Surveillance & Society

Debate

Challenging 'Just Surveillance Theory': A Response to Kevin Macnish's 'Just Surveillance? Towards a Normative Theory of Surveillance'.

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Introduction

English delights in its irregular verbs: I wage just war, you rebel, he threatens my economic interests. We ought to be under no illusion that the just war tradition floats above deeply contested values and assumptions. This is not to cynically dismiss this method of practical reasoning as valueless but to highlight its non-innocence, especially when it wears the mask of a normative ethical framework founded on a supposedly neutral Archimedean fulcrum point.

My principal contentions with Macnish's proposal are that we would be unwise to co-opt a framework that (a) inadequately interrogates the assumptions around, particularly but not exclusively, proportionality and intention, and (b) omits the notion of consent. Furthermore, Macnish's discussion is much too closely aligned to investigative operations, appearing to rely on a model of panopticism which results in an attenuated appreciation of the ubiquity of contemporary surveillance that fails to include assemblage, dataveillance, sousveillance, peer surveillance and much else besides.

Is Just War Theory a normative ethic?

What I understand Macnish to be arguing is that just war theory can provide a normative ethical perspective that can be deployed towards surveillance strategies and that this tradition can provide a seam of moral reasoning from which we can usefully draw. I recognise that Macnish aims, in his abstract, to discuss the ethics of 'any surveillance operation' by which he seems to mean, on the whole, police or security service investigations. However, if we attend to his conclusion, he is making a much broader claim that the Just War Tradition 'can provide a powerful framework to help in establishing the rights and wrongs of surveillance'. At the outset we must be clear that just war theory is not really a first order normative ethic. It is a second order model of practical reasoning that relies upon values drawn from elsewhere. For example, it tells us nothing about the virtues that might need to be developed by members of the armed forces (Fotion 2005: 33). It is not even about 'just wars' but 'how we may enact just judgement even in the theatre of war' (O'Donovan 2003: 6). It seems to me that Macnish, whilst on the one hand acknowledging the theory's second order status, on the other hand treats it as a normative ethic.

This is more than a quibble over semantics because I think this slippage into normative ethics results in obscuring the external (first order ethical frameworks) upon which much of just war thinking relies. Macnish makes the mistaken claim that the tradition tell us 'that something which harms children in

warfare is wrong'. It does not. Just War Theory offers criteria for justifying the harming of children in warfare—by means of, for example, the principle of double effect where the *targeting* of children is unethical but knowing that they may be collateral damage resulting from the targeting of military personnel or sites justifies children's injury. This has particular implications when we, later, discuss proportionality.

If we set aside questions around the status of Just War Theory, I agree with Macnish that there remains value in exploring the rich discourse of the tradition—but much more critically than does he.

Challenges to Just War Theory

Before we consider the saliency of deploying this model of practical reasoning to surveillance we need to be clear that Just War Theory is not without its critics; a fact not well-highlighted by Macnish. It is open to the charge of punctualism in that it undervalues the longitudinal dimensions of a conflict by directing focus on the immediate circumstances over which waging war is envisaged (Yoder 1991). The theory is also rather dependent on understanding justice as an either/or category when terms such as comparative or imperfect justice might better render the biases and interests of those with the power to define what is 'just' (Allman and Winright 2012).

Just War Theory is strongly nation-state oriented, assuming too-readily that states are independent of each (Williams 2012)—although others argue that a re-reading of Grotius opens the theory to include justified force by non-state actors (Lang Jr. 2009). Furthermore, the theory does not open out the question of whether or not the state is the primary focus of our political loyalty (Williams 2012). In these respects, it is unsurprising that the theory can be viewed as a 'top-down authoritarian attempt to create the world' (Williams 2012: 156).

Nicholas Rengger has recently argued that the theory has been complicit in the expanding (rather than constraining) of the scope of justifications of the use of force. He argues that Just War Theory has been predominantly about eliminating (or at least reducing) injustice '*over and above* the restraint of force and that, as a natural corollary in a violent and conflictual world, the tradition has become, and is becoming progressively *less* restrictive' (Rengger 2013: 66). Rengger's reasoning has implications for the co-opting of Just War Theory for surveillance. It is the dominance of a teleocratic theory of the state that has led to justifications for the use of force in promoting justice. The state is understood to be, following Oakeshott, a 'joint enterprise of seeking the satisfaction of some common substantive want...the management of a purposive concern' (quoted in Rengger 2013: 32). In other words, this is ordering a society for war wherein the use of force is, under certain circumstances, an appropriate response towards achieving its wants. The alternative emphasis, for Rengger is only contending against the *dominance* of the teleocratic state, lies in stressing 'our common purposes and common engagements, not our diverse and different ones' (Rengger 2013: 164).

My point is that a translation from war to surveillance may be much more problematic than Macnish believes. We see the teleocratic state justifying surveillance in a mode that is often not far from one of perpetual war—if not a 'war against terror' then a 'war against drugs', etc. What Rengger has found regarding the *extension* of the scope of justifications for war could too easily be a similar outcome were the same method of practical reasoning applied to surveillance. Do we wish to perhaps look back in 50 years time and find that 'just surveillance theory' has resulted in the proliferation rather than constraint of surveillance?

So, at quite a general level I take issue with Macnish's proposal. If, for the sake of argument, I accept that there can be a translation of the theory from just war to just surveillance let me consider his discussion in

more detail. He leads us through the principles, first of the justification to go to war and then just conduct in war. I will expound my criticisms by following his pattern.

Jus ad speculandum

Just cause

Here is where we first encounter the problem of Macnish's attenuated account of surveillance. The examples he proffers are investigative (Glen Michael, parents, Hewlett Packard seeking to discover a leak). Of course we need to ask about the reason for practicing surveillance, and investigation is, at least in broad terms, an uncontentious cause. No-one could seriously argue against the importance of investigation by police or security services. I take Macnish's point that he is not seeking to find the same answers to surveillance as one might expect of justifying a war. However, how are we to think critically about the way a state's duty to protect its citizens is framed? The legitimacy of a particular investigative operation might be established but this is only one dimension of ubiquitous surveillance. To encompass assemblage, filtering and sorting and dataveillance (for example in contexts of customer data management) within the theory seems to stretch it much too far.

Correct intention

It is laudable that ulterior motives should be ruled out and that the intention to surveil should be the same as the cause given for the surveillance. However, we have to ask whether there is such a thing as a 'pure' intention. It may, as O'Donovan says, be a 'will o' the wisp' search (O'Donovan 2003: 42). The intentions of individuals are hard enough to distil. I would even question whether we can ever be confident that we can claim to ourselves (let alone others) that our intentions are pure, unsullied by even the hint of further motivations. When it comes to discerning the intentions of states or corporations the task is impossible. As Fotion remarks, 'is it done by obtaining the average of the intentions of key government officials?' (Fotion 2005: 35).

If we consider peer surveillance then the dual questions of cause and intention are even more implicated in the web of hopes, expectations, playfulness, and creepiness in which we make our ethical decisions. Practices of *sousveillance*, surveillance from below towards the authorities who are themselves practicing surveillance, do not readily fit questions of cause and intention. This is the territory of resistance, civil disobedience or even criminal subversion of authorities' surveillance. The model (let alone the tradition) of Just War Theory so favours the powerful that its saliency for *sousveillance* is non-existent.

Proper authority

Once again we encounter the problem of Macnish's limited account of contemporary surveillance. Questions of investigation and, as he extends, *paparazzi* photography are but one dimension of surveillance. The discourse of Just War Theory assumes the authority of the sovereign, as it has developed in various constitutional forms. Again, I accept that Macnish is not transferring the answers from war to surveillance but the model is closely aligned, and dependent upon, precedent (in the Westphalia settlement) and contemporary international law. This is the 'rich discourse' upon which we are invited to draw. I am not convinced that the 'theory' can be disentangled in this way and applied out of its context of decisions over war. We have to stretch—I would say to breaking point—the notion of 'authority' if we are to discuss the extent of surveillance beyond the panoptic.

Last resort

It is not obvious that we should consider surveillance as a last resort. The framework of Just War Theory forces this—even if the analogy is not made between war and surveillance. It could be that surveillance is actually to be a first resort in some circumstances. An elderly relative with early symptoms of dementia may benefit greatly from a surveillance device that monitors the controls on the hob or oven. Similarly, this person might find immense security (as might his or her close family) from carrying a tag by which he

or she could be located should a short walk unintentionally turn into a disorientated ramble through a large town with otherwise untraceable bus journeys. Yet again, it is Macnish's perception of surveillance as panoptic/investigative monitoring that weakens his proposal. If care can be expressed by providing a surveillance device then the criterion of last resort is positively unhelpful. Even if we limit the discussion to police investigations it is not self-evident that covert surveillance need be a last resort.

Declaration of intent

Here we face similar problems in transposing the theory into surveillance. A declaration of intent may be desirable in some contexts of surveillance. The context in the theory is that of declaration of war. This is vastly asymmetrical once we introduce questions of consent. Just War Theory has no place for the consent of the other state being waged war against. It might be argued that consent is implied under the criteria of proper authority. However, democratic states are not granted the blanket consent by citizens to place them under surveillance. The issue then of proper authority does not cover consent.

The absence of consent as a criterion, replaced, as I fear it seems to be by a declaration of intent, is a disastrous omission in Macnish's proposal. The model of practical reasoning is inherently asymmetrical wherein action is performed against others whose consent is of no importance.

Reasonable chance of success and proportionate to the occasioning cause

I take these two criteria together because they depend upon the notion of proportionality. This is where any theory is saturated with assumptions, biases and interests. For a start, the definition of proportionate is very slippery. Although there is no precise legal formulation for such a test, its use in the review of cases under the UK Human Rights Act has generated typically four sub-questions. These address the legitimate objective, rational connection, minimal impairment and overall balance (Brady 2012). Even if a sophisticated, multifaceted test of proportionality could be agreed upon, this would not divest 'balance' of its baggage. 'Balance', as Lucia Zedner points out, is another notion that can easily obfuscate assumptions that need to be made transparent. Before we can conclude that a *fair* balance has been struck we need to ask what has tipped the balance, in whose interests the balance has been secured and what lies in the scales? (Zedner 2006). In other words, what we require is a weak ontology in order that we might 'map a world in which experience is seen as contested truth' (Sjoberg 2006: 210). Without this critical dimension policy making is conducted as if the very ideas we have of a country or a context have not actually been forged from 'the produced histories of the political situations' surrounding it (Sjoberg 2006: 209).

If 'proportionality' is not treated with extreme suspicion we mistakenly offer it as foundational moral justification. This is when, for example, a robber has pulled a gun ready to fire. It is not foundational, but epistemic moral justification on which we are relying. We presume, here bolstered by a reliance on 'proportionality', that there is a response imminent that demands our response. Pratt has put this elegantly: 'As beauty is in the eyes of the beholder, so is threat in the perception of the defender' (Pratt 2005: 59).

I am sorry to say that Macnish does not dig sufficiently deeply into the problems of proportionality although he admits that what is meant by it 'is not always clear'. This is carried over into his final two principles.

Jus in speculando

Proportionality

Macnish is correct that here we must consider different kinds of surveillance deployed, although I would not wish to make such a distinction between justification of initiating surveillance *per se* and how surveillance is conducted. Again the model of Just War Theory assumes a condition of not-war then war (and, although Macnish does not discuss it, after-war). I do not think this is helpful because it would rather suggest that there is a period before-surveillance, a phase of surveillance and then one post-surveillance.

Perhaps this can have saliency for a police or security services investigation but it does not cohere with the ubiquitous and continuous surveillance—such as social sorting—that is a feature of advanced capitalist social life.

But, if we stay with Macnish's selected examples his argument is still inadequate. He suggests that 'CCTV cameras in areas where cars are frequently stolen is more proportionate than bugging the telephones of everyone in the city in which the cars are being stolen'. This implies that the CCTV cameras are only observing potential car thieves. Images of whom else and what activities will be captured by these cameras in a residential street? Indeed, intuitively it would seem that CCTV is more proportionate a response than phone interception. But, if the residential street is home to a number of political activists, involved in legal protests on a regular basis, the notion of proportionate could be rather different. That aside, if CCTV may be more proportionate than phone interception this does not really get us very far. It only hints at *relative* proportionality/disproportionality not unlike a mugger offering me the choice of being stabbed or hit on the head. It is a false choice, masquerading as virtuous discernment of relative harm.

Now Macnish could rightly appeal to the composite nature of Just War Theory that requires each criterion to be met. My contention is that one of the most significant criterion, proportionality, is intrinsically deceptive. It conveys the impression, through the use of statistical discourse, that factors are actually capable of being measured. Proportionality hints at an objectivity that it most certainly does not possess.

Discrimination

Here is the claim that a distinction can be drawn between combatants and non-combatants. Significantly, it is also a claim that such a distinction ought to be made in light of a value stating that non-combatants are immune from attack. Within the context of war this is highly problematic, not least because of a version of punctualism. At any given moment someone might be a combatant—and that moment may last for several months or years. But is a retired combatant (perhaps a military officer) really a non-combatant? The complications are many; my point is simply that discrimination within Just War Theory is far from being non-innocent.

When the context is a focused surveillance operation it is well-established that the data collected in a wide trawl cannot generally be retained. In the UK, for example, legislation was amended to tackle the unjust retention of DNA data. The notion of discrimination is even less clear once we include other forms of surveillance such as dataveillance, assemblage, and social sorting and filtering.

The Principle of Double Effect (PDE) is also relevant, and problematic here. Closely allied with the question of intention, PDE can be deployed to justify 'collateral' damage. Harm is caused to innocent parties but it is not intended. Their hurt is an unfortunate consequence of action directed 'justifiably' against legitimate targets. The advantage to the powerful, who are in a position to name the distinction between combatant/non-combatant or legitimate/illegitimate (in the context of surveillance), is considerable.

Conclusion

I do acknowledge that Macnish is not making an analogy between war and surveillance. However, Just War Theory cannot be disentangled from the discourse of war in which it has developed. At its core, this is a tradition that seeks to constrain an action that is deemed undesirable, namely war. I do not believe that we need say the same about surveillance. It is not *per se* something to be avoided if at all possible. To deploy Just War Theory is to cast surveillance in much too negative a light from the outset.

My difficulties with proportionality are significant. Just War Theory simply does not engage us unequivocally with the deep biases (generally favouring the powerful) that saturate 'proportionate'.

The absence of consent as an integral dimension of practical moral reasoning around surveillance is most worrying. It cannot be subsumed under 'proper authority' as I think Macnish might argue. Consent—although not always required—is simply too important to be sidelined in this framework.

I am sorry to say that I find Macnish's aim of a normative ethics of surveillance to be an unnecessary goal. I could be persuaded that a radically revised model of practical reasoning based on the Just War Tradition might have saliency for investigative strategies involving surveillance technologies. However, 'surveillance' is much too all-encompassing a term to be the subject of its own ethics. There can be no 'ethics of surveillance' but there may be norms appropriate for particular contexts of surveillance. This means examining specific domains in which surveillance is deployed, along with other strategies, to address concerns or challenges. For example, the ethics of surveillance in elderly care or the ethics of surveillance in education are valuable discussions to be had. My point is that it ought to be the ethics of elderly care that is foregrounded within which we would seek to understand the ethical deployment of surveillance mechanisms.

Even then, I remain suspicious of any normative ethics lest it conceal vested interests and biases under the guise of universality. However, if we are to have normative ethics—as I concede we probably do need—we require a radical suspicion that questions continually not only what we and others are doing but what is being done to us. We need to understand how we are being shaped by surveillance—whatever the context.

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