

Debate

Response

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I am extremely grateful to the editors of *Surveillance & Society* for suggesting this paper should be used as the basis for discussion through inviting responses. I am similarly grateful to Gus Hosein, Gary Marx, Elin Palm and Eric Stoddart for each taking the time to present these responses. Together these add considerably to an impoverished area in academic literature. When it comes to the rights and wrongs of surveillance in academic discourse much seems to be assumed and comparatively little defended.

I had hoped for my paper to start or re-ignite a discussion, rather than to be the final word on the subject of surveillance ethics. Clearly there is much more to be said on the issues raised here and it would be foolish to think that there is not (hence the subtitle: *towards* a normative theory of surveillance). I think that the excellent responses given here demonstrate that, and I am grateful for the critique offered as well as suggested areas for improvement.

My response will come in two parts. First, I shall respond to the general discussion as to whether there is a need for a general theory of surveillance, and whether the just war model can provide that theory. Second, I shall respond to what I see as the most salient critiques levelled at particular principles in the theory. While I would like to respond to the points made by each author in turn, this would quickly become tedious for the reader. Just as my initial paper left much to be said on this approach to surveillance ethics, so this response will also inevitably be limited.

General

A fundamental question which needs to be asked, and which I only assumed in the original paper, is whether there is even a need for a general theory of surveillance. While Hosein, Marx and Palm are sympathetic to this need, Stoddart is sceptical. He writes that, 'surveillance is much too all-encompassing a term to be the subject of its own ethics'. There may be an ethics of surveillance in elderly care or in education, he concedes, but not surveillance in general.

Not surprisingly, I disagree with Stoddart on this. I do agree that context is important, and that the justification of particular acts of surveillance will vary according to context. However, we should not ignore that in whichever context we are operating, the acts are still acts of surveillance. In determining whether surveillance is justified in a particular context, it does not seem to me that the justifying reason for that surveillance (for example) should be any less of a relevant concern if the surveillance is of the elderly than if it is of people using a supermarket. Secondly, I am not sure that surveillance is any broader than medicine or business, and yet it does not seem too much of a stretch to discuss medical ethics or business ethics. Finally, as I clearly stated in the paper, I am not suggesting a normative theory for *all*

surveillance but for the surveillance of non-consenting adults. Stoddart appears to have missed this emphasis on non-consenting surveillance and I shall return to this below. For now it is sufficient to say that cases in which surveillance is carried out with the consent of the surveilled subject are not my concern here.

Even if there is to be a general theory of ethical surveillance, though, it does not follow that the just war tradition is the best place to start. This gets to the heart of argument I make in the paper in that I believe this tradition captures all the relevant principles and misses none out. As a point of clarification, it is important to note that I am drawing on the just war *tradition* rather than the just war *theory*. While the theory is, as I see it, a largely 20th century phenomenon, the tradition itself goes back much further, certainly to Augustine and arguably Cicero (Reichberg, Syse and Begby 2006). This is important as, while the *theory* may be tied to the state as authority (although, as I argue below, I would dispute that it is), the *tradition* is not (Coates 1997: 156).

Tradition or theory, the key point is whether or not it is the best approach. Again, Stoddart is sceptical. He writes that the just war theory is contested and is concerned that in appealing to it we may obscure the ethical values on which it relies. Palm also refers to the contested nature of the theory but picks up on the *lack* of foundational values on which an ethics of surveillance, using the model I suggest, would draw as it currently stands.

Certainly the just war tradition is one of debate and contention, and, as Stoddart rightly says, even the use of the tradition is itself contested. However, I see this as a strength. It is a tradition which has been tried and tested over time, and continues to be subject to scrutiny and challenge with virtually every conflict. It is not settled theory which I'm suggesting can be applied like a cookie cutter to surveillance. As such I agree that we should be cautious in its adoption into understanding the ethics of surveillance, but not that this is a reason to reject it. Quite the opposite: it is this continual re-examination of the just war tradition which makes it such a powerful force on which to draw, providing rich debate and thinking on relevant moral principles. For example, the just war literature contains some of the most sophisticated debates of the principle of discrimination and the doctrine of double effect.

It is less easy to respond to the concern of covertly importing ethical values, or of not having any ethical values. Clearly both of these criticisms cannot be right: either there are underlying ethical values (obscure or otherwise) or there are not. Certainly there is an ethical commitment in the tradition to limit harm,¹ and to do so in a broadly deontological manner, but beyond that there is no commitment to any overarching political or ethical system. Once more, I see this as a strength of the approach. I do believe that surveillance carried out by the state is more damaging to the constitution of a democratic than a non-democratic system, but in both cases it harms privacy, causes chilling effects, can be abused, and so on. That is, the individual and societal harms are similar no matter the political situation. As such, I would argue that in assessing whether an act of surveillance in the former German Democratic Republic was justified we should use the same criteria (authority, just cause, proportionality, etc.) as we would of an act of surveillance in North America or Europe.

One challenge to the applicability of the theory that arises in Hosein, Palm and Stoddart is that by employing the just war model we may become distracted by looking for analogies between surveillance and war. I agree that this is a concern. This is demonstrated by the fact that not only do they raise it, but they then assume greater similarities between surveillance and war than I do (for example, over the nature

¹ This should be distinguished from the principle of no means *mala in se*. War is not seen in the tradition as inherently evil. If it were then we would be morally committed to pacifism. Instead, particular means of waging war, such as biological weapons, anti-personnel landmines, etc. are sometimes described as being *mala in se*. Such means are prohibited, not merely avoided as Palm suggests, in the tradition. It is interesting to reflect whether there are similar means, the use of which could never be justified, in surveillance.

of authority). If the harms of the analogy are greater than the benefits, shouldn't we abandon the analogy and treat the principles in isolation? This could be done, although then we would risk throwing the baby out with the bathwater. Ignoring the parallels with the just war tradition could well lead to a reinvention of the wheel, as many of the same debates already held about war will be restaged about surveillance.

An alternative would be to critique the just war tradition as being relevant only to war. Might not the same principles be applied to areas other than war and surveillance? Others have argued that the same principles may have relevance to espionage (Bellaby 2012; Omand 2012; Quinlan 2007), while Aaron Fichtelberg has applied them to manufacturing weapons and Elizabeth Ellis draws on it in informing an ethical understanding of economic sanctions (Ellis 2013; Fichtelberg 2006).

Marx expresses a desire to move beyond the avoidance of harm and into actively promoting the good. In this I thoroughly agree and, as Stoddart points out in talking about care, it is clear that surveillance can do this. I would disagree with Marx's claim along these lines that I am arguing for a *categorical avoidance* of harm, though. In the case of non-consenting surveillance of adults there will always be some degree of harm in the terms I describe (see below for my response to Palm's suggestions). However, this can be outweighed by certain benefits when the terms that I have described are met. The serial killer planning his next murder, for instance, has only a very weak claim to his privacy and autonomy in the face of his actions. Indeed, one of the more controversial aspects of the just war tradition that is worth considering is whether, when the ethical criteria for just war are met, this obliges the authority to engage in war. At least some theorists hold that engaging in war may be an obligation (Coates 1997: 157; Ramsey 2002: 484) and recent writings on the responsibility to protect tend to support this position (Bellamy 2010; Pattison 2013). By extension, my approach doesn't rule out the possibility that surveillance could be an obligation.

There remain five further points addressing the general approach which I will consider before moving on to look at individual principles. These are the role of normative ethics, consent, the nature of the harm caused, the potential for surveillance to proliferate, and the addition of *post bellum* considerations.

Starting with the role of normative ethics, Hosein expresses a concern that in proposing a theory I am bypassing consultation. In taking a stance on how surveillance should be subject to ethical assessment, though, I am clearly not claiming that this is the final word on the matter, nor that my approach should be forcibly implemented. Consultation, democracy and ethical argument are three different beasts with different ends. Imagine we decide tomorrow that apartheid is legally right. It would not follow that it is thereby morally right. Furthermore, it is quite normal and consistent with democratic values to take a stand on a particular issue and argue your point. This bears a relation to Stoddart's closing thought in which he rather begrudgingly concedes that we 'probably do need' normative ethics. Of course we do! Some things are clearly morally wrong (torture, child abuse, racism, and sexism all spring to mind, although the list hardly stops there). In society we do often need to argue the point as to whether and why these things are wrong. Through that argument it is hoped that vested interests and biases will come to light and be dealt with appropriately (if they do not then we are failing to be sufficiently critical). In claiming that child abuse (or, for that matter, a particular act of surveillance) is wrong I am not closing down discussion but rather inviting response. I agree with Hosein that we need consultation, but it would be absurd to do this without including debates about what is ethically justifiable.

Stoddart also challenges what he calls my sidelining of consent, which he describes as 'a disastrous omission' and which he suspects I have replaced by a declaration of intent. This is not the case. Rather, as noted earlier, I explicitly state in the paper that the model which I propose does not address surveillance of the consenting. As both Stoddart and Marx recognise, the ethical issues regarding consent (such as coercion and exploitation) are different and would not be covered by the model that I have outlined.

Thirdly, Palm raises the problem that I have a disproportionate focus on privacy and fail to address other harms such as autonomy, liberty, etc. This is a fair comment. Privacy, as Palm notes, can be instrumental to autonomy and liberty but she is right that it does not equate to either of these. As such, the list of harms that I give should not be considered exhaustive and is certainly open to additions such as those raised by Palm. This, though, does not affect any of the principles, but rather the considerations, and particularly the harms, to be borne in mind when employing the principles.

Fourthly, Stoddart asks whether we would wish in 50 years to look back and find that the employment of this theory ‘has resulted in the proliferation rather than constraint of surveillance’. This is at odds with his later comment that surveillance can be welcome in certain areas, such as caring for those with dementia. If this were the only surveillance that we were discussing then its proliferation over 50 years would be a good thing. The issue is not whether surveillance proliferates, but which *sort* of surveillance proliferates. As Stoddart recognises, there is surveillance which is justified in its implementation and surveillance which is not. My approach seeks to distinguish one from the other.

Finally, Palm suggests that we adopt a third component to the model, drawing on the comparatively recent notion of *jus post bellum*, the justice of what happens in the closing phase of or after a war (Orend 2008). With this, she argues, we ‘would not only be able to require that the least intrusive means that achieves the desired aim should be employed but that, once in use, overly intrusive systems should be replaced with less invasive such. The third step can prevent unreflected routine use of surveillance’. Stoddart also makes reference to *jus post bellum*, but does not comment on its applicability. I suspect that he would be less attracted to its adoption, given that it assumes an end to particular acts of surveillance which ‘does not cohere with ubiquitous and continuous surveillance ... that is a feature of advanced capitalist social life’.

I agree with Palm that assessment of any act of surveillance, as in war, should be ongoing. However, the existing *jus ad bellum* considerations not only allow for this but mandate it. To limit *jus ad bellum* considerations to the outset of war is an abuse of the principles: one may be justified in declaring a war, but that doesn’t mean that the war continues to be justified as it goes on (McMahan 2005: 2). This was a criticism levelled by Elizabeth Anscombe at the allies during WWII when they decided that only unconditional surrender by the Axis powers would end the war (Anscombe 2006: 632). In that case, the just cause changed and so the justifiability of the war also changed. Whether it changed enough to make the war unjustified is a discussion for another time.

Adding a *post bellum* consideration is not necessary to prevent ‘unreflective routine use of surveillance’. The *ad speculandum* considerations are sufficient for this, although it does not thereby follow that people will adhere to them. If the end has been met then the surveillance should cease. If the end has not been met then the surveillance should be continued, sensitive to changes in circumstances.

Nevertheless, the inclusion of a *post bellum* consideration would be highly beneficial and so I am grateful to Palm for this suggestion. It would be advantageous in reflecting on the act of surveillance once that act has been completed. For example, it could be employed to recognise the harms caused by surveillance and seek compensation for deserving victims who were subjected to surveillance. It could also be used to reflect on acts of surveillance in order to determine how to avoid future injustices. It would be interesting to explore further possibilities in this area.

Specific Principles

My argument is that there are nine specific principles which should be applied to surveillance. Stoddart in particular addresses each of these in turn. While I would like to respond to all of these comments I will here limit myself to four: just cause, intention, authority and proportionality.

Just Cause

Stoddart agrees that there needs to be a reason for surveillance, but then claims that this is limited to investigative surveillance. By ‘investigative surveillance’ I presume that he is referring to surveillance carried out by police, private investigators and journalists. Certainly it does apply to these, but not only to them. It also applies to the use of CCTV, to monitoring the behaviour of shoppers without their knowledge, to surveillance as a deterrent to committing acts of vandalism, and numerous other scenarios in which the surveilled subject is an adult who has not given consent to the surveillance. I do not see why, in these non-investigative scenarios, there is no need for a justified reason in which to ground the surveillance. Stoddart needs to do more than simply assert his case here. Failing that, in the absence of an explanation as to why these scenarios do not require a justified reason, I am less than convinced of his case.

Intention

Stoddart again agrees that the intention behind an act of surveillance should be the same as the given just cause, but then questions if there is such a thing as a clear intention. He asks if there is ever such a thing as a clear intention, and if so whether we can ever know it (whether it is our own intention or that of another). I agree that our intentions are often mixed, and not always easy to access. Nonetheless, we do *have* intentions and these have moral relevance. There is a relevant moral difference between the CCTV operator in a supermarket who is looking for shoplifters and gets distracted by an attractive person and the surveillant who is using the same system to indulge in voyeurism. We may not know for sure which of these a particular surveillant is, but that does not negate the moral relevance of the principle.

As with his comments on just cause, Stoddart also claims that some non-investigative acts of surveillance, in this case *sousveillance*, do not fit with the principle of intention. This, though, strikes me as bizarre. Why is intention important when in the hands of one person and not in the hands of another? *Sousveillance* still involves deliberate acts of monitoring carried out by individuals. The only alternative that I can imagine is that the intention of the *sousveillant* is implicit in the act. In that case the intention is still relevant, though. It is not hard to imagine an ill-intentioned *sousveillant* who makes the life of someone in power an unnecessary misery because of a personal grudge. As with his comments on just cause, Stoddart needs to demonstrate why he feels this would not work.

Authority

Palm and Stoddart both struggle with disentangling the principle of authority from its application in the just war tradition. At a very basic level, I take the principle of authority to state simply that surveillance should be carried out by an appropriate entity. We then need to consider who or what that entity should be. It certainly does not have to be the state. I have argued elsewhere that an authority should be an entity occupying a role which is trusted and held accountable, operating within a context-defined scope, and which has had the role of authority conferred upon it by a suitable entity (Macnish 2012: 178). I also acknowledge that there may be times when a person who does not fit these criteria may be justified in carrying out surveillance. For that reason I don't believe that the condition of authority is necessary. This is different from suggesting that less attention needs to be paid to the principle. I therefore agree with Palm that more needs to be done with the notion of authority in this context, and indeed I would concede that the difference between just war and just surveillance is greater in this principle than others.

Proportionality

Finally, Stoddart is troubled by the principle of proportionality, which he claims is complex and ‘saturated with assumptions, biases and interests’. I agree. However, there are few moral activities which are not so saturated. The fact remains that, despite these limitations, proportionality has moral currency and so we should not abandon it. Are these problems so great that we should likewise abandon proportionality as a concept in jurisprudence? We still use the term ‘draconian’ (from Draco the Athenian law giver who administered capital punishment to all crimes, trivial and serious) to refer pejoratively to disproportionate

punishment. Instead we hold that the punishment should fit the crime. Alternatively, should we consider it acceptable for acts of surveillance to be disproportionate? Neither of these is appealing, and so while I accept that the concept is not straightforward, I do not think that we should therefore ignore it. Rather we should acknowledge the limitations and do our best to correct any assumptions, biases and interests as we are able.

In my paper I suggest that it would be more proportionate to use CCTV to monitor an area where cars were frequently stolen than to bug the phones of everyone in the city in which the cars were being stolen. Stoddart challenges this. First, he claims that I imply ‘that the CCTV cameras are only observing potential car thieves.’ This simply isn’t true. Neither do I imply this nor does my argument rely on it. My point is merely that telephone bugging is more harmful than being captured on CCTV. Second, he suggests that CCTV operating in a residential street where political activists live is more harmful than bugging the telephones of an entire city. This, though, is clearly wrong. It may be more harmful than operating CCTV in a street where no political activists live, but this is not in contention. The only way in which Stoddart’s challenge might work would be if bugging telephones were somehow less harmful than CCTV. While I do not deny that it *could* be harmful to employ CCTV in a residential street where political activists live, or that the images of passers-by will be captured by CCTV, I fail to see how this would be *more* harmful than bugging the telephones of an entire city. This is especially true as, in the example given, those same political activists would live in that city and so have their phones bugged as well. Even if Stoddart is correct that the proportionality balance would change when given greater context, giving us pause for thought, this merely concedes the point that proportionality is a relevant consideration.

Stoddart then argues that even though ‘CCTV may be more proportionate than phone interception this does not really get us very far. It only hints at *relative* proportionality/disproportionality not unlike a mugger offering me the choice of being stabbed or hit on the head. It is a false choice, masquerading as virtuous discernment of relative harm.’ Stoddart is correct that I would here appeal to the composite nature of the approach. Mugging is always unjustified and so the analogy is a false one, unless we assume that surveillance is also always unjustified, and Stoddart does not take this position. A better analogy may be the use of coercion by the police in making an arrest. In this case whether the police officer uses a knife or a truncheon does become a relevant consideration.

Stoddart moves from this challenge to say that his ‘contention is that one of the most significant criterion, proportionality, is intrinsically deceptive. It conveys the impression, through the use of statistical discourse, that factors are actually capable of being measured. Proportionality hints at an objectivity that it most certainly does not possess.’ While I am not sure how that ties in with the mugging analogy, I do agree that in practice proportionality often cannot be measured and does not have the precision that some might claim for it. It simply follows from this, though, that some people might abuse the principle, perhaps unwittingly. It does not follow that we should therefore abandon it. If we did then, as I have said, we would need to alter considerably more than just our approach to surveillance, leaving us with no way of objecting to draconian punishment.

It is clear from the remarks of all four commentators that more needs to be done with each of the principles and with the theory as a whole. I am in complete agreement here and again refer to my subtitle as being *towards* a normative theory rather than the presentation of a complete system. I have been working towards this for some time and hope to publish a more thorough development of this approach as a monograph. There is, after all, only so much that can be achieved in a single journal article.

It remains for me to extend my sincere thanks once more to the authors and editors who have engaged in this discussion. It has been of immeasurable value to my own thinking on the matter, and I hope that it will be stimulating to others.

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