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The Privacy Question

The theoretical and practical problems with the Fourth Amendment raise profound questions about privacy itself. To aid our understanding, we like to draw distinctions and categorize, but modern American intelligence operations and law enforcement present complications for any simple analysis. For Fourth Amendment originalists and propertarians, the appropriateness of searches often turns on whether they intrude on private-property rights. For libertarian critics of the surveillance state, the most relevant distinction is often between government and private-sector data collection. For national security hawks, foreign and incidental domestic intelligence collection for diplomatic purposes belongs in a category separate from law enforcement. For others, surveillance in the name of national security poses more problems than that done in the name of criminal justice, and only those actually suspected of crime deserve government monitoring. For conservatives, government gathering of financial information violates core freedoms, whereas intrusions on bodily autonomy have been improperly deemed unconstitutional only through the creation of artificial "privacy rights." For liberals, the modern administrative state's accumulation of personal data is less bothersome than are restrictions on reproductive choices.

The twenty-first century poses challenges to such clean delineations, if they ever were valid. The private sector has accumulated vast amounts of personal data, which the government has all too happily jumped in to collect.[1] Whereas any one piece of data might be trivial and not represent a violation of property

or even privacy in itself, a critical amount of such data can become far more important than the sum of its parts.[2] Complicating the problem, intelligence agencies such as the NSA will almost surely not use the data principally to support arrests and incarceration. Historically, one dangerous power of state surveillance has resided not in its infliction of physical coercion or trespass but in its use of information to blackmail and engage in social disruption. The legal theories that protect against such abuses cannot therefore rely primarily on due process criminal justice guarantees.

Encouraged by the precedent of *Katz v. United States*, many legal theorists have championed the doctrine of "informational privacy."[3] Our right to privacy, they maintain, resides not so much in our control over our physical space but in the control we have over how information about us is disseminated. But the attempt to control personal information through legal protection raises a host of profound problems.[4]

Moreover, if collecting information on people itself constitutes some sort of violation based on individual rather than civic rights, then the entire state intelligence apparatus is anathema to human freedom. Government spying no more violates the *natural rights* or *property rights* of American citizens than it violates such rights of foreigners. But unlike its practice in setting detention policy, U.S. law tends to recognize no legal rights of non-Americans living outside the United States. In a perverse sense, this distinction serves to recognize that accumulating data is not in itself an act of physical intrusion or violence. And yet the implication for nationalists to consider is that when a foreign government spies on them, it too is not necessarily committing a violation. This raises concerns about foreign governments spying on America and sharing the information with the U.S. government without any constitutional violations taking place.

Accumulating information can cause as much harm as physical trespass and can bolster state power just as readily. Indeed, the world of physical scarcity imposes limits on government's capacity to monitor, whereas the digital era has made more possible than ever a total information state. Whereas most people would prefer mild nonphysical surveillance to, say, incarceration, the calculation changes depending on the severity of the surveillance. As Erin Murphy suggests, most of us would prefer sitting in jail for one day to facing a lifetime of careful monitoring, even if the latter did not involve physical intrusion.[5]

Modern technology appears to introduce both opportunities and threats that can change humanity qualitatively and forever.[6] In assessing this duality and warning about the rise of what he called technopoly, Neil Postman wrote in 1992 that technology "creates a culture without a moral foundation. . . . Technology, in sum, is both friend and enemy."[7] One day before too long, the government might have technologies that can approximate the thoughts and

feelings of people without touching them. Any attempt to restrain government snooping into personal lives must go far beyond the conceptions of private property that motivated Taft in his 1928 *Olmstead* decision.

The private sector conceivably will develop invasive capabilities as well. Already, businesses track human movement and activity in a thousand ways. Online advertisement tracking is a multibillion-dollar industry. A 2012 *Wall Street Journal* study found that 75 percent of the most popular one thousand websites featured social network codes that could match web users' names with their browsing tendencies.[8] Major web companies have faced legal problems for divulging sensitive information about users' contacts without fair warning.[9] Even putting aside the government's role, the sheer fact of the information gathering will change humanity forever. Every day, we each generate hundreds of documents and appear in many captured images and recordings just through our normal activity. This is unprecedented, even revolutionary.

In this world, the enemy of privacy is no longer a central government bent on omniscience but the consequence of a vast web of information-gathering bureaucracies in and out of the public sphere. Accordingly, Daniel Solove believes that for many privacy concerns, the conceptual model of Orwellianism has been overwrought. For many depredations, we should instead rely on the metaphor of Kafka, as the threats to privacy come not so much from a unified totalitarian state as from an impersonal bureaucracy that often lacks intentionality.[10] In this atmosphere, sometimes statutory law actually serves to protect privacy against private depredations, even if on balance one finds government the greater threat.

Decentralized surveillance, some of it directed against government abuse, has arisen and continues to expand. The increasingly ubiquitous reality of *sousveillance*—"inverse surveillance," the dispersed monitoring of the public sphere by private individuals with portable recording devices—at least in and of itself would seem to compromise the privacy of the public sphere as much of a lot of government monitoring does, and yet it can also become one of the main tools in fighting back against government surveillance and abuse.[11] Many civil libertarians advocate sousveillance to keep police brutality in check, and in May 2014 the First Circuit Court of Appeals upheld the First Amendment right of drivers to film traffic stops.[12] But surveillance directed at police raises its own questions, as do police body cameras meant to deter and record police abuses while ironically outfitting law enforcement as permanent agents of video surveillance.[13] Furthermore, a society completely comfortable with constant private monitoring, whether by fellow bar patrons or by employers, will likely lack vigilance in stopping state surveillance. After all, information is information, and if patrons going to the local restaurant willingly expose themselves to a

thousand private cameras, they may seem to lose a bit of moral standing in condemning the handful run by the police—or in protesting police use of information captured by unwitting activists engaged in private countersurveillance.

At its core, privacy, however imperfectly defined, is a cultural value. Whatever neat and tidy legal distinctions people wish to embrace, what will govern the use of surveillance, private surveillance, and, ultimately, government surveillance is not so much legal or even property theory but a conception of privacy as rooted in something more nebulous and imperfectly defined. This is unsatisfactory for those used to rigidly defined political principles, but unfortunately the future of civilization appears to hinge on inherently ambiguous questions.

We might advance a rough sketch of a formula: the extent of government monitoring flows from societal conceptions of privacy and the inverse proportional deference to the surveillance power. In turn, that power has effects on the culture. Polls taken in 2014 show that NSA spying has affected online commerce. About half of Americans said they changed their online behavior because of the surveillance.[14] The Court and the legal community have long recognized the "chilling effect" that policies such as surveillance can have on everyday behavior.[15] The greater cultural implications of surveillance have fascinated scholars at least since 1791, the very year the Fourth Amendment came to life, when Bentham advanced the concept of the panopticon, a prison in which a warden could watch all prisoners at all times. Michel Foucault discussed the societal ramifications in *Discipline and Punish*, which has influenced the entire field of surveillance studies perhaps more than any other single work.

In American history, cultural attitudes toward privacy and surveillance tended to shift depending on national circumstance. At the Cold War's height and immediately after 9/11, Americans were less jealous of their privacy than in the 1990s and at times of relative peace. Attitudes also corresponded to the popular literature and culture. Scholars have long focused on the interplay between American cultural icons and attitudes toward intelligence, starting with Cooper's *The Spy* in 1821.[16] Throughout the twentieth century, spy novels served as an indicator of public attitudes toward social reality, institutions, government, and the law.[17]

During the early Cold War, spies were glorified in novels and radio dramas, even as fears of Gestapo and KGB-style intelligence omniscience found a hearing in such culturally influential novels as George Orwell's *Nineteen Eighty-Four*. In the late 1990s, TV and Hollywood depicted the intelligence agencies with a bit of skepticism.[18] After 9/11, a flurry of new programming appeared, seemingly romanticizing government surveillance efforts. Television shows like *NCIS* and *Criminal Minds* glorify omniscient intelligence networks. On CBS, *Person of Interest* depicts an all-knowing "machine that spies on you every hour of every day."[19]

The first few seasons portrayed the government negatively for failing to use the machine enough to catch ordinary criminals. Later seasons shifted their focus to the dangers of such intelligence gathering in anyone's hands.

Culture seems to account for differing opinions on privacy in ways more profound than differences fostered by sharp distinctions regarding physical or informational depredations. In the twentieth century, the concept of a constitutional right to privacy became associated with the left, as conservatives rejected this principle as vague and judicially activist. When it came to the wiretapping debates in *Olmstead* and *Katz*, conservatives tended to want Fourth Amendment protections to be limited to physical trespass, whereas liberals favored a more expansive understanding grounded in a "reasonable expectation" of privacy. Yet the conservatives also argued against a "right to privacy" as a way to defend some of the most invasive physical intrusions of all—government restrictions of bodily autonomy to control reproduction, contraception, and sexuality.

Before 9/11, liberals criticized conservatives including Chief Justice William Rehnquist, and Presidents Reagan and George H. W. Bush, for waging war on privacy rights. These critics saw Reagan's push for comprehensive data banks linking files of various federal departments and the IRS as part of the same agenda as the right's attacks on reproductive freedom. Their criticisms mostly rang a distinctly libertarian tone. One critic said, "The issue of privacy, in the form of the right of the individual to make personal choices[,] is central to this division" in the culture war.[20]

Conservatives lent credibility to this understanding of the division. The legal originalist stalwart Robert Bork called the "right to privacy . . . but one of a series of phrases employed by the Supreme Court to justify the creation of rights not found in the Constitution by any traditional method of interpreting a legal document."[21] Bork's words appear in a foreword to a book by Janet E. Smith, who has criticized "advocates of radical individualism" who "think that freedom or autonomy is the greatest good," blames "the modern age that puts such a premium on individualism, relativism, and skepticism" for seeing "the right to privacy to be a nearly self-evident right," and worries that a protected right to privacy might assist in the "degeneration of morality and the quality of life for children [which] can be attributed a great deal to the acceptance of contraception, abortion, assisted suicide, and homosexuality."[22]

Interestingly, Smith stresses that the right to privacy as advanced by Brandeis and Warren is "the right to have one's thoughts not published against one's will," surely a more dubious "right" by the reasoning of the trespass doctrine than the right to bodily autonomy. But she is also onto something in recognizing that the appreciation of privacy is fundamentally a cultural, even an anthropological, question, when she writes about the elusive "ultimate

philosophical justifications" for these rights, asking such good questions as "Why is it wrong to make some information about individuals public? Why should certain spaces be inviolate? Why would it be wrong for the state to try to regulate certain human actions?" She is all too correct that "to answer these questions sufficiently would require a full-blown anthropology and eventually a complete theory of the nature and purpose of the state as well."[23]

Conservatives have not been alone in criticizing the very conception of a right to privacy. Libertarians too have tended to regard the idea as in tension with property rights. Indeed, tangible property rights and broader privacy rights do in ways conflict, as hinted at earlier in the discussion of sharing information. One way to reconcile a civil libertarian urge to restrain state surveillance with propertarian values is to base the restraint in the purpose of keeping government restrained for its own sake. Like many other civil liberties and due process rights, a "right to privacy" simply becomes a prophylactic check on government power, although it does not always involve actionable rights the way property depredations do.[24] One problem, however, is that a surveillance society could emerge even independent of government. It is important to see privacy not solely in terms of "rights" but also as a more general cultural concern.

Critiques of privacy rights coming from the left tend to have a very different approach.[25] For one practical matter, an individualized grounding of privacy rights can hardly compete with the broad social aims of the surveillance state.[26] John E. McGrath finds that "the notion of privacy is functionally quite weak as a counter to the growth of surveillance," because "seemingly legitimate 'public' uses of surveillance can justify most of its intrusions."[27]

Individualists, however, could respond that then the cultural problem is one with neglected individualism in modern culture. Nevertheless, John Gilliom argues that the focus on privacy rights obscures the reality of the weakest subjects of government surveillance by ignoring the greater question of power dynamics. "In sum," writes Gilliom, "surveillance programs should not be viewed as mere techniques or tools for neutral observation." Instead, we should see them as "expressions of particular historical and cultural arrays of power." Thus, we should "resist the appeal of the privacy rights paradigm" and focus more on "the ongoing dynamics of political struggle."[28]

But the conception of surveillance as a means of control does not necessarily mean we have to break from a focus on privacy, once we willfully acknowledge that privacy itself is a somewhat vague concept, not always best understood in terms of actionable rights. The subjects of Gilliom's study saw themselves primarily not as victims of privacy intrusions but rather as objects of political control. Perhaps this distinction is not as sharp as it seems. In any event, the surveillance state has indeed always been about power. "Knowledge is power"

was the motto of Poindexter's Total Information Office for a reason. And on the other side of that power dynamic are the people subjected to surveillance.

John Castiglione has advocated grounding Fourth Amendment privacy rights in a principle at once inherently amorphous and yet fundamentally humane: the principle of human dignity. While privacy and dignity "are distinct values, and should be treated as such," Castiglione sees in the concept of dignity hope for salvaging the reasonableness standard. Drawing on Kant's categorical imperative, he argues that "a violation of that precept is a violation of human dignity, because every individual has a right to be treated as an end, not as a means." Castiglione contends that, "despite its somewhat conspicuous absence in the constitutional text, and the underdeveloped understanding in the case law and commentary, dignity is a concept that pervades the American system, operating as an undercurrent to the core constitutional rights embodied in the Bill of Rights and the Fourteenth Amendment." What American traditions treat implicitly should become explicit: "Dignity should . . . be raised from the unstated bedrock of doctrine and become a recognized, fully integrated element of the reasonableness analysis."[29] This somewhat vague principle might create problems in the courtroom, but perhaps dignity should indeed serve as a fundamental concern when assessing public and private surveillance activities. "The Fourth Amendment is not just about privacy," Castiglione concludes. "It is also, at its core, about dignity."[30]

However imperfectly we define it, we can value privacy for its centrality to civilized life. Privacy "protects the solitude for creative thought," write Ellen Alderman and Caroline Kennedy. "It allows us the independence that is part of raising a family. It protects our right to be secure in our own homes and possessions. . . . Privacy also encompasses our right to self-determination and to determine who we are. . . . The right to privacy, it seems, is what makes us civilized."[31]

When Warren and Brandeis articulated the "right to be left alone," in 1890, they opened the door to more than a century of debate over the question of what the right of privacy consists. Yet those in the twentieth century who loved individual liberty and feared government power always had an appreciation of privacy, however imperfectly defined. As rigid as she could be in reducing questions of liberty down to property rights, Ayn Rand seems to have seen that other values were at stake when she wrote, "Civilization is the progress toward a society of privacy."[32] Maybe we cannot define "privacy" perfectly but can still embrace this fundamental truth.

Those who favor more government surveillance and those who champion broader privacy rights all insist they stand for civilization, either against foreign terrorists or destruction from within. This book has raised more questions than

it has answered. I do not know what legal arguments will best protect privacy. I do not know how the U.S. government can continue to maintain its domestic and foreign policies without trampling over privacy, nor do I know whether, given the shifts in culture and technology, there is even any possible solution to the dilemmas we face. I can only surmise that what is at stake is the kind of civilization we have.