Privacy, Security and Safety: Intelligence Services and National Security

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Relations Among Concepts

- Privacy
  - Individual value
  - Social value
  - Public good, public interest
- Security/ Safety
  - Interchangeable
  - Levels, domains
  - Risk; insecure/ unsafe
- Conflict, compatibility, or 'balance'?
- Instance: oversight of intelligence services

Privacy as a Value

- No single definition or conceptualisation
- Deontological and consequentialist value
- Seven types (Finn *et al.,* 2013): privacy of:
  - the person
  - behaviour and action
  - communication
  - data and image
  - thoughts and feelings
  - location and space
  - association
- Could be more (Wright and Raab, 2014)
- Context-dependent (Nissenbaum, 2010)

Critique of Conventional Privacy Paradigm

- Individualistic, classical liberal, rights-oriented only (Bennett and Raab, 2006)
- Leads to (tendentious) 'privacy v. public interest/ security/ etc.' construct
- Proposes 'balancing' as policy aim
- Unsatisfactory about 'balance' (e.g., Loader and Walker, 2007: 54-56; Hildebrandt, 2013; Waldron, 2003; Dworkin, 1977; Zedner, 2009; Raab, 1999; ....)
  - Noun?
  - Verb?
  - How to 'balance'?
  - What to 'balance'?
  - Common metric?
  - Who should do it?
  - Consensus, or exercise of power?

Privacy: Social Value

- Regan (1995):
  - Common value
  - Public value
  - Collective value
  - Society, not just the individual, is better off when privacy exists
- Many other writers (Westin, 1967; Solove, 2008; Schoeman, 1992; Bygrave, 2002; Goold, 2009; Steeves, 2009; Raab, 2014, 2012; ….)
- Privacy's importance for society, social and political relationships; not only for individual rights or values
- Therefore, public interest in privacy and its protection

New Policy Questions

- We can ask new questions, reformulate issues, re-position privacy
- E.g.: in terms of equal protection and experience of privacy:
  - (How do we know) who gets what privacy? (Raab and Bennett, 1998)
  - Can unequal distribution be justified?
  - Should equality be a new object of regulation? (Bennett and Raab, 2006)
  - Whose responsibility should equality be, within privacy regime of mixed instruments and multi-level governance?
  - Is privacy obtained at expense of some other person's or group's lack of privacy?
  - By what processes are uneven distributions created, exacerbated, or made even?

Summing up on 'Privacy'

- Privacy indeed an individual right: fundamental, not absolute
- But also crucial underpinning of interpersonal relationships, of society, of democratic political system
- To consider privacy only as an individual right ignores this
- When individual privacy is protected, society, political processes and exercise of important freedoms are protected
- When privacy is eroded, society, polity, freedoms are also harmed
- Privacy/ rights protection in the public interest, not only in individual's interest; one of many 'vital interests' harmed by intelligence-gathering (Bellaby, 2012)

Definitions of 'Security' and 'Insecurity'

- '[T]he condition (perceived or confirmed) of an individual, a community, an organisation, a societal institution, a state, and their assets (such as goods, infrastructure), to be protected against danger or threats such as criminal activity, terrorism or other deliberate or hostile acts, disasters (natural and man-made).' (adopted by CEN BT/WG 161 on Protection and Security of the Citizen, January 2005; cited in Martí Sempere, 2010: 6)

- '[A] fundamental *good* without which societies cannot prosper.'
    Martí Sempere (2010: 2; emphasis in original)

- '[undesired events] can be distinguished because they create fear or insecurity in citizens… five main sources of insecurity can be identified: armed conflicts, terrorism, organised crime, pandemics, and natural or man-made disasters. (Martí Sempere, 2010: 4-5)

Insecurity Across Six Centuries

- 'O miserable and very sad life!...We suffer from warfare, death and famine; Cold and heat, day and night , sap our strength; Fleas, scab-mites and so much other vermin Make war upon us.' (Jean Meschinot (1420-1491); see Huizinga, 1924 [1965]: 32, n. 3)

- 'Why are times so dark That men do not know each other, But governments move From bad to worse, as we see? The past was much better. Who reigns? Affliction and Annoyance; Justice nor law are current; I know no more where I belong.' (Eustache Deschamps, 1340-1406; see Huizinga, 1924 [1965]: 35, n. 1)

- '...the sentiment is growing that life as people have known it is unravelling; and that the new normal may resemble a mixture of unpredictable, hidden dangers and a rush to large-scale security measures.' ('Death in Europe and the search for a political answer', *The Guardian*, Thursday, 28 July 2016: 26)

'Security' and 'Safety'

- Many ways of understanding 'security' (or its cognate, 'safety'), e.g.:
    - Individual, personal security/ safety
    - 'Collective' security at many levels: international, national, local, neighbourhood, social group
    - Objective security: probability/ severity of harm
    - Subjective security: feelings of (in)security

        What should be at focus of attention, and how can foci be reconciled?

Security and Safety (I)

- Prevalence in public and policy discourse
  - To reflect/ shape public fear
  - To justify and legitimise policy, organisation, action
  - To re-configure values, re-order priorities, allocate resources

  State/ elite's way out of impotence, retreating from protecting against global forces by finding new legitimacy through fear, displacing global insecurity onto mundane, local, personal safety concerns (Bauman (2006)

Security and Safety (II)

- Themes (at different levels of scale):

  avoidance of danger and fear

  concealment

  pure/ impure

  clean/ soiled

  harmony/ disharmony

  peacefulness/ conflict

  predictability/ surprise

  known/ unknown

  certainty/ uncertainty

  trust/ distrust

  order/ disorder

  familiar/ strange

  comfort/ discomfort

Security/ Safety: Levels

- Grand (macro)

  terrorism

  organised crime

  war

   immigration

  environmental hazards

  climate change

  nuclear accidents

   earthquakes

   epidemics

  tsunamis

  defence of sovereign territory

  critical infrastructure protection

loose stair carpets

slippery bathtubs

kitchen fires

paedophilia

playground accidents

car crashes

workplace hazards

'serial killer', ' obtrusive beggar', 'mugger', 'stalker'. 'prowler', 'poisoner of water or food' (Bauman, 2006)

- Everyday (micro/ meso)

Safety/ Security: Types

- 1. Physical security: safeguarding physical characteristics and properties of systems, spaces, objects, human beings
- 2. Political security: protecting rights, institutions/ structures, policy choices
- 3. Socio-Economic security: economic measures to safeguard individuals
- 4. Cultural security: safeguarding permanence of traditional schemas of language, culture, associations, identity, religious practices
- 5. Environmental security: providing safety from environmental dangers caused by natural or human processes
- 6. Radical uncertainty security: providing safety from exceptional and rare violence/threats not deliberately inflicted
- 7. Information (cyber) security: protecting information/ information systems from unauthorised access, modification, disruption

(Source: PRISMS FP7 project, Deliverable 2.1: *Preliminary report on current developments and trends regarding technologies for security and privacy*, 28 February 2013: 11-12)

The 'Safety State' (I)

- One of many 'states' or societies, e.g.:
  - 'disciplinary state', 'control state', 'security state' (Agamben, 2013)
  - 'surveillance state' (or society) (Lyon, 2001, 2003; many others)
  - 'safety state' (Raab, 2005); 'personal safety state' (Bauman, 2006)
  - 'welfare state'
  - 'capitalist state'
  - 'garrison state' (Lasswell, 1941)
  - 'risk society' (Beck, 1986, 1999; many others)
- Denotes a society or polity built around a specific value, given distinctive shorthand label to describe particular, prominent governing actions of state (central political authority) and characterise it in terms of main values or activities
- 'State' or 'society' refers both to authoritative governing aspect of society – the affairs of state – and to society's characteristic condition – the state of affairs

The 'Safety State' (II)

- Analytical construct/ thought-experiment

    trends in public and private life towards elevation of safety as paramount value

    shift from or re-branding of economic/ welfare ideas of 'good society'

- Postulates that a trend exists or that we can imagine it

    trend's existence needs multidisciplinary research verification

- Portrays complex, hypothetical picture

    pursuit of safety/ security as value permeating and shaping wide range of social relationships and organisational practices

    safety/ security as powerful policy trump card; motivator/ legitimator for decision-making in vast array of domains

- What, if anything, should be done about this, if it were so?

Trend: Evidence? (I)

- Anecdotal (but suggestive); e.g.:

- 2015 UK Conservative and Labour Party election manifestos use 'safe', 'secure', and derivative words in relation to:

> children
> the elderly
> the economy
> work
> energy supplies
> the Middle East
> hospitals
> communities
> the country
> families
> the Green Belt
> banking
> farming
> retirement
> borders

> religious practice
> neighbourhoods
> cycling
> cyber activity
> jobs
> health care
> … and many more

- Conservative Party manifesto has 'A Brighter, More Secure Future' in its title, stating: 'Keeping you and your family safe is our overriding priority'. Chancellor's July 2015 budget speech : 'This is a Budget that puts security first.' Links 'economic security' to 'financial security', 'national security'; also mentions 'security of work,' 'security of home ownership'

Trend: Evidence? (II)

- Safety might be '[t]he world's largest industry' (Adams, 1995: 32)
- Antedates '9/11' and other terrorist attacks
  - but these have profoundly affected the way states and citizens think about and cope with the world
- 'Securitisation' across major sectors (e.g., Buzan *et al.*, 1998)
- Child safety as major public issue (e.g., Wyver *et al.,* 2010)
- Safety heavily regulated in workplace, physical space, other milieux
- Heated debates over safety of genetically modified or contaminated food, in genomic research and genetic manipulation for therapeutic reasons
- Strong safety overtones in immigration discourse, implicating boundary between who is safe/ familiar, who is strange/ dangerous
- In many domains, safety theme plays in terms of technical language of risk
- Institute for the Security and Protection of the Citizen (Joint Research Centre of the European Commission), describes research portfolio in terms both of safety and security; includes projects for road safety, safety of buildings, safe mobility for visually impaired people (IPSC, 2011)

The 'Safety State': Implications

- Organisations and power; elites; resources; safety/ security industry interests (Zedner, 2009)

- Information/ communication systems; surveillance and categorisation; identification systems (e.g., Bowker and Star, 1999; Schneier, 2003; Monahan (ed.), 2006; Lyon, 2010)

- Means of prediction > means of production as prized socio-economic resource

- Precautionary principle prevails; risk aversion

- 'Resilience' strategy and discourse

- Relegation of other values, or 'trade-off'/ 'balance'

- Distribution and displacement issues ignored, *but…*

Safety: Distribution and Displacement (I)

- Safety is common/ public good/ in public interest, provided to all through political means, but might not actually be provided equally to all
- Social distribution of safety and risk therefore is major research and policy issue:
    - (Can we know) who gets what/ how much safety/ security, when, why, how?
    - Can unequal distribution be justified? (Waldron, 2003)
    - Is security obtained at expense of some other person's or group's *in*security?
        (Chandler, 2009; Zedner, 2009)
    - Whose responsibility should equality be, within privacy regime of mixed instruments and multi-level governance?
    - By what processes are uneven distributions created, exacerbated, or made even?
    - Does security or safety at one level/ domain cause insecurity elsewhere?
    - A 'law of conservation of (in-)security': not created or destroyed but only transferred from one context, group or person, to another; zero-sum?
    - Or can we make security a positive-sum process? If so, why should we?
    - What countervailing ethical or policy pressures prevent or mitigate inequality caused by political economy of security/ safety that creates unregulated market?

Safety: Distribution and Displacement (II)

- Quest for security may paradoxically result in exacerbation of *insecurity*, or of feelings of insecurity, by redistributing exposure to risk towards certain minorities less able to defend themselves, and by creating new patterns of vulnerability through implementation of policies for securing against terrorism or other adverse events (Chandler, 2009)

- Illustration: airport security checks on passengers

  > Hypothesis: quest for airport security creates zone of insecurity and stress for passengers (security practice variation; random treatment; uncertain expectations)

- Airport, and perhaps country, society, or aggregation of citizens may be made secure by displacing insecurity onto individual/ category/ group who may be placed under suspicion

- We may say that we live in multi-layered zones of security and insecurity

Conflict Between Privacy and Society/ Common Good/ Safety?

- '[t]he realm of rights, private choice, self-interest, and entitlement…[*versus*] corollary social responsibilities and commitments to the common good… [their neglect has] negative consequences such as the deterioration of public safety…' (Etzioni, 1999: 195)

'(National) Security v. (Personal) Privacy'?

- Security/ privacy relationship is very complex; cannot be glossed over by rhetoric of 'opposed' rights or values of security and privacy, 'balance', 'trade-off'

- If both privacy and security are contested and inter-related concepts, the idea that they can be 'balanced' or 'traded-off' must also come under sceptical scrutiny

- Whether 'balancing' is between one individual right and another, or between an individual right and a collective right, or between an individual right and social or collective utility, also requires specification and precision if 'balancing' – even if inescapably built into our mindset – is to lose the quality of shorthand and slogan

Security/ Safety and Privacy:
Balancing Individual and Public Interest?

security (public interest) *v* privacy (individual interest)
OR
security (public interest) *v* privacy (public interest)

**

security (individual interest) *v* privacy (public interest)
OR
security (individual interest) *v* privacy (individual interest)

Security/ Safety and Privacy: Affinities (I)

- Privacy *itself* is a *security/ safety* value, often promoted as such
  - protective, defensive, precautionary, risk-aversion value
  - serves selfhood, autonomy, dignity, sociality
  - in face of technologically assisted policy initiatives
  - in society driven by counter-terrorism, law-enforcement, preoccupation with personal safety
  - provides secure refuge for individuals and groups
    for inward-looking purposes
    for external sociality and participation
    guarding against spatial or informational encroachments

Security/ Safety and Privacy: Affinities (II)

- Privacy advocates (often fear-driven) invoke precautionary principle, criticise state security policies and surveillance technologies
- 'Privacy impact assessment' based on precautionary risk-minimisation
  - 'securitisation' of information systems in interest of privacy
- Both privacy and security of society or state can therefore be seen as two 'takes' on public interest, changing nature of argument
- Privacy and civil liberties/ freedoms can be seen as valuable partly because of the security and safety – not least, of personal data – they provide for individuals, groups, societies (cf. *Liberty and Security in a Changing World*, p. 14)
- Slogan: 'A man's home is his castle' reflects both privacy and security

Privacy and [In]security

- Slogan: 'One can never be too safe' in protecting lives, relationships, systems against privacy incursions, even if/ because we cannot accurately estimate risk of harm (probability, severity)

- We cannot be certain that states or companies are trustworthy in respecting privacy

- Transparency and accountability in dealing with personal data or private lives help us feel more secure

- So do laws, regulatory policies, institutions

PRISMS Project: Selected Survey Findings

- *Both* privacy and security important to people

- People do *not* value security and privacy in terms of 'trade-off'

- No significant relationship between people's valuation of privacy and valuation of security

- Significant correlation between valuation of personal and general security

PRISMS

Intelligence, Security and Oversight: Three Recent Reports (UK)

- Intelligence and Security Committee of Parliament, *Privacy and Security: A Modern and Transparent Legal Framework* (2015)

- David Anderson, QC, Independent Reviewer of Terrorism Legislation, *A Question of Trust: Report of the Investigatory Powers Review (*2015)

- Royal United Services Institute for Defence and Security Studies, *A Democratic Licence to Operate: Report of the Independent Surveillance Review* (2015)

ISC Call for Evidence (2013)

- 'In addition to considering whether the current statutory framework governing access to private communications remains adequate, the Committee is also considering the appropriate balance between our individual right to privacy and our collective right to security.'

  echoed by Philip Hammond, then Foreign Secretary, 2015:

- *'W*e are after all, all of us in our private lives, individuals who seek privacy for ourselves and our families, as well as citizens who demand protection by our government from those who would harm us. So we are right to question the powers required by our agencies – and particularly by GCHQ – to monitor private communications in order to do their job. But we should not lose sight of the vital balancing act between the privacy we desire and the security we need.'

Review Group on Intelligence and Communications Technologies
Liberty and Security in a Changing World (12/12/13)

'We suggest careful consideration of the following principles:

'1. The United States Government must protect, at once, two different

forms of security: national security and personal privacy.

'In the American tradition, the word "security" has had multiple

meanings. In contemporary parlance, it often refers to national security or homeland security. One of the government's most fundamental responsibilities is to protect this form of security, broadly understood. At the same time, the idea of security refers to a quite different and equally fundamental value, captured in the Fourth Amendment to the United States Constitution: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ". Both forms of security must be protected.' (pp. 14-15)

RUSI (2015) on Privacy

- 'Privacy is an essential prerequisite to the exercise of individual freedom, and its erosion weakens the constitutional foundations on which democracy and good governance have traditionally been based in this country. ...Privacy is also a pre-requisite for democracy. It gives people the freedom that is needed to be personally autonomous, to seek out alternative sources of information and to question the status quo. ...Those who challenge the state – through journalism or legal advocacy, for example– need to be confident they are not spied upon, otherwise they cannot do their jobs effectively, and such jobs are an acknowledged part of a functioning democracy.' (RUSI (2015): ix; 2.10

Anderson (2015) on Privacy

- 'A good start is provided by the recent judicial description of privacy protection as "a prerequisite to individual security, self-fulfilment and autonomy as well as to the maintenance of a thriving democratic society". As that statement implies, the privacy ecosystem has individual, social and political aspects.' (Anderson (2015): 2.9, citing the Canadian Supreme Court case of *R v Spencer*, 2014 SCC 43, involving privacy and anonymity on the Internet and the 'reasonable expectation of privacy'

RUSI (2015) on 'Balancing'

- 'Each right must be protected and respected, to the greatest extent possible, but it cannot exist in isolation. There is no privacy without respect for security; there is no liberty without respect for privacy; security requires both certain liberties and privacy. It is therefore unfruitful (indeed misleading) to cast debates about privacy, liberty and security as a matter of choice or 'balancing' between these rights, still less to think of trade-offs between these rights.' (RUSI (2015): 2.3)

- 'The relationship between privacy on the one hand, and liberty and security on the other, is complex. Discussions of privacy and security are often described as a matter of finding or striking a 'balance'; this traditional metaphor can be misleading. There is no metric for 'weighing' different rights, or even for comparing the 'weight' of different rights in particular cases. But it is feasible to set out robust standards that must be met in adjusting rights to one another and to devise and establish structures to do so.' (RUSI (2015): 2.6)

Review Group on Intelligence and Communications Technologies
Liberty and Security in a Changing World (12/12/13)

'The idea of "balancing" has an important element of truth, but it is also inadequate and misleading. It is tempting to suggest that the underlying goal is to achieve the right "balance" between the two forms of security. The suggestion has an important element of truth. But some safeguards are not subject to balancing at all. In a free society, public officials should never engage in surveillance in order to punish their political enemies; to restrict freedom of speech or religion; to suppress legitimate criticism and dissent; to help their preferred companies or industries; to provide domestic companies with an unfair competitive advantage; or to benefit or burden members of groups defined in terms of religion, ethnicity, race, and gender.'

Privacy and Civil Liberties Oversight Board (PCLOB) Legislation: Quote from 9/11 Commission Report

- '(3) The National Commission on Terrorist Attacks Upon the United States correctly concluded that "The choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend."'

  and then came Snowden…..

Review Group on Intelligence and Communications Technologies
Liberty and Security in a Changing World (12/12/13)

'When public officials acquire foreign intelligence information, they seek to reduce risks, above all risks to national security. The challenge, of course, is that multiple risks are involved. Government must consider all of those risks, not a subset, when it is creating sensible safeguards. In addition to reducing risks to national security, public officials must consider four other risks:

- Risks to privacy;
- Risks to freedom and civil liberties, on the Internet and elsewhere;
- Risks to our relationships with other nations; and
- Risks to trade and commerce, including international commerce.'

(p. 15)

Surveillance and Scrutiny

'The government should base its decisions on a careful analysis of consequences, including both benefits and costs (to the extent feasible). In many areas of public policy, officials are increasingly insistent on the need for careful analysis of the consequences of their decisions, and on the importance of relying not on intuitions and anecdotes, but on evidence and data. Before they are undertaken, surveillance decisions should depend (to the extent feasible) on a careful assessment of the anticipated consequences, including the full range of relevant risks. Such decisions should also be subject to continuing scrutiny, including retrospective analysis, to ensure that any errors are corrected.' (Review Group on Intelligence and Communications Technologies, *Liberty and Security in a Changing World* (12/12/13: 15)

'National Security v. Personal Privacy'?

- 'How much security should we give up to protect privacy' rarely asked
- Assumptions about risk, equilibrium, common metric for weighing not clear, doubtfully warranted
- Can we know and agree how much (and whose) privacy should/ should not outweigh how much (and whose) security?
- Proposal to 'balance' is silent about method by which a balance can be determined and challenged, and about who is to determine it
- Whether 'balance' refers to method, or to outcome, is often ambiguous; legal case decisions a source for understanding, and perhaps disputing, weighing process and arguments used, e.g., about necessity and proportionality
- Remains to be seen how these understandings can gain purchase in closed conditions of intelligence and security services where strategic and operational decisions must be made, and in oversight/ scrutiny

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