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Kapittel 1

How Much Surveillance is Too Much? Some Thoughts on Surveillance, Democracy, and the Political Value of Privacy

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Over the last decade, it has become increasingly common to speak of the emergence of a surveillance society. As many journalists, academics, and politicians are now fond of telling us, surveillance is an almost inescapable part of 21st century life, and there is a very real danger that individual privacy – at least as we currently understand it – may soon become a thing of the past. Indeed, according to some commentators – like the former CEO of Sun Microsystems Scott McNealy – privacy is already dead, and we have no choice but to just "get over it" and accept our newly transparent lives.[47]

47. Quoted in Manes, S. (2000), "Private Lives? Not Ours!" *PC World* 18(6): 312.

It is not difficult to understand why many people are deeply concerned about the spread of surveillance. The architecture of public and private surveillance is clearly growing, and is fast becoming a part of everyday life for an increasing number of people. In many cities and towns around the world – and especially in countries like Britain and the United States – surveillance television cameras can be found in almost every bank, store, and shopping mall, as well as in many public streets and parks. We are also confronted with the visible signs of surveillance every time we travel through an airport, as we are physically scanned and our passports are subjected to close electronic scrutiny. At public gatherings and demonstrations, it is now becoming common to see police officers armed with video cameras overtly monitoring and recording proceedings, while others unashamedly take photographs of those involved and even casual passersby.[48]

However, perhaps the most profound expansion in surveillance in recent years has been in the area of dataveillance.[49] Both the state and the private sector now routinely require us to hand over large amounts of personal information, either as a matter of law or in exchange for access to services. For example, in order to qualify for various forms of tax relief or child benefits in the United Kingdom, I must first register with a government website and disclose various forms of information about myself and my family, information that often goes well beyond simply stating my name, age and address. I might be asked about the status of my relationship, my employment, and – if I am a non-national – about my recent travels inside and outside the country. This information can then be shared between government departments and agencies, and although data protection laws govern such sharing, in many instances it may be passed on within government without my express consent or knowledge.

Like the state, the private sector also now holds large amounts of information about us, and routinely shares and processes that information with a view to selling us more goods and services. As anyone who has used Amazon over the past ten years will be able to tell you, companies have become increasingly adept at matching personal information with consumption data, and at producing sophisticated consumer profiles capable of predicting individual consumption preferences with a high degree of accuracy. For many of us, our

48. Lewis, P. and Valleé, M. "Revealed: police databank on thousands of protesters", *The Guardian* (6 March 2009). Available at: http://www.guardian.co.uk/uk/2009/mar/06 / police-surveillance-protesters-journalists-climate-kingsnorth
49. Clarke, R. (1988), "Information Technology and Dataveillance", 31 Comm. of the ACM, May (available at: http://www.rogerclarke.com/DV/CACM88.html)

Amazon account is better at predicting what we might want to read next or what we want for Christmas than our family or friends. Of the regular book suggestions I receive by email from Amazon every week, perhaps 70 or 80 percent are accurate, with the result that I probably buy almost half of the books that Amazon now recommends to me. While helpful (and for that matter, expensive), this still amounts to a highly sophisticated form of surveillance, and it is easy to see how such a system could be used to predict not only what I might like to read tomorrow, but also who I might vote for in the next election.[50]

Of course, many commentators have speculated on what all of this surveillance means for individual freedom and privacy. Perhaps the most common concern is that the gradual expansion of surveillance into almost every aspect of our daily lives has meant that there are now very few spaces left where we can truly be alone. If we think that a degree of privacy is essential for the proper development of the self – that is, that we need time free from scrutiny in order to flourish as human beings – then the fact that we are monitored by cameras in the streets, watched every time we go shopping, or are tracked in our dealings online means that we are increasingly living lives in which we are constantly responding to the explicit or implicit demands of others.[51]

Closely related to this idea that privacy is essential to the development of the self is the belief that surveillance threatens our ability to construct and control different social identities. Broadly speaking, most of us play many roles in our daily lives – we are friends, parents, employees, team-members etc. – and part of what makes it possible for society to function effectively is our ability to keep these roles separate.[52] However, as the level of surveillance

50. For further examples of the spread of surveillance, see: Lyon, D. (2001), *Surveillance Society: Monitoring Everyday Life* (Open University Press: Buckingham); *Surveillance Studies Network, A Report on the Surveillance Society* (2006), Office of the UK Information Commissioner; *Dilemmas of Privacy and Surveillance: Challenges of Technological Change* (2007), The Royal Academy of Engineering; and *Surveillance: Citizens and the State*, (2008), House of Lords Select Committee for the Constitution, Second Report of Session 2008–09, HL Paper 18-I.
51. For an overview of the different theories of privacy, see: Solove, D.J. (2002), "Conceptualizing Privacy", *California Law Review* 90: 1087–1155; Solove, D.J. (2009) *Understanding Privacy* (Harvard University Press: Cambridge, Mass.); and Nissenbaum, H. (2010), *Privacy in Context* (Stanford University Press: Stanford, California).
52. This is point that has been made by many commentators. See, for example: Schoeman, F. (1992) *Privacy and Social Freedom* (Cambridge University Press: Cambridge); and Steeves, V. (2009) "Reclaiming the Social Value of Privacy" in I. Kerr, V. Steeves, and C. Lucock (eds.) (2009) *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press: New York, NY).

in society increases – and more and more personal information is collected and shared – it becomes increasingly difficult for individuals to maintain different identities in different contexts, and as a result our ability to fulfill those roles is diminished. As James Rachels has argued, viewed from this perspective privacy is valuable because there is a "close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people".[53] Put another way, if an essential aspect of privacy is the ability to construct different identities for ourselves and maintain some control over how those identities evolve, then surveillance poses a very real threat to the possibility of living complex, multi-layered social lives. [54]

There are of course many other critiques of surveillance that focus on the threat posed by technologies such as CCTV and dataveillance to individual privacy, and it would be very easy to spend the rest of this chapter summarizing and critiquing them. However, my concern here is not so much with the possible effects of surveillance on individual privacy, but rather with the question of how surveillance might affect the proper functioning of the rule of law, and the related question of how much surveillance is too much in a democratic society. What does the use of surveillance by the state do to the position of the state? How does the spread of state surveillance affect the democratic mandate of governments? How does surveillance change the way in which the governed – the public – view and respond to the state? These are all questions that demand an analysis that extends beyond concerns with individual privacy, personal autonomy, and matters of individual self-determination, and require us to think about the proper limits that should be placed on the surveillance activities of the state.

1 The role of privacy in the protection of political rights

As has already been noted, one of the main reasons why we value privacy so highly is because it is essential to the exercise of individual autonomy and the proper development of the self. But while it is perhaps easy to see how privacy is fundamentally important to each of us as individuals, it is also crucial to remember that privacy has a vital public dimension as well. As Priscilla Regan argues in *Legislating Privacy*, the value of privacy stretches well beyond its

53. Rachels, J. (1975), "Why Privacy is Important", *Philosophy & Public Affairs*, 4(4): 326.
54. For a more detailed discussion of the importance of privacy to personal development, see: Goold, B.J. (2002), "Privacy Rights and Public Spaces: CCTV and the Problem of the 'Unobservable Observer'", *Criminal Justice Ethics* 21(1) Winter/Spring.

usefulness in helping individuals maintain a sense of dignity or construct personal relationships. For Regan, privacy is also important because it serves "common, public, and collective purposes".[55] Drawing on John Stuart Mill's writings on the struggle between liberty and authority, Regan argues that privacy is essential to the maintenance of democracy, primarily because it ensures that citizens are able to hold elected governments to account and place limits on the expansion of the state:

> A public value of privacy derives not only from its protection of the individual as an individual but also from its usefulness as a restraint on government or on the use of power … Privacy in this sense is not important just to individual liberty but also to civil or social liberty because it helps to establish the boundaries for the exercise of power.[56]

How is this limitation achieved? How does protecting privacy impose limits on the exercise of power by the state? On the one hand, privacy helps to place limits on the state by making it clear that there are certain places the state cannot go and certain things it cannot expect to know. As Regan points out, in the US context this view of privacy has been crucial to the development of the Fourth Amendment, and the development of rules regarding the investigatory powers of the police and other law enforcement agencies. As Justice Felix Frankfurter observed over 60 years ago in *Wolf v. Colorado*, the "security of one's privacy against intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society".[57]

More crucially, however, privacy's public value also stems from its importance to the exercise of other, more obviously political rights. It is difficult to

55. Regan, P. (1995), *Legislating Privacy: Technology, Public Values, and Public Policy* (University of North Carolina Press: Chapel Hill): 221.
56. Regan, P. (1995), *Legislating Privacy: Technology, Public Values, and Public Policy* (University of North Carolina Press: Chapel Hill): 225. Note that it is this public aspect of privacy that provides one of the most compelling reasons for recognizing a right to privacy in public spaces. See: Goold, B.J. (2002), "Privacy Rights and Public Spaces: CCTV and the Problem of the 'Unobservable Observer'", *Criminal Justice Ethics* 21(1) Winter/Spring; and Goold, B.J. (2008) "The Difference between Lonely Old Ladies and CCTV Cameras: A Response to Jesper Ryberg", *Res Publica* (March).
57. *Wolf v. Colorado*, 338 U.S. 25 (1949), quoted in Regan, P. (1995), *Legislating Privacy: Technology, Public Values, and Public Policy* (University of North Carolina Press: Chapel Hill) on page 226. According to the 4th Amendment to the United States Constitution: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

imagine, for example, being able to enjoy freedom of expression, freedom of association, or freedom of religion without some accompanying right to privacy. Individuals not only need to be able to be alone with their own thoughts, but they also need to be free to share those thoughts with others without being subject to the watchful, possibly critical, eye of the state. Indeed, one of the greatest dangers of unfettered mass surveillance – particularly mass covert surveillance such as communications monitoring – is the potential chilling effect on political discourse, and on the ability of both individuals and groups to express their views through comment, protest and other forms of peaceful civil action.[58]

Sadly, we are already beginning to see signs in countries like the UK and the US of surveillance being used as a means of suppressing criticism and political speech. Although it is often claimed that the police record public demonstrations and rallies with a view to detecting and investigating possible criminal and terrorist behavior, the reality is that such tactics are now commonly used at almost every type of protest, ranging from anti-war marches to environmental group protests, often not with the intention of arresting or charging individuals with a crime, but rather in the hope that it will cause them to alter their behavior and become effectively self-policing. Equally, the mass and routine monitoring of electronic communications like email – as revealed in a recent European Court of Human Rights judgment against the UK – may severely affect the ability of individuals to share their views with others or to be willing to criticize the government in their private communications.[59]

By ensuring that there is a limit on what the state can know about us, privacy not only helps to protect individual autonomy, but also leaves us free to use that autonomy in the exercise of other fundamental rights like the right to free speech. As Thomas Emerson has argued:

> In its social impact a system of privacy is vital to the working of the democratic process. Democracy assumes that the individual citizen will actively and independently participate in making decisions and operating in the

58. As Keith Boone puts it, privacy is "vital to a democratic society [because] it underwrites the freedom to vote, to hold political discussions, and to associate freely away from the glare of the public eye and without fear of reprisal." See Boone, C.K. (1983), "Privacy and Community", *Social Theory and Practice* 9(1): 8. This is an idea that can also be found in work of Alan Westin, who has argued that "[p]rivacy is an irreducibly critical element in the operations of individuals, groups and government in a democratic system with a liberal culture." See: Westin, A. (1967) *Privacy and Freedom* (Atheneum: New York, NY): 368.

59. See: Goold, B.J. (2009), "Liberty and Others v The United Kingdom: A New Chance for Another Missed Opportunity", *Public Law*, Spring.

> institutions of society. An individual is capable of such a role only if he can at some points separate himself from the pressure and conformities of collective life.[60]

This is a powerful argument in favor of privacy, and crucially it is one that may be easier to sell to the general public. One of the problems that has faced privacy advocates and civil libertarians interested in privacy is that it is often very difficult to explain to the public at large why they should care about their privacy or the privacy of others. Compared with easily understood anti-privacy slogans such as "nothing to hide, nothing to fear", appeals to the value of dignity and personal autonomy often fall on deaf ears. But arguments that privacy is essential if we are to be able to enjoy our basic political rights – and to be in a position to keep state actors honest and hold them to account – are much easier to understand. According to this argument, we should resist the spread of surveillance not because we have something to hide, but because it is indicative of a worrying expansion in state power and makes dissent more difficult. While individuals might not be concerned about the loss of autonomy that comes from being subjected to more and more state scrutiny, it is unlikely that many would be comfortable with the suggestion that more surveillance inevitably brings with it more intrusive government and less political freedom. Furthermore, without privacy, it is much harder for dissent to flourish or for democracy to remain healthy and robust, and as such there must be a limit placed on the ability of the state to know things about us or to subject us to surveillance.[61]

Recognizing the political value of privacy also has other implications. Once we start to think about privacy as an essential precursor to the exercise of political rights, it becomes quite natural to question why the state is allowed to engage in surveillance at all. For the most part, surveillance by the state is typically justified by reference either to safety and security or to an attempt to improve the efficiency of public service delivery. We need surveillance, we are told on the one hand, in order for the state to be able to protect us from crime and terrorism, and to ensure that our borders are

60. Emerson, T.I. (1970), *The System of Freedom of Expression* (Random House: New York): 546.

61. See also Goold, B.J. (2009) "Surveillance and the Political Value of Privacy", *Amsterdam Law Forum* 1(4) August. Note that Ruth Gavison has made an interesting argument about the political importance of privacy that draws in part on ideas about the relationship between privacy and the development of the self. According to Giavison, privacy is also important to democratic government because "it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy." See: Gavison, R. (1980), "Privacy and the Limits of Law", *Yale Law Journal* 89: 455.

secure. Equally, we are also told that the state needs to collect personal information in order to ensure that we receive the benefits to which we are entitled, and to ensure that others do not try to defraud the state or get more than they should.

These are, of course, justifications that are as old as the state itself. Some of the earliest forms of state surveillance – such as the census – were justified on exactly these grounds. Equally, the introduction of passports, border controls, and the 19th century introduction of the bureaucratic file can all be seen as evolutions in the surveillance apparatus of the state, and as part of its efforts to provide greater security and more efficient and equitable services for its citizens. There is, of course, another way of looking at these justifications – namely as merely excuses for an expansion in state power. As many commentators have rightly observed, one of the features of the late-modern state is the realization on the part of governments that the ability to govern is in many ways dependent on the ability to monitor and acquire information about the public. This realization has been taken to extremes in a number of authoritarian states, particularly in the last fifty years. One only needs to reflect on the example of East Germany to be reminded how the argument for surveillance based on security can be turned back on the population that such measures are supposed to protect, and be used as a means of suppressing dissent and denying basic rights and freedoms. To my mind, one of the advantages of focusing on the political value of privacy in our discussions of surveillance is that it places the responsibility back on the state to explain and justify why surveillance is needed, and why any expansion in the surveillance architecture of the state should be tolerated or accepted.

2 How much surveillance is too much?

This all of course leads us back to the question at the beginning of this chapter, namely: how much state surveillance is too much? Perhaps the first and most obvious response to this question is that the state should at all times be sensitive to the fact that privacy is a basic human right, and that it is essential to personal development, individual dignity, and the ability of citizens to engage in meaningful social relationships. We have, in the words of Article 8 of the European Convention on Human Rights, a right to "respect for private and family life" because without such privacy we can never truly flourish. Going further, however, the state must also recognize that privacy has an important role to play in the promotion of democracy and the meaningful exercise of a number of other fundamental rights, such as the right to

freedom of expression and freedom of association. As a consequence, all state surveillance activities – regardless of whether the justification for such measures is the prevention of crime, the promotion of security, or even the efficient delivery of public services – must be evaluated in terms of the potential cost to political freedom and the maintenance of democratic values. This is particularly important given that, as Bennett and Raab rightly point out, the social value of privacy can be easily forgotten in our efforts to protect individuals from the personal effects of overzealous state surveillance:

> The social value [of privacy] is underpowered and survives precariously unless it can be specifically reinforced by a change in the privacy culture, for it is powerfully challenged by the legacy of the conventional paradigm and by forces that tend to the protection of privacy seen as an individual value, if a value at all.[62]

Put simply, there is little point in the state seeking to create a society free from crime and secure against terrorist threats if the overall cost is a severe loss of personal freedom and the introduction of Orwellian, authoritarian government. Put more simply, we know that there is too much surveillance when citizens begin to fear the surveillance activities of the state, and no longer feel free to exercise their lawful rights for fear of unwanted scrutiny and possible censure.

Finally, given that a democratic state can only be legitimate and thrive in an atmosphere of mutual trust between government and governed, it follows that any surveillance measure that threatens to erode or destroy that trust must be resisted, or at the very least its potential costs and benefits carefully considered. As anyone who has lived in a state where the rule of law is not taken for granted – and where there is little in the way of institutional trust – will be able to tell you, confidence in the institutions of government is hard won and easily lost.[63] For this reason, the presumption should be that any surveillance measure which is directed at the public at large – and which treats all citizens as potential threats or management challenges – has prima facie gone a step too far, and demands an extra-ordinary justification. According to this view, mass state surveillance should always be the exception and never the rule.

62. Bennett, C. and Raab, C. (2006) *The Governance of Privacy: Policy Instruments in Global Perspective* (MIT Press: Cambridge, Mass): 42.
63. For more on the relationship between surveillance and institutional trust, see: Goold, B.J. "Technologies of Surveillance and the Erosion of Institutional Trust" in K Franko Aas, H. Oppen Gundhus, and H. Mork Lomell (2008) *Technologies of inSecurity* (Routledge: Oxford).

In short, we will know when there is too much state surveillance when political rights and democratic participation are threatened, and it is at this point that the citizenry should demand that the state pulls back and accepts that there are times when it is better for the government to know less rather than more. Of course, some will say that we have already passed this point, that the current surveillance infrastructure already poses a serious threat to democracy and the rule of law. If this is true, then there is an even more pressing need for us to demand a halt to any further expansion in the surveillance apparatus of the state, and a fundamental reappraisal of the state's use of technologies like public area CCTV.

Finally, I want to conclude by saying a little more about the role of law in the regulation of state surveillance, and the possibility of developing regulatory structures that can effectively protect individual and collective privacy from the overzealous – if sometimes well-meaning – state. Clearly, law has a central role to play in defining the limits of individual privacy, and in setting the standards which both private and public sector actors must meet when they engage in any form of surveillance. Yet it would be a mistake to put too much faith in the capacity of the law to hold back the state, in part because of the general problems associated with regulating new technologies. By its very nature, law and law-making is conservative, slow, and incremental. Statutes, by-laws, codes of practice, and judicial decisions all take time to craft, and even the most progressive and forward-looking laws can quickly become outdated in the face of rapid technological and social change.[64]

As a consequence, effective control of state surveillance requires a multi-pronged approach to regulation that draws not only on substantive rules and the threat of sanctions, but also gives a prominent role to technological solutions. Although privacy enhancing technologies are not always appropriate and effective, their importance has to date been largely overlooked by civil libertarians and privacy advocates concerned about the Orwellian instincts of the modern state. Yet by forcing governments to accept that certain surveillance technologies – such as CCTV and data mining software – must incorporate privacy enhancing restrictions and be designed and implemented with privacy in mind, we both guard against the dangers of function creep and the

64. For a more detailed account of the challenges associated with regulating surveillance technologies, see: Goold, B.J. "Building it In: The Role of Privacy Enhancing Technologies (PETS) in the Regulation of Surveillance and Data Protection" in B.J. Goold and D Neyland, (2009), *New Directions in Surveillance and Privacy* (Willan: Cullompton); and Bennett, C. and Raab, C. (2006), *The Governance of Privacy: Policy Instruments in Global Perspective* (MIT Press: Cambridge, Mass).

possibility of benign or well-intentioned programs being co-opted for dangerous purposes. Given the likely audience for this book, this seems like an appropriate message to end on. Lawyers and policy-makers must, I believe, draw on the expertise of the information technology sector to develop a new, comprehensive system of regulation that is capable of protecting the individual from the overzealous surveillance state, and preserving the delicate balance of trust, openness, and accountability between the state and the individual that makes it possible for modern democracies to function and prosper.