Debate

Response to Bennett: Also in defence of privacy

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Privacy has always been a messy, complicated, and rather vague concept. It has been in ‘disarray’ since earliest attempts at definition. But that’s OK—and similar to a number of other powerfully important concepts, such as freedom, liberty, and justice. That alone should not dissuade us from its use and value. The question then is, does it still capture a meaning that is valuable to us in the 21st century and does its usage in public and philosophical discussions help us to understand and address important human and social issues. To this I simply answer yes and join Bennett in defending privacy. My defence, however, proceeds a bit differently, as might be expected, to help further the privacy and surveillance community’s shared, but not new, conversations about this topic.

I believe that defining contemporary problems associated with governmental and nongovernmental activities of monitoring and recording peoples’ actions, behaviours and communications is best done by speaking in terms of ‘surveillance’ not ‘privacy invasion’. In this sense then I disagree with Bennett that privacy is an effective way to frame the contemporary problem. The scale and scope of the problems exist at a systemic level (institutions, social practices, fabric of modern life) not at the level of private space (invading one’s house, taking pictures from a distance, over-hearing a conversation between two parties). The phrase ‘privacy invasion’, as it is commonly used and understood, is too limited to encompass what has become a distinguishing and disquieting feature of modern life. Surveillance as a concept, as an image, more accurately connotes the modern landscape.

Surveillance as a definition of, or frame for understanding, the policy problem is far more powerful than privacy because the way we define a problem affects what policy options are best for addressing the problem. Privacy definitions elicit policy options that focus primarily on giving individuals ‘rights of control’, based largely on the thinking of Warren and Brandeis (1890) and Alan Westin (1967) and developed in the mid 1960s at the time that society was moving from paper records to large computerized databases—not a time of decentralized data capturing literally every movement on mobile, wireless devices and putting that information up for grabs on the internet. As Bennett and others rightfully point out, the fair information practices, developed in response to privacy definitions of the problem, are generally weakly enforced, rely upon individual initiative, and narrowly cast the problem. Surveillance definitions elicit broader social, institutional practices and enforcement—ones that are more likely to effectively respond to the problem.

But although the problem is best defined in terms of surveillance, the social and individual value that is at risk from surveillance is still best captured by privacy. Surveillance is not just a problem because it involves monitoring and tracking of individuals but because surveillance practices affect the panoply of concerns that we have bunched together under the powerful concept of ‘privacy’. Surveillance is an

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activity or set of activities that are of concern to societies for reasons, and privacy provides, perhaps not the perfect, but the most robust and concise understanding of the reason we are, and should be, concerned. ‘Everyday surveillance’ (Lyon 2001) and the ‘panoptic sort’ (Gandy) have indeed created the ‘digital person’ (Solove 2004). We mediate most of our daily existence through digital, wireless, mobile systems. The surveillance activities accompanying these have fundamentally changed the relations of people and institutions, and increasingly of people and other people. So how do we understand that fundamental change? And I would argue that even in the 21st century our human, and perhaps predominantly liberal, understanding of that change has to do with some intuitive, conceivably innate, sense of the relationship of self within the larger society—an understanding that is generally understood as involving the value of privacy.

I agree, however, with Bennett and others (Lyon 2001; Haggerty and Ericson 2006; Allen 1985) who criticize an individualistic conception of privacy. As Bennett notes, I have argued that privacy is also a common value, a public value, and a collective value—and that when we are talking about privacy we are also talking about ‘the larger questions about the kind of society we are building,’ as Bennett states in his essay. Similarly Steeves refers to ‘a social construction that we create as we negotiate our relations with others on a daily basis’ (Steeves 2008, 193). These relationships between individuals and modern organizations are enormously complicated and now almost universally are mediated by, or occur within, socio-technical systems. Moreover, as Bennett and Nissenbaum (2009) point out, privacy is not simply about a ‘bubble’ around the self but about this social, relational, and contextual complexity.

And if we recognize that privacy encompasses more than the flow of information from the individual to others but also the relationships of which individuals partake, then the problem of monitoring and tracking individuals (surveillance) within those relationships entails a solution that targets these surveillance practices. This dovetails with Bennett’s criticism of ‘fair information practices’ as the quintessential solution. Instead the solution becomes much more focused on the way these relationships are structured, understood, and most importantly held accountable. This means looking at these relationships as entailing power—as has also been recognized by those (such as Lyon 2001; Norris and Armstrong 1999) who start with a surveillance perspective. Privacy enters the discussion because it provides one of the key values available to hold power accountable. Privacy involves a constraint on the use of power—a rationale for setting limitations on its exercise. And, as has been noted since the beginning of our discussions of privacy and surveillance, information is a source of power. Within systems where accountability is expected and valued, justifications are required for uses of power and these justifications are necessary *ex ante*.

So, do we need a concise definition of privacy that conveys its larger social importance? Or is such a definition sufficiently recognized in our previous discussions of a social, collective and public value of privacy (Regan 1995; Simitis 1978), or of contextual integrity (Nissenbaum 2009), or of privacy as a social construction (Steeves 2008)? Where should surveillance and privacy scholars best spend their time—on framing the problem, on defining the concept or value to be protected, or on developing solutions? I recognize that this is all integrated but also recognize that finding a perfect conceptualization of the value may distract us from developing and analyzing options for responding to the problems involved.

However some attention to a more clear conceptualization of privacy in light of the current social and technical realities is essential and Bennett’s piece nicely charts a path for our community. In my view, the need is for reinvigorating privacy not creating a new concept. Although I note the significance of a human rights basis for privacy, I would abandon the notion of an individual right to privacy—agreeing with Bennett’s analysis, as this approach appears to have muddled the territory—and instead emphasize that the human rights justification supports a more social orientation for privacy. A human rights justification is entirely consistent with arguments for common, public and collective importance of privacy. Pitting the individual as citizen, consumer, friend or enemy against the organizational forces of society has become unhelpful and distracting.

Similarly, the public-private dichotomy is too simplistic to represent the range of relationships that individuals have with other people and organizations. Instead, the conceptual foundation for privacy in today's world should be its social, or societal, value. On the individual level, people may perceive they have different privacy preferences; but on the societal level, people require some measure of, and understanding of, how they can relate to others in a way that permits the development of a sense of self and connectedness to others within the society of which they are a part. This harkens back to a conception that Ferdinand Schoeman articulated in 1992 of privacy as protection against 'social overreaching,' limiting the control of others over our lives but also permitting us to participate in our social lives (1992, 1). The notion of overreaching well incorporates the importance of accountability, of privacy as a restraint on the use of power, and of the concerns that both privacy and surveillance scholars have been talking about for fifty-odd years.

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