

Outline

- What gives privacy its point?
- The value of privacy according to liberal theory
- Liberal theory and criminality
- Terrorism as life-threatening criminality
- Detection and prosecution of terrorist crime in a liberal state, and limits of justifiable intrusion
- The norm of proportionate intrusion, and judicial oversight

Outline 2

- If evidence based, both reactive and preventive policing of life-threatening criminality can justify the use of detection technologies
- In liberal theory, strong public support for the use of e.g. data exchange under the Passenger Names agreement affects understanding of intrusion.

Outline 3

- The norm of proportionate intrusion applies to intrusive agents other than the state
- Understanding of proportionality affected by changing private norms of exposure, exhibitionism

What gives privacy its point?

- Unwilling exposure

Body; sincerely held but disapproved of thoughts

- Unwanted intrusion

Private space –home

- Unwanted influence or interference

Private choice or plan

- Unwanted classification, stereotyping (Goold, 2007)

Employment, travel, immigration

What gives privacy its point? 2

- The desirability of/need for intimacy
- The desirability of arriving in one's own right at a belief or practical choice (autonomy)
- The desirability of solitude
- The desirability of a sphere in which one does not have to keep up appearances
- The desirability of space, things, one is not required to share

Liberal theory requires

- Greatest freedom of action [least prohibition] compatible with equal freedom for each
- Freedom restricted only by law that applies to each in the same way
 1. Freedom restricted by law in a democratic republic subject to separation of powers and a bill of rights
 2. Freedom restricted by law in a democratic republic subject to separation of powers and rule-utilitarian policy

The value of privacy related to value of freedom

Privacy as a condition for legitimate freedom of action;
private life as a sphere of freedom of action

Freedom presupposes

- Security of person
- Privacy as a condition of freedom of action, including collective freedom of action or politics
- Privacy as a condition of personal happiness [liberalism is the organization of collective life for the free pursuit of personal and collective happiness]

Privacy as condition of freedom of action

The private= a sphere within each person of detached and autonomous deliberation yielding considered beliefs and practical choices

- Detached deliberation (free from passions, or at least subject to procedures that make it easier to be dispassionate)
- Autonomous deliberation (thinking for oneself)

Privacy in this sense as a condition of both private and public life

Privacy as a condition of personal happiness

Happiness partly consists of

- Having and maintaining romantic relationships
- Successful parenting
- Having and maintaining friendships
- Developing skills and talents
- Living life according to one's own sense of what matters, as opposed to other people's

Privacy necessary for all the above

Privacy in this sense a space for action protected from uninvited observation and influence

Protected Private Life in Liberalism

- Intimate (romantic and sexual) life
- Intimate (atomic?family) life
- Close friendships
- Sphere selected for the recording of thoughts, feelings e.g. Diary, letters
- Sphere selected for the unguarded disclosure of most beliefs, impulses (private conversations, letters, texts, emails)
- Discretionary sphere of autonomously chosen career

Excluded from a private life

- The public (the set of strangers)

Non-lovers; non-friends; non-family

- The state
- The media?
- Employers
- Retail sector?
- Financial sector?

The value of privacy

- Rises in proportion to the need to make public professions of belief, loyalty
- Rises in proportion to degree of official intrusion and unendorsed surveillance
- Decreases the more there is a publicly perceived threat that is perceived to be reduced with more available private information
- Decreases the more it becomes culturally acceptable for anything at all to be done in public
- Decreases the more there is a public appetite to watch and be watched (e.g. in return for celebrity) or to engage in public social networking

Criminality in liberal theory

- Crime= encroaching on others' lawful freedom
- breaking a correctly enacted penal law of a democratic republic [with a separation of powers and a bill of rights or rule-utilitarian set of policies]
- Crime= behaving as if one is not subject to a prohibition that applies to everyone, and that everyone is democratically obliged to abide by
- Criminal is irrational (breaks a law he is autonomously a co-legislator of)and anti-social: victim of crime is harmed; co-legislator, non-victims are shown disrespect because criminal takes more liberty than is allowed by co-legislators
- Criminal is a rights violator who may be punished if a correctly enacted law requires it.

Criminality and Privacy

- Crimes justify only as much intrusion as is required for enforcing law (proportionate intr.)
- Life-threatening or life-taking crimes justify maximum intrusion
- Under a bill of rights, prop. intr may still require probable cause and judicial oversight
- Committed crimes can involve conspiracies
- Pursuing conspiracies can involve intrusions on those suspected of having planned crimes or who have only assisted those who have carried them out.

Terrorism as a crime

- Contravenes law against murder and attempted murder
- More successful, the more lives it takes
- More successful, the more fear it creates
- Indiscriminate

Often takes place without public warning;
directed against unarmed, harmless people

- Often a hate crime

Terrorism as a crime 2

- Bypasses democratic process
- Often contemptuous of law, including rights protections
- Often contemptuous of liberal values, including the desirability of autonomously arrived at thought and choice
- Often associated with a conspiracy
- Probability of occurring hard for public to judge

Reactive policing

- Terrorist act committed
- Evidence against suspects aids a prosecution
- Evidence collection can resemble evidence collection in case of murder by criminal gang
- Reactive policing easy to accommodate in liberal theory

Preventive policing

- Identifying terrorist *planning* based on information received from public, security services
- Fits in with “anticipation” strand of National Security Strategy, cf. Omand, IPPR 2009
- Identifying terrorist sleepers based on inferences from characteristics of known terrorists [profiling]
- Eliminating non-terrorists by searches, surveillance at conjectured attack points e.g. large infrastructure sites, airports

Profiling

- Evidence-base, methodology, success doubtful, even in its prime area of application (Dowden et al, *J Police Crim Psych* 2007)
- In Europe often involves illegal discrimination, quite apart from intrusion (De Schutter and Ringelheim *Mod Law Rev* 2008)

Profiling 2

- Does profiling never make sense? Or are many categories used in profiling badly chosen?
Plausible categories:
- frequent travel to Pakistan/Afghanistan border (as revealed by mobile tel. location-tracking)
- Visits and posts on jihadist websites
- Connected with bank account with big deposits from abroad
- Visits websites related to components of explosives

Terrorism and intrusion

1. Life-threatening crimes justify the maximum amount of [useful] lawful intrusion for their prevention or prosecution
2. Terrorism [life-threatening violence directed at civilians for the purpose of changing state policy] is life-threatening
3. Therefore, terrorism justifies the maximum amount of [useful] lawful intrusion for their detection or prosecution
4. Lawful useful intrusion can include telephone tapping, room bugging, computer monitoring, internet monitoring; CCTV surveillance; interrogation of suspects and friends of suspects; and searches of premises.

Terrorism and Intrusion

- Profiling –aided by data-mining-- can be less intrusive, but more discriminatory and arbitrary, than the use of devices that penetrate a private space
- Profiling –aided by data-mining– can create a population of “suspects” that in fact includes more of the law-abiding population than surveillance, even electronic surveillance would implicate
- Is profiling therefore more objectionable than direct surveillance? Yes and Not necessarily. Yes, because indiscriminate; Not necessarily, since public can agree to it.

Public Support for personal data-sharing [Eurobarometer, 2008]

Fieldwork was carried out from January 8th to 12th, 2008. Over 27,000 randomly selected citizens aged 15 years and over were interviewed in the 27 EU Member States. Interviews were predominantly carried out via fixed-line telephone, approximately 1,000 in each country. Due to the relatively low fixed-line telephone coverage in Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Romania and Slovakia, face-to-face (F2F) interviews were also conducted (700 telephone and 300 F2F interviews) in those countries.

Eurobarometer 2

Most EU citizens were ready to accept restrictions of their data protection rights when this benefited the fight against international terrorism. A majority of respondents answered positively that it should be possible to monitor the different actions listed in the survey, such as telephone calls or Internet usage.

Eurobarometer 3

Allowing the possibility to have people's personal details monitored when they took a flight was the action that was most often agreed to by respondents (82%), followed by the monitoring of people's Internet usage (75%).

Monitoring of people's phone call, Internet usage, credit card usage and personal details when they fly



Q9. In light of the fight against international terrorism, do you think that, in certain circumstances, it should be possible:
 %, Base: all respondents

Kinds of intrusion

- Searches of homes, offices
- Bugs in homes, hotel rooms
- Hidden cameras in homes, hotel rooms
- Location-tracking
- CCTV or human surveillance of actions done in a public place [if surveillance in a public place is an intrusion]
- Surveys of personal financial information, email and telephone contacts

The proportionality of intrusion

- Is the intrusion tied to a particular case of criminality or e.g. is it part of a general plan of blackmailing a population to co-operate with a state (Stasi)
- Is the intrusion merely intimidating, or has it a good chance of producing legal evidence?
- Are some intrusions unlikely ever to produce relevant evidence?

Body searches in cases of serious financial fraud

- Might even some evidence-producing intrusions be too undignified to be permissible?

Concessions

- Proportionate intrusion even for the sake of prosecuting or preventing terrorism can sometimes be useless or even counterproductive
- It is possible for non-terrorists to be suspected of terrorism
- The evidence of the imminence of a terrorist attack can be weak
- The evidence for an imminent attack, even when strong, can be known only to a few, encouraging the public sense that some intrusions, even when actually proportionate, are not

The range of intrusive agents

- The tendency to focus on the state
- The ambiguous position of the press—also subject to norm of proportionateness
- The greater powers of intrusion and publicity for individuals through the internet
- Private detectives
- Hackers
- Stalkers

The value of privacy in theory and practice

- Friendship groups as a commodity
- The pursuit of celebrity
- Happy slapping
- Internet for character assassination
- Reality television
- Consumption of a highly intrusive press
- Ordinary nosiness and gossip

Conclusions

- Protection of private life promotes lawful freedom, personal happiness
- Life-threatening criminality forfeits protected private life, and terrorism is life-threatening criminality
- Proportionate intrusion in counter-terrorism is justifiable
- Proportionate intrusion can involve use of detection technologies
- Public attitudes toward intrusion are inconsistent