

Justifying Surveillance

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KEVIN MACNISH, JAN 20 2015

Surveillance is not a new phenomenon. The manner in which we carry out surveillance, though, is almost wholly new. The digital information that we produce on a daily basis is astounding. From the moment I switch on my cell phone, to catching a bus with CCTV installed, to using my credit card for a purchase, to browsing for a new book online, to catching up with a novel on my e-reader before going to sleep. At almost every stage of my day, with almost everything that I do, I leave a digital trail in my wake.

The information that is contained in this trail is profound. From my visits to the doctor (tracked by cell phone location) to the pharmacy (tracked by credit card usage) to what I bought at the pharmacy (tracked by loyalty cards), my medical history can be established. From the number and frequency of phone calls made and texts sent to a phone that isn't my partner's, it is plausible to conclude that I am having an affair, without ever having to listen to a word I say. Again, the location of my cell phone on a Friday, Saturday or Sunday can indicate whether I engage in regular acts of worship and the religion to which I belong. All of these are accessible through access to my digital trail, but I might equally make them freely available myself on my Twitter feed or as a status update in Facebook. At the same time, all of these have been used as grounds in the past to persecute groups and individuals in society.

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We typically turn to human rights as a means of protecting the individual in the face of government abuse. In the case of surveillance the protection that we often seek is in the form of privacy, recognized as a human right in the Universal Declaration of Human Rights (1948) and the European Convention on Human Rights (1950). However, neither of these treats that right as absolute. Privacy, while a fundamental interest for every person, can be "trumped" by overriding concerns. It would seem ridiculous, for example, for the person caught in a police bust wiring up a bomb in a suitcase to complain that his right to privacy had been violated, or for the serial rapist to seek redress for his browsing history having been made available to the police, enabling them to gain the evidence that he knew each of his victims.

How then should we approach surveillance? It is clear that it can be used to good ends, to protect the vulnerable and allow the smooth functioning of society. At the same time it is also ripe for abuse. Information can be gleaned about citizens and consumers without their consent. Accurate depictions can be derived as to our lifestyles, our political and religious opinions, and our habits: information that can be used against citizens by governments or corporations wishing to exercise control. Even if that control is never exercised, the mere potential for its use gives the surveillance a chilling effect, deterring people from engaging in politics or sharing their views on government.

To determine when surveillance is a justified act we need to go beyond wearied tropes such as "if you've done nothing wrong then you have nothing to hide" (claimed by people who clearly never close the curtains when getting undressed at night) or "you have to sacrifice some privacy in order to gain security" (seemingly oblivious to the fact that we value privacy in part because it affords us a degree of security). We also need to beware of restricting ourselves to social critique, important as this is. Instead we need to find a more fine-grained approach to judging individual acts of surveillance, which is what I propose to do in the following.

Ethical Surveillance

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I believe that a list of eight principles can be employed to determine the ethical acceptability of acts of surveillance. In brief, these principles are as follows: a just cause, a right intention, the correct authority, a declaration of the act, a chance of success, the necessity of the act, the proportionality of the act, and that the act be discriminating. Some readers might note a lack of originality in this list, drawn as it is from contemporary discussions of the just war tradition. I will address this towards the end of this article.

Just Cause

It seems uncontroversial that surveillance should have a reason. Arbitrary invasions of privacy *are* forbidden by human rights law. What precisely counts as a good, or just reason for surveillance is less clear cut. Part of the difficulty here is the contextual nature of surveillance: a grounded suspicion that I am having an affair may justify my partner monitoring my behaviour, but not the state or my employer; a grounded suspicion that I am shirking work may justify my employer monitoring my behaviour, but not the state. By contrast, a grounded suspicion that I am engaged in an act of terrorism that will lead to the deaths of a large number of people *would* justify the state in monitoring my activities.

Right Intention

Just because a surveillant has a just cause, it does not follow that this is the reason for the surveillance. Thinkers from Arendt to Žižek have pointed out the tendency of totalitarian regimes to gather information on citizens that might be used in the future if the time comes to quiet a particular citizen. I may be caught on camera speeding today, but only prosecuted for this in five years' time after I have published an article criticising the government. It is important then that the reason given for the surveillance is not a smokescreen, but is matched by the intention for carrying out the surveillance.

Authority

It would seem excessively restrictive to argue that surveillance should only be carried out by those in authority. What of *sousveillance*, the act of the people monitoring the empowered elite? Nonetheless, while a requirement for authority would be too restrictive, the value of authority should not be dismissed lightly. For many years in the UK private investigators have been able to practice without a license. Yet in the absence of a license, what is there to prevent a person leaving prison for stalking one day and setting herself up as a private investigator the next?

Declaration

As with authority, a requirement to make a declaration of the surveillance would seem to be overly restrictive, if not counter-intuitive. To inform the person under surveillance that this is the case would in many instances cause that person to change the way they act and so defeat the purpose of the surveillance. However, that a declaration be made to someone is important. Police require a warrant, and with good reason, before tapping a person's phone, or placing a tracking device on their vehicle. Declaration to an authority presents an opportunity for accountability on the part of the surveillant, and a further protection against abuse.

Success

If a surveillance operation does not stand a chance of success, of meeting the justified cause, then it would be gratuitous to carry it out. People stand to be harmed by the surveillance by at least having their privacy invaded, a harm which should not be undertaken lightly. Then there are the further harms such as chilling effect, abuse, and social conformity that can result from surveillance.

Necessity

Similarly, if there are less harmful ways of gaining the information sought by surveillance these should be undertaken first. Why monitor a person's phone when they would willingly give the information sought? At the same time, if

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questioning a person is likely to warn them that they are subject to suspicion and could act to tip them off to possible surveillance then this would be counter-productive.

Proportionality

The requirement that harms be in proportion to the occasioning cause is common in ethics, as it is in the law of punishment. Just as it was Draconian to deport people to Australia for stealing a loaf of bread in Victorian England, it would be wrong to subject people to intensive and intrusive surveillance on the basis that they may have been involved in shoplifting. By the same token, it would be equally inappropriate to subject a person, known to have first hand involvement in bombing campaigns, to incidental CCTV surveillance when he is in public if the state knows his phone number.

Discrimination

Just as the reasons for surveillance should not be arbitrary, so should the choice of people against whom surveillance is carried out not be arbitrary. Indiscriminate, or untargeted, surveillance treats all people as equally liable for the harms rendered by surveillance, irrespective of anything they may have done. This fosters suspicion and distrust which is harmful to society.

Surveillance and War

I noted above that these principles are derived from the just war tradition, a discourse on the ethics of war which stretches back at least 3,000 years to biblical strictures to spare women and children during the sacking of (some) cities. While I do not want to suggest that there are similarities between surveillance and war, I do want to argue that there are similarities between the ethics of surveillance and the ethics of war. In both cases there is an acceptance of a degree of harm and an acceptance also of the need to limit that harm as much as is possible while still allowing the harm to occur.

Conclusion

I want to argue that surveillance can be justified. I don't think that this is too controversial for anyone who takes a moment to consider the implications of finding *all* surveillance to be unethical. In virtually all theories of political philosophy, the sovereign retains the prerogative, and the obligation, to protect its citizens, and surveillance is one means of achieving this. The challenge lies in not justifying surveillance as such, but rather in justifying particular acts of surveillance, and in determining why it is that some such acts strike us as eminently sensible, while others are morally reprehensible.

In suggesting the principles above I have tried to lay out a framework by which these acts can be judged. In their light we can see that the mass collection of cell phone meta-data is ethically questionable: it is indiscriminate in treating all people as liable for surveillance irrespective of their actions. We can likewise see that surveillance carried out against dissidents is unjustified for the very different reason that it has no just cause (or, that it has a just cause, but one which is being used as a smokescreen for the underlying intention of prosecuting dissent). Finally, we can see why the unwarranted tapping of a person's phone is problematic: there may be grounds for suspecting that person of a grave wrongdoing, but without declaration to a suitable authority, the surveillant acts without accountability. In this way we have a more finely-grained approach to understanding ethical surveillance than some of the more popular aphorisms discussed above, and a means of intelligently discussing the problems that surveillance raises in society.

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