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UNIVERSITY OF LEEDS
University of Sheffield
UNIVERSITY of York

An Eye for an Eye: Proportionality and Surveillance

Abstract

It is often claimed that surveillance should be proportionate, but it is rarely made clear exactly what proportionate surveillance would look like beyond an intuitive sense of an act being excessive. I argue that surveillance should indeed be proportionate and draw on Thomas Hurka's work on proportionality in war to inform the debate on surveillance. After distinguishing between the proportionality of surveillance *per se*, and surveillance as a particular act, I deal with objections to using proportionality as a legitimate ethical measure. From there I argue that only certain benefits and harms should be counted in any determination of proportionality. Finally I look at how context can affect the proportionality of a particular method of surveillance. In conclusion, I hold that proportionality is not only a morally relevant criterion by which to assess surveillance, but that it is a necessary criterion. Furthermore, while granting that it is difficult to assess, that difficulty should not prevent our trying to do so.

1. Introduction

In 2008 Poole Borough Council was suspicious that a family was falsely claiming residence in a particular school district in order to gain entrance to a particular school for their children. The school was popular and heavily oversubscribed. The council's response was to mount a two-week surveillance operation which involved following the family when they left the house and monitoring which lights were on at what times of the day and night. When it emerged that the council had been engaged in this level of surveillance of a family, the response in the UK press was critical. James Welch of the civil rights group Liberty, said: "This is a disproportionate and unnecessarily intrusive use of RIPA [the Regulation of Investigatory Powers Act (2000)]" (Alleyne 2008).

The problems of disproportionate surveillance are not limited to Poole. Another UK pressure group, Big Brother Watch, argued in 2011:

> Britain is unique in the widespread and relentless use of CCTV across every aspect of our lives. It continues to represent a disproportionate intrusion into the privacy of law abiding people, without delivering a corresponding improvement in public safety (Pickles 2011).

In addition to examples of *dis*proportionality, the importance of proportionality in ethical surveillance is recognised in law and academia. Regarding the UK government's legal abilities to intercept and retain communications data, Andrew Kernahan of the Internet Service Providers' Association has said, "It is important that proposals to update Government's capabilities … are proportionate" (Barrett 2012). Section 28 of the UK's Regulation of Investigatory Powers Act (RIPA 2000) stipulates that "a person shall not grant an authorisation for the carrying out of directed surveillance unless he believes … that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out." This is underlined in the *Code of Practice concerning Covert Surveillance and Property Interference* pursuant to the Regulation of Investigatory Powers Act, paragraph 3.6 of which states that the following elements of proportionality should be considered:

- balancing the size and scope of the proposed activity against the gravity and extent of the perceived crime or offence;
- explaining how and why the methods to be adopted will cause the least possible intrusion on the target and others;
- considering whether the activity is an appropriate use of the legislation and a reasonable way, having considered all reasonable alternatives, of obtaining the necessary result; and evidencing, as far as reasonably practicable, what other methods had been considered and why they were not implemented (Home Office 2010)

Those in academia writing on the ethics of surveillance have also recognised the need for a principle of proportionality. David Lyon, John Kleinig, Gary Marx, and Anita Allen all argue in its favour (Marx 1998; Lyon 2001; Allen 2008; Kleinig 2009). Yet there is very little discussion in these writings as to what is meant by proportionality in the context of surveillance. By contrast, there are others such as Eric Stoddart who feel that proportionality should have no ethical part to play in surveillance (Stoddart 2014).

The aforementioned Code of Practice states that a surveillant authority should balance "the size and scope of the proposed activity against the gravity and extent of the perceived crime or offence" (Home Office 2010 Para 3.6). This has intuitive plausibility. Had the family in Poole been reasonably suspected of planning a major act of terrorism, the surveillance carried out on them would almost certainly have been proportionate. However, just as there are different degrees of wrongdoing, so there are differing degrees of response, surveillance being just one in a list of possible responses. In addition, there are also degrees of response *within* surveillance.

In this paper I address what is meant by proportionate surveillance and how proportionality should be determined. I argue that proportionality is a necessary condition for ethical surveillance. I use "surveillance" here to mean the monitoring of a competent adult or adults over a period of time without their consent. Surveillance can be carried out on other parties (e.g. children) and it may be carried out with consent (e.g. television programmes such as Big Brother). In this paper, though, I am specifically interested in the surveillance of non-consenting, competent adults. I start by considering an analogy with proportionality in war. I then look at what is meant by proportionality, in the process distinguishing proportionality from necessity. I also examine which considerations should be weighed in the balance when deciding whether a particular course of action is proportionate. Here I draw particularly on Thomas Hurka's work regarding proportionality in war (Hurka 2005) and apply this to surveillance.[1] Finally I consider some of the problems in determining whether an act is proportionate. My conclusion is that while the application of proportionality is not straightforward it is nonetheless a necessary factor in establishing the justifiability of surveillance. Through drawing on the just war tradition throughout the paper, I build upon an approach I have advocated elsewhere (Macnish 2014) and which has been challenged (Stoddart 2014).

There are therefore three areas which this paper seeks to address. The first is to demonstrate the relevance of proportionality in ethical surveillance. The second is to develop a principle of proportionality as it pertains to surveillance, spelling out how

[1] I have argued elsewhere for the applicability of the just war tradition to the ethics of surveillance (Macnish 2014). This paper involves a development of one aspect of that argument. In addition, I am grateful to comments by Thomas Hurka and an anonymous reviewer for improvements made to this paper.

one might determine whether an act of surveillance is proportionate. The third is to demonstrate that the just war tradition can contribute effectively to the debate surrounding ethical surveillance.

Part I – Proportionality *ad Speculandum*

2. Proportionality in War and Surveillance

In the Just War tradition, there are generally taken to be at least two distinct aspects of proportionality: the proportionality of declaring war (*jus ad bellum*) and the proportionality of particular acts of war (*jus in bello*). War itself may be a proportionate response to the occasioning cause, but a particular act of war may be disproportionate: e.g. using short-range nuclear weapons in response to an enemy which had run out of ammunition for their guns and had no other weapons. Alternatively, the war itself might be a disproportionate response to the occasioning cause,[2] whereas individual acts of that war might be entirely proportionate. In other words, if a war is disproportionate from the *ad bellum* perspective, it does not follow that all acts of that war will be disproportionate from the *in bello* perspective, and *vice versa*. The proportionality of the individual act will depend upon the circumstances of that act rather than on the proportionality of the overall war.

It does not seem unreasonable to suggest that there may also be two aspects of proportionality in surveillance. The first would be that of the decision to employ surveillance *per se*. This would be proportionality as a consideration of *jus ad speculandum*, the decision to employ surveillance. The second concerns the method of surveillance being used, which would be an issue for *jus in speculando*, the oversight of means used to effect surveillance. Hence in the above quote by Big Brother Watch, the focus was not on whether surveillance *per se* would be disproportionate, but on CCTV in particular. That is not to say that Big Brother Watch does not see other government surveillance in the UK as being disproportionate, but the quoted accusation of disproportionality focuses on the use of CCTV cameras in particular.

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[2] Imagine a farmer extending his field across an international border. As a result the state into which he has encroached declares war on his state. All other things being equal, this declaration would be a disproportionate response.

A possible objection here is that there is an important disanalogy between war and surveillance in terms of the severity of the harm. War involves death, injury, internal displacement of people, refugees, destruction of property, and much more. Surveillance, on the other hand, seems far more limited in its effects. It is rare if ever that people die from an act of surveillance alone (although they might die as result of an action which would not have occurred without surveillance, as was the case with many victims of the Stasi in the German Democratic Republic).

This objection, though, does not lessen the importance of proportionality. In a state without capital punishment convicted criminals will not die for their crimes, but proportionality in sentencing is still important. The pejorative notion of a draconian punishment still exists in common parlance, thousands of years after the Greek tyrant Dracos instituted severe penalties for even minor crimes.

Just because the harm in surveillance is less than in war, it doesn't follow that proportionality is a less relevant concept. All that is implied is that the benefits of surveillance can be more modest than those of war in order to outweigh those harms. The harms of surveillance will be discussed more fully in §8.1 below.

3. What Is Proportionality?

Proportionality is a term often used but rarely described. On the face of it, a reasonable starting definition would be that it involves the harms of a particular act not outweighing the benefits of that act. I shall consider precisely what is meant by the terms "benefits", "harms", and "outweighing" below, but for now it is sufficient to note that if the harms arising from an act outweigh the benefits then that act is likely to be disproportionate. Despite this, I do not see the consideration of proportionality to be one of pure consequentialism. I will argue that not all benefits should count in favour of an act of surveillance and that the difference between benefits and harms in favour of benefits should be significant, rather than slight, in order to render an act proportionate.

It is also important to note an ambiguity in the way in which "proportionality" is often used. In referring to a "disproportionate" response it may be assumed I mean that the response is excessive. However, this is not necessarily the case. It may be simply

that it is inappropriate. Imagine that a convicted serial killer is punished with 40 hours of community service. The punishment is not excessive but it is certainly disproportionate. In this case the disproportionality arises from the inappropriateness, or lack of fit, of the punishment to the crime. An inappropriate matching of incident and response certainly can be excessive (e.g. receiving five years hard labour for stealing a loaf of bread), but this is not necessarily the case (e.g. the serial killer receiving community service). Both are examples of disproportionality. Hence proportionality refers to appropriateness, a subcategory of which is excessiveness. In this paper I use the term "proportionate" to indicate something which is appropriate and "disproportionate" to indicate something which is inappropriate, and not necessarily excessive.

Along similar lines, proportionality is sometimes taken to include necessity. In discussing *jus in bello*, some authors include necessity as a separate condition (Hurka 2005; Frowe 2011, 106–07) while others see it as a part of the proportionality condition (Graham 1996, 57; Coates 1997, 110–11, 208; Orend 2000, 134). We might describe these different approaches as narrow proportionality, which is distinguished from necessity, and broad proportionality, which conflates proportionality and necessity. As an illustration, imagine that a superstitious person is trying to kill me. Assuming that I am justified killing him in self-defence, to kill him would be a proportionate response. However, now imagine that I know it to be the case that, owing to his superstitious nature, I can say "abracadabra" three times and he will stop trying to kill me. Broad proportionality (incorporating necessity) holds that for me to continue to try to kill my assailant in self-defence would not be a proportionate response – there are less harmful means of achieving the same end. Narrow proportionality, by contrast, holds that for me to continue to try to kill him in self-defence would be proportionate (there is still a balance of some sort between costs and benefits) but not necessary. As such, the second point of RIPA 3.6 (which explains how and why the methods to be adopted will cause the least possible intrusion on the target and others) would be classed as an aspect of proportionality in the broad sense, but only of necessity *and not proportionality* in the narrow sense. In this paper I work with the narrow concept of proportionality.[3] This is not to say that surveillance need not be necessary as I have argued that it should only be used when

[3] I am grateful to Thomas Hurka for clarifying this distinction.

necessary (Macnish 2014), but rather that the concept of necessity deserves to be addressed separately.

Proportionality was originally used by Euclid as a mathematical term relating to relationships between shapes, and subsequently transposed to ethical considerations, most notably in war and jurisprudence. However, though it is relatively easy to judge the proportionality between two objects such that one is twice the height, width and depth of the other (for example), it is less straightforward to judge proportionality in human action. When, for instance, is an act of war proportionate, or the sentencing of a criminal disproportionate? Mathematical objects can be measured with a degree of accuracy and then compared. Human actions, by contrast, do not lend themselves to such measurement or common denominators, and so comparison is more difficult. There are a number of objections which arise from the application of proportionality to ethics to which I now turn. Nevertheless, I will argue that each of these objections should be dismissed.

3.1 No Inhibitory Effects

The lack of a mathematical rigour that can be applied to proportionality in ethics has led some to question its usefulness. Michael Walzer, for instance, appears to dismiss the notion of proportionality in war, concluding that "the proportionality rule often has no inhibitory effects at all." (Walzer 2006, 318). A similar argument would be that though the principle "do not murder" is uncontroversial, it does not have an inhibitory effect on murderers. It does not follow that the principle "do not murder" should be abandoned, though. Moreover, even if people did not accept the principle "do not murder", and committed murder, this would not undermine the value of the ethical position. Instead, the principle would affirm that the murderer was wrong in committing murder, and that those disputing it were wrong to do so.

3.2 Political Re-description

A second challenge arises from the political malleability of the term, "proportionate". For example, in a conflict one side might choose to frame a particular action in light of situation X, rendering that action proportionate. At the same time, an opposing

side could frame it in light of situation Y (where X and Y are true states of affairs) such that the same act is not proportionate.

It is true that an act can be re-described in different ways, leading to potential confusion. However, this is arguably true of most moral teaching. Rape is wrong, but not consensual sex. The rapist may in retrospect genuinely see himself as having engaged in consensual sex, and so not at fault. However the act is described, though, and granting that there are limitations as to what a person not present can know, there is nonetheless a truth in the matter. Either the sex was consensual or it was not. Returning to the above case, a consideration of proportionality would therefore need to take into account both X and Y before drawing a conclusion.

3.3 Elasticity of Proportionality

A third concern regarding proportionality is what Oliver O'Donovan refers to as the elasticity of proportionality (O'Donovan 2003, 62). This is partly an epistemic problem of knowing when an act is proportionate and partly an ontological problem as to whether there even is a dividing line.

O'Donovan answers this challenge with the response that this elasticity, whether epistemic or ontological, is not infinite. There are acts, he claims, which are clearly disproportionate: "which would be inappropriate to meeting any threat whatever. To be convinced of this, we do not have to determine precisely where the line of categorical disproportion is to be drawn; we only have to identify some case that lies beyond it" (O'Donovan 2003, 62). To employ a metaphor O'Donovan uses of discrimination, we may say that, "while we puzzle over the twilight cases, we cannot overlook the difference between day and night" (O'Donovan 2003, 38).

Proportionality is not an easy concept to apply, but it does not thereby follow that it cannot or should not be applied. While the point of reference may vary and while there may be elasticity in considerations of proportionality there remain acts which are clearly disproportionate and those which are clearly proportionate. The fictional case of total surveillance presented by George Orwell in *1984* (Orwell 2004) is a clear example of disproportionate surveillance which lies beyond the acceptable. By

contrast, police monitoring the communications of a gangland boss strongly suspected of ordering a number of murders seems to be a proportionate act of surveillance.

4. Measuring Proportionality

I have argued that the ability to accurately measure is an obvious and significant difference between the mathematical and the ethical notions of proportionality. As problematic, though, is the question of *what* is to be measured. In comparing plane shapes such as squares there are two dimensions: height and width. In discussing an act with regard to its harms and benefits it must first be decided which harms and which benefits (as well as *whose* harms and benefits) are to be applied.

Writing in the context of war, Thomas Hurka raises concerns of proportionality regarding which benefits and harms should be weighed in the balance (Hurka 2005). I argue below that Hurka's analysis of proportionality is a clear case in which writings in the ethics of war can be employed in resolving issues in the ethics of surveillance. I will first describe Hurka's analysis and then apply it to surveillance.

4.1 Benefits

In response to the question as to which benefits are to be measured in proportionality, Hurka argues that "the relevant goods [in proportionality] are only those contained in the just causes" (Hurka 2005, 40). That is, only those goods present in the causes which justify going to war should be weighed in the balance. Other benefits which may arise but would not be sufficient to justify a declaration of war should not count. In making this claim, Hurka positions himself against a classically consequentialist position which would place *all* benefits and *all* harms in the balance before determining the optimal outcome.

Hurka is keen to avoid the conclusions of a consequentialist argument which may lead to counter-intuitive and even repugnant conclusions (Hurka 2005, 39–40). For a consequentialist, a small benefit for enough people can outweigh the deaths of a smaller number of people, if the aggregate is an overall increase in well-being. Furthermore, the nature of this benefit is not limited and so could include not only human rights benefits, but also economic benefits, morale boosters, or even entertainment. This may lead to conclusions such that if a particular war benefits

enough people by entertaining them then it is "worth" the cost of a limited number of deaths.

Hurka points out that World War II contributed tremendously towards reinvigorating the US economy in the wake of the Great Depression of the 1930s. However, he argues that it would be wrong to count this as a benefit of the war to be weighed against the millions killed in the fighting and associated harms brought about by the war. If economic reinvigoration did count, as it would in a simple consequentialist perspective, then it would follow that it could be judged to be proportionate to wage war on a country for *purely* economic ends. Yet, as Hurka responds, "killing cannot be justified by merely economic goods, and the same is true of many other goods" (Hurka 2005, 40). He argues that, as the reinvigoration of its economy would not have been justification for the US entering the war, nor should it be included in the balance when weighing up the harms and benefits of going to war. I shall refer to the reinvigoration of a country's economy, along with similar benefits of war which should not count in the proportionality consideration (such as technological progress or meeting the desires of soldiers who are bored with training and want to go to war) as "peripheral benefits". That is, they are benefits but they are peripheral to the considerations as to what should be counted in the balance of proportionality.

There are hence, according to Hurka, benefits which should count in determining proportionality and benefits which should not. The former Hurka identifies as those "contained in the just causes" while the latter are what I have called peripheral benefits. It is important to note that Hurka recognizes two types of just cause. One is the sufficient just cause, those causes which "suffice by themselves to fulfil the just cause condition" (Hurka 2005, 41). The other is the contributing just cause. Of these Hurka writes, "contributing just causes do not suffice to satisfy the just cause condition; given only these causes, one is not permitted to fight. But once there is a sufficient just cause, contributing causes can be further legitimate aims in war and can contribute to its justification" (Hurka 2005, 41). The difference between sufficient just cause, contributing just cause and peripheral benefits can be seen in Table 1.

Causes	**Benefits Relevant to Cause**	**Benefits Relevant to Proportionality**
Sufficient Just Cause	Relevant (sufficient)	Relevant
Contributing Just Cause	Relevant (contributory)	Relevant
Peripheral Benefit	Not relevant	Not relevant

Table 1: Benefits of Surveillance as they relate to Cause and Proportionality

As examples of contributing just causes, Hurka suggests the good that can come from disarming an enemy to prevent a return to aggression and deterring this and other nations from war by demonstrating that aggression does not pay. Clearly it would be inappropriate to go to war purely for these reasons (i.e. with no *sufficient* just cause), yet at the same time these are goods which should be weighed in the balance when considering entering a war (Hurka 2005, 41).

Hurka raises the question as to whether there is a unifying feature to contributing just causes which gives them their status. His conclusion is that, "there is not; like the sufficient just causes, they are just the items on a list" (Hurka 2005, 43). However, he does acknowledge that there are "intuitive limits" to what can go on that list. If Hurka is correct in this, and I can see no obvious unifying feature either, then contributing just causes need to be dealt with on a case-by-case basis.

There are hence three categories in Hurka's account: sufficient just causes, contributing just causes, and peripheral benefits. Of these, justified causes are alone sufficient to go to war over. Contributing causes are not sufficient to go to war over, but may lend weight to the justified causes in the declaration of war. Peripheral benefits are not sufficient to go to war over and may not lend weight to the justified causes in the declaration of war. When it comes to weighing proportionality, both the justified causes and the contributing causes should be counted as benefits of a war. Peripheral benefits do not contribute to the benefits of the war *insofar as these are relevant to the proportionality consideration.*

This has taken the discussion a long way from considerations of surveillance, but it is not hard to see the parallel. In weighing up surveillance as an option, only certain benefits of surveillance should be included in the balance. Those benefits which serve as sufficient justifying causes and contributing just causes of the surveillance should be counted in the balance. Peripheral benefits should not count in this way. Hence, if we return to the case of Poole Borough Council raised in the introduction, the benefits which could be weighed are the sufficient just cause (detecting parents who are attempting to cheat the system of allocating school places) and any contributing just causes (such as protecting other parents from having their place in the queue to get their child into school "trumped" by a parent who can afford to move house, deterring other parents from attempting to cheat the system, etc). What should not count in the balance are peripheral benefits, such as the employment of staff engaged in the surveillance.

The alternative, consequentialist position would be to count *all* the benefits of surveillance in the balance. This would, for example, include the enjoyment which the surveillant received from the surveillance. It would then be feasible, given enough pleasure on the part of the surveillant, that his voyeuristic pleasure could outweigh the harms visited upon the surveilled subject by the surveillance. This would render the surveillance proportionate and, in those terms at least, permissible. Yet both this consideration and this conclusion are, to me at least, ethically unacceptable.

There is likely to be some dispute as to which benefits should be considered peripheral in surveillance. As in war, I can see no unifying feature that would distinguish contributing just causes from peripheral benefits but would recommend these be treated on a case-by-case basis. I have suggested that employment of staff and voyeuristic pleasure gained by the surveillant in the act of surveillance should both be treated as peripheral. What of less self-serving benefits such as the incidental uncovering of further crimes, though? That is, surveillance is justified for one reason but in carrying it out one *may* uncover wrongdoings not previously countenanced. Should this be considered a contributing just cause or a peripheral benefit?

My concern with including wrongdoings for which there is no evidence as a contributing cause is that this could swing the balance too easily in cases where it is

not certain that surveillance would be proportionate. This is easier to see in cases where the sufficient just cause is relatively mild (e.g. burglary) and the *possible* offence which may be uncovered incidentally is serious (e.g. terrorism), than in cases where the sufficient just cause is serious (e.g. terrorism) and the *possible* incidental offence is milder (e.g. burglary).

For example, imagine a burglar who should not be placed under surveillance for reasons of proportionality. It may be that the burglar is also a terrorist, or a paedophile, or a rapist, and the surveillance would uncover these as well. If these possibilities are added to the proportionality consideration then the surveillance becomes proportionate. Yet if there is no evidence that he is a terrorist, paedophile, or rapist, then it seems as if these are merely being added to the consideration simply to swing it in such a way that the surveillance will go ahead. If this were permissible then the proportionality consideration would quickly become vapid.

Much of the detail as to which benefits should be considered will obviously swing on what are the sufficient just causes to employ surveillance. This requires a lengthy discussion which goes beyond the scope of this paper, but which would be a welcome addition to the debate.

4.2 Harms

Moving from benefits to harms, Hurka believes that there is "no restriction on their content parallel to the one on relevant goods" (Hurka 2005, 45). For example, while economic benefits accruing to a country as a result of war should not be weighed in the balance, the economic harms resulting from war certainly should be. However, it does not follow that all harms should be considered equally. Hurka wrestles with problems of responsibility in terms of human shields (both voluntary and involuntary), suicide bombers and the decision of NATO not to engage the Warsaw Pact in military action following the invasion of Czechoslovakia in 1968. Here he acknowledges a sense of diminished responsibility either when the choice to cause the harm is made by the enemy (i.e. in the case of suicide bombers) or when a choice made by the enemy introduces "new causal processes leading to new harms" (i.e. in the case of the enemy placing involuntary human shields around a military headquarters) (Hurka 2005, 50).

There are implications of Hurka's view for surveillance practices as well. Should all harms in this context be considered equally? Clearly not. Imagine that a person is engaged in preparing for an unquestioned act of terrorism such as building a sizeable bomb in her house. On the basis of good evidence and with the correct authority, the police put a wiretap on her phone to confirm that she is building the bomb as well as when and where she will detonate said device. As a result of the wiretap this person will experience harm through, at the very least, having her privacy invaded. Should this be weighed as a harm when considering whether to place her under surveillance? I think that it should, but, in line with Hurka, a harm with diminished weight. It is a relevant harm as even those who reject society maintain an interest in their dignity. Furthermore, it is not the case that she has, through engaging in terrorism, thereby lost *all* her rights to or interests in privacy. We do not ritually humiliate rapists as a form of punishment, nor would we even if there were evidence that this would deter future rapists. At the same time, the fact that she has acted in such a way that the police have good reason to believe that she is planning to harm society means that, like the suicide bomber, this harm counts for less than if she had not so acted.

A similar position could be taken with a person who was planning the same act of terrorism not because he believed in the terrorist cause, but because he had a gun to his head (literally or metaphorically) forcing him to build the bomb. Say, a terrorist has kidnapped the children of a weapons scientist in order to force the scientist to build a particularly lethal bomb. Even more than the willing terrorist, the scientist retains an interest in privacy and dignity and so monitoring his phone calls without his knowledge or consent is a harm. However, that harm is diminished by the fact of his actions, even though they are involuntary.

Finally, what if the terrorist organisation holding the scientist's children hostage, announces that the discovery of any wiretaps by the police will lead them to kill the children? Would the police have any responsibility for the deaths of those children if the wiretap was discovered? Presuming that the discovery is not owing to police incompetence then I think not. However, the forecast deaths of the children are a relevant consideration when weighing up the proportionality of the decision to put the scientist under (at least this form of) surveillance. Hence, as with Hurka's involuntary human shields, the deaths of the children should be counted as a harm, but one with

diminished weight owing to the ultimate responsibility lying with the terrorists, not the police.

4.3 Time

In his discussion on relevant harms, Hurka also deals with the limits of time. Should the result of an act 100 years hence be weighed on either side of the balance? When there is reasonable foresight then he concludes that there should be no time limit on either benefits or harms. As he suggests, if a hypothetical war really *would* end all wars forever then this would count strongly in its favour. At the same time, if a war led to long term suffering, such as a nuclear holocaust, then this would count strongly against it.

Once more this translates easily into considerations of proportionality in surveillance. All reasonably foreseeable benefits and harms, no matter how remote from the action, should be taken into consideration when determining whether to take that action. For example, over the long term the continued use of surveillance practices is likely to have an impact on society. Surveillance practices could become normalised which might in turn lead to a diminishing of trust at a societal level. Children growing up in schools under the constant gaze of CCTV cameras and biometric identification may never question the value or the purpose of these instruments. They become so mundane that even when they leave school these methods are accepted as a part of everyday life. Indeed, anyone who resists this surveillance could be seen as wrong headed in rejecting the protection that such surveillance offers, either that or they must have something to hide. As such, over the long term those resisting surveillance become objects of distrust in society (or become more distrusted) as a result of this normalisation. Trust thereby becomes based not on a sense of common humanity or a belief in the good in human nature, but rather on one's conformity to surveillance systems.

At the same time, an alternative picture could be painted such that surveillance, and the subsequent prosecution of terrorists who would kidnap scientists' children, acts as a deterrent on future would-be kidnapping terrorists. As with Hurka's war to end all wars, if this act of surveillance could somehow be guaranteed to end all future acts of terrorism then that would count strongly in its favour.

4.4 Likelihood

It is worth noting that not all harms and benefits will occur with equal likelihood. While it has been argued that there could be surveillance without consequences (Doyle 2009), a suggestion to which I shall return in §8.1 below, this is not very likely. It is far more likely that there will be consequences to surveillance, either on the part of the surveillant or the surveilled subject should the latter become aware of the surveillance. Likewise, it cannot be known in every case that an act of surveillance will return the information sought. There is therefore a fundamental aspect of risk involved in determining the proportionality of an act of surveillance, involving both the weighing of the extent of the respective harms and benefits and the chances of these occurring (Hansson 1996, 170).

5. Balancing Harms and Benefits

Having established what should count as benefits and what as harms, I now turn to consider how those benefits and harms should be weighed. James Turner Johnson argues that the benefits must outweigh the harms in order for the proportionality condition to be met (Johnson 1999, 27–28). Douglas Lackey, though, expresses a concern that Johnson's interpretation is too restrictive as it would not permit many of the wars fought in defence of moral rights, as these may not lead to an overall benefit. However, he continues, "according to most theories of rights, the maintenance and protection of rights is morally permissible unless the defence of rights causes *a great deal* more harm than good." By extension, Lackey holds that "a war for a just cause passes the test of proportionality unless it produces a *great deal* more harm than good" (Lackey 1988, 40–41). Hence to Lackey, the harms may outweigh the benefits by a marginal amount, and the war still be proportionate. Between Johnson and Lackey is a logical third position that the benefits should equal the harms in order for the war to be considered proportionate.

Drawing on O'Donovan, I argued above that there was a "twilight zone" between the obviously proportionate and the obviously disproportionate. This means that any call for strict equality between benefits and harms is unrealistic. This would require the precise measurements that I have argued are available for mathematicians but

unavailable for philosophers. As such, the third position suggested above of proportionality involving the equal balancing of harms and benefits is unrealistic.

With the third position rejected, there remain two alternatives for balancing harms and benefits. Should one side with Johnson in requiring the benefits to outweigh the harms or with Lackey that the harms may outweigh the goods so long as there is not a great deal more harm than good? Johnson's position, as Lackey recognizes, tends to be restrictive while Lackey's is, by design, more permissive. Should one's default position therefore be with Lackey that war is generally proportionate unless the harms it occasions are *a great deal* worse than the goods it brings about, or should the default be with Johnson that war is generally disproportionate unless the goods it occasions are better than the harms it brings about?

The solution to this question lies in O'Donovan's analogy of the twilight zone, taken in this sense to be the limits set by combining Johnson's and Lackey's approaches. Obviously acts to one side of the zone ("clearly proportionate") are acceptable, and acts to the other side of the zone ("clearly disproportionate") are unacceptable. The question is what should be done with (quite possibly the majority of) acts which fall within the zone. Are they to be taken as proportionate or disproportionate?

There are three options in response to this question. One is to presume proportionality unless there are strong arguments to the contrary (permissive). A second is to presume disproportionality unless again there are strong arguments to the contrary (restrictive). Third, one could refuse to privilege one position over the other, on the basis that we simply do not know which should be the default. Like W. D. Ross we could accept that, "our judgments about our actual duty in concrete situations have none of the certainty that attaches to our recognition of the general principles of duty" and make the best decision we can on a case-by-case basis (Ross 2002, 31).

While all three positions are tenable, I am disposed to come down in favour of a presumption of disproportionality in both war and surveillance. In both cases there are very real harms which are apparent and which the ethical framework is intended to guard against. It may be objected here that this is more plausible in war than surveillance, owing to the necessary harms of war and corresponding lack of necessary harms in surveillance. Hence, the objection runs, there are better grounds

for being more cautious in war than in surveillance. This objection overlooks the fact that here I am discussing that grey area in which it is unclear whether the harms are proportionate to the benefits. Where there are no harms, or the harms are genuinely minimal, then there is no question regarding the proportionality of the surveillance. Where there are harms, though, although not so many as to render the surveillance clearly disproportionate, I am advocating that one should proceed with caution. The more permissive approaches of Lackey and of deciding on a case-by-case basis leave open the possibility of those harms occurring which would otherwise be preventable. However, I accept that all three positions are controversial and merely comment that this is not intended to be the final word on the subject.

Part II – Proportionality *in Speculando*

6. Means and Ends

I have argued that there is a division to be made in considerations of proportionality in surveillance as in war. As the just war tradition recognizes a distinction between the proportionality of the decision to wage war and a particular act in wartime, so there is a distinction between the decision to employ surveillance and the methods used to carry out that surveillance. Having looked at what is meant by proportionality, some of the objections to proportionality, and what should be weighed in the balance to determine proportionality in the context of surveillance, I now turn to looking at specific acts of surveillance to see the relevance of proportionality as a consideration *in speculandum*. So far I have focused on the *ends* which can legitimately be served by surveillance through linking proportionality with the just cause. Now I shall focus on the *means* of surveillance which can legitimately be employed for those ends. That is, if the decision to use surveillance has been taken, the next question is which sort of surveillance should be used in which circumstances.

In the introduction I quoted the pressure group Big Brother Watch claiming the "widespread and relentless use of CCTV [in Britain] … represent[s] a disproportionate intrusion into the privacy of law abiding people" (Pickles 2011). While this quote refers to the use of CCTV, others have raised proportionality questions in relation to different systems. In October 2011, the Guardian newspaper ran a story concerning the Metropolitan police's use of a surveillance system called

Datong. The opening sentence claimed that "Britain's largest police force is operating covert surveillance technology that can masquerade as a mobile phone network, transmitting a signal that allows authorities to shut off phones remotely, intercept communications and gather data about thousands of users in a targeted area … Barrister Jonathan Lennon, who specialises in cases involving covert intelligence and RIPA, said the Met's use of the Datong surveillance system raised significant legislative questions about proportionality and intrusion into privacy. 'How can a device which invades any number of people's privacy be proportionate?' he said" (Gallagher and Syal 2011).

In response, "former detective superintendent Bob Helm, who had the authority to sign off RIPA requests for covert surveillance during 31 years of service with Lancashire Constabulary, said: 'It's all very well placed in terms of legislation … when you can and cannot do it. It's got to be legal and obviously proportionate and justified." (Gallagher and Syal 2011).

The obvious response to the need to recognise proportionality of means in surveillance would be to take the discussion so far and apply this equally to the means and the ends. It may be, for example, that levels of crime in a particular town justify the use of continuous surveillance of public areas (the crimes are too serious/frequent for regular policing and yet not serious enough to merit forcibly entering people's homes to gather evidence). It does not follow, though, that *any* surveillance is justified. CCTV of public areas may be appropriate. Wiretaps on the phones of everyone in the town would not be. At the same time, albeit perhaps more controversially, the police officer who is told to monitor the phone calls of person X *may* not be morally required to know who that person is or why the surveillance is occurring. I stress the "may" in that last sentence as this is by no means certain.

There are numerous types of surveillance which may be used in any one situation. CCTV; wiretapping; having people follow someone by car, on foot, or by GPS; loyalty cards; and keylogging are just a few examples. Clearly each situation could demand a different type of surveillance on pragmatic grounds. If the person to be placed under surveillance is known never to use a computer then keylogging is going to be of little use. However, more than merely pragmatic concerns should be taken into account when deciding which type of surveillance to employ. Each different type

will involve introducing different harms, or different degrees of harm, on the person subject to that surveillance. Furthermore, each method of surveillance (CCTV, wiretapping, keylogging, etc.) will involve different harms in different contexts. For example, CCTV in someone's bedroom could be more harmful than keylogging a computer in a call centre where there are strict rules prohibiting personal use of the computers, but keylogging an individual's home computer would be more harmful than CCTV in the street where that person usually shops.

Rather than attempt to produce an exhaustive list of each type of surveillance and its respective harms and benefits (such a list would be cumbersome and quickly become outdated) I shall instead discuss the intrusiveness of the surveillance. I argue that the harms properly relevant to the proportionality principle in surveillance are the harms occurring to the liable subject of surveillance, rather than to non-liable people. This equates in the just war tradition to harm visited on combatants rather than non-combatants. This is not to say that the harms visited on non-liable people should not also be subjected to considerations of proportionality. However, I believe that, as in war, the harms visited on the non-liable should be considered in the light of the principle of discrimination within the doctrine of double effect. As in the first part of this paper, it is also important to determine which benefits are appropriate to be weighed in the balance against the harms. Finally, I return to the example of Datong to demonstrate how context is a relevant consideration.

7. Proportionality *in bello*

The idea that liable targets are subject to considerations of proportionality sits at odds with some commentators in the just war tradition. These commentators, Thomas Hurka among them, hold that proportionality is not a proper consideration of combatant-on-combatant fighting, but only of combatants killing non-combatants. To carry the analogy, this would be equivalent to saying that proportionality is not a proper consideration of surveillance of the liable, but only surveillance of the non-liable. As I have suggested, though, this is counter-intuitive. It makes sense to talk about levels of surveillance to be carried out against those liable for that surveillance. Thus we should either abandon the analogy at this point or challenge the perspective

of those commentators such that proportionality in war should address combatant-on-combatant fighting. I shall do the latter.

Hurka argues that "*in bello* proportionality as standardly understood seems to allow a nation to kill virtually any number of enemy soldiers to save just one of its own soldiers. Once a war has begun, enemy soldiers are essentially free targets that one may attack at any time. … If killing enemy soldiers now will prevent them from killing one of our soldiers in the future, it seems we may kill almost any number to achieve that end. … it seems we may kill virtually any number to save one of our soldiers" (Hurka 2005, 58).

If Hurka is correct in this then proportionality in a traditional understanding is employed in *jus in bello* only insofar as it concerns non-combatants. However, proportionality regarding acts which involve non-combatants is also a consideration of the classic doctrine of double effect (DDE). Within the context of DDE, the proportionality of acts against non-combatants makes sense against a background assumption that the targeting of non-combatants is always impermissible. DDE can be summarized as stating that targeting which would amount to the deaths of non-combatants is permissible if and only if:

> a) the act considered independently of its evil effect is not in itself wrong;
>
> b) the agent intends the good and does not intend the evil either as an end or as a means; and
>
> c) the agent has proportionately grave reasons for acting, addressing his relevant obligations, comparing the consequences, and, considering the necessity of the evil, exercising due care to eliminate or mitigate it (Cavanaugh 2006, 36).

To take the *jus in bello* principle of proportionality as pertaining to non-combatants could be seen to undermine the principle of discrimination. The latter states that non-combatants cannot be targeted (O'Donovan 2003, 42–43). However, the principle of proportionality, when taken to refer to non-combatants, seems to suggest that they *can* be targeted so long as the benefit is sufficiently great. This leads to a degree of

inconsistency within the two major principles of *jus in bello*: one treating the prohibition on targeting non-combatants as absolute, the other treating it as *pro tanto*.

Alternatively, one might see, the two principles as complementary, both concerning non-combatants. Hence the principle of discrimination forbids the targeting of non-combatants, and the principle of proportionality limits the incidental harm to non-combatants when combatants are being targeted. To use the proportionality principle in this way, though, would effectively repeat the function served by the proportionality principle in the DDE and render at least one of these principles redundant while also taking into account the same concern twice. To avoid this, one could reject the inclusion of the DDE in the consideration, but that brings with it further problems through losing considerations of intention (see, for instance, McMahan 2009).

A better approach is to see the proportionality principle in *jus ad bellum* as concerning benefits and harms of the war *per se*; the proportionality principle in *jus in bello* as concerning benefits and harms insofar as they concern combatants; and the proportionality principle in DDE as concerning benefits and harms insofar as they concern non-combatants. This is certainly neater and avoids the inconsistency I have highlighted, but is it right? If Hurka is correct that, "we may kill virtually any number [of enemy combatants] to save one of our soldiers" then any discussion regarding the proportionality of combatant-on-combatant fighting would be largely irrelevant because almost any act would be proportionate.

Imagine a situation in which an act of war involving only combatants is necessary but not proportionate. Take, for example, the capture of an island which is viewed as necessary for the continued prosecution of a war. All non-combatants have been removed from the island, but it is now defended by a large number of combatants who will not surrender. To take the island will therefore involve killing all of the defenders.

If the two sides are (more-or-less) evenly matched in terms of technology and materiel then this would not be ethically problematic. However, if the defenders are armed with blowpipes and spears while the invader has machine guns, air support, and tactical nuclear weapons then the battle would be disproportionate and, I believe,

ethically problematic. If I am correct in this, and I accept that it is controversial, then, contra Hurka's description of the standard understanding of proportionality, we may *not* kill virtually any number of enemy combatants.

Returning to surveillance, and maintaining the analogy with the just war discourse, as I think I can now do, there are similarly three aspects of proportionality which should concern those engaged in surveillance. The first is the effects of surveillance as such (*jus ad speculandum*), the second is the effects of surveillance on those who are liable to be subject to surveillance (the proportionality principle of *jus in speculando*), and the third is the effects of surveillance on those who are not liable to be subject to surveillance (the proportionality qualification in DDE as a part of the principle of discrimination). For the remainder of this paper I shall focus on the proportionality of carrying out surveillance on the liable.

It is less controversial to talk of proportionate surveillance of the liable in surveillance than in war. Imagine that there are reasonable grounds to suspect a person of being an active shoplifter, and that shoplifting is an adequate offence to merit justified surveillance. Now imagine that the shoplifter is subjected to round-the-clock monitoring of all personal movements, recording of all phone calls, bugs placed in his house, etc. Unless he were shoplifting something of value to national security (in which case the justifying cause would be espionage or treachery rather than shoplifting) this response would be entirely disproportionate. At the same time, it would also be disproportionate to subject a person suspected of being actively engaged in a terrorist plot to plant a bomb in a crowded area to no more than public-area CCTV with a heightened awareness on the part of the camera operator whenever that individual enters the operator's field of vision. Surveillance can therefore be employed disproportionately against legitimate targets, just as it is possible for acts of war to be employed disproportionately against legitimate targets.

8 Harms and Benefits

8.1 Harms

I argued above that all reasonably foreseeable harms arising from surveillance, as from war, should be considered in the balance of proportionality. What then *are* the

harms of surveillance? This is a complex question and to give a thorough answer would require empirical research and at least a paper in its own right. However, I can speculate as to what are plausible harms of surveillance. In brief, I see these as including (but not necessarily limited to) the following:

1. Privacy violations
2. Chilling effects
3. Social sorting – stereotyping, stigmatization, discrimination
4. Paternalism (harm to autonomy)
5. Social fatalism
6. Behavioural uniformity
7. Imbalance of distribution of costs
8. Diminution of trust
9. Vulnerability
10. Fear of control
11. Human error and abuse of power
12. Fear of being "found out" when hiding legitimate information

It is noteworthy that particular acts of surveillance may only carry *some* harms. The list is not therefore a compilation of all harms which occur with every act of surveillance. Jesper Ryberg, for example, argues that CCTV in public spaces does not involve a violation of privacy (Ryberg 2007). By positing an elderly woman (Mrs Aremac) watching the street below her window and writing in a journal all that she sees, Ryberg argues that firstly there is no substantive difference between Mrs Aremac and a CCTV camera, and secondly that there is no invasion of privacy in the case of Mrs Aremac. By implication, then, there is no necessary invasion of privacy by CCTV in public spaces. While Ryberg challenges pre-theoretical intuitions about CCTV and privacy, Tony Doyle has made the claim that some surveillance of the non-consenting may not involve any harm (Doyle 2009). This he argues for by imagining an alien watching earth at a sufficient remove that he cannot affect the lives of any of the people he watches. Doyle argues that this is essentially a harmless act of surveillance, rendering the alien the "perfect voyeur". There is not space here to look at these arguments in any detail and I do not refer to these papers because I necessarily agree with them nor think them uncontroversial (Annabelle Lever, for

example, takes issue with Ryberg (Lever 2008)). What they demonstrate, though, is that it is at least plausible that not *all* harms happen with *every* act of surveillance. At the same time, in practice it is unlikely that there is an act of surveillance carried out on a non-consenting, competent adult, which does not carry with it some level of harm.

Rather than work through each of these harms, or laboriously pin a set of harms to each act and context of surveillance, I will focus on one aspect which is common to them all: intrusiveness. In the introduction I cited James Welch of Liberty, who recognised the significance of intrusiveness when he said, "This is a disproportionate and unnecessarily intrusive use of RIPA" (Alleyne 2008). As an act of surveillance becomes more intrusive so more information, or more intimate information, is likely to be recovered on the surveilled subject. As more (or more intimate) information is recovered on the surveilled subject, so the harms listed above will become either more likely to occur or they will become greater harms when they do occur. Intrusiveness is therefore a key element in considering harms of surveillance.

To say that intrusiveness is a key element in considering harm is of limited use without clarifying what it is for an act of surveillance to be more or less intrusive. Imagine an employer monitoring her employees. Many of us would accept some form of time card stamping to establish time of entry and exit from the work place. As a form of surveillance this is not too intrusive. It may carry some of the harms listed above, perhaps a diminution of trust within the workforce, but this is not likely to be a great harm unless the employees are a very trustworthy group and there is no reason to doubt their time-keeping abilities. CCTV in the workplace is more intrusive, as this could well have chilling effects, lead to behavioural uniformity, carry some stigma, violate the privacy of some and lead to a fear of control. Placing CCTV cameras in the toilets or changing rooms at work, though, would be more likely still to involve privacy violations, chilling effects, feelings of vulnerability, stigmatization, behavioural uniformity and a fear of control. As the surveillance becomes more intrusive, then, as it intrudes into more areas of the employees' lives, so the severity of the harms increases. It might also be, as in this case, that the number of harms increases also.

A second illustration involves a consideration of the data returned by surveillance. Broadly speaking, surveillance can return two sorts of data: content and metadata. In the case of a recording made of a meeting between two people, the content describes what was said while the metadata describes the time, place and duration of the meeting. The value of metadata and content respectively will depend on the context. If a target is a suspected terrorist talking on the phone about the location of a bomb about to be detonated then the content would be more valuable. If on the other hand the suspected terrorist is not talking about a wrongdoing then the number of the person to whom he is talking and the duration of the conversation may be of more use than the content. It will enable the surveillant to build up a picture of the terrorist's contacts and potentially find "middle men" who act as couriers between two terrorists. Such a middle man may convey information from one terrorist to the other allowing the two never to meet and so avoid being associated with one another. By then targeting the conversations of this middle man more intelligence may be gathered than by targeting either of the two terrorists themselves. Generally speaking, and depending on context, content can be useful for determining a person's intentions while metadata can give an understanding of that person's actions, their contacts and their habits, as well as building up profiles of people such that anomalous actions can be recognised (Kopstein 2013). It is also possible to build up a picture over time of a person's habits based purely on the metadata of phone calls. These might give indications that the person is having an affair, that they have particular medical problems, or even that they are contemplating suicide, depending on where they are, and for how long, if they have their mobile phone with them.

From the perspective of the individual or group affected, though, the collection of content will *usually* be more intrusive and thus more harmful than the collection of metadata. For many people, a close conversation between two individuals is the epitome of what is invoked by privacy. Hence types of surveillance which collect and record metadata are intrusive, but those types which collect and record content are typically more intrusive still. As such, content-collecting types of surveillance are generally more harmful than those which collect just metadata.

Taking these illustrations together, it can be seen that the intrusiveness of an act of surveillance depends not only on the means of surveillance but the information

monitored via that means. For example, in the case of the suspected terrorist subject to a wiretap on his phone, it is arguably more intrusive to listen to his private conversation than it is to listen to that regarding the forthcoming bombing he is planning. Imagine that the conversation which does not relate to a wrongdoing is an intimate discussion with his lover. Granted he may provide information in this call regarding his whereabouts in the coming days and so allow the surveillant to determine more information about the bombing. It may also be that his lover is also a terrorist and the two are communicating about the bombing using code words so that what appears to be a conversation about coffee is actually about the planned bombing. Assume, though, that the conversation does not contain any information pertaining to the act of terrorism. If this could be established to a reasonable level of satisfaction then it would be unnecessary and intrusive to monitor this particular conversation. As such, intrusiveness is not only a factor of the sort of surveillance used, but also a factor of the nature of the information returned.[4]

8.2 Benefits

I argued above that two types of benefit should be placed in the balance when weighing proportionality. These are the sufficient just causes and contributing just causes. A third type of benefit, which I called peripheral benefits, should not count. Peripheral benefits are those which do not feature in the just causes. In relating this to the *means* of surveillance there is a parallel in terms of peripheral benefits. I also argued above that the contents of peripheral benefits and contributing just causes should be determined on a case-by-case basis, there being no unifying theory that would determine into which category a benefit fell. This holds for *in speculando* considerations as well, meaning that the *ad speculandum* consideration of just cause contributes to both *ad speculandum* and *in speculando* principles of proportionality.

Returning to the example of the violent terrorist, I will assume that a *jus ad speculandum* consideration has found surveillance to be acceptable in his case. All the relevant criteria for such a consideration have been met (there is a just cause, a correct intention, a chance of success, and the surveillance is deemed necessary and proportionate (see Macnish 2014)). The surveillant should now turn to consider the

[4] I am grateful to Thomas Hurka for pointing this out.

jus in speculando aspects, including proportionality. However, in assessing the proportionality of the surveillance, the surveillant must bear in mind the wrongdoing that she is up against. Terrorism is a grave wrongdoing and could therefore justify very intrusive means of surveillance. In reaching this decision, the surveillant is bringing the just cause of the surveillance to bear on her methods of surveillance. This is not overly surprising: when I earlier raised the issue of the harms wrought by surveillance in the contexts of harming a violent terrorist and a shoplifter, the nature of the occasioning action (an aspect of just cause and hence *jus ad speculandum*) was directly relevant to the method of surveillance applied. The terrorist warranted more, and more intrusive, surveillance than the shoplifter.

A second example could be found with the employer monitoring her employees. Which methods of surveillance she uses, and where she places them, will be strongly influenced by the reasons for employing surveillance in the first place. If, for instance, the reason for the surveillance was absenteeism by a significant number of workers, then responding to this would probably be a just cause. This might justify the introduction of time cards or similar. Monitoring the conversations workers had in the toilets, though, would almost certainly be excessive, even if absenteeism was being discussed by workers while using the toilets. The just cause consideration is therefore relevant not only for whether to use surveillance, but also what sort of surveillance could justifiably be used.

It therefore seems reasonable in these cases at least to take the benefits which can be weighed in the *jus in speculando* considerations of proportionality to fit the same categories as those in *jus ad speculandum*. Hence the relevant benefits are the sufficient just causes and contributing just causes. Peripheral benefits still should not be counted in favour of the methods of surveillance just as they are not counted in favour of the ends of surveillance.

9. The Proportionality of Datong

In §6 I referred to the Metropolitan police using a surveillance system called Datong. According to Ryan Gallagher and Rajeev Syal (Gallagher and Syal 2011), the Datong system can pretend to be a mobile phone network with the abilities of turning off phones remotely, intercepting phone conversations and text messages, and gathering

data about users in a targeted area. The article raised the question as to whether the system was proportionate.

According to the article the Datong system is potentially very intrusive. Phone calls and text messages are the epitome of private conversations. To intercept these is a violation of privacy which would need considerable justification in order to be acceptable. This is widely recognized in many countries, where a warrant signed by a senior authority is required before interception of phone calls can take place. Given the intrusiveness of the Datong system, I take it to be very harmful. However, I shall also stipulate for the purposes of this discussion, that the system will be more effective the more intrusive it is. I acknowledge that in reality this correlation between intrusiveness and efficacy does not always hold.

To assess benefits one would normally apply the surveillance to the circumstances in which its use was proposed. Unfortunately neither Datong plc not the Metropolitan police would comment on actual situations in which the system has been used. Given this I will suggest three hypothetical scenarios: terrorists about to carry out an atrocity similar to the 7 July 2005 attacks in London; rioters such as took to the streets around the UK in August 2011; and shoplifters.

Beginning with the terrorists, the relevant benefits of the surveillance, if successful, would include apprehending the terrorists, avoiding the attack (thus saving dozens of lives), and deterring future terrorists from similar actions. Peripheral benefits might include employing workers at Datong plc, or providing return on investment for Datong plc shareholders. The harms, owing to the intrusiveness of the Datong system, are considerable. However, the benefits in this case appear to clearly outweigh the harms. Visiting these harms on a select number of people who have acted in such a way as to justifiably invite suspicion is a proportionate response to the threat posed to life. This therefore strikes me as being proportionate.

Moving to the rioters, the relevant benefits of the surveillance include apprehending the wrongdoers, avoiding damage to property and endangerment of life, and deterring other rioters in the knowledge that their communications will be intercepted. To my knowledge, no direct threat to life was a part of the riots (although acts of arson clearly do put people's lives in danger), and so the damage was limited to property

and perhaps fear for life in the case of some. The proportionality of this case is less clear-cut than that of the terrorist. The benefits will turn on the value of the property endangered by the rioters. The surveillance would be more likely to be proportionate as the risk of harm, or the value of the property, increases. It is of course important to note here the distribution of harm in that the value of property is typically far higher to the owner of that property than to anyone else. Hence the value of a house in an impoverished area may be quite low in market terms, but very high in terms of the person who cannot afford to move. There is therefore an empirical question here as to the value that society (or groups within society) places on property. There are also questions about how highly society values civil order.

It is important to bear in mind that here I am discussing not whether surveillance *per se* is justified in response to rioting (I think that it is) but whether this *sort* of surveillance is justified in response to rioting. Furthermore, the harms considered here are the harms against those liable for surveillance (i.e. the rioters) and not against those who are not liable for surveillance (i.e. residents in the area). It may be objected that, as they are rioting, the rioters deserve intrusive surveillance. This may be true, but it is not true without limits. It would not follow that the police would be justified in placing cameras inside suspected rioters' houses, for instance, whereas this might be justified in the case of the suspected terrorist. Hence proportionality is a relevant consideration and I return to my claim that the proportionality consideration in using Datong in this situation is less clear cut than in the case presented by the suspected terrorist.

Finally there is the case of the shoplifter. Here the relevant benefits include apprehending a petty criminal, preventing further shoplifting and deterring others from shoplifting. Following from the cases of the suspected terrorist and the rioters, this is clearly disproportionate and so unjustified. The harms visited on the shoplifter are simply not warranted by the damage caused by his actions. Again, though, this is not to say that *all* surveillance of shoplifters is disproportionate, merely the use of the Datong system against shoplifters would be disproportionate.

10. Conclusion

In this paper I have attempted to go beyond the media sound bites of lawyers, pressure groups and the state to determine how one might ascertain proportionality in terms of surveillance. I have argued that proportionality bears on both *jus ad speculandum* and *jus in speculando* considerations. It is a proper consideration both in the decision whether to use surveillance (the ends) and in determining which type of surveillance to use (the means). In both cases, proportionality involves balancing the relevant benefits and harms to arise from the surveillance.

In understanding relevant benefits I drew heavily on the work of Thomas Hurka, writing in the tradition of the just war discourse. This demonstrates the value that this discourse can have for areas other than war, and particularly surveillance. It is not a cookie-cutter approach as the harms (and benefits) in surveillance are different from those in war. However, it is a helpful springboard for discussing both the difference between relevant and irrelevant benefits, and the degree to which (indeed whether) benefits should outweigh harms.

Proportionality is not unproblematic, but it does not follow that it is not therefore morally irrelevant, or that it should be abandoned. The above cases demonstrate the relevance of proportionality: disproportionate surveillance is wrong just as disproportionate sentencing of criminals is wrong. Just as we revolt at draconian sentencing, so we are right to recoil from draconian surveillance. There are many reasons why we hold Big Brother and the Stasi in contempt, but the disproportionality of the surveillance carried out by each is a significant factor. In democratic countries it is important that we do not lose sight of this in our eagerness to apply new and intrusive means of technology to combat the wrongs that we see in society.

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