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Since 2011 the debate/discussion section of *Surveillance & Society* has promoted exchange of key ideas and discussion of relevant topics among readers. Distinguished discussants have been invited annually to contribute short papers on a selected topic to appear together to foment scholarship and commentary in this journal and beyond.

Our focus this year is **“What is the relationship between law and surveillance?”** In this post-Snowden environment, law remains at the forefront of discussion about jarring revelations of the scope of mass surveillance. Among the first questions raised when mass surveillance programs *and* Edward Snowden’s whistle-blowing came to light was: ‘Is that legal?’ Since then law has been touted both as a means to limit mass surveillance *and* a way to ensure these programs’ presence never enter public consciousness again. But the need to understand the law-surveillance relationship easily precedes these developments and is perhaps perpetual. For example, one long standing set of questions concerns the relationship among criminal law, constitutional law and state/police surveillance leading to what is called in US legal circles, ‘surveillance law’. Information privacy laws have for some time explicitly sought to curtail more mundane surveillance via privacy principles and civil law has occasionally indirectly limited its proliferation too (e.g., recognizing that installing a surveillance camera to monitor activity in a private space may increase one’s exposure to civil litigation when occupiers of that space are harmed). Other mundane kinds of law (e.g., administrative law), quite distant from hotly debated issues of national security and mass monitoring, have emerged as forceful enablers of creeping surveillance (e.g., safety regulations that have required systematic inspection of spaces deemed risky). Mundane surveillance therefore has been not only law’s elusive target but also its product. And conversely, surveillance in its myriad forms has been a key enabler of law too, such as when it has exposed, sometimes inadvertently, legal avoidance, leading to law reform or even criminalization (see Ericson 2007). How law and surveillance are related, including relationships between less celebrated or vilified forms of law and surveillance, remains obscure and is thus vital to think more about and empirically explore.

Given these complexities in and beyond the academy, scholars from several countries and from both law and social science disciplines were invited to share responses to the basic question of the relationship between law and surveillance and, if possible, to a sub-question or two: Do law and surveillance inevitably go hand-in-hand? Can law be the answer to too much surveillance in an era of mass surveillance? Can surveillance be the answer to too much law in an era of the legalization of society? Four contributors—Lisa Austin, University of Toronto Law School, James W. Williams, Social Science, York University, Irus Braverman, Buffalo Law School, SUNY, and Ian Warren, Social Science, Deakin University, Australia—addressed their responses to a preferred realm of law and surveillance. Because of

Michel Foucault's enduring influence on Surveillance Studies, also invited to respond was a prominent Foucauldian legal theorist, Peter Fitzpatrick, and his colleague Phillip Kender (both from University of London, United Kingdom) to the question of how law and surveillance are related in Foucault's work.

What follows is more a discussion than a debate comprising five thought-provoking, innovative papers that immediately reveal—perhaps unsurprisingly since they address general master concepts—that there is no unitary relationship between law and surveillance. Rather, the relationship may depend not only on which forms of law and surveillance are considered, that is, on context, but also on consideration of the other's absence or externality. Together these papers remind us the domains of both law and surveillance are vast, varied, mutating. But that does not mean greater understanding cannot be lent to these relationships. To this end the papers introduce compelling concepts or themes (lawful illegality, sovereignty, hyper-legality, illimitability, and law's absence) likely to permit better understanding and certain to promote further inquiry into how law and surveillance are related.

Directing attention to state surveillance specifically, Lisa Austin underscores the importance of considering the rule of law in the national security context, even over longstanding privacy rights. She discusses too why rendering these 'exceptional' state practices consistent with the rule of law are unlikely. Ian Warren shares Austin's attention to online state surveillance but more in relation to criminal law. He points to a need to closely explore how the nature of state sovereignty is shifting as evinced in troubling legal decisions pertaining to transnational law enforcement and US corporate dominance of communication platforms. Both papers rightfully address vital realms often discussed in relation to law and surveillance, namely national security and criminal law, and both find the law wanting in its capacity to curtail the proliferation of mass data surveillance by the state.

Taking us far beyond the increasingly overlapping realms of national security and criminal law enforcement where the ambition of surveillance knows few bounds, the next two papers consider domains that tend to receive less attention in Surveillance Studies but are of at least equal importance to human well-being, perhaps even survival: the world of financial markets recovering from the 2008 collapse and the natural world in which extinction of numerous animal species suggests it risks its own collapse. Thus, in focusing on financial markets, James W. Williams accepts that law and surveillance go hand-in-hand but argues the issue is the absence rather than the presence of surveillance; law emerges as a constraint operating *within* and not *beyond* surveillance and regulation. The issue is neither too much surveillance nor too much law. Rather, he asks regarding attempts to introduce 'financial surveillance' to identify market misconduct, whether surveillance is the answer to law's absence and the ostensible and continuing failure to legally regulate the markets. Irus Braverman then similarly asserts law and surveillance are intermingled in that hyper-legality (intensification of regulation of the governed and those who watch them) closely accompanies heightened surveillance within the governance of animal species through pastoral care. Here, she is drawing on Foucault's rarely invoked notion of pastoral care and takes it literally. She identifies US and Canadian legislation as well as establishment of lists of species and standards that permit this care or protection to become more and more abstract and calculable. Ultimately, law and surveillance cannot be easily distinguished in this realm.

Last but not least, Fitzpatrick and Kender interrogate how Foucault understands the relationship between law and surveillance by first critiquing the 'expulsion thesis' or the widely accepted notion that Foucault expelled law from his thinking, displacing it by a close attention to discipline and biopower instead. These authors provocatively argue, however, that Foucault assumed law was 'illimitable', that it possesses an inherent capacity to move beyond other forms of power, including surveillance. From this, Foucault's answer to whether law and surveillance are inevitably interwoven, therefore, is 'no'.

Law and surveillance are related but whether their emergence or presence together is inevitable, contingent, and/or in deep tension remains murky and may well depend on the specific domain under

consideration. Nonetheless together these papers represent some of the finest thinking on the subject and provide several keys for potentially unlocking these puzzles in relation to mass surveillance and far beyond. Their publication here answers a recent call (Cohen 2015) for greater exchange between Surveillance Studies and legal studies. I wish to echo this sentiment in suggesting more discussion and empirical inquiry about forms of law and surveillance and how they are related should be encouraged and are long overdue.

References

- Cohen, Julie. 2015. Studying Law Studying Surveillance. *Surveillance & Society* 13(1): 91-101.
Ericson, Richard V. 2007. *Crime in an Insecure World*. Cambridge: Polity Press.