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Introduction

Bravo! Kevin Macnish brings some coherence and direction to an anarchic field unduly based on emotional responses and unarticulated assumptions. The well-developed literature on the ethics of war offers a rich area for instruction and comparison. His discussion is thoughtful, fair and clearly stated. His analysis of the modest literature on the topic (modest given the importance and salience of contemporary surveillance and the few articles on ethics) is a model for how to systematically approach and distil the essence of unrelated articles¹ to make the case for what is needed.² He simplifies the number of normative principles even if he doesn't do much with the values which legitimate them, nor help us deal much with the ethics of goals (although this would come under "just cause"). Nor does he offer much to contrast various surveillance means, as against surveillance as an omnibus tactic against some other (unspecified) general means.³

The concept surveillance is so laden with cultural and emotional baggage that it might be better to talk about the ethics around crossing personal borders. At any event, a more precise definition and a way to account for variation would be helpful. When, where or to whom should these ideas be applied? Who is the sovereign? Is it for those making laws about data, those setting or reviewing privacy rules, guidelines and assessments? Is the audience executives, privacy officers, government and/or private surveillance agents, researchers, journalists, managers, parents, friends, the public at large?

Is his argument to be applied to any datum the senses take in about another, or is it restricted to that which is intentionally gathered, attached to or emanates from the person, and then to any datum in any form, or primarily that which is intimate or sensitive, that which isn't freely offered or known to outsiders that which is processed or altered? Do different kinds (e.g. audio, visual, olfactory, biochemical) or the form in which it they are presented (e.g., print, video, reproduction) call for gradations in ethical analysis or does one size fit all? Should different standards apply to different types of technology? Why (or should?) the

¹ I am not sure these are that; they are softly normative or guiding ideas but does that make them principles?

² The lack of cross referencing in most of the articles he reviews is itself worthy of an article and a sad commentary on scholarly insularity and wheel re-discovery.

³ In the case of drugs for example—informers, undercover operations, video cameras, dogs, physical searches, sensing residue on cloths and surfaces or drug testing (and even then—behavioral tests or assessments using urine, blood, hair?). So even if goals are as pure as fresh snow and the presumed costs of inaction are greater than the risks of action, we need criteria for deciding what tools to use among the many imaginable.

new surveillance call for a new ethics relative to traditional forms such as informing, eavesdropping, infiltrating and plain old watching and listening?

My damning observations (if that they be) are accompanied by robust, not faint praise. But a critical reviewer must go beyond praise. My concern is not so much with what the paper does, but with what I hope future work will do.⁴ I argue for a more imperialistic, broader reaching ethics of surveillance that can offer a systematic way of dealing with surveillance settings beyond the conflictual, and that can consider the goods as well as the bads, subjects⁵ as well as agents,⁶ and the empirical phases of surveillance processes. Perhaps it is the chimerical goal of the non-specialist, but it would be good to find a Rosetta Stone to make sense of, and offer greater ethical direction to, the heterogeneous mix of surveillance components and settings. I think there are some linking and transcendent elements here, however hard to discern from the cave while wearing disciplinary dark glasses.

A comprehensive ethics needs to cover a variety of settings (beyond types and forms of data and kinds of tool), not just those of conflict and coercion. Kevin doesn't claim that surveillance is like war.⁷ His approach fits conflict settings best. However the paper's title, 'Just Surveillance? Toward a Normative Theory of Surveillance', suggests something more inclusive. That title and the paper's assertive style will lead many readers to think he is offering a more general theory (although it is really an approach rather than an explanatory theory). I hope that he will expand his work beyond settings of conflict and coercion to three other major surveillance scenes. These are contracts, care and the crosscutting setting of the private within the public, topics expanded on in Marx (forthcoming).

Avoiding the Bad Doesn't Mean Doing Good

In writing about the ethics of surveillance in undercover police investigations and later other forms (Marx forthcoming), I suggested a series of questions that tended to involve avoiding harm in data collection and application. Whether for decisions about a tactic more generally or its application in a given case, the more the above questions can be answered in a way that supports an affirmative answer, the more likely it is to be ethical.⁸ Kevin's work follows the same model, if in a more workable fashion because he has fewer questions. Usability is gained at a cost of covering fewer bases.

Yet frameworks which mostly involve questions of "harm avoiding" rather than "doing good" are limited. First, is it enough to simply avoid harm? And even then we need to ask harm to whom? Might there not also be an ethical obligation to do harm when it is warranted? Here I take issue with his principle of categorically avoiding harm and discrimination, if these are minimal, necessary and equally shared. That could be the case with some undercover investigations into serious crime (where to declare intent might be to insure the operation will fail) or even with a highly contagious, catastrophic illness when there are no

⁴ That can be a cheap shot if the reviewer does not self-deprecatingly warn the reader of his or her awareness of the ease of responding to what a paper doesn't do, rather than what it does.

⁵ Regarding subjects, does it matter whether or not they are citizens and whether the agents act within or beyond their own geographical borders?

⁶ With respect to agents, it is necessary to consider the harm that may befall them as a result of using a given means, as well as the harm that may be done to others.

⁷ However, some of those in the Surveillance Studies game who carelessly restrict and reduce the universal human (and indeed animal) activity of surveillance to something always involving power and domination are guilty as charged. The goal should be to contrast the causes, correlates and consequences of types of surveillance. Those forms the researcher sees as illegitimately involving inequality, coercion and secrecy will be better understood when the breadth of the topic is seen, rather than eliminating the study of other forms by a narrow definition. Even when surveillance involves inequality, moral condemnation or support require specification of the values by which it is judged.

⁸ Such a list can mislead in implying that all factors are equal. Kevin is correct that such a list is unwieldy, although it was meant to provoke thought, not to serve as an operational tool.

grounds for prior suspicion and the wide net that is cast necessarily initially includes the innocent. In these cases non-discrimination rather than discrimination seems preferable. So whether or not discrimination is desirable or undesirable would seem to depend on the context.

But even when harm is not the issue, should not the avoidance of harm (as in protecting the innocent) be joined by a positive normative concern with doing good? Can these be integrated into the same framework? Are an ethics of virtue and an ethics of avoiding harm different sides of the same coin or different currency altogether? As a real philosopher perhaps Kevin can take this further and develop an ethics of obligation to act alongside of one not to act.

The ethical advantages of a given tactic must be considered beyond the absence of disadvantages. A related factor involves the question of goals—one of Kevin's principles. The *jus ad speculandum* involves ends in the sense that Aristotle implied as purpose. But this can be made more specific. The problem of dealing with goals and intentions are monumental (e.g., hidden goals, unclear goals, multiple goals, different interpretations of what goals mean, changing goals). When stated purposes are joined by consequences—actual outcomes occurring at a later stage that always come with risks that are usually difficult to calculate because of the known non-specific unknowns and the unknown unknowns.

Most discussions of ethics focus on the attributes of the means and conditions of their use, while goals tend to be assumed; even then, the emphasis for both Kevin and Helen Nissenbaum (2010) is about the fit between means and ends, not about the appropriateness of the ends.⁹ But a broad ethics of surveillance must consider the ends as well the means. Opponents and supporters of a given surveillance setting often talk past each other and need to be clear about whether they are talking about means or ends. Both, neither, or one or the other can be seen as ethical or unethical.

Kevin is not alone in the minimal ethical attention given to actors *other* than agents of surveillance. Subjects, third parties in the data stream and even broader audiences shouldn't be excluded from ethics. Why is the emphasis almost entirely on those doing the surveillance and not also on those who are subject to it? Don't subjects of legitimate surveillance have an obligation to cooperate and not resist, thwart or neutralize it for selfish reasons? Ethical issues of confidentiality can also weigh heavily on third parties who may encounter sensitive personal data in the course of their work. The issue might even apply to the "use" of data that has become "public" as a result of illegal actions (whether physical or electronic break-ins), violations of confidentiality, trust or whistleblowers. Does the fact that data or information becomes known through questionable means therefore preclude subsequent knowers from any ethical concerns?

To be grander still, our ethics should include crossing the borders of the person or group for *communication* as well as surveillance (that is imposing data or information on subjects), as well as taking it from them (Marx 2011). What is at issue here for many indignation raising topics is the question of personal borders—whether they keep information within or prevent it from being imposed upon the person.

The Specificity of Surveillance Occasions and Strips

Kevin sets up his paper as being philosophical rather than empirical, but I am not convinced. Thus he implicitly calls for empirical considerations in determining whether the consequences of an act are discriminating or whether the latter has a good likelihood of success. But beyond this, I would like to see

⁹ The mantra of context (with its implication that for purposes of judgment the means used need to be "appropriate" to the setting) is (or should be) central to surveillance studies. Yet, as with all culturally relative approaches, in the name fairness, neutrality and knowledge, this should not automatically excuse the analyst from moral judgment.

the analysis of the wrongs and rights of personal border crossings more logically connected to the empirical.

One way to approach this is to tie the analysis more closely to the totality of activities that constitute what can be called the *surveillance occasion*. Such activities are *surveillance strips*. These are the familiar distinct actions such as subject selection, and data collection, processing/analysis, interpretation, uses/action and data fate. A fuller account still could cover expectations about being noticed (a right to be identified), or being forgotten.

Kevin's approach does not provide sufficient space for surveillance as differentiated sets of processes (although he does distinguish between the decision to use a tool and its application). Ethical analysis is not like a vaccination that occurs once and is over. Rather it must be approached in relation to an enduring process involving a series of separate actions that are temporally, conceptually, empirically and often spatially distinct. Over time, the distinct action fragments of these stages combine into stories about personal data and illustrate the emergent character of surveillance and privacy as multifaceted abstractions made up of many smaller actions. As with issues around the reputation and even the DNA of the departed, the occasion may outlive the subject.

The various kinds of rights and wrongs of surveillance do not occur randomly, but tend to cluster at particular social locations (e.g., discrimination seems most likely at the target selection stage, harm to reputation at the data fate stage). But there has been little systematic work exploring this.

In contrast to social science explanation with its probabilistic statements and peer decisions about what counts as significant, the value of an ethical system is much more heuristic. Is it useful or not? Does it clarify what is at stake? Those of us who offer sermons from on high in the university would do well to demonstrate how our surveillance ethics can be applied to actual cases such as with the NSA and drones. This can hopefully make clearer why a given tool or its application seems appropriate or inappropriate. Until then talk is cheap.

One article early in a new field's history can't provide a comprehensive coherent general ethics of personal data collection and communication. But praise to Kevin Macnish for a fine beginning.

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