Foreword to the 'Privacy and Surveillance Conference Special Issue' of the Birkbeck Law Review

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On a beautiful, late-October day in Bloomsbury, London, privacy and surveillance scholars gathered together at Birkbeck, University of London to deliberate and define the threats (and a few opportunities) presented by the developments and revelations of the use of state surveillance and 'inverse surveillance' against, and by, citizens, globally.

Over the following two days of discussions, and through the course of the works collected in this issue, featuring some strident, wide-ranging speeches by privacy law advocates, and an even greater number of nuanced dissections of surveillance laws in particular panel papers, a bittersweet note was struck. Most of us present at the conference concurred that while the conference theme was an extremely timely one, in a post-Snowden or post-Wikileaks era, there is a paucity of checks and balances on state surveillance culture in many jurisdictions. This, we now know, indicates less and less attention to the rule of law in jurisdictions that have championed the principle of legality and the importance of due process than we might imagine.

In the keynote speech that opened the conference, Dr Mark Ellis[1] offered up an insightful account of everyday surveillance, and the intrinsic 'function creep' of surveillance technology—to which there must always be a recourse in the form of the law, and legal advocacy. With regard to the conference theme and the publication to follow, Dr Ellis invoked memories of George Orwell's fictional *1984* society,

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[1] Executive Director of the International Bar Association (IBA): 'Losing Our Right to Privacy: How Far is Too Far?' (2014) 2(2) Birkbeck Law Review 173.

thus emphasizing the fundamental importance of discussing such topics from a legal, academic and critical perspective.

Indeed, and only recently, the United Kingdom's Information Commissioners Office (ICO) released the new Code of Practice.[2] Dr Ellis' discussion of an ever-intrusive CCTV surveillance society therefore serves as a link to the commissioners report that sought to develop organizational compliance under the Data Protection Act 1998 in respect of surveillance cameras and their use of personal and private information and data:

> Surveillance cameras are no longer a passive technology that only records and retains images, but is now a proactive one that can be used to identify people of interest and keep detailed records of people's activities, such as with ANPR cameras. The use of surveillance cameras in this way has aroused public concern due to the technology no longer being used solely to keep people and their property safe, but increasingly being used to collect evidence to inform other decisions, such as the eligibility of a child to attend a school in a particular area.[3]

The ICO report sets the groundwork for this summary of the conference and lays the foundation for the ten publications that follow in this issue.

The first conference panel, on the topic of 'Surveillance and Control Society: A Philosophical Perspective', featured a mixture of theoretical and case-study approaches by Amy Corcoran,[4] Raphael Ramos Monteiro de Souza,[5] and Professors David Rosen and Aaron

[2] Information Commissioner's Office, 'In the Picture: A Data Protection Code of Practice for Surveillance Cameras and Personal Information' (*ICO*, 15 October 2014).

[3] ibid 3.

[4] Birkbeck, University of London, UK: 'Is Foucault's Concept of the Panopticon an Outdated One for Understanding Modern Surveillance Techniques' (forthcoming issue).

[5] Federal University of Rio de Janeiro, National Law School, Brazil: 'Inverse Surveillance, Activist Journalism and Brazil's Protests: The Mídia Ninja Case' (2014) 2(2) Birkbeck Law Review 211.

Santesso.[6] The presenters, and subsequent authors, discussed and touched upon questions that sought to examine the ways we might view surveillance. While the authors approached the topic from a verity of perspectives—post panopticon society, inverse surveillance and surveillance and education— the authors seemed to agree that in a society as complex as ours, it is important to consider the multiplicity of effects that surveillance has and the implications such effects have on society as a whole.

In the second keynote speech of the conference, Professor Mireille Hildebrandt asked vital questions that cut to the core of the debate over the ramifications for personal privacy posed by computational power and statistical prediction of behaviours.[7] Here we see the risks posed by privacy being 'designed in' as much as 'designed out'. This special issue also sees a very relevant contribution to this area of research in the form of an article by John S Atkinson[8] that investigates how the complex effects of digital evidence on the current (and future) legal system have created the present privacy and surveillance status quo.

The second panel, with the title 'Privacy v Technology: Human Autonomy in a Technologically-Enhanced World', saw Micheal Vonn[9] present a superb paper on the obfuscation and conflation of privacy and the public interest in the e-health context, and attendant risks to civil liberties. This echoed Dr Mark Ellis' question: how far is to far? and sought to disclose the subsequent damage that can occur from the computation and centralization of medical records.

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[6] Trinity College, Hartford, USA, and Georgia Institute of Technology, USA: 'Surveillance and Education' (2014) 2(2) Birkbeck Law Review 229.

[7] See Mireille Hildebrandt and Katja de Vries (eds), *Privacy, Due Process and the Computational Turn: The Philosophy of Law Meets the Philosophy of Technology* (Routledge 2013).

[8] PhD candidate in Security and Crime Science, University College London, UK: 'Proof is Not Binary: The Pace and Complexity of Computer Systems and the Challenges Digital Evidence Poses to the Legal System' (2014) 2(2) Birkbeck Law Review 245.

[9] Policy Director, British Colombia Civil Liberties Association, Canada: 'Citizens @ the Fringes: How e-Government Initiatives are Displacing Citizens' Rights and Participation' (2014) 2(2) Birkbeck Law Review 191.

Considering the evident damage that the invasion of privacy can cause—as per Professors Rosen and Santesso's analysis of the relationship between the right to privacy and the law of tort—Dr Gloria González Fuster[10] led the audience through a fascinating evaluation of the intersections and developments in European laws on privacy and data protection law as held by both the Council of Europe's Strasbourg court and the European Union institutions. Dr Fuster's paper contributes to the privacy literature by discussing 'The convoluted case law of the EU Court of Justice' on privacy, data protection and the recent decision on the so-called 'right to be forgotten'.[11]

Dr Arne Hintz,[12] analysed the privacy risks posed by allowing for the less formal regulation of online communication by commercial entities in a post-Snowden world of state intrusion and surveillance facilitation through the spread of e-commerce and global social media on the web.

In the third keynote speech Micheal Vonn took to the conference stage once more to deliver her insights into the risks posed constitutionally by systems of secret courts and 'special advocates' in common law jurisdictions. The third panel of papers, with the theme of 'Confronting Surveillance: Societal Implications' built upon this erudite start to the last section of the conference.

I presented my research on stigma and difficulties with 'forgetting' criminality information,[13] while Dr Natalina Stamile[14] addressed

[10] Postdoctoral Researcher at the Interdisciplinary Research Group on Law, Science, Technology and Society (LSTS), Vrije Universiteit Brussel, Belgium: 'Fighting for Your Right to What Exactly? The Convoluted Case Law of the EU Court of Justice on Privacy and/or Personal Data Protection' (2014) 2(2) Birkbeck Law Review 263.

[11] ibid.

[12] University of Cardiff, UK: 'Outsourcing Surveillance—Privatising Policy: Communications Regulation by Commercial Intermediaries' (2014) 2(2) Birkbeck Law Review 349.

[13] Senior Lecturer in Law, Sheffield Hallam University, UK: 'The Surveillance of 'Risky Subjects': Adiaphorisation through Criminal Records, and Contested Narratives of Stigma' (2014) 2(2) Birkbeck Law Review 279.

[14] University of Catanzaro, Italy: 'Beyond Possessive Individualism: The Vividown Case' (not published in this issue).

issues of stigma and the risk of harm that potentially arises from a lawless, bullying Internet—and the difficulties in regulating this netscape. The last formal presentation at the conference was from Bernard Keenan, who shared his work on the application of elements of systems theory to problems of privacy, transparency and the regulation of 'closed material proceedings' and surveillance technologies.[15]

As Dr Mark Ellis describes in his speech that follows this introduction, we live in uncertain times and our right to privacy is forever being approached upon by the intrusive glare of the modern surveillance state. In some ways, the UK parliament recognizes that their may indeed be a problem. Though Parliament have yet to respond to a UK Law Commission report on some of the vagaries and inconsistencies in the law and practice relating to data sharing between public bodies as part of that broader state surveillance.[16]

Authors' research included in this issue, such as Rebecca Wong's,[17] into the development of social media and data protection legislation becomes ever-more relevant. While the conference presenters and papers highlighted and critiqued the traditional dichotomy that exists between a citizen's right to privacy and the state's use of surveillance technologies, this volume reminds us that further research needs to go into the modernity of privacy and surveillance, such as, the development of organizational compliance under the Data Protection Act 1998 (in respect of surveillance cameras and their use of personal information).

In order to properly introduce the issue that follows, it should be said that not only was this conference a timely event—on November 7th 2014 *The Guardian* reported that the UK intelligence agencies have been exposed for intruding on the private conversations

[15] London School of Economics, UK: 'Contingency and Surveillance: Framing the Risk of Taking Risks' (2014) 2(2) Birkbeck Law Review 293.

[16] See: Law Commission, *Data Sharing Between Public Bodies: A Consultation Paper* (Law Comm CP No 214, 2013); and Law Commission, *Data Sharing Between Public Bodies: A Scoping Report* (Law Comm No 351, 2014).

[17] Senior Lecturer, Nottingham Law School, UK: 'Social Networking: The Application of the Data Protection Framework Revisited' (2014) 2(2) Birkbeck Law Review 317.

between lawyers and clients[18]—but it also demonstrates the need for substantial research and scholarship in the areas surrounding the legality of privacy and surveillance.[19] It appears that legal institutions are struggling to keep pace with the modern technological age, and in the age of CCTV, smart data and computation—in an ever more intrusive word—it is important that we evaluate technological developments and build adequate legal and institutional frameworks. This issue, and the conference that preceded it, aims at doing just that, and in the ten papers that follow, the authors will evaluate and critique the modern conception of privacy and surveillance.

A last point: my heartfelt thanks to Edward Chin, Devin Frank, Nana Anowa Hughes and others at Birkbeck for organising such a wonderful conference. Additionally, a special thank you to Fraser Alcorn, Max Byrne, Simon Thorpe and Marek Marczynski for their editorial work and for inviting me to provide a foreword to this special issue of the much-needed, student-led Birkbeck Law Review.

Jamie Grace

Sheffield, 21st November 2014

[18] Owen Bowcott 'UK Intelligence Agencies Spying on Lawyers in Sensitive Security Cases' *The Guardian* (London, November 7 2014) <www.theguardian.com/world/2014/nov/06/intelligence-agencies-lawyer-client-abdel-hakim-belhaj-mi5-mi6-gchq> accessed 20 November 2014.

[19] See, e.g., Hildebrandt and de Vries (n 7).