

The Peter A. Allard School of Law Allard Research Commons

Faculty Publications

Faculty Scholarship

2009

Surveillance and the Political Value of Privacy

Benjamin J. Goold

Allard School of Law at the University of British Columbia, goold@allard.ubc.ca

Follow this and additional works at: http://commons.allard.ubc.ca/fac_pubs

 Part of the [National Security Law Commons](#), and the [Privacy Law Commons](#)

Citation Details

Benjamin J Goold, "Surveillance and the Political Value of Privacy" (2009) 1:4 Amsterdam LF 3.

This Article is brought to you for free and open access by the Faculty Scholarship at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

SURVEILLANCE AND THE POLITICAL VALUE OF PRIVACY

*Benjamin J Goold**

Of all the rights typically enshrined in domestic and international human rights instruments, privacy is perhaps one of the most problematic.¹ Although few people would suggest that privacy does not deserve to be protected as a right, many nonetheless find it difficult to explain why it should enjoy the same status as the right to free speech or freedom of religion. As a consequence, while academic lawyers, sociologists, and philosophers continue to engage in increasingly rarefied debates about the meaning and limits of privacy, for the public at large it remains one of the most difficult rights to understand.

Given that the last twenty years has seen a profound expansion in the apparatus of surveillance in Europe and North America,² this continuing disjuncture between the level of academic and public interest in privacy is deeply worrying. A public that is unable to understand why privacy is important – or which lacks the conceptual tools necessary to engage in meaningful debates about its value – is likely to be particularly susceptible to arguments that privacy should be curtailed. For evidence of this, one only has to reflect on how quickly advocates of increased surveillance invoke the mantra that ‘those who have nothing to hide have nothing to fear.’ Despite being deeply flawed, it is an argument that has proved to be remarkably effective in countries like Britain and the United States, and one that civil libertarians and privacy advocates have had considerable difficulty countering. Faced with politicians repeatedly reminding them of the grave threat posed by criminals and terrorists, it is hardly surprising that the public is attracted to the supposed benefits of surveillance, and left cold by arguments rooted in the need to ‘preserve individual autonomy’ or ‘protect our dignity.’

In part, the problem here is one of language. Explaining why privacy is important in terms that a lay member of the public is likely to engage with is difficult, mostly because privacy is an inherently complex concept. Although it is possible to talk of privacy as simply the right to be ‘let alone’,³ its status as a right derives primarily from its relationship to ideas of autonomy and self-determination. Privacy is valuable because it is necessary for the proper

* *Dr Benjamin J Goold is a Lecturer in Law at the University of Oxford, and Fellow and Tutor in Law at Somerville College. He is also a member of the Oxford Centre for Criminology.*

¹ A right to respect for privacy and family life is, for example, set out in Article 8(1) of the European Convention on Human Rights, which states that: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

² For an account of the modern expansion in surveillance, see: D. Lyon, *Surveillance Society: Monitoring Everyday Life*, Buckingham: Open University Press 2001.

³ S.D. Warren and L.D. Brandeis, ‘The Right to Privacy’, *Harvard Law Review* 1890-4(1), pp. 193-220.

development of the self, the establishment and control of personal identity, and the maintenance of individual dignity.⁴ Without privacy, it not only becomes harder to form valuable social relationships – relationships based on exclusivity, intimacy, and the sharing of personal information – but also to maintain a variety of social roles and identities. Privacy deserves to be protected as a right because we need it in order to live rich, fulfilling lives, lives where we can simultaneously play the role of friend, colleague, parent and citizen without having the boundaries between these different and often conflicting identities breached without our consent.

Because, however, none of these ideas are easily reduced to newspaper sound bites or capable of being adequately conveyed in a televised debate, they are not immediately familiar to the public. If asked ‘why is privacy important’, the average person on the street is unlikely to suddenly appeal to notions of identity and autonomy, and as such may struggle to explain why privacy deserves to be protected at all. It is for this reason that many privacy advocates have continued to evoke the nightmarish imagery of George Orwell’s ‘1984’ in their efforts to get the public to take privacy seriously. Aside from the fact that such imagery is both familiar and dramatic, it has the advantage of being sufficiently extreme to scare even the most complacent individual into at least thinking about the possible implications of technologies like CCTV and computerised databases. Yet it can be argued that even this rhetorical play is beginning to lose some of its power. As 1984 slips further into the past and the totalitarian future imagined by Orwell continues to remain a fiction rather than a reality, there are signs that such warnings are beginning to fall on deaf ears. Although surveillance has become ubiquitous, it has also become increasingly decentralised and ambiguous. In a world of online shopping, social networking websites, and GPS enabled smart phones, it is hard to point to a single Big Brother who fully embodies our fears about the loss of privacy and can serve as a focus for acts of resistance.

As important as the problem of language may be, however, there is another reason why privacy has failed to capture the public imagination. Although academics and civil liberties groups have been right to draw attention to the importance of privacy to the individual, it can be argued that they have done so at the expense of developing a fully realised account of the political value of privacy. While it is true that privacy is important for the exercise of personal autonomy and the maintenance of dignity, we also need a measure of privacy in order to enjoy a range of other, more obviously political rights. It is hard to imagine, for example, being able to enjoy freedom of expression, freedom of association, or freedom of religion without an accompanying right to privacy. Indeed, one of the greatest dangers of unfettered mass surveillance is the potential chilling effect on political discourse, and on the ability of groups to express their views through protest and other forms of

⁴ B.J. Goold, ‘Privacy, Identity and Security’ in B.J. Goold and L. Lazarus, *Security and Human Rights*, Oxford: Hart Publishing 2007, pp. 61-63.

peaceful civil action. By ensuring that there is a limit on what the state can reasonably expect to know about us, privacy not only helps to protect individual autonomy, but also ensures that we are free to use that autonomy in the exercise of other fundamental rights.

Looked at from this perspective, privacy becomes both easier to understand and defend. By focusing on the political rather than the individual dimension of privacy, we not only free ourselves from complex discussions of individual autonomy and dignity, but also ensure that the relationship between the individual and the state remains at the heart of any debate about privacy and surveillance. Without privacy, it is much harder for dissent to flourish or for democracy to remain healthy and robust. Equally, without privacy the individual is always at the mercy of the state, forced to explain why the government should not know something rather than being in the position to demand why questions are being asked in the first place. Emphasising this dimension of privacy also has the advantage of focusing the public's attention on the political dangers of surveillance, dangers that can be explained in terms that are familiar and easily understandable, even to those who have no great interest in privacy per se. We should resist the spread of surveillance not because we have something to hide, but because it is indicative of an expansion of state power. 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 bureaucracy and bigger, more intrusive government.

Of course, none of this should be taken as rejection of individualistic conceptions of privacy. Clearly, privacy is first and foremost a personal concern, and deserves to be treated as an individual right. Yet if we are to stem the growing tide of surveillance, civil libertarians and privacy advocates need to broaden their campaign of public education and do more to emphasise the political value of privacy. In particular, they must constantly remind government and the general public that in order for democracy to flourish, individuals must feel free to choose whom they associate with, whom they speak to, and who hears what they say, safe in the knowledge that such choices are free from routine scrutiny by the state. While it is true that privacy is one of the most difficult rights to define and appreciate, it is also one of the most important. Without privacy, many of the other rights that individuals and societies regard as fundamental are left even more vulnerable to the forces of right-scepticism, the demands of security, and the authoritarian instincts of over-zealous governments. If for no other reason, this should be enough for us to be worried about the spread of surveillance, and for the public to reject any suggestion that only those who have something to hide have anything to fear from technologies such as CCTV, DNA profiling, and data mining. Regardless of whether we have something to hide or not, in a world in which the possession and control of information is increasingly the basis of economic and political power, we should all be

demanding more privacy – not just to protect ourselves as individuals, but also to ensure that everyone is able to enjoy the rights and freedoms we have come to associate with life in modern, liberal democratic states.

As a final point, it is perhaps worth returning to the role of academics in all of this. While it might be unreasonable to expect legal scholars, sociologists, and philosophers to take the lead in public debates on surveillance, there is little doubt that academics could do more to help improve the public's understanding of the value of privacy. Given there is an urgent need for civil libertarians and privacy advocates to find a new 'vocabulary of privacy', any assistance on this front is likely to be gratefully received. Although there are still many more papers and books to be written on the subject of privacy, unless we find some way of capturing the public's collective imagination and convincing ordinary people that privacy is something worth fighting for, there is a very real danger that it will soon become a thing of the past.