Debate

A response to Bennett's 'In defence of privacy'

John Gilliom

Ohio University, USA. gilliom@ohio.edu

Introduction

Colin Bennett has written a thoughtful and enlightening article that is sensitive to both context and nuance; it advances valuable arguments in a balanced and engaged presentation that is sure to become a widely assigned and cited reference point in the field. Opening with the recognition that much contemporary surveillance scholarship has gone post-privacy, Bennett advances a 'defence of privacy as a way to frame the contemporary problems, as a regime of governance and as a set of practices'. What I read as his larger message is a case that privacy is actually more intellectually relevant to Surveillance Studies than it gets credit for and a plea for Surveillance Studies to stay relevant by maintaining its participation in the discourse of privacy. It advances, then, a request that Surveillance Studies comes home to privacy. To that, I must say, 'No, thank you'.

In the last two decades, the cohering field of Surveillance Studies has been shaping a vibrant paradigm for understanding and explaining surveillance. Surveillance Studies is now a robust interdisciplinary field that is, in many senses, defined by its movement away from the privacy/public law scholarship that defined the early phases of research and advocacy on surveillance issues. We are at a stunning confluence of rapid technological and social change, improving theoretical understandings, and self-consciously expanding scholarly networks. Much of our work has necessarily entailed going beyond and sometimes against the longstanding discourse of the privacy regime as new issues and intellectual framings come to the fore. We do not yet know how the journey will end, but one thing is sure: turning back to the privacy regime is the wrong way to go.

First, let me note that it is not 'privacy' that should be done away with, but the *regime* of privacy. By this, I mean, the *intellectual* regime which insists that privacy be the central theme or even the very terrain for every discussion of surveillance. Privacy is an important part of what we study, but we must and we are moving quickly away from an era in which it was the defining element of the field. The fact that we now have a leading scholar in the leading journal arguing for its salvation underscores the progress that has been made. But the mission of post-privacy scholars is not and really cannot reasonably be to remove privacy from the field of study—the mission has been (at least for me) to remove it from its position of intellectual and political monopoly. In the end, it is my belief that research-oriented participants in the field will do best to keep privacy in its proper place—as one part of the cultural politics of surveillance, but not as the organizing matrix for the field.

Space limitations prohibit a detailed engagement with this ambitious and far-reaching essay, so I here focus on three moments in the work: the conceptual defence of privacy as an intellectual tool; the realist

Gilliom, G. 2011. A response to Bennett's 'In defence of privacy'. *Surveillance & Society* 8(4): 500-504.

<http://www.surveillance-and-society.org> | ISSN: 1477-7487

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defence of privacy as *the* way that people see surveillance; and the pragmatist defence that privacy is an effective tool for limiting the spread of surveillance.

1. The conceptual defence

Much of the Bennett's essay is a dialogue challenging several of the central critiques of privacy as an intellectual concept—the lead items are the arguments that privacy is hyper-individualistic, spatial, legalist, blind to discrimination, and, in the end, simply too narrow to catch the richness of the surveillance experience. The general sway of each section is to introduce the critique, acknowledge the validity of the concerns, point to some ways in which the critique misses the evolving nuances of contemporary scholarship and policy, and close with a defence of the privacy paradigm. Along the way, students of surveillance gain a well-explained tour of key points of contention in the privacy debate.

But even when I am persuaded that there is particular evidence that some contemporary privacy scholarship or policy has actually responded to and improved from the longstanding critiques, I remain unconvinced that the general sway and tenor of the privacy paradigm does not remain hyper-individualistic, spatial, legalistic, blind to discrimination, and, in the end, simply too narrow to catch the richness of the surveillance experience. These concerns cannot be solved with a few upgrades. The defence of the intellectual ground held by the privacy regime also tends to overlook that fact that there are many (some yet unimagined) dimensions to the impact and powers of surveillance that simply don't fit the privacy framework. At one point, Bennett recognizes this when he notes that privacy discourse is not helpful when we consider something like the social impact of non-operative but potential surveillance. With no viable privacy concerns raised, he finds a 'crucial point at which privacy analysis ends and surveillance analysis begins'. Maybe I just get to that point a lot earlier.

The conceptual section is summarized, in part, with the observation that 'each critique (of privacy) is an important contribution, but none really challenges the concept and regime of privacy *in toto*'. My response to the point-by-point defence is that each defence is an important contribution, but none really *salvages* the concept and regime of privacy *in toto*. This is, in large part, because the problem is not so much the specific points, but the impact of the regime *in toto*. This intellectual monopoly is the central problem and it cannot be argued away with examples of updates.

2. The realist defence

Bennett argues: 'Like it or not, privacy frames the ways that most ordinary people see the contemporary surveillance issues. Surveillance scholars have got to live with it'.

This is probably one of the most important dimensions of the argument for having surveillance scholars take a sober second look at the privacy regime. But, upon reflection, I do not think that even agreeing with this statement about popular culture means that one agrees with the necessary dominance of the *regime* of privacy in our work as intellectuals. As I have noted, privacy is certainly a relevant part of at least some of our work because it 'frames the ways that most ordinary people see' surveillance. Because of this, privacy is a part of our subject matter. But, here, it must be stressed that popular perceptions of surveillance issues are only one part of a field encompassing all sorts of work dealing with technology, policy, theory, ethnography, and other agenda in fields as diverse as Sociology, Political Science, Anthropology, Criminology, and Science and Technology Studies. The argument that all of the scholars in all of these fields should submit to the ways that most ordinary people see things is precisely the sort of intellectual domination that we attempt to shed when we enter the post-privacy period of Surveillance Studies.

From a different perspective, I am also not sure that either one of the sentences quoted at the opening of this section is correct. For the first claim, about 'how most ordinary people see the contemporary

surveillance issues', there are a number of reasons to raise questions. First, though privacy obviously has a lot of polling power and is the go-to term for journalists, empirical research has demonstrated that there are at least some people out there who do not turn to the privacy framework to voice their concerns about surveillance (Gilliom 2001). When we interviewed welfare clients about their interactions with a new computerized finance, benefits, and eligibility surveillance system, they only said a little about privacy—they spoke more of fear, degradation, need, and struggle. These are issues that are simply far more relevant and pressing in a life removed from relatively abstract concerns about privacy. What would happen if we expanded this sort of research to use open-ended interviews and other means to get a sense for how people 'see' surveillance away from the confines of a pre-formatted public opinion poll? We should also consider the possibility that a big part of the reason that Bennett and I have different takes on these questions has to do with the locations and people we study. His recent work has been about and among the privacy advocates and their struggle with surveillance; I have no doubt that in such a context, the idea of privacy seems vibrant, alive, useful, and nuanced. My research has been among everyday people and their struggles with surveillance as one dimension of their troubles. Here privacy has less going for it: privacy concerns don't stack up well when competing with the hunger, fear, and homelessness that are part of a broader system of inequality that is complicit with systems of surveillance.

Furthermore, we also need to ask if 'most ordinary people' actually 'see' surveillance—frequently, they seem to be simply unconscious of the fact that they live in a surveillance-intensive condition called 'modern life'. When I first tell my students that their cell phone is a *de facto* location and interaction monitor or that each of their credit card transactions records a merchant code revealing the nature of their business, they are authentically surprised. They do not, in short, 'see' the contemporary surveillance issue, let alone put it in the terms of the privacy framework. So how do we work to help people 'see' the contemporary surveillance issues? This is an important point within the terms of Bennett's essay because political relevance is one of his central touchstones. Here, I believe that the predominance of the privacy regime may actually interfere with effective public education about the practices and politics of surveillance. Part of the problem is tied to the fact that 'privacy discourse' has become something like background noise in a complex cultural environment. I recall a brief news story on National Public Radio that ended by stating that '*privacy advocates argue that the new technology poses a threat to privacy rights.*' Does anyone really even *hear* that? Is it not the socio-political equivalent of elevator music hovering in some strange space between silence and meaningless presence? Privacy frames may be in rampant circulation, but I am not sure people use them to *see* much at all.

I am even more sceptical on the second point: 'privacy scholars have got to live with it'. I actually think that we may be obliged to kill it! I begin my seminars on the politics of surveillance with an informal discussion about different surveillance practices and whether or not they are of concern to my students. As we go, I quietly make a rough count of how many times the word 'privacy' pops up. It's a lot. We then talk about this and discuss the fact that surveillance *is not, in fact, the ontological antithesis of privacy*.¹ We may be trained to think this way (up:down, in:out, surveillance:privacy), but, I explain to my students, our work as intellectuals demands that we move away from the inherited regimes of thought, which (as Dewey reminds us) are necessarily inappropriate because they are inevitably mired in times and situation which no longer exist. As class proceeds, we follow the lead of PeeWee's Playhouse: anytime someone says the secret word, ('Privacy' or, as we come to call it, the 'P-word,') we all yell and scream and wave our arms in the air. By thus disciplining ourselves (using surveillance, of course) to discuss surveillance without the stultifying intellectual crutch of the privacy regime, we can begin to think afresh about the startlingly new phenomena we're confronting. And, in my experience, this is when surveillance can truly capture my students' imaginations. Really, how many more lectures, debates, articles, or paperback books

¹ See Torin Monahan's discussion in the opening essay of his *Surveillance and Security: Technological Politics and Power in Everyday Life* (Routledge, 2006).

need to harangue us about the tradeoffs between surveillance and privacy? Isn't it more productive help people rethink what is, after all, an unprecedented new framework of social control?

3. The pragmatist defence

In 2001, I published *Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy*, which studied the ways in which impoverished Appalachian women cope with new forms of surveillance in welfare administration. Those few readers who made it all the way to the end of the book encountered a personal epilogue describing my family's experience when local sheriff's deputies searched our home under the (incorrect) suspicion that we were growing marijuana on public land adjacent to our small farm. In the epilogue, I described how the idea of 'privacy' was simply not up to the job of conveying all the senses of anger, fear, and frustration; the parental concern; the realities of local politics; the disbelief; the absurdity; and the physical toll. Our cherished rights to privacy were also—according to two specialist attorneys—not up to the job of doing anything to help us take legal action. Sure, we could sue, but it would just waste a lot of time and money and yield no tangible result.

In this sense, I argued, my own experience ran somewhat parallel to the women interviewed in the book itself—they were articulate in their critiques of welfare surveillance, but they very rarely used the P-word and they certainly didn't file a lawsuit or call Privacy International. There are a lot of important ideas that can be teased out of our shared recognitions of the limits of privacy, but I want to focus on one very important one here. It is a point that is particularly important as part of a response to Bennett's essay because he places so much emphasis on representing a realist's perspective—privacy failed us.

Neither my family nor the women studied in *Overseers* had any meaningful prospect of using the right of privacy as a credible vehicle for improving our situation. I think that there are many reasons for this (and Bennett's essay explains them well): privacy is a weak argument in the face of overwhelming arguments for public safety, drug-control, accountability and welfare fraud control; privacy has a cultural weakness as a NIMBY like, me-first sort of value; privacy has, for the most part, become a *procedural* order, not a substantive guarantee: if the rules are followed (consent forms, warrants, boilerplate notifications) then the objections are null. This list could go on, but if the crux of the argument for saving privacy is a realist assessment that it is a powerful tool in the anti-surveillance arsenal, I am not persuaded. There are, for sure, examples of limited policy successes for the privacy advocates. But, just as surely, we could point to myriad examples where privacy has failed to erect any meaningful barrier or limit to new surveillance initiatives. And success at limiting surveillance is not something we should expect to see. Surveillance is a central organizing principle of our times and no mere counter-arguments are going to slow the broad progress of its sweep. Why then, shackle a vibrant intellectual movement in a bid for very tentative political relevance?

Conclusion

The key points I have attempted to make in this brief response are that privacy is not the problem, but the privacy *regime*; that the regime's now-slipping monopoly has hindered our understanding of surveillance; that the weakening of the regime is a necessary part of the flourishing of the field; and that the path to continued flourishing is to keep questioning or even ignoring the regime.

These points are, I believe, supported by the fieldwork that I presented in *Overseers of the Poor* which was, at its heart, an effort to hear the ways that people talk about surveillance in their daily lives. As I wrote then:

(B)y paying attention to what people are saying and doing about these important public policy issues, we can build better and more inclusive accounts and understandings of societal concerns. 'Privacy' is a very important and meaningful thing to lots of people. This study suggests that meeting needs and taking care of others is too. And so, it seems clear, is a sense of personal dignity. By moving away from the discursive monopoly of the privacy paradigm we might begin to hear about things like need and care, or religious objections, or fears of concentrated powers, and other unimagined claims as well. And we might, as we add these differently critical voices and ideas to the conversation, begin to learn more about the politics of surveillance.

(Gilliom 2001, 125)

References

Gilliom, J. 2001. *Overseers of the Poor: Surveillance, resistance, and the limits of privacy*. Chicago: University of Chicago Press.