society, Faculty of Law (Common Law Section), University of Ottawa, Canada

E-mail: buki.olu@hotmail.com or olugasao@babcock.edu.ng

Abstract

Till date the United States of America has not overcome the 9/11 shock despite her efficient police and intelligence network. Nigerians would have perhaps saved the horror of the Boko Haram kidnap of the 276 innocent school girls in Maiduguri. Australians in Sydney would perhaps have prevented the death of two citizens in the hand of a man with known history of violence and crime at "the siege in Martin Place" had proper pre-emptive measures been taken. Less than 24 hours to that of Sydney Pakistan suffered its most horrifying attack in the hands of the Pakistan Taliban, causing a massacre of about 126 innocent children. Next, France became the victim. Some world leaders gathered to conduct a solidarity march and protest against terrorism. The clamour among scholars who hold fastidiously to the preservation of privacy against the quest for crime prevention surveillance in an insecure world today may be very rational and worthy of merits. But is it expedient? It appears the various democratic jurisdictions agitate against crime prevention surveillance in a manner detrimental to the same security they concertedly desire to provide for the citizens. Law enforcement agencies seek efficiency, relevance and confidence of the citizens in their role in society but it seems the same society backed by scholars would not listen? What message are we passing to the law enforcement agencies? Who should the population trust more; the citizens or the law enforcement officers? Whose privacy is the state protecting? Whose security is the state obliged to protect? Could the resistance to crime prevention surveillance tie the hands of the state law enforcement and inadvertently provide opportunities for criminals and terrorists? What is the way forward? These are the questions this paper intends to discuss in the light of recent global events of security breaches.

Key Words: Adversarial system, Privacy, Surveillance, Criminal justice, Crime prevention, Crime control, Security

1. Introduction

In some developed jurisdictions like the United States of America and Canada, the police have continually improved with the pace of socio-economic and technological advancement in crime prevention. Yet these jurisdictions are not able through the police to cover quite significant proactive crime prevention.¹ Till date the United States of America has not overcome the 9/11 shock despite her efficient police and intelligence network. The question of how manage the security officials and the highly regarded intelligence agencies of the government could not prevent such a disaster still reverberates. Nigerians would have perhaps saved the horror of the Boko Haram kidnap of the 276 innocent school girls in Maiduguri.² Australians in Sydney would perhaps have prevented the death of two citizens in the hand of a man with known history of violence and crime at "the siege in Martin Place" had proper pre-emptive measures been taken.³ Less than 24 hours to that of Sydney Pakistan suffered its most horrifying attack in recent time in the hands of the Pakistan brand of Taliban, causing a massacre of about 126 innocent children.⁴ Next to that France became the victim and in an unprecedented fashion, some world leaders gathered to conduct a solidarity march and protest against terrorism. The news of these agonizing events resonates all over the world. Perhaps carried away by the intoxicating freedom of speech syndrome journalists inadvertently celebrate the villains. What a terrorist wants is publicity⁵ of his act and he

¹ K. Bryett & C. Lewis, (n3), pp.1-48. The victims are referred to as "the Chibok girls."

² See "Boko Haram abducts 200 schoolgirls in Borno" Available at <http://www.punchng.com/news/boko-haram-abducts-200-schoolgirls-in-borno/> Accessed on 20/12/2014.

³ See "Sydney hostage drama: Live updates as police cordon off busy street as hostages are being held in cafe," Available at <http://www.mirror.co.uk/news/world-news/sydney-hostage-drama-live-updates-4812272> Accessed on 15/12/2014. The siege lasted for over 16 hours with three casualties.

⁴ See "Taliban attack on Pakistan school leaves 126 dead," Available at <http://www.cbc.ca/news/world/taliban-attack-on-pakistan-school-leaves-126-dead-1.2874449> Accessed on 15/12/2014

⁵ Alex Schmid, "Terrorism as Psychological Warfare" (2005) in *Democracy and Security*, 1:137-146, 2005, particularly at

gets it beyond his imagination. Secondly, they achieve instilling fear in the people and government.¹ A normal offender/criminal, on the other hand, does not want publicity.

2. Surveillance

Surveillance has been identified as one of the notable aspects of Britain's successes in its 43 Police Departments and particularly in Loughborough to the satisfaction of the people within the community.² According to Anderson *et al* (2007:214) surveillance is: "[a]n investigative technique used by the police that will enable them to make electronic or visual observations or listen to persons at any location. Its objective is to collect evidence connecting a suspect to a crime."³ This study prefers a wider concept of surveillance. It perceives surveillance as a crime preventive technique as well as investigative. O'Hara & O'Hara (2003:226-227) attempted to define it as "the covert observation of places, persons, and vehicles for the purpose of obtaining information concerning the identities or activities of subjects. The surveillant is the person who maintains the surveillance or performs the observation. The subject is the person or place being watched. Surveillance may be divided into three kinds: surveillance of places; tailing or shadowing; and roping or undercover investigation. The objectives and methods will vary with each type of observation."⁴ This paper adopts that description to the extent that it covers wider range of use of and users of surveillance. But in addition surveillance here includes, and particularly focuses on the use of electronic camera by the surveillant, mounted in strategically mapped locations in the streets, shops, and precincts of houses in every community or mounted on drones for the purpose of crime prevention and detection.

Galetta, A. (2013:221-377)⁵ opposed the justification of surveillance camera on grounds that it offends the adversarial doctrine of criminal law; presumption of innocence. According to her the use of surveillance amounts to a denial of the suspect his time-tested right of presumption of innocence and fundamental right. Cynthia Laberge (2011:2) questioned this vehemently saying:

"...But with the law unable to keep pace with technological advances, are we letting technology determine how best to protect us? With oversight and accountability at an all time low, are the technological programmes that are being put in place to combat terrorism effective? And if so, at what cost? Regional, national and global databases, containing records on everything from finances and vehicle ownership, to DNA records, are booming. Investment in technologies to analyse and cross reference data in those databases is also booming. The security related goal: to stop the next terrorist attack. Governments justify this previously unprecedented accumulation of data on the grounds that they are faced with an unprecedented threat. If this is true, does it also justify the unprecedented secrecy surrounding our governments' activities?"⁶

Her argument is that in the quest for crime prevention the privacy of each individual is being unacceptably sacrificed. She is dissatisfied that the excuse is based on overriding national interest. The argument going the rounds as to whether the increase in crime and its sophistication coupled with the trend of terrorism could justify the use of information technology to infringe on our rights as persons of dignity must be distinguished. The criminal law has from time immemorial been infringing on rights of persons when it permits arrest in circumstances where a person is suspected to be about to commit a crime. After all an attempt may constitute a criminal act. Whereas the argument made by Laberge and others is meritorious to certain extent, when it comes to crime prevention some exceptions to privacy must be drawn.

The most pedestal argument for supporting invasion of privacy because of crime prevention has been "if you

pp.141-142

¹ Alex Schmid, *Supra*, p. 138

² Philip Bean, "Technology and Criminal Justice," (1999) in *International Review of Law Computers & Technology*, Vol.13, No.3, pp.361-375, pp.366-367.

³ Anderson, James F., Dyson Laronistine, Adam Langsam and Willie Brooks Jr., *Criminal Justice and Criminology: Terms Concepts, and Cases*, London: University Press of America, 2007,

⁴ Charles E. O'Hara and Gregory L. O'Hara, *Fundamentals of Criminal Investigation* (7th Ed) Springfield: Charles C. Thomas Publisher Ltd., (2003), pp.226-227

⁵ Antonella Galetta, "The changing nature of the presumption of innocence in today's surveillance societies: rewrite human rights or regulate the use of surveillance technologies?" in *European Journal of Law and Technology*, Vol. 4, No. 2, 2013. Available at <http://ejlt.org/article/view/221/377> Accessed on 25/11/2014

⁶ Cynthia Laberge, "To What Extent Should National Security Interests Override Privacy in a Post 9/11 World?," (2011) *Victoria University of Wellington Law Review*, Working Paper Series: Vol 3, p.2. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1735044. Accessed on 25/11/2014

have nothing to hide” and Solove¹ had done some in-depth critique of that as unjustifiable. The analysis done by Solove is however not without some gaps too. For instance, the argument based on “I have nothing to hide” is not altogether irrational. It is a simple fundamental truth based on credible assumptions. And when it comes to crime prevention it is a plausible basis for invasion in privacy. The risks of misusing that exception no doubt will always be there. The challenges are: first, to draw a balance between crime prevention and invasion of privacy; second, assume or trust the ideal situation of the law enforcement officers being always obedient to the rule of law; third, where the law officers do not the will to prosecute those who fail to conform; and third, where there are no easy means of identification of culprits then national interest becomes an overriding factor for lifting the veil of privacy.

Criminological findings of apprehension probability principle lends credence to the use of CCTV surveillance in the present dispensation. It provides a platform for pre-crime intelligence which whether known or unknown elicits the imperative duty of each person in society to act in good faith towards one another. The abuse of the use of surveillance camera is a different ball game altogether. The concern here is to ensure the optimum prevention of crime for the general good of the citizenry. One of the challenges of the state, in dealing with crimes is the rate of reportability in certain areas while in other areas the co-operation of victims in prosecution of crimes is very low.² Integrity of the police system is very important to the citizens if they must be encouraged to report as appropriate.

There are two sides to prevention in criminal justice system. There is the prevention of crime in the context of persons who have never committed an offence, which is the general and usual type of prevention. There is also prevention in the context of persons already identified as by at least one conviction or prosecution and proven to be of criminal propensity.³ There has been controversy as to the ability and efficacy of the police in effectively carrying out its role to prevent and detect crime. There have been significant limitations and constraints to the police in preventing and detecting crimes.⁴ This, however, is not meant to undermine the capability of the police in that function and therefore conclude they cannot prevent crimes. Studies carried out have simply appeared to conclude, and it is obvious, that the police alone cannot prevent crimes not even when they are made ubiquitous

¹ Solove, Daniel J. "Why Privacy Matters Even if You Have 'Nothing to Hide'." *The Chronicle of Higher Education* 57.37 (2011). Academic OneFile. Available at <http://go.galegroup.com/ps/i.do?&id=GALE|A257153831&v=2.1&u=otta77973&it=r&p=AONE&sw=w&authCount=1> Accessed on 11 Jan. 2015.

² Jan van Dijk, John van Kesteren, and Paul Smit, Criminal Victimization in International Perspective: Key findings from the 2004-2005 ICVS and EU ICS (2007) Available at http://unicri.it/services/library_documentation/publications/icvs/publications/ICVS2004_05report.pdf. Accessed on 06/01/2015; Carlos Carcach, "Reporting Crime to the Police," (1997) in *Australian Institute of Criminology* No. 68. pp.1-6

³ See the definition of prevention in Anderson, James F., Dyson Laronistine, Adam Langsam and Willie Brooks Jr., *Criminal Justice and Criminology: Terms Concepts, and Cases*, London: University Press of America, 2007, p172. It states that prevention is “a philosophy in corrections arguing that the goal of punishment is to deter criminals from crime.” Tony Abbott, the Australian Prime Minister meant that kind of prevention when in his statement after “the siege in Martin Place” in Sydney he queried: "This was an atrocity - it may well have been a preventable atrocity, and that's why this swift and thorough review is so important." Prime Minister Tony Abbott told Macquarie Radio. Fifty-year-old Iranian-born Man Haron Monis, a self-styled cleric with a lengthy criminal history, entered a cafe in central Sydney on Monday with a shotgun, taking 17 people inside hostage. The siege ended 16 hours later when police stormed the cafe. Two of the captives were killed in a barrage of gunfire, along with Monis himself. Abbott has ordered a sweeping government investigation of the siege and the events leading up to it. Australia has seen a growing chorus of criticism in the aftermath of the attack, including why Iranian-born Man Haron Monis was out on bail and how he obtained a shotgun license. Court documents detailing Monis' long history with the law have also begun to emerge. In 2011, Noleen Hayson Pal - his ex-partner and mother of their two sons - went to police after she said Monis threatened her life. He was subsequently charged with intending to cause fear of physical or mental harm. Pal said she feared he would carry through on his threat, noting that he'd once told her he had a gun license. "Just like about everyone else from the premier down, I was incredulous and exasperated at this," Abbott said. "This guy has a long history of violence, a long history of mental instability, he has a long criminal record and obvious infatuation with extremism. It was extraordinary he was on our streets."

⁴ Ross Homel, "Can Police Prevent Crime?" (1994) in K. Bryett & C. Lewis (Eds.), *Unpeeling tradition: Contemporary policing*, Macmillan Australia, pp.7-34; Johnson, H., "Limits of a criminal justice response: Trends in police and court processing of sexual assault", *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, E. Sheehy, Ottawa, University of Ottawa Press, 2012, 613-634; Shawn Bushway and Peter Reuter, "Economists' Contribution to the Study of Crime and the Criminal Justice System," (2008) Available at http://www.albany.edu/bushway_research/publications/Bushway_Reuter_2008.pdf Accessed: 20/11/2014 at 8:50; James Byrne and Gary Marx, "Technological Innovations in Crime Prevention and Policing. A Review of the Research on Implementation and Impact" (2011) *Cahiers Politiestudies Jaargang 2011-3*, nr. 20 p. 17-40. Available at <https://www.ncjrs.gov/pdffiles1/nij/238011.pdf>. Accessed on 26/11/2014

in every nook and cranny of society.¹ It is human nature to be susceptible to certain limitations. A police officer cannot, for example, see all things at the same time, know all things and be in all places at the same time, observe all things accurately, assess accurately and objectively all activities suspected to be criminal attempt, etc., otherwise all crimes would have been easy to crack and prosecute. There are some that are perpetrated in darkness or via internet and so on.

Acknowledging these challenges, the police in some jurisdictions have adopted different approaches.² It has been generally acknowledged that for police to prevent and detect crimes, efficiently and effectively, the assistance and cooperation of the immediate community, proper enlightenment, economic empowerment of the people and surveillance by gadgets would be required among others. The police are humans who are limited by time and space and therefore susceptible to natural limitations. Surveillance aspect of prevention here concerns the use of ICT gadgets of artificial intelligence to satisfy a very fundamental gap in the quest for deterrence by considerable reduction of situation opportunity for potential offenders and thereby increase significantly apprehension probability. Surveillance gadgets can be near-omnipresent and less susceptible to variability of natural and emotional constraints of man.

Describing the pre-crime society, Lucia Zedner (2007) drew a contrast between what used to be the system as post-crime society and brought about a thesis that:

"In a post-crime society there are crimes, offenders and victims, crime control, policing, investigation, trial and punishment, all of which are staples of present criminological enquiry. Pre-crime, by contrast, shifts the temporal perspective to anticipate and forestall that which has not yet occurred and may never do so. In a pre-crime society, there is calculation, risk and uncertainty, surveillance, precaution, prudentialism, moral hazard, prevention and, arching over all these, there is the pursuit of security ... Already the criminological lexicon has expanded: though they were scarcely in use just two decades ago, these terms are now commonplace in criminological enquiry. A coincidental facet of the temporal shift to pre-crime is that responsibility for security against risk falls not only to the State but extends to a larger panoply of individual, communal and private agents. The shift is therefore not only temporal but also sectoral; spreading out from the State to embrace pre-emptive endeavours only remotely related to crime."³

It would appear that contrary to the proposition made by Zender above criminology had long discovered that the human species has the tendency to committing crime under certain given conditions and have therefore based the solution to crime prevention on those conditions. Therefore making it sound as a novel idea may not be entirely the way to describe it as all the research in situational opportunity and apprehension probability were indeed quests for pre-crime solutions.

In the quest for solutions to the criminal tendencies of men in society legal scholars, biologists, sociologists and psychologists have worked assiduously at variance and in concerted efforts to provide solutions to the innate human quests for societal aberrations. Different jurisdictions since the post world war have developed, though in similar and comparative terms, strategic prophylactic methods of crime prevention. According to Mark Finnane (2006:399),

"The arrival of criminology as an academic discipline was a post-war development in Australia as much as in Britain or the United States. Classical criminology had developed as a question about punishment—neo-classical criminology as a question about the criminal. Academic criminology pursued both questions and added others. Less systematic than pragmatic, less theoretical than eclectic, the criminology of post-war universities was both intellectually

¹ David Weisburd and John E. Eck, "What Can Police Do to Reduce Crime, Disorder, and Fear?" (2004) in *ANNALS, AAPSS*, 593, May 2004, pp.42-44; James Byrne and Gary Marx, (n3) 42-43; David JacquiKar, "Policing and Crime Reduction: The evidence and its implications for practice," (2013) Available at http://www.police-foundation.org.uk/uploads/holding/projects/policing_and_crime_reduction.pdf Accessed on 30/11/2014

² Anthony A. Braga, "Police Innovation and Crime Prevention: Lessons Learned from Police Research over the Past 20 Years," (2007). Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/218585.pdf> Accessed on 1/12/2014. It was originally a paper presented at the National Institute of Justice (NIJ) Policing Research Workshop: Planning for the Future, Washington, DC, November 28-29, 2006. See also, Plant and Scott, (n1) pp. 5, 16-19.

³ Lucia Zedner, *supra*, p. 262

broader and politically more critical than once thought."¹

Criminological assumptions may be summarised in the dictum of Denis Szabo (1975):

"It is assumed that a potential for "antisocial" behavior is present in every society; that whether at the affective level or level of socialization, every individual has tendencies which incline him towards the commission of antisocial acts which are forbidden by the lawmaker. From the point of view of the criminology oriented towards correctional practices, it is assumed, explicitly or implicitly, that human nature is fundamentally the same, and that it is only socio-economic and cultural conditions which imprint variations upon it. In addition, human behavior being the point of departure for the analysis"

Szabo's position agreeably suggests, that criminology research observed that the criminal tendency in man is universal; not limited by colour, creed, religion or culture. According to him, "the human nature is fundamentally the same." The only differences exist in their respective settings. It is therefore more economical² to invest more in pre-crime stage than other subsequent stages in the CJS.

The assumptions³ have been categorised according to the schools of thought in criminology. Historically, there were the Classical School whose proponent was the father of criminology, Cesare Bonesana, Marchese di Beccaria⁴ (in the 18th century) and closely followed by Jeremy Bentham's;⁵ the Positivist School (of the 19th century) which moved away from the free will assumption of the Classical School but was more of scientific⁶ observation of the human behavior as affected by both internal and or external factors; and the Neo-Classical School⁷ which combines the earlier schools and the precursor to the modern criminological approach.

Generally, the following assumptions may be attributed to the Classical School:

- a. human beings have free will which bear some logical foundations;
- b. the free will enables him to decide and follow a calculated course of action;
- c. his actions are usually founded on things that give him pleasure;
- d. he is deterred where the pleasure is met with pain where inconsistent with the law;

The modern classification seems to modify the categorization of the schools into two major schools of criminology, namely the "mainstream criminologists" and the "critical criminologists."⁸ The former focuses on the specific different crimes that offend against the criminal law of a given society while the latter focuses on the broader spectrum of human actions that constitute crimes and other wrongs not necessarily recognized by law of the given society as crime.

Essentially, there exists the rational choice and routine activities theory position that a potential offender considers the situational opportunity he has where there are no witnesses such as the police, superiors and the

¹ Mark Finnane, "The ABC of Criminology: Anita Muhl, J. V. Barry, Narval Marris and the Making of a Discipline in Australia" in *The British Journal of Criminology* (MAY 2006) Vol. 46, No. 3, pp. 399-422. Available at <http://www.jstor.org/stable/23639355>. Accessed: 19/11/2014 15:39.

² Richard H. Adams and Thomas S. Ulen, "Behavioral criminal law and economics," (2009) in Nuno Garoupa (ed.) *Criminal Law and Economics* Vol. 3. Cheltenham: Edward Elgar, pp.403-404.

³ Assumptions are things accepted to be true without question or proof. See Reiss' "Challenge Assumptions" Available at http://www.sagepub.com/upm-data/47099_Reiss_Ch1.pdf at p.10. and <http://www.learn.austhink.com> both accessed on 1/1/2015. In the latter site, assumption is described as "... a proposition which somebody takes to be true without having provided or considered evidence in relation to it" and that they can be categorized as acknowledged, unstated (unacknowledged) and hidden.

⁴ Contained in his book entitled *Dei Delitti e della Pene (On Crimes and Punishment)* (1764).

⁵ *Principles of Morals and Legislation* (1789)

⁶ By scientific is meant the School approaches the study of human behavior from the perspectives of biology (eg Augusto Comte's *The Course in Positive Philosophy*, 1830-1842), Cesare Lombroso's *Criminal Man*, 1876 and Charles Goring, *The English Convict: A Statistical Study*, 1913), psychology or other observable and empirically proved social determinants.

⁷ The School brought about rational choice theory, deterrence theory, economic model of crime, and routine activities theory

⁸ Robert Agnew, "Integrating Assumptions about Crime, People, and Society Response to the Reviews of Toward a Unified Criminology" in *Journal of Theoretical and Philosophical Criminology* (January, 2013) Vol. 5(1), p.74; Robert Agnew, *Toward a Unified Criminology: Integrating Assumptions about Crime, People, and Society* (New York: University Press, 2011).

vulnerability of the victim. The critical assumption here is that more situational opportunities encourage criminal tendencies. For instance, crimes tend to be committed more under cover; cover being darkness, enclosure, absence of on-lookers, etc.

Ozan Gok (2011:97) had rightly observed that "... there are two options to prevent crime: the first is try to remove the *criminal dispositions* that offenders have, and the second is to remove the *crime opportunities* that offenders have.¹ It is upon these two fundamental issues that identification and data capture of each person in a community through biometrics; street-mapping; surveillance cameras; street illumination at night etc., become imperative.

Psychologists and biologists have studied persons found guilty of different offences over time and came up with certain trends indicative of criminal inclinations of certain offenders. The outcome of the researches no doubt may be to certain degree controversial² but there are still certain fundamental truths established in the claims. What it implies is that certain criminal behaviour are provoked by some biological disposition and which can be prevented by proper intervention. Some scholars consider this position as discriminatory and derogatory to the persons of those classified as such. Recent researches have impliedly acknowledged the truth, at least to certain extent, of the same condemned theory in modern times.³ The notion or theory behind developmental crime prevention is substantially an authentication of the veracity of the claims to criminal disposition.

Another expression for situational opportunity to commit crime is what Gok had called crime opportunity. Yet another and more pragmatic synonym of the same expression and commonly adopted as the technical meaning is "lack of apprehension probability."⁴ Lack of apprehension probability of who; of the prospective suspect/would-be offender, of course. There has been so much emphasis on the use of sanctions (penal approach) to deter potential and extant offenders.⁵ However, the gap yet to be quite filled lies in the deterrence potential of apprehension probability to checkmate the notorious situation opportunity to commit crime. This is not to suggest that attempts have not been made in this regard. It is assumed that not enough has been done. Deterrence has been described as "... a theory of choice in which would-be offenders balance the benefits and costs of crime. Benefits may be pecuniary, as in the case of property crime, but may also involve intangible benefits such as defending one's honor, expressing outrage, demonstrating dominance, cementing a reputation, or seeking a thrill..."⁶

There are several methods of crime prevention. There are equally different approaches to the different methods.⁷ Braga (2007:2) mentioned some as follows: "These innovations included community policing, "broken windows" policing, problem-oriented policing, "pulling levers" policing, third-party policing, hot spots policing, Compstat, and evidence-based policing. These strategies represented fundamental changes to the business of policing."⁸

¹ Özkan GÖK, "The Role of Opportunity in Crime Prevention and Possible Threats of Crime Control Benefits" (2011) in *Turkish Journal of Police Studies* Vol: 13 (1), pp. 97-114.

² The opposition groups are classified as the "neo-eugenics." See Poston, W., & Winebarger, A., "The misuse of behavioral genetics in prevention research, or for whom the "bell curve" tolls," (1996) *Journal of Primary Prevention*, 17(1), 133–147, particularly at p.134.

³ Michael Rocque, Brandon C. Welsh, Adrian Raine, "Biosocial criminology and modern crime prevention" (2012) in *Journal of Criminal Justice* 40 (2012) 306–312, particularly p.306.

⁴ Daniel S. Nagin, "Deterrence in the Twenty-First Century" in *Crime and Justice*, Vol. 42, No. 1, *Crime and Justice in America 1975–2025* (2013), pp.199. Available at <http://www.jstor.org/stable/10.1086/670398>. Accessed: 19/11/2014 19:44; Clarke, R. V. "Situational crime prevention: Theoretical background and current practice," (2009) in M. D. Krohn, A. J. Lizotte, & G. P. Hall (Eds.), *Handbook on crime and deviance*, New York: Springer pp. 259–276.

⁵ Robert Apel, "Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence" (2013) *Journal of Quantitative Criminology* 29(1) pp.87–101; Nagin, Daniel S., Francis T. Cullen, and Cheryl Lero Jonson "Imprisonment and Reoffending" (2009) In *Crime and Justice: A Review of Research*, vol.38, edited by Michael Tonry, Chicago: University of Chicago Press.

⁶ Daniel S. Nagin, *supra* at p.199.

⁷ Robert White, "Situating Crime Prevention: Models, Methods and Political Perspectives," in ... summarily classified the different approaches under three, namely, conservative, liberal and radical.

⁸ Braga (n6), p.2. The Czech Republic interior ministry drew up some crime prevention strategy for 2008 to 2011. The ministry, in doing that, first identified the causes of crime in society among others, as "... such as social policies, employment, education, leisure activities, crisis intervention, or urban planning." M. Rocque et al. (2012: 307) discussed crime prevention both as criminology and criminal justice. It discussed the biological/psychological approaches in the light of psychological developmental prevention and identified the stages as "Neuropsychological/Cognitive Deficits," "Impulsivity/Negative Emotionality," "Conduct Disorder/Aggression," "Mental/Physical Health" and biological

3. Privacy

Privacy has become such an independent and seriously and deeply considered aspect of law. It is in fact appears now larger in perspective than its root, that is torts law.¹ Privacy is traditionally a topic under tort. Over time it has become a subject on its own. It involves the protection of right to private life. Different countries have provisions in their Constitutions for the protection of right to privacy of the citizens. The Constitution of the Federal Republic of Nigeria 1999 in section 37 provides – “The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected”

Giving insight into the complexity of the concept of privacy Kasper (2007) said:

”When delving into the contemporary discourse on privacy, one is confronted by an overwhelmingly diverse array of works. The topics to which privacy is deemed relevant include: surveillance, communication, feminism, the family, internet commerce, the body, and information—medical, financial, psychological, genetic, and biographical. Continuing advances in information collection and communications technology, along with a "war on terror," have only exacerbated concerns about privacy and spurred further writing and opinion polls on the topic.”²

Privacy imposes an obligation on all to respect the private life of every citizen. In its simplest description, privacy constitutes the protection of an individual’s private affairs against the interference of another. It exists in the realm of prevention of trespass to person. Any interference to a person’s right to enjoyment of what belongs to him constitutes a trespass. With the advent of technology in the dictation of human interactions private issues of persons have been seriously interfered with beyond traditional expectations. That is why its protection has been found under various laws, common law and statutes, including tort, contract, constitutional law, administrative law, employment law, human rights, etc.³ Solove & Schwartz (2011:1) identified two different strands of privacy namely, information privacy and decisional privacy.⁴ This paper is concerned with the former although in certain circumstances they may converge.

Soma *et al.* (2014:7) noted the difficulty of defining the concept but and stated that: “Indeed, the only certainty in defining privacy is that it is a concept that is highly malleable depending on the experience, interests, and agenda of the person interpreting it and the socio-political context the definition is offered.” This description tends to bring home the position of this paper on the challenges of crime prevention surveillance in the face of privacy protection. The question is: whose interest is really being protected when it comes to crime prevention?

Privacy law may be broadly classified into public and private. Privacy in public law concerns law of privacy in law enforcement and government dealings with individual private information. Privacy in private law concerns the protection of private life, information and any data against the interference of any individual citizen. It can be further divided into “Transactional Privacy” and Information Theft (Protective Privacy). For the purpose of this paper privacy is construed as public

4. Whose security is the state obliged to protect?

The social contract theory if anything to go by came about in order for there to be maintenance of order and peace in society. The people supposedly chose to relinquish their private rights by might to some created authority now called government and fashioned through this government laws to regulate the conduct of both the government and the individual and collective citizens. The government is therefore a creation of the people and it is accountable to the people. What the government and by extension the law enforcement officers in charge of state security does is the interest of the people. It is the aggregate power of the respective citizens that empowers the law enforcement agents. True, the people may decide by their votes in a democratic setting decide to

developmental approach as including "Family-Centered and Parenting Programs," "Preschool and School-Based Programs," "Mental or Physical Illness Programs," and "Nutrition and Crime Prevention."

¹ See J.T. Soma, S. D. Rynerson and E. Kitaev. *Privacy in a nutshell* 2nd ed. (2014) Denver: West Academic Publishing, pp.31-32.

² Kasper, Debbie V.S. "Privacy as a Social Good" (2007) in *Social Thought & Research*, Vol. 28, Social "Movements", pp. 165-189

³ Jon L. Mills, “Privacy: The Lost Right” (2012) Oxford: Oxford Scholarship online. Available at <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195367355.001.0001/acprof-9780195367355> Accessed on 10/1/2015, p.7

⁴ D. J. Solove and P. M. Schwartz, *Privacy, Information, and Technology* 3rd ed. (2011) Frederick: Wolters Kluwer Law & Business, p.1.

withdraw the powers and amend it or confer it to another agency, it is presumed that it is the majority that determines such. But in reality as has been disproved the majority may not determine the decision of governance in reality. So what happens where the decision making falls into the wrong hands? That appears to be the ambivalence of the people in the hesitation to release information privacy to the government and law enforcement agencies. The apprehension therefore seems justified.

The other side to that argument, however, is: the minority citizens with criminal tendencies so to speak may also use the same apprehension disposition to wield the law to their advantage. After all, there is the saying that the law is an ass. The user many times pulls the reins to his side. The same good law may be used to perpetrate evil. When such circumstances occur what shall we hold on to yielding to the apprehension and distrust of the law enforcement agencies?

5. Assumptions of the Present Disposition to Privacy

James A. Thorn et al (1986) noted the assumptions of privacy as:

- “(1) a predefined consistent purpose;
- (2) a direct relationship between data-subject and record; and
- (3) an identifiable and responsible record-keeper”¹

had outlived their purposes with the new technologies and therefore expected new approach to privacy. Solove (2013) went beyond these assumptions to thrash all possible excuses for the justification of crime prevention surveillance. He identified five excuses proffered for the justification of relaxing privacy restrictions on information privacy which he branded as “Five myths about privacy.”² The five of the excuses are:

- “1. The collection of phone numbers and other "metadata" isn't much of a threat to privacy...
- 2. Surveillance must be secret to protect us...
- 3. Only people with something to hide should be concerned about their privacy...
- 4. National security requires major sacrifices in privacy...
- 5. Americans aren't especially bothered by government intrusions into their privacy...”

While submitting that Solove’s bases for thrashing these excuses are plausible, the facts remain that they also true as his arguments are not absolute. That calls for further consideration of the arguments which had continued to go in circles with no concrete solutions.

Ann Cavoukian (2009)³ however appeared to have pushed the arguments beyond moribund cycle and provided some solution which eminent scholars in privacy like Solove and Shwartz (2011)⁴ have acknowledged as such. She suggested that the solution to the challenge of information privacy is the engagement of the same ICT to build in programs to enforce the privacy regimes automatically within the each ICT surveillance mechanism. According to her,

“But unlike some critics, who see technology as necessarily eroding privacy, I have long taken the view that technology is inherently neutral. As much as it can be used to chip away at privacy, its support can also be enlisted to protect privacy through the use of Privacy-Enhancing Technologies (PETs) – a term that I coined in 1995 with the Netherlands Data Protection Authority. The concept of PETs was predicated on a deeper philosophy – that of embedding privacy into the design specifications of technology itself, thereby ensuring its ongoing presence. Even in the '90s, it was clear to me that the time was upon us when regulation and policy would no longer be sufficient to safeguard privacy. With the increasing complexity and interconnectedness of information technologies, nothing short of building privacy right into system design, in my view, could suffice. So I developed the concept of “Privacy by Design” to capture the notion of embedding privacy into technology itself – making it the default, delivered through various PETs.”⁵

Now, it must be stated that Ann Covakian’s proposition was exclusively for privacy in relation to transactional

¹ James A. Thom and Peter G. Thorne, "Privacy Principles - Tacit Assumptions under Threat," (1986) in *2 J.L. & Inf. Sci.* 68-82 1991, pp.71-72

² D.J. Solove, “Five Myths about Privacy,” (2013) in *Washington Post*, June 13, 2013. Available at <http://go.galegroup.com/ps/i.do?&id=GALE|A333770143&v=2.1&u=otta77973&it=r&p=AONE&sw=w> Accessed on 11/12/2015

³ Ann Cacoukian, *Privacy by Design* (2009) Available at <http://celarc.ca/cppc/218/218527.pdf> Accessed on 11/1/2015

⁴ D. J. Solove and P. M. Schwartz, *Privacy, Information, and Technology* 3rd ed. (2011) Frederick: Wolters Kluwer Law & Business, pp. 461-462

⁵ Ann Cacoukian, *supra*, p. iv

privacy described above. It is not within the context of public law related privacy which we call here “privacy for law enforcement.” But we can borrow from her the same proposition of built-in mechanism to avoid continuing invasion of privacy after legitimate intrusion of privacy for law enforcement. This is exemplified in the Canadian law which compels the police to obtain warrant of search when going beyond “exigency” search of personal information in the course of enforcing the law.¹ The Court held that

“In this case, the initial search of the cell phone, which disclosed all of the cell phone evidence tendered by the Crown at trial, breached F’s s. 8 rights. Although they were truly incidental to F’s arrest for robbery, were for valid law enforcement objectives, and were appropriately linked to the offence for which F had been lawfully arrested, detailed evidence about precisely what was searched, how and why, was lacking. Despite that breach, the evidence should not be excluded. The impact of the breach on F’s Charter-protected interests favours exclusion of the evidence, but it does so weakly. Although any search of any cell phone has the potential to be a very significant invasion of a person’s informational privacy interests, the invasion of F’s privacy was not particularly grave.”

6. Presumption of Innocence and Standard of Proof

Another challenge faced by crime prevention surveillance consists in the fundamental principles of the adversarial system practiced in common law jurisdictions. The two are evidential principles namely: a suspect is deemed innocent until proven guilty; and the standard of proof on the prosecutor to prove beyond reasonable doubt. A. Galletta (2013)² as earlier stated had argued that letting in surveillance would breach the principles unless amended. Perhaps it is time the principles are reconsidered and appropriately modified in deserving cases.³ For that purpose, three scenarios are possible: (i) the case of an ex-convict whose activities may need be monitored while on parole or after serving all sentence; (ii) the case of a suspect never arraigned for lack of sufficient information to warrant prosecution in court; (iii) a suspect already prosecuted but discharged for want of credible evidence; and (iv) the case of a prospective suspect. We are concerned with the fourth here. The first three have got some record that may justify the check on them.

There was an original presumption of trust and friendship in the police than the criminal which appears to have now given way to a new paradigm. This paradigm shift is exemplified in the decision in the case of *R. v. Fearon* recently decided by the Supreme Court of Canada to the effect that:

“Safeguards must be added to the law of search of cell phones incident to arrest in order to make that power compliant with s. 8 of the Charter. Ultimately, the purpose of the exercise is to strike a balance that gives due weight to the important law enforcement objectives served by searches incidental to arrest and to the very significant privacy interests at stake in cell phone searches. Consequently, four conditions must be met in order for the search of a cell phone or similar device incidental to arrest to comply with s. 8. First, the arrest must be lawful. Second, the search must be truly incidental to the arrest. This requirement should be strictly applied to permit searches that must be done promptly upon arrest in order to effectively serve the law enforcement purposes. In this context, those purposes are protecting the police, the accused or the public; preserving evidence; and, if the investigation will be stymied or significantly hampered absent the ability to promptly conduct the search, discovering evidence. Third, the nature and the extent of the search must be tailored to its purpose. In practice, this will mean that only recently sent or drafted emails, texts, photos and the call log will, generally, be available, although other searches may, in some circumstances, be justified. Finally, the police must take detailed notes of what they have examined on the device and how they examined it. The notes should generally include the applications searched, the extent of the search, the time of the search, its purpose and its duration. The record-keeping requirement is important to the effectiveness of after-the-fact judicial review. It will also help police officers to focus on whether what they are doing in relation to the phone falls squarely within the parameters of a lawful search incident to arrest.”⁴

The decision chronicled the safeguards rightly for the purpose of building in some mechanisms to prevent the abuse of power to invasion of privacy in the circumstance of law enforcement. The trust hitherto reposed in the

¹ *R. v. Fearon*, [2014] 3 SCR 621, 2014 SCC 77 (CanLII) — 2014-12-11 Supreme Court of Canada — Canada (Federal)

² Antonella Galetta, *supra*

³ Olugasa, Olubukola Adeyemi, “Re-Thinking Evidential Requirements in Prosecution of Embezzlers of Public Fund: The Olabode George and John Yakubu Yusuf Sagas” (April 6, 2014). Available at SSRN: <http://ssrn.com/abstract=2511619> or <http://dx.doi.org/10.2139/ssrn.2511619>

⁴ [2014] 3 SCR 621, 2014 SCC 77 (CanLII) — 2014-12-11 Supreme Court of Canada — Canada (Federal)

law enforcement officers seems to have been suspended or laid to rest. The same trend would appear to permeate North America and Europe. The trend may indeed be justified by the case of the Ferguson Police abuse of the Afro-American which turned out to be a sour story. It is submitted that the attempt to strike a balance between the power of the state to carry out surveillance that intrudes privacy in law enforcement under “exigency” circumstances is laudable. However, one wonders if it is expedient in the circumstance of increase in insecurity in the world today. The crash of the Germanwings which has been attributed to the suicide urge in Lubitz, the co-pilot, points to the need to reconsider that position. His case is quite alarming. The German law is strict on privacy. He did not disclose his medical condition to his employers. They seemed never to have had an inkling of his depressive tendencies and incidents. The whole “surveillance” of his private life only began after he had successfully “obliterated” 150 innocent souls. Interestingly, the German law on privacy is very strict on privacy.

7. Conclusion

There is no doubt that the trend of insecurity in the world today has placed tension on the old paradigms of adversarial systems in law enforcement. The tension has been complicated by the need to balance between the fundamental right to privacy and the fundamental right to security of life. The human race is caught in the web of mistrust and confusion caused by unprecedented selfish interest. But when we consider the expediency of the balance between privacy and crime prevention through surveillance one is tempted to argue that the time to tilt the balance towards crime prevention by surveillance is priority and the more expedient. World news in recent time is replete with the scourge of attacks on innocent peoples all over the world, from Nigeria, to Libya, to Afghanistan to Kenya, to Canada, to Iraq to Syria, to Canada, to Australia, to France, and across the globe. The time has come when governments must face the reality of the need for surveillance even when privacy is invaded. The imperative for reassessment of surveillance need has just been further underscored with the recurrence of terrorists’ acts in Europe, Africa and the United States of America.

In Canada and a number of North American and European countries, the rule guiding the use of surveillance camera in public places requires proper and conspicuous notice in the surroundings, warning passers-by that there are surveillance cameras. That implies when the notice has been satisfied any act recorded is with the consent of the person carrying out the act. Besides, sound is exempted from the surveillance recording. The challenge that rule brings up is that a person who wants to commit a criminal act and who is bent on doing it has the option to destroy the camera or find alternative means to doing the act behind or outside the scope of the camera. Again, professionals rendering essential services that are very hazardous may require stricter surveillance if Lubitz’ case is anything to go by. When will the adversarial orientation of the common law jurisdictions that now appears too susceptible to crime perpetration in contemporary world be jettisoned or considerably modified to meet the current challenges of crime sophistication? The Big Brother would appear to have gone beyond this challenge through the use of satellite surveillance. Should developing countries where crimes are rife not also seize the advantage of surveillance and where the rate of crime has been considerably minimized restore the adversarial system?